Opinion of Advocate General Jacobs delivered on 5 April 2001

Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA (C-393/99) and Guy Lorthiois and Comtexbel SA (C-394/99)

Reference for a preliminary ruling: Tribunal du travail de Tournai – Belgium

Freedom of movement for workers and freedom of establishment - Social security - Determination of the legislation applicable - Persons who are simultaneously employed and self-employed in the territory of different Member States - Cover by the social security legislation of each of those States - Validity of Article 14c(1)(b), now Article 14c(b), of and Annex VII to Regulation (EEC) No 1408/71

Joined cases C-393/99 and C-394/99

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Opinion of the Advocate-General

1. In these joined proceedings, a sequel to the judgments in Inasti v Hervein and Hervillier (hereinafter: Hervein I) and De Jaeck v Staatssecretaris van Financiën (hereinafter: De Jaeck), the Tribunal du Travail (Labour Court), Tournai, Belgium, requests a preliminary ruling on whether Article 14c(1)(b) of and Annex VII to Regulation (EEC) No 1408/71, as amended by Regulation (EEC) No 1390/81 and Regulation (EEC) No 2001/83, are compatible with Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 and 43 EC).

2. The essential legal issue is whether rules of Community law which provide that a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject to the social security legislation of both States are compatible with the Treaty.

The relevant legislative provisions

Regulation No 1408/71 as amended and updated by Regulation No 2001/83

3. Whenever a person is employed or self-employed in a different Member State from the one in which he or she normally resides, the question arises as to the social security legislation to which that person is subject: that of the State of residence, of the State of employment or self-employment, or of both States?

4. Title II of Regulation No 1408/71 (hereinafter: the Regulation) contains a set of choice of law rules designed to answer that question as regards the persons falling within the scope of the Regulation. Those rules are based on the principle that an employed or self-employed person is subject to the legislation of only one Member State at a time (hereinafter: the single State principle). Thus, Article 13(1) provides that:

Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

5. The single State principle applies to persons who are employed in more than one Member State; to persons who are self-employed in more than one Member State; and to persons who are employed in one Member State and self-employed in another Member State.

6. As may be seen from the wording of Article 13(1) of the Regulation, Title II contains only two exceptions to that principle.

7. Under Article 14f - which was inserted recently into the Regulation by Council Regulation No 1606/98 - civil servants who are simultaneously employed in two or more Member States are subject to the legislation of each of those Member States. That provision is not in issue in the present case.

8. More importantly for present purposes, under Article 14c(1)(b), persons who are simultaneously employed in one Member State and self-employed in another are subject to the legislation of both Member States. Article 14c was inserted into the Regulation by Regulation No 1390/81 which first extended the scope of the Regulation to the self-employed and which entered into force on 1 July 1982. In its original form, Article 14c read as follows:

Special rules applicable to persons employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State

1. A person who is employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

(a) to the legislation of the Member State in the territory of which he is engaged in paid employment, subject to subparagraph (b);

(b) in the instances referred to in Annex VII, to the legislation of each of these Member States, as regards the activity pursued in its territory.

2. The detailed rules for implementing subparagraph (b) of paragraph 1 shall be laid down in a Regulation to be adopted by the Council on a proposal from the Commission.

9. Article 14c was amended by Council Regulation No 3811/86 to take account of situations where more than two activities in a combination of paid employment and self-employment are carried out in the territory of two or more Member States. After Regulation No 3811/86 took effect on 1 January 1987, Article 14c provided that:

A person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

(a) save as otherwise provided in subparagraph (b) to the legislation of the Member State in the territory of which he is engaged in paid employment or, where he pursues such an activity in the territory of two or more Member States, to the legislation determined in accordance with Article 14(2) or (3);

(b) in the cases mentioned in Annex VII:

- to the legislation of the Member State in the territory of which he is engaged in paid employment, that legislation having been determined in accordance with the provisions of Article 14(2) or (3), where he pursues such an activity in the territory of two or more Member States, and

- to the legislation of the Member State in the territory of which he is self-employed, that legislation having been determined in accordance with Article 14a(2), (3) or (4), where he pursues such an activity in the territory of two or more Member States.

10. Article 14d of the Regulation, which was inserted by Regulation No 1390/81, initially provided that:

The person referred to in ... [Article] 14c(1)(a) shall be treated, for the purposes of application of the legislation laid down in accordance with these provisions, as if he pursued all his professional activity or activities in the territory of the Member State concerned.

11. Regulation No 3811/86 added, with effect from 1 January 1987, a new paragraph 2 to Article 14d of the Regulation:

2. The person referred to in Article 14c[1](b) shall be treated, for the purposes of determining the rates of contributions to be charged to self-employed workers under the legislation of the Member State in whose territory he is self-employed, as if he pursued his paid employment in the territory of the Member State concerned.

12. Annex VII to the Regulation mentioned - when it came into force on 1 July 1982 - the following instances in which a person would be simultaneously subject to the legislation of two Member States:

1. Where he is self-employed in Belgium and gainfully employed in any other Member State except Luxembourg. For Luxembourg the exchange of letters of 10 and 12 July 1968 between Belgium and Luxembourg shall be applicable.

2. Where a person resident in Denmark is self-employed in Denmark and gainfully employed in any other Member State.

3. Where he is self-employed in farming in Germany and gainfully employed in any other Member State.

4. Where he is self-employed in France and gainfully employed in any other Member State except Luxembourg.

5. Where he is self-employed in farming in France and gainfully employed in Luxembourg.

6. Where he is self-employed in Greece and gainfully employed in any other Member State.

7. Where he is self-employed in Italy and gainfully employed in any other Member State.

13. Annex VII has been amended a number of times:

- Council Regulation No 2000/83 replaced point 3 by the following:

3. For the agricultural accident insurance scheme and the old-age insurance scheme for farmers: where he is self-employed in farming in Germany and gainfully employed in any other Member State.

