JUDGMENT OF THE COURT (Sixth Chamber)

15 June 2000 *

In Case C-302/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundessozialgericht, Germany, for a preliminary ruling in the proceedings pending before that court between

Manfred Sehrer

and

Bundesknappschaft,

Joined party:

Landesversicherungsanstalt für das Saarland,

on the interpretation of Articles 6, 48 and 49 of the EC Treaty (now, after amendment, Articles 12 EC, 39 EC and 40 EC), Article 50 of the EC Treaty (now

* Language of the case: German.

Article 41 EC), Article 51 of the EC Treaty (now, after amendment, Article 42 EC) and Article 3 of 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 (OJ 1983 L 230, p. 6),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), G. Hirsch and F. Macken, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry for Economic Affairs, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,

— the Commission of the European Communities, by P. Hillenkamp, acting as Agent,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2000,

gives the following

Judgment

1 By order of 13 May 1998, received at the Court on 3 August 1998, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 6, 48 and 49 of the EC Treaty (now, after amendment, Articles 12 EC, 39 EC and 40 EC), Article 50 of the EC Treaty (now Article 41 EC), Article 51 of the EC Treaty (now, after amendment, Article 42 EC) and Article 3 of 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 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71').

2 That question has been raised in proceedings between Mr Sehrer and the Bundesknappschaft (Federal Insurance Fund for Miners) which is demanding payment of sickness insurance contributions in respect of the supplementary French retirement pension drawn by Mr Sehrer.

3 Mr Sehrer is a former miner of German nationality resident in Germany. Since reaching 60 years of age he has drawn a statutory retirement pension from the

Bundesknappschaft and a supplementary retirement pension from the German association for miners and metallurgy.

4 Since Mr Sehrer also worked as a miner in France, he receives in addition a French supplementary retirement pension from the Caisse de Retraites Complémentaires des Ouvriers Mineurs (Mineworkers' Supplementary Pension Fund, hereinafter 'Carcom'). The gross amount of that retirement pension, which varied during the period at issue from FRF 2 384.19 to FRF 2 538.45 per quarter, is subject to a deduction of 2.4%, that is to say FRF 57.22 to FRF 60.92 per quarter in that period, by way of a contribution to the French sickness insurance scheme. It is a 'solidarity' contribution which as such confers no benefit entitlement.

5 Mr Sehrer is affiliated to the Krankenversicherung der Rentner (Pensioners' Sickness Insurance Scheme, hereinafter the 'KVdR') through the Bundesknappschaft. When the Bundesknappschaft learnt of Mr Sehrer's French supplementary pension, it demanded from him, by decisions of 7 and 13 September 1993, payment of arrears of sickness insurance contributions calculated on the basis of the gross amount of that pension. The arrears amount to DEM 1 005.67 for the period from 1 December 1988 to 30 September 1993.

6 When the Bundesknappschaft rejected his objections challenging the demand for payment, Mr Sehrer brought proceedings before the Sozialgericht für das Saarland (Social Court of the Saarland). By judgment of 8 February 1995, that court granted his application in part. It held that the Bundesknappschaft was not entitled to include in the basis for calculating the contributions payable in Germany the part of the French retirement pension deducted by way of contribution to the French sickness insurance scheme. The appeal brought by the Bundesknappschaft against that judgment was dismissed by judgment of the Landessozialgericht für das Saarland (Regional Social Court of the Saarland) of 23 May 1996, on the ground that the principle of solidarity precludes a person covered by social insurance from paying contributions on contributions and thus being required to pay twice.

7 The Bundesknappschaft brought an appeal on a point of law before the Bundessozialgericht (Federal Social Court). It contended that, by confirming that the sickness insurance contributions paid in France were to be excluded from the amount of the French supplementary pension which served as a basis for the German contributions, the appeal court had failed to apply Paragraphs 237 and 229 of the Fifth Book of the Sozialgesetzbuch (Code of Social Law, hereinafter the 'SGB') which entered into force on 1 January 1989 and the equivalent provisions previously set out in the Reichsversicherungsordnung (National Social Insurance Code).

8 In its order for reference, the Bundessozialgericht states that under German law the contributions payable in Germany to the KVdR must in fact be calculated on the basis of the gross amount of Mr Sehrer's French supplementary pension. By virtue of the second point of the first sentence of Paragraph 237 of the Fifth Book of the SGB, pensioners' contributions to the German sickness insurance scheme are calculated on the basis of the 'nominal amount' ('Zahlbetrag') of income equivalent to retirement pension. In accordance with the fifth point of the first sentence and the second sentence of Paragraph 229(1) of the Fifth Book of the SGB, to which Paragraph 237 refers, supplementary retirement pensions form part of that income, including when they are drawn abroad.