- Council Regulation No 1660/85 replaced point 6 by the following:

6. For the pension insurance scheme for self-employed persons: where he is self-employed in Greece and gainfully employed in any other Member State.

- The treaty concerning the accession of Austria, Finland and Sweden of 1994 made further amendments and replaced the whole of Annex VII by the following (substantive amendments marked in italics):

1. Where he is self-employed in Belgium and gainfully employed in any other Member State, except Luxembourg. For Luxembourg, the exchange of letters of 10 and 12 July 1968 between Belgium and Luxembourg shall apply.

2. Where a person resident in Denmark is self-employed in Denmark and gainfully employed in any other Member State.

3. For the agricultural accident insurance scheme and the old-age insurance scheme for farmers: where he is self-employed in farming in Germany and gainfully employed in any other Member State.

4. Where a person resident in Spain is self-employed in Spain and gainfully employed in any other Member State.

5. Where he is self-employed in France and gainfully employed in any other Member State, except Luxembourg.

6. Where he is self-employed in farming in France and gainfully employed in Luxembourg.

7. For the pension insurance scheme for self-employed persons: where he is self-employed in Greece and gainfully employed in any other Member State.

8. Where he is self-employed in Italy and gainfully employed in any other Member State.

9. Where a person is self-employed in Austria and gainfully employed in any other Member State.

10. Where he is self-employed in Portugal and gainfully employed in any other Member State.

11. Where a person resident in Finland is self-employed in Finland and gainfully employed in any other Member State.

12. Where a person resident in Sweden is self-employed in Sweden and gainfully employed in any other Member State.

- Council Regulation No 3096/95 replaced point 1 by the following:

1. Where he is self-employed in Belgium and gainfully employed in any other Member State.

- Council Regulation No 1399/1999 deleted point 9 of Annex VII concerning self-employment in Austria.

14. It may be added that the Commission has recently put forward a proposal for a new regulation intended to replace Regulation No 1408/71. That proposal does not contain an equivalent to Article 14c(1)(b) and Annex VII; the single State principle applies to all persons who are employed in one Member State and self-employed in another Member State.

Regulation No 574/72 as amended and updated by Regulation No 2001/83

15. Regulation No 574/72 contains detailed rules for the implementation of the Regulation. Those rules were extended to cover self-employed persons by Regulation No 1390/81. For the purposes of this case, the following provisions of Regulation No 574/72 (hereinafter: the Implementing Regulation) are in particular relevant:

16. Article 9 contains rules applicable in the case of overlapping of rights to death grants under the legislations of two or more Member States. The effect of paragraphs 1 and 2 of that provision is that employed and self-employed persons, and their families, can claim death grants only in one Member State.

17. Article 15(1) lays down rules for the aggregation of social insurance periods which a person has fulfilled in more than one Member State. The general rule is that periods fulfilled in different Member States must be aggregated by the competent authorities in the Member States. However, in accordance with the principle that migrant workers are subject to the legislation of only one Member State at a time, social insurance periods which overlap cannot be aggregated.

18. Articles 9 and 15, and certain other provisions of the Implementing Regulation, were amended by Regulation No 3811/86 with effect from 1 January 1987. Those amendments aimed to facilitate the aggregation of social security benefits, such as invalidity benefits, old-age benefits and survivor's benefits, acquired by persons who are or have been employed or self-employed in more than one Member State.

19. After amendment, Article 9(3) provides, by way of derogation from Article 9(1) and 9(2), that persons who are or have been subject to the legislation of two Member States under Article 14c(1)(b) of the Regulation retain rights to death grants acquired under the legislation of each of those States. Article 15(1)(a) provides that overlapping periods of social insurance must be aggregated where those periods have been completed by a person subject to the legislations of two Member States under Article 14c(1)(b) of the Regulation.

The facts and the relevant national legislative provisions

20. The present cases form part of a long-running dispute between on the one hand the applicant in Case C-393/99 and Case C-394/99, Inasti, and on the other hand the defendants in Case C-393/99, Mr Hervein and Hervillier SA, and the defendants in Case C-394/99, Mr Lorthiois and Comtexbel SA, over the payment of social security contributions in Belgium. The facts which form the basis of that dispute, as set out in the two orders for reference, may be summarised as follows.

Case C-393/99 Inasti v Hervein and Hervillier SA (Hervein II)

21. The first defendant in the main proceedings in Case C-393/99, Claude Hervein, is a French national resident in France. Until 6 October 1986, he was simultaneously chairman/director general and director or assistant director of Établissements Hervillier SA, Laines Anny Blatt SA and Berger du Nord SA, companies established in France and in Belgium.

22. Under French social security law company directors are considered to be employees, and Article L 311-3 of the French Code de la sécurité sociale (Social security code) provides that directors must be affiliated to the general social security scheme for employees. In accordance with that provision, Mr Hervein is affiliated and contributes to the Caisse Primaire d'Assurance Maladie de Tourcoing (Tourcoing Primary Health Insurance Fund) which provides cover for sickness, maternity, death, invalidity and old age.

23. By contrast, company directors are under Belgian social security law considered to be self-employed persons. Directors are thus subject, under Article 10 of the Royal Decree No 38 of 27 July 1967, to compulsory affiliation to the Belgian social security scheme for self-employed persons.

24. The level of contributions under that scheme is determined by Article 12 of Royal Decree No 38 and by the more detailed rules laid down in Articles 35 and 36 of the Royal Decree of 19 December 1967. Those provisions distinguish between persons whose primary professional activity is in self-employment (travailleurs indépendants à titre principal) and persons who exercise a secondary activity in self-employment (travailleurs indépendants à titre complémentaire).

25. Persons whose primary professional activity is in self-employment pay a fixed annual minimum contribution and - where their net income from self-employment exceeds a certain level - additional contributions calculated as a percentage of that income. The social security scheme for the self-employed affords those persons cover for sickness, death, invalidity, old age and bankruptcy, and it entitles them to family benefits.

26. Persons who exercise a secondary activity in self-employment are divided into two categories.

27. The first category (hereinafter: Category I) consists of persons whose annual earnings from their activity in self-employment fall below a certain level fixed in the relevant rules (hereinafter: the full rate level). Persons in this category pay social security contributions calculated as a percentage of their net income from self-employment. However, the rate is lower than that applicable to persons whose primary professional activity is in self-employment and there is no minimum annual contribution.

28. Persons in Category I are not entitled to benefits of any kind under the social security scheme for the self-employed. However, as Inasti explained at the hearing, the contributions they are required to make are considered to be justified on grounds of social solidarity.

29. The other category of persons exercising a secondary activity as self-employed persons (hereinafter: Category II) consists of those whose annual earnings exceed the full rate level. The rules applicable to those persons were changed with effect from 1 January 1997. Since then, persons in Category II have been liable to pay the same contribution as persons whose principal activity is in self-employment. Before then, persons in Category II paid the same contribution as persons whose principal activity was in self-employment in respect of the part of their net income which exceeded the full rate level but reduced contributions in respect of the part of their income which fell below that level.

30. Persons in Category II are entitled to certain social benefits under the scheme for the self-employed. According to information provided by Inasti, those benefits include retirement pensions, death payments, medical cover in respect of major risks, invalidity benefits and child benefits, but not payments in case of bankruptcy.

31. It appears from the file that Mr Hervein's earnings in Belgium exceeded the full rate level, and that he was therefore liable under Belgian law to pay social security contributions at the rates applicable before 1 January 1997 to travailleurs indépendants à titre complémentaire of Category II. However, although Mr Hervein was affiliated to the Belgian auxiliary social security fund for self-employed persons (Caisse nationale auxiliaire d'assurances sociales pour travailleurs indépendants) during the material period, he and his Belgian company, Hervillier SA, did not pay the contributions claimed.

32. On 23 February 1988 Inasti commenced proceedings against Mr Hervein and Hervillier SA in the Tribunal du Travail de Tournai for the payment of BEF 1 596 489 equivalent to the contributions claimed in respect of his activities in Belgium from 1982 to 1986.

33. Inasti argued that Mr Hervein was simultaneously self-employed in Belgium and employed in France, and that he was therefore subject to the social security legislation of both Member States under Article 14c(1)(b) of and Annex VII to the Regulation.

34. Mr Hervein and Hervillier SA resisted that claim. They contended that although Mr Hervein was treated in France as an employee for the purposes of social security cover, he did not pursue paid employment there. He effectively carried out the same activity as a self-employed person in France and in Belgium. Article 14a(2) of the Regulation should therefore be applied with the result that Mr Hervein was subject only to the legislation of the Member State in which he resided, that is to say the French legislation.

Case C-394/99 Inasti v Lorthiois and Comtexbel SA

35. The facts of this case are similar to - but in at least one important respect different from - those of the case of Hervein and Hervillier SA. The defendant, Guy Lorthiois, is a French national resident in France. He is director, chairman of the board of directors and managing director of Comtexbel France, a company established in France. At the same time, he is the Chairman of the board of directors of Comtexbel SA in Mouscron, Belgium.

36. In France, Mr Lorthiois is a member of the social security scheme for employees and pays contributions to that scheme. It appears from the file that his earnings in Belgium during the period 1 November 1987 to 31 December 1998 did not exceed the full rate level. He was therefore, in contrast to Mr Hervein, liable to pay only the reduced contributions applicable to travailleurs indépendants à titre complémentaire of Category I. Mr Lorthiois was, like Mr Hervein, a member of the Belgian auxiliary social security fund for self-employed persons (Caisse nationale auxiliaire d'assurances sociales pour travailleurs indépendants) during the material period. Neither he nor his company paid the contributions claimed.

37. Inasti commenced legal proceedings on 27 December 1993 against Mr Lorthiois and Comtexbel SA for the payment of BEF 103 527 in social security contributions claimed for the period 1 January 1987 to 31 December 1988.

38. The arguments put forward by Inasti and the defendants in this case are identical to those presented in the case of Hervein II.

The reference, Opinion and judgment in Hervein I

39. Being uncertain how Mr Hervein's work in France should be categorised for the purposes of Articles 14a and 14c of the Regulation, the Tribunal du travail de Tournai decided to stay the proceedings in the case of Hervein I and refer the following question to the Court of Justice for a preliminary ruling:

Is self-employment (activité non-salariée) for the purposes in particular of Article 14a(2) of Council Regulation (EEC) No 2001/83 of 2 June 1983 to be taken to include the activities of an independent worker (travailleur indépendant) who is a national of a Member State?

40. In its judgment in Hervein I, the Court of Justice answered that question as follows:

For the purposes of Articles 14a and 14c of the Regulation, "employed" and "self-employed" should be understood to refer to activities which are regarded as such for the purposes of the social security legislation of the Member State in whose territory those activities are pursued.

41. That answer was in accordance with the Opinion of Advocate General Ruiz-Jarabo Colomer, who had considered that it was not possible to elicit a Community definition of employed and self-employed person from the provisions of the Regulation.