9 However, in the light in particular of Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, the Bundessozialgericht raises the question of the compatibility with Community law of a system under which a retired worker is liable to pay sickness insurance contributions on his supplementary pension twice merely because he draws that pension in another Member State. It states that the effect of such a system is to penalise workers who have exercised their right to freedom of movement as against workers who have not made use of that right.

10 According to the Bundessozialgericht, the fundamental principle of freedom of movement for workers could thus preclude the inclusion, in the basis for calculating the German contributions, of the part of the French retirement pension deducted by way of contribution to the French sickness insurance scheme. The Court admittedly held in Case C-57/90 *Commission* v *France* [1992] ECR I-75 that Article 33 of Regulation No 1408/71, under which a Member

State is entitled to levy sickness insurance contributions from a pensioner only if the cost of the corresponding benefits is borne by it, does not apply to supplementary retirement pensions which, like the pension paid by Carcom, are based on agreements. However, that provides no ground for inferring that it is compatible with Articles 6 and 48 to 51 of the Treaty for a supplementary retirement pension to be subject to concurrent contributions.

11 It was in those circumstances that the Bundessozialgericht decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 6 and 48 to 51 of the Treaty establishing the European Community and Article 3 of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community preclude national rules under which the whole of a supplementary French pension paid on the basis of a collective agreement is subject to contributions both to the French sickness insurance scheme and to the German sickness insurance scheme for pensioners?'

12 The German Government and the Commission submit that in the present case it should be considered first, before answering the question submitted, whether the payment of a contribution under the French sickness insurance scheme is compatible with Articles 48 to 51 of the Treaty. Only if it is consistent with Community law to levy that contribution should the way in which the German contribution is calculated be considered.

13 The German Government points out that, under the Court's case-law, Article 59 of the EC Treaty (now, after amendment, Article 49 EC) precludes a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first Member State to pay employers'

contributions with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable contributions in the State where it is established (Case C-272/94 *Guiot* [1996] ECR I-1905; see also Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* v *EVI* [1982] ECR 223).

14 According to the German Government, Mr Sehrer, who already enjoys full protection against the risk of sickness in his State of residence, is required to pay in France a second sickness contribution which confers on him no entitlement or additional advantage whatsoever. Thus, just as the employers' contributions at issue in *Seco and Desquenne & Giral* and *Guiot* infringed Article 59 of the Treaty, the levying of the sickness contribution in France constitutes an obstacle to freedom of movement for workers prohibited by Article 48 of the Treaty.

15 The Commission notes that a sickness contribution is deducted in France from Mr Sehrer's French supplementary retirement pension although he is resident in Germany and can only claim benefits provided by the German sickness insurance scheme. Such payment, which is not accompanied by any benefit entitlement, therefore disadvantages Mr Sehrer. It also results in an additional financial burden for him inasmuch as he must pay a further sickness contribution, calculated on the gross amount of that retirement pension, in his State of residence. The Commission concludes that the levying of a contribution under the French sickness insurance scheme is contrary to Article 48 of the Treaty.

16 Should the Court confine itself to the question submitted by the national court, the German Government submits that that question should be answered in the negative. By contrast, the Commission contends that in that case Article 5 of the EC Treaty (now Article 10 EC) and Articles 48 to 51 of the EC Treaty require the competent authorities of a Member State to take account of contributions deducted by another Member State from retirement pensions paid in that State and to calculate their own contributions on the basis of the net amount of the pensions in question.

Scope of the question referred for a preliminary ruling

17 By its question, the national court seeks to ascertain whether certain provisions of the Treaty and secondary legislation preclude a Member State from calculating the sickness insurance contributions of a retired worker subject to its legislation on the basis of the gross amount of the supplementary retirement pension payable under an agreement which that worker draws in another Member State, without taking account of the fact that a part of the gross amount of that pension has already been deducted by way of sickness insurance contributions in the latter State.

18 On the other hand, the question submitted is not concerned with whether the Community provisions at issue preclude the latter Member State from deducting sickness insurance contributions where they confer no benefit entitlement and the worker concerned receives a statutory retirement pension and is already insured against the risk in question in the first Member State.

19 Furthermore, while the Bundessozialgericht in its order for reference expressed its doubts as to whether it was compatible with Community law for sickness insurance contributions conferring no benefit entitlement to be levied in France, it stated that the plaintiff in the main proceedings could have put their compatibility in issue only before the French courts. It added that Mr Sehrer had nevertheless preferred to put in issue the validity of the German sickness insurance contributions on the ground that they were at a higher rate than the French contributions.

20 It is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular

circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-254/98 *TK-Heimdienst* v *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I-151, paragraph 13).

21 It is therefore appropriate only to reply to the question submitted by the national court.

Answer to the question submitted

22 It should be noted first of all that Mr Sehrer, who has given up work and draws a statutory retirement pension in Germany, where he resides, is subject on that basis to German social security legislation, in accordance with Article 13(2)(f) of Regulation No 1408/71. Under that provision, which was inserted into Regulation No 1408/71 by Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2), a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the previous subparagraphs of Article 13(2) or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, is to be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.