42. In contrast to the Advocate General, however, the Court of Justice did not examine the validity of Article 14c(1)(b) of and Annex VII to the Regulation. Although the parties in the main proceedings and the referring court had not questioned the validity of those provisions, the Advocate General considered that the Court should examine their compatibility with Articles 48 and 52 of the EC Treaty. In his view, Article 14c(1)(b) and Annex VII constituted an obstacle to freedom of movement for workers and freedom of establishment, and he concluded that the Court should therefore declare them invalid in so far as they provide that a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject to the legislation of both States.

The questions referred in the present proceedings

43. Following the Court's judgment in Hervein I, the proceedings in Inasti v Hervein and Hervillier SA were recommenced before the Tribunal du travail de Tournai.

44. Relying on the judgment of the Court of Justice, Inasti argued that it was clear that Mr Hervillier and - in the case of Inasti v Lorthiois and Comtexbel SA - Mr Lorthiois were subject to Belgian social security legislation in so far as company directors are under French social security law treated as employees and under Belgian law as self-employed persons.

45. The defendants challenged that claim. Relying on the Opinion of Advocate General Ruiz-Jarabo Colomer in Hervein I, they argued that Article 14c(1)(b) and Annex VII were contrary to Articles 48 and 52 of the Treaty.

46. Considering that those arguments raised a new point of Community law, the Tribunal du travail de Tournai, decided to stay the proceedings in both cases and refer the following questions to the Court of Justice for a preliminary ruling:

1. Are Article 14c(1)(b) of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, and Annex VII to Regulation No 1408/71 to be declared invalid in the light of Articles 48 and 52 of the Treaty inasmuch as they provide that persons who pursue an activity as employees in one Member State and an activity as self-employed persons in another Member State are subject to the legislation of both those Member States?

2. Can that invalidity be relied on to call into question affiliation and the contributions payable in application of the provisions found to be invalid for periods which predate delivery of the judgment finding them to be invalid and, if not, is there an exception as regards workers or persons entitled under them who have already brought legal proceedings or made an equivalent claim under national law before that date?

47. Written observations have been submitted by Inasti, the defendants in the main proceedings, the Council, the Commission, and the Belgian and Greek Governments. The Council, the Commission and Inasti have submitted written answers to questions put by the Court. At the hearing, Inasti, the Council, the Commission and the Greek Government were represented.

Admissibility

48. Inasti, the Belgian Government and the Council consider the references from the Tribunal du travail de Tournai to be inadmissible. In their view, the Court of Justice implicitly but conclusively accepted the validity of Article 14c(1)(b) of and Annex VII to the Regulation in its judgment in Hervein I in so far as it interpreted the meaning of those provisions without questioning their validity. In those circumstances, the Tribunal du travail de Tournai was not entitled to refer the question of the validity of Article 14c(1)(b) and Annex VII to the Court, since that amounted to an attempt to obtain a review of the Court's judgment in Hervein I contrary to the division of competences laid down in Article 177 of the EC Treaty (now, after amendment, Article 234 EC).

49. I find that argument unconvincing.

50. The fact that the Court of Justice interprets, on one or more occasions, certain provisions of Community law without questioning their validity cannot be taken as conclusive evidence that the Court considers those provisions to be valid. That applies especially where, as in De Jaeck and Hervein I, the referring court and those submitting observations did not raise the issue of validity before the Court of Justice. The fact that the Advocate General urged the Court to declare Article 14c(1)(b) and Annex VII of the Regulation invalid in those cases cannot, in my view, affect that conclusion. The only inference which can be drawn is that, contrary to the Advocate General, the Court did not consider it necessary to examine ex officio the validity of those provisions. In any event, as is clear from the Court's case-law, even if the Court had examined their validity explicitly, and even if it had ruled that there were no factors affecting the validity of the provisions, that would not have precluded the Court from re-examining their validity in the light of further argument in a later case.

51. The reference is therefore, in my opinion, admissible.

The first question

52. By its first question, the Tribunal du travail de Tournai asks whether Article 14c(1)(b) of and Annex VII to Regulation No 1408/71 are to be declared invalid in the light of Articles 48 and 52 of the EC Treaty.

53. The defendants and the Greek Government claim that that question should be answered in the affirmative, essentially for the reasons given by the Advocate General in Hervein I. Inasti, the Council, the Commission and the Belgian Government consider that Article 14c(1)(b) and Annex VII should not be declared invalid. They put forward a number of arguments in favour of that view which will be considered in due course.

54. In order to answer the question referred by the Tribunal du travail de Tournai, two issues must be considered. First, it must be examined whether Article 14c(1)(b) of and Annex VII to the Regulation restrict freedom of movement for workers and freedom of establishment. Secondly, and in case of an affirmative reply to the first question, it falls to be considered whether Article 14c(1)(b) of and Annex VII to the Regulation should be declared invalid.

Do Article 14c(1)(b) of and Annex VII to the Regulation restrict freedom of movement for workers and freedom of establishment?

55. Title II of the Regulation envisages that a person pursuing professional activities in more than one Member State shall be subject only to the legislation of a single Member State at a time. The contributions which must be paid in that State are, in accordance with Article 14d of the Regulation, calculated on the basis of the person's total income earned in all of the Member States.

56. The purpose of that system is, as the Court has pointed out on a number of occasions, to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue and to ensure that the persons covered by the Regulation are not left without social cover.

57. Article 14c(1)(b) provides, for the situations listed in Annex VII, exceptions to that system. Under those provisions, a person who is simultaneously employed in one Member State and self-employed in another Member State is subject to the legislation of both States. It follows that such a person may be required to be affiliated and make contributions to the social security systems of both States. In the first State, the person is liable to contribute in respect of his income from employment in that State. In the second State, the person can be required to contribute in respect of his income from self-employment in that State.

58. The Commission and the Council argue that the exceptions to the single State principle provided for by Article 14c(1)(b) do not restrict the free movement of persons. They stress that Article 14c(1)(b) creates a system of parallel payments of contributions on distinct incomes generated in different Member States. Workers cannot be required to pay social charges in several Member States in respect of the same earned income, and there is therefore no duplication of social charges for the persons concerned.

59. That argument is, in my view, unconvincing.

60. It is true that persons falling within Article 14c(1)(b) cannot be required to contribute in respect of the same income in several Member States. The fact that the phrase as regards the activity pursued in its territory was removed from the wording of Article 14c(1)(b) when that provision was amended by Regulation No 3811/86 does not, in my view, affect the substantive meaning of that provision. I do not, however, agree with the Commission and the Council that the simultaneous application of the legislation of several Member States in respect of the separate incomes earned in each of those Member States is incapable of restricting freedom of movement for persons.

61. It may be recalled that the Treaty provisions relating to freedom of movement for persons are, according to settled case-law, intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community. Those provisions therefore preclude measures which place nationals of one Member State at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. Measures which deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

62. With regard to social security in particular, the Court held in Kemmler that [l]egislation of a Member State which requires contributions to be made to the scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme inhibits the pursuit of occupational activities outside the territory of that Member State. That judgment, and the Court's earlier case-law, shows that Articles 48 to 52 of the Treaty preclude a Member State's legislation from requiring a person who is employed or self-employed in another Member State to pay contributions to the scheme for self-employed persons, where that person resides in the other Member State and is affiliated to its national social security scheme, because that would have adverse effects on the pursuit of occupational activities outside the territory of that Member State.

63. However, that is precisely the effect of Article 14c(1)(b) of the Regulation. Even if - as the Commission and the Council stress - Article 14c(1)(b) does not lead to a complete duplication of social charges, that provision may none the less effect a substantial increase in social charges for the persons concerned. Under the legislation of certain Member States, earnings which exceed a certain level are either exempt from or subject to reduced rates of social contributions. Persons who - under Article 14c(1)(b) - are liable to pay separate contributions in several Member States are less likely to benefit from such rules than persons who - under the single State principle - pay all of their contributions in a single Member State.

64. The new paragraph 2 of Article 14d, which was introduced by Regulation No 3811/86, does not - contrary to what the Commission, the Council and Inasti suggested at the hearing - protect migrant workers effectively against such adverse financial consequences. Article 14d(2) provides that a person covered by Article 14c(1)(b) is to be treated, for the purpose of determining the rates of contributions to be charged to self-employed persons under the legislation of the Member State in whose territory he is self-employed, as if he pursued his paid employment in the territory of that Member State. A provision so worded will prevent an increase in social charges from arising only where the legislation of the Member State of self-employment exempts high incomes from social charges to at least the same extent as the legislation of the Member State of employment. Indeed, it is possible that when it comes to applying the legislation of the State of self-employment, Article 14d(2) may have the effect of increasing, rather than reducing, the rate of contribution.

65. In any event, a requirement of affiliation to the social security system of more than one Member State is, in my view, capable of inhibiting free movement even if it does not in practice increase the level of contributions. The social security legislations of most Member States are highly complex, and there are large differences between the rules which apply in different States. A person who contemplates whether to exercise free movement rights is therefore likely to find it difficult to ascertain the financial implications of affiliation to the social security system of another Member State. It must be remembered that such a person will often be making enquiries from the territory of the State in which he is resident and that he may face linguistic difficulties. Some workers and self-employed persons will consider that to be a bureaucratic nightmare. Others will consider it to be, at least, an administrative complication.

66. I consider, in the light of those observations, that Article 14c(1)(b) of and Annex VII to the Regulation restrict the freedom of movement for workers and the freedom of establishment.

Should Article 14c(1)(b) of and Annex VII to the Regulation be declared invalid?

67. It is settled case-law that Articles 48 and 52 of the Treaty are specific expressions of a more general principle of equality and freedom of movement which must be respected not only by the Member States, but also by the Community legislature, and that provisions of Community law which are contrary to Article 48 and 52 may be declared invalid by the Court of Justice.

68. It does not follow from that case-law, however, that all provisions of Community law which restrict freedom of movement to some extent are to be declared invalid.

69. The Community legislator does not have the power to harmonise the social security laws of the Member States. Article 51 of the EC Treaty (now, after amendment, Article 42 EC) provides only for the coordination of social security legislations as far as is necessary to provide freedom of movement for workers. The Community legislator therefore faces a difficult task when it comes to removing obstacles to free movement which may result from the existence of disparate national social security regimes. It follows, as the Court of Justice has acknowledged, that the legislator must be granted a wide discretion in its choice of the measures it considers most appropriate to achieve the purpose of Article 51 of the Treaty, and that it may carry out the coordination which is necessary to achieve free movement in stages. A Community measure which - while reducing barriers to free movement in some areas - allows certain inequalities or restrictions to free movement to subsist in other areas is therefore not automatically unlawful.

70. The Commission and the Council point out, correctly in my view, that by adopting Regulation No 1390/81 (which inserted Articles 14c and 14d into the Regulation) the Community legislator achieved a degree of coordination. While persons who fall within Article 14c(1)(b) are liable to contribute in more than one Member State, the contributions owed in each State are based exclusively on the income which is earned in each of those States. The insertion of Article 14c(1)(b) thus removed the risk, which existed prior to the adoption of Regulation No 1390/81, of a complete duplication of liabilities in respect of the same periods, risks and incomes in several Member States.

71. The fact that Article 14c(1)(b) provides a degree of coordination is however, in my view, insufficient of itself to show that Article 14c(1)(b) and Annex VII are valid provisions. In order to answer the question referred, it is necessary to place those provisions within the context of the Regulation as a whole, and to examine their practical effects as illustrated by the facts of the present cases.

72. Article 14c(1)(b) and Annex VII created, for the first time, a set of exceptions to the single State principle laid down in Article 13(1) of the Regulation. Those exceptions are both complex and anomalous within the structure of the Regulation as a whole. It is however not clear from the preamble to - or any other part of - Regulation No 1390/81 why the Community legislator considered exceptions to be necessary or why the particular situations listed in Annex VII were selected for special treatment.

73. The preamble to Regulation No 1390/81 states that the coordination of the social security schemes applicable to self-employed persons is necessary to attain one of the objectives of the Community, and that in the sphere of social security, the application of national legislations only would not afford sufficient protection to self-employed persons moving within the Community; ... in order to make the freedom of establishment and the freedom to provide services fully effective, the social security schemes for self-employed persons should be coordinated. Those recitals suggest that the purpose of Regulation No 1390/81 was to improve freedom of movement for persons by assimilating the rules applicable to employed and self-employed persons in the area of social security. However, the application of the single State principle (Article 14c(1)(a)) to all persons simultaneously employed and self-employed in more than one Member State would have achieved that purpose far better without the exceptions listed in Article 14c(1)(b) and Annex VII.

74. The anomalous nature of the exceptions contained in Article 14c(1)(b) and Annex VII is particularly striking where - as in the case of Mr Hervein and Mr Lorthiois - they are applied to a single professional activity which is categorised differently under laws of the Member States concerned. In such circumstances, Article 14c(1)(b)

creates an artificial difference between employed and self-employed persons contrary to the purpose of Regulation No 1390/81.

75. Moreover, and perhaps more importantly, it appears that Article 14c(1)(b) and Annex VII created, for certain classes of persons, restrictions on the freedom of movement for workers and the freedom of establishment which did not previously exist under national law.

76. The defendants have drawn the attention of the Court of Justice to the bilateral Franco-Belgian Treaty on Social Security (Convention générale sur la sécurité sociale entre la Belgique et la France) signed on 17 January 1948, approved by the Law of 2 June 1949, and completed by the administrative agreements of 23 December 1953 and of 25 and 26 January 1956, which prior to the entry into force of Article 14c(1)(b) exempted certain persons working simultaneously in France and in Belgium from payment of social security contributions under the Belgian scheme for the self-employed.

77. The minutes of the meetings held between the Belgian and French Governments on 25 and 26 January 1956 stipulate under point E.I.) that ... if a person is considered as an employee in France and as a self-employed person in Belgium, but as a matter of Belgian law the two functions carried out by that person constitute a single professional activity, only French [social security] law is applicable. That is in particular the case for a director of a company in France who is simultaneously ... (administrateur) of Belgian branches of the same company. Contrary to what Inasti suggests, it follows from that wording, as well as from the case-law of the Belgian courts, that persons working simultaneously as company directors of French companies in France and as directors of branches of those companies in Belgium were not required to be affiliated to the Belgian social security scheme for the self-employed.

78. Article 14c(1)(b) of and Annex VII to the Regulation thus effected an adverse change in the legal situation of a not wholly insignificant class of persons; namely persons working simultaneously as directors of companies established in France and of Belgian branches of such companies. While those persons were only required to be affiliated in France before the adoption of Article 14c(1)(b), they are now required to be affiliated both in France and in Belgium.

79. The difficulties which those persons encounter are exacerbated by the fact that Belgian law requires persons who pursue self-employment as a secondary activity (à titre complémentaire) to contribute, although it affords those persons social cover only where their annual earnings in Belgium exceed a certain level. For example, it appears that Inasti is seeking contributions from the defendant in Case C-394/99, Mr Lorthiois, although he will not be entitled to any social benefits under that scheme owing to the fact that his earnings in Belgium did not in any year exceed the full rate level laid down in the Belgian legislation.

80. The Commission and the Council suggested at the hearing that the problems caused by the absence of social cover in Belgium for certain categories of self-employed persons are a consequence of national law, and that they cannot therefore affect the validity of provisions of Community law. I cannot accept that argument. Persons in situations falling within Annex VII to the Regulation are liable to be disadvantaged by national rules which make entitlement to benefits dependent upon minimum annual contributions precisely because Article 14c(1)(b) has the effect of splitting their incomes between different Member States.

81. In the light of those observations, I consider that Article 14c(1)(b) and Annex VII cannot be justified on the grounds that those provisions provided a degree of coordination and hence a (small) improvement for free movement of persons compared to the rules of national law existing prior to the adoption of Regulation No 1390/81.

82. Inasti, the Commission, the Council and the Belgian Government argue that Article 14c(1)(b) and Annex VII are in any event justified by other considerations.

83. Those arguments must, as the Council stated at the hearing, be examined in the light of the structure of the social security schemes for the self-employed in the Member States. In some Member States - such as Denmark, the United Kingdom, Ireland, the Netherlands and Luxembourg - compulsory social protection is organised in a universal scheme covering employed as well as self-employed persons. In other Member States social security for the self-employed is organised either - as in Belgium and Portugal - in a separate (general) scheme covering all self-employed persons or - as in Germany, France, Italy, Spain and Greece - in a set of specific schemes covering distinct professions or categories of self-employed persons. In those States which do not have a universal scheme, persons who are simultaneously employed and self-employed are typically required to pay separate contributions in respect of both activities. The effect of Article 14c(1)(b) and Annex VII is essentially to replicate the requirement of separate contributions where a person is simultaneously employed and self-employed in different Member States.

84. A first argument, which is advanced by the Council, Inasti and the Belgian Government, is that the requirement of separate contributions is necessary in order to prevent distortions of competition and discrimination against persons exercising all their professional activities in Member States which require separate social security contributions to be made in respect of income from self-employment (the situations listed in Annex VII). For example, if a person employed in France and self-employed in Belgium were not simultaneously subject to the French and the Belgian legislation, social contributions would be levied only on that person's income from employment in France. That person would therefore be treated more favourably than a person exercising all his professional activities in Belgium who would be paying separate contributions in respect of both employment and self-employment.

85. That argument should not, in my view, be accepted.

86. The existence of separate social security systems for the self-employed in some Member States is relevant in so far as those systems make it practically possible - though, as Inasti and the Greek Government pointed out at

the hearing, not uncomplicated - to require separate contributions on incomes earned in different Member States by different professional activities in accordance with Article 14c(1)(b).

87. The fact that those separate social security systems exist, and the fact that the single State principle might therefore favour migrant workers over domestic workers, is however not a valid justification for derogating from the single State principle to the detriment of freedom of movement for workers and freedom of establishment.

88. I consider persons who exercise all of their professional activities in one Member State to be in an objectively different situation from persons who pursue activities in two or more Member States at the same time. The fact that the single State principle might in some instances give the latter category of persons an economic advantage does not therefore constitute discrimination. Moreover, the fact that the application of the single State principle might increase cross-border competition is - as the Commission appeared to accept at the hearing - not in itself a valid justification for imposing restrictions on freedom of movement for persons in the context of a regulation purporting to promote free movement and social protection of migrant workers.

89. In any event, I am not convinced that the application of the single State principle would in all, or even most, cases grant persons exercising activities in several Member States an advantage over persons exercising all of their professional activities in a single Member State. The way in which contributions are calculated differs greatly from one Member State to another. Affiliation in a single Member State will therefore not always entail lower contributions than affiliation in two Member States. Moreover, Article 14d(1) of the Regulation provides that a person who is simultaneously employed in one Member State and self-employed in another Member State, and who is subject only to the legislation of the first Member State in accordance with Article 14c(1)(a), is to be treated as if he pursued all his activity in that State. It follows that such a person may be required to pay social security contributions in the Member State of employment in respect of his income from self-employment in the other Member State. That would prevent, or at least reduce, the advantage for the persons concerned in instances where the activity in the first Member State (categorised as employment in that State) is categorised as self-employment in the other Member State. For example, in the present case the application of the single State principle and Article 14d(1) would enable the French social security authorities to levy contributions on the income earned by Mr Hervein and Mr Lorthiois as company directors in Belgium.

90. The second argument, put forward by the Commission, is that Article 14c(1)(b) and Annex VII are justified by the need to prevent evasion of social security contributions. Evasion might occur, for example, where a Belgian national exercising an activity as a self-employed person in Belgium pretended to be employed in another Member State where persons who are simultaneously employed and self-employed are not required to make separate contributions in respect of their income from self-employment.

91. I find that argument unconvincing.

92. It may be accepted that the Community legislator has competence to adopt measures on the basis of Articles 51 and 235 of the Treaty aimed at combating social security evasion. Such measures must however be proportionate to the aim sought. The requirement of double affiliation which applies under Article 14c(1)(b) of the Regulation is not, in my opinion, a proportionate measure in view of the restrictions it creates on the exercise of free movement rights. It ought, I consider, to have been possible for the Community legislator to address problems of evasion by the introduction of appropriate administrative controls which would have had less restrictive effects on free movement.

93. The third argument put forward by Inasti, the Belgian Government, the Commission and the Council is that Article 14c(1)(b) and Annex VII are justified since the persons covered by those provisions may benefit from additional social cover. In that regard, the Commission and the Council stressed in their replies to questions put by the Court that Regulation No 3811/86 amended, in particular, Articles 9 and 15 of the Implementing Regulation in order to facilitate the aggregation of social security benefits earned by persons who are or have been employed or self-employed in more than one Member State. Attention was also drawn to Larsy where the Court held that the anti-overlapping rules in the Regulation cannot be applied where a worker has been required to pay old-age pension contributions in two Member States for one and the same period, since the coexistence of the two pensions to which he is entitled by virtue of those contributions cannot be considered unjustified.

94. That argument does not withstand scrutiny either.

95. It is true that the Court of Justice has held that provisions of national law which require contributions to be made to the scheme for self-employed persons by persons already working in another Member State where they have their habitual residence and are affiliated to a social security scheme may be lawful where those contributions are duly justified by the provision of additional social cover for the persons concerned.

96. The derogations from the single State principle, and the corollary requirement of contributions in more than one Member State, laid down in Article 14c(1)(b) could however, in my view, be justified under that case-law only if those derogations were intended and necessary to grant additional social protection to migrant workers or, perhaps, if it could be shown that migrant workers are inherently likely to obtain greater social cover than if the single State principle had applied in all instances. The fact that persons falling under Article 14c(1)(b) may become entitled to some benefits - such as invalidity benefits, old-age benefits and survivor's benefits - in each of the Member States where they have been compelled to make contributions cannot of itself justify the restrictions on the free movement of persons resulting from that provision.

97. It is clear that Article 14c(1)(b) is neither intended nor necessary to grant workers additional social cover. The purpose of that provision was, according to the concurrent explanations of the Commission and the Council, to prevent what certain Member States perceived at the time of adoption of Regulation No 1390/81 as a risk of abuse and/or unfair competition.

98. What, then, is likely to lead to greater social cover: the payment of social contributions in two or more Member States in respect of the incomes earned in each of them (Article 14c(1)(b)) or the payment of

contributions in a single Member State in respect of the total income earned in all the Member States concerned? The answer to that question depends entirely upon the social security legislations of the Member States. Those laws are subject to change at the will of the national legislators. It follows that even if separate payments in several Member States might at one point in time and as regards particular situations be more beneficial for the persons concerned, that will far from always be the case. The application of the system laid down in Article 14c(1)(b) is thus not inherently likely to afford migrant workers greater social protection than the single State principle laid down in Article 14c(1)(a). That point is clearly illustrated by the facts of the present case. As explained above, Mr Lorthiois is required under Belgian law to contribute to the social security scheme for the self-employed in Belgium, but he is not entitled to any social benefits whatsoever under that scheme. In those circumstances, the application of Article 14c(1)(b) does not in any way increase the level of social cover.

99. I accordingly conclude that Article 14c(1)(b) and Annex VII restrict freedom of movement for workers and freedom of establishment; that those restrictions are not justified by the reasons put forward by the Council and the Commission; and that Article 14c(1)(b) and Annex VII must for those reasons be declared invalid.

The second question

100. The Tribunal du travail de Tournai asks by its second question whether the invalidity of Article 14c(1)(b) of and Annex VII to the Regulation may be relied on to call into question affiliation and contributions payable in application of those provisions for periods prior to the judgment in this case. In case of a negative reply to that question, the referring court desires to know whether persons who have already brought legal proceedings or made an equivalent claim under national law before the date of the judgment may none the less rely on the invalidity of Article 14c(1)(b) and Annex VII.

101. Referring to the Opinion of Advocate General Ruiz-Jarabo Colomer in Hervein I, the Greek Government argues that the Court of Justice should rule that the invalidity of Articles 14c(1)(b) can be relied upon only by persons who have already brought legal proceedings or made an equivalent claim prior to its judgment. The Council shares that view in case the Court decides, contrary to its main argument, to declare Article 14c(1)(b) and Annex VII invalid.

102. The defendants argue that the Court should not impose such a restriction on the effects of its ruling in this case. Alternatively they argue that the Court should hold that the invalidity of Article 14c(1)(b) and Annex VII can be relied upon by persons who have brought legal proceedings or made an equivalent claim, whether as applicants or defendants, prior to the Court's judgment.

103. The Court of Justice has acknowledged that the temporal effect of a preliminary ruling of invalidity can be limited on the basis of Article 174(2) of the EC Treaty (now, after amendment, Article 231(2) EC) where such a limitation is, exceptionally, justified by overriding considerations of legal certainty.

104. In the present case, it must be acknowledged that the Member States which, following the entry into force of Regulation No 1390/81 on 1 July 1982, required persons who were already affiliated to a scheme for employed persons in another Member State to be affiliated to their own social security schemes for self-employed persons may have been uncertain as to the precise extent of their obligations as regards freedom of movement for persons. The judgments in De Jaeck and Hervein I, in which the Court interpreted Article 14c(1)(b) of the Regulation without examining its validity, may have increased that uncertainty to some extent. Account must also be taken of the fact that Article 14c(1)(b) and Annex VII apply to a large number of persons in the Community, and that serious financial consequences for the social security bodies, as well as strain on the resources of the judicial systems in the Member States, could ensue if the invalidity of Article 14c(1)(b) could be relied upon to challenge social contributions paid or owed in respect of periods prior to the date of the Court's judgment.

105. I therefore agree with the Greek Government and the Council that overriding considerations of legal certainty militate against calling in question affiliation and contributions payable in application of Article 14c(1)(b) in respect of periods prior to the delivery of the judgment in the present case.

106. According to the case-law, it is however incumbent upon the Court to decide - where it limits the effect of a ruling of invalidity - whether an exception to that temporal limitation should be made in favour of the party which brought the action before the national court or in favour of any other person who took similar steps before the declaration of invalidity or whether, conversely, a declaration of invalidity applicable only to the future constitutes an adequate remedy even for persons who took action before the Court's ruling with a view to protecting their rights.

107. In my view, the principle of effective judicial protection clearly requires that persons who have already commenced legal proceedings or made an equivalent claim in accordance with applicable national law prior to the date of the Court's judgment should be able to rely on the invalidity of Article 14c(1)(b) and Annex VII.

108. The defendants are concerned that a ruling to that effect would not assist individuals who, like themselves, have attempted to protect their legal position by refusing to pay contributions owed under Article 14c(1)(b) rather than by challenging before national courts contributions already paid.

109. Those doubts are, in my view, unfounded. The purpose of extending the effects of a ruling to persons who have initiated proceedings or made an equivalent claim is, as the Court stated in Lomas and others, to protect all those persons who have asserted their rights in due time. In order to fulfil that purpose, and to grant individuals effective judicial protection against the consequences of unlawful provisions of Community law, the phrase made an equivalent claim must be taken to include situations where a person has asserted his rights by refusing to pay sums on the grounds that the request for payment was contrary to Community law, whilst stating that reason

clearly to the body or authority requesting the payment and - if the body sought payment through legal proceedings - by invoking the conflict with Community law in those legal proceedings.

Conclusion

110. In the light of all the foregoing observations, I am of the opinion that the Court of Justice should declare that:

(1) Article 14c(1)(b) of and Annex VII to Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, are invalid.

(2) The invalidity of those provisions cannot be relied on to call in question affiliation and the contributions payable, in application of them, in respect of periods prior to the delivery of this judgment, except as regards employed or self-employed persons, or those entitled under them, who have already brought legal proceedings or made an equivalent claim in accordance with applicable national law prior to that date.