23 Secondly, Article 1(j) of Regulation No 1408/71 provides that, for the purposes of the regulation, the term 'legislation' excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by

the authorities rendering them compulsory or extending their scope, in so far as that limitation is not lifted, in the cases provided for in the regulation, by a declaration of the Member State concerned.

24 It is apparent from the order for reference that the supplementary retirement pension scheme administered by Carcom is based on an agreement entered into by management and labour which has not been the subject of a declaration as referred to in Article 1(j) of Regulation No 1408/71.

25 It follows that, for the purposes of that regulation, Mr Sehrer draws a retirement pension under the legislation of a single Member State, namely Germany.

26 Finally, Section 5 of Chapter 1 of Title III of Regulation No 1408/71 is concerned with the rights of pensioners and members of their families. However, the pertinent provisions of that section cover either situations where the pensioner draws pensions under the legislation of two or more Member States or situations where he draws a pension under the legislation of a single Member State but is not entitled to benefits in his country of residence (Articles 27, 28 and 28a). As for Article 33, it is applicable only by reference to those provisions.

27 Since Mr Sehrer's situation is not covered by any of the foregoing provisions of Regulation No 1408/71, the deduction by the German authorities of sickness insurance contributions from his French supplementary retirement pension is a matter exclusively for German legislation.

28 However, when exercising that power the Federal Republic of Germany must comply with the rules of the Treaty, in particular those relating to freedom of movement for workers (see Case C-18/95 *Terhoeve* v *Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345, paragraphs 34 and 35).

29 The fact that Mr Sehrer has German nationality cannot prevent him from relying on the rules relating to freedom of movement for workers against the Member State of which he is a national, since he has exercised his right to freedom of movement and worked in another Member State (*Terhoeve*, paragraphs 27, 28 and 29).

30 Nor does the fact that Mr Sehrer is no longer in an employment relationship deny him certain guaranteed rights which are linked to the status of worker (Case C-57/96 *Meints* v *Minister van Landbouw Natuurbeheer en Visserij* [1997] ECR I-6689, paragraph 40, and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 41). A supplementary retirement pension, such as the one drawn by Mr Sehrer, whose grant is dependent on the prior existence of an employment relationship which has come to an end falls within that category of rights. The pension entitlement is intrinsically linked to the objective status of worker.

31 As regards Article 48 of the Treaty, which it is appropriate to consider first, the Court has repeatedly stated that that provision implements a fundamental principle contained in Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), under which, for the purposes set out in Article 2 of the EC Treaty (now, after amendment, Article 2 EC), the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons (Case C-370/90 *The Queen* v *Immigration Appeal Tribunal and Singh* [1992] ECR I-4265, paragraph 15, and *Terhoeve*, cited above, paragraph 36).

32 The Court has also held that the Treaty provisions relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and

preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (*Singh*, cited above, paragraph 16, and *Terhoeve*, cited above, paragraph 37).

33 Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (*Masgio*, cited above, paragraphs 18 and 19, and *Terhoeve*, cited above, paragraph 39).

34 That is the precisely the case with the German legislation at issue which, while applying to migrant and non-migrant workers in the same way, is liable to prejudice only the former. It is unlikely that sickness insurance contributions will be levied twice in Germany on the gross amount of the supplementary retirement pension of a worker who has been employed only in Germany. By contrast, that risk is real for a worker who, like Mr Sehrer, has been employed in another Member State where he draws a supplementary retirement pension.

35 It follows that national legislation of the kind at issue in the main proceedings constitutes an obstacle to freedom of movement for workers, prohibited by Article 48 of the Treaty. It is therefore unnecessary to determine whether Article 6 of the Treaty and Article 3 of Regulation No 1408/71 preclude such legislation.

36 The answer to the question must therefore be that Article 48 of the Treaty precludes a Member State from calculating the sickness insurance contributions of a retired worker subject to its legislation on the basis of the gross amount of

the supplementary retirement pension payable under an agreement which that worker draws in another Member State, without taking account of the fact that a part of the gross amount of that pension has already been deducted by way of sickness insurance contributions in the latter State.

Costs

37 The costs incurred by the German Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Bundessozialgericht by order of 13 May 1998, hereby rules:

Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes a Member State from calculating the sickness insurance contributions of a retired

worker subject to its legislation on the basis of the gross amount of the supplementary retirement pension payable under an agreement which that worker draws in another Member State, without taking account of the fact that a part of the gross amount of that pension has already been deducted by way of sickness insurance contributions in the latter State.

Moitinho de Almeida Gulmann Puissochet

Hirsch Macken

Delivered in open court in Luxembourg on 15 June 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber