JUDGMENT OF THE COURT (Sixth Chamber)

8 March 2001 *

In Case C-68/99,

Commission of the European Communities, represented by P. Hillenkamp and A. Buschmann, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

defendant,

APPLICATION for a declaration that, by applying Paragraph 23 et seq. of the Künstlersozialversicherungsgesetz (Law on social insurance for artists) to artists and journalists who reside in another EU Member State and normally pursue a self -employed activity both in that other Member State and in the Federal Republic of Germany, and who are thus exclusively subject, as regards the social security system, to the legislation of the Member State in the territory of which

* Language of the case: German.

they reside, the Federal Republic of Germany has failed to fulfil its obligations under Articles 51, 52 and/or 59 of the EC Treaty (now, after amendment, Articles 42 EC and 43 EC and/or 49 EC) and Title II, specifically the first sentence of Article 14a(2) in conjunction with Article 13(1) and (2)(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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet (Rapporteur), R. Schintgen and F. Macken, Judges,

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 February 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by applying Paragraph 23 et seq. of the Künstlersozialversicherungsgesetz (Law on social insurance for artists, hereinafter 'KSVG') to artists and journalists who reside in another EU Member State and normally pursue a self-employed activity both in that other Member State and in the Federal Republic of Germany, and who are thus exclusively subject, as regards the social security system, to the legislation of the Member State in the territory of which they reside, the Federal Republic of Germany has failed to fulfil its obligations under Articles 51, 52 and/or 59 of the EC Treaty (now, after amendment, Articles 42 EC and 43 EC and/or 49 EC) and Title II, specifically the first sentence of Article 14a(2) in conjunction with Article 13(1) and (2)(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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, hereinafter 'Regulation No 1408/71').

The Community legislation

2 Article 13 of Regulation No 1408/71, which is the first article of Title II on determination of the legislation applicable, provides:

'1. Subject to Article 14c, 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.

2. Subject to Articles 14 to 17:

(a) ...

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

...'.

3 The first sentence of Article 14a(2) of Regulation No 1408/71 provides:

'[A] person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State'.

The national legislation

4 Paragraph 1 of the KSVG provides that self-employed artists and journalists who are gainfully employed as such are compulsorily affiliated to the workers' retirement insurance, statutory sickness insurance and social insurance. The KSVG provides however for cases where self-employed artists or journalists are not subject to that scheme, in particular where they also pursue another activity, either as employed or self-employed workers, or where they employ more than one worker in the pursuit of their artistic or journalistic activity.

5 According to Paragraph 14 of the KSVG, half of the social security for artists is funded by contributions from the insured persons and the other half by a contribution termed Künstlersozialabgabe (hereinafter 'the artists' social charge'), to be supplemented, as necessary, by a contribution by the State.

6 Under Paragraph 24(1) of the KSVG, heads of press undertakings and other publishing houses and press agencies are *inter alia* required to pay the artists' social charge. The basis of assessment of the artists' social charge is composed, according to Paragraph 25 of the KSVG, of the remuneration relating to work or services which a taxable person pays to artists or journalists even where they are not themselves compulsorily affiliated to the KSVG. The artists' social charge corresponds to a percentage of the basis of assessment, in accordance with Paragraph 23 of the KSVG.

7 The second sentence of Paragraph 36a of the KSVG provides that Paragraph 32 of Book I of the Sozialgesetzbuch (German social code, hereinafter 'the SGB'), is applicable to the legal relationships between the persons liable to the artists' social charge and the insured persons. According to the latter provision, any private-law agreement which derogates from the provisions of the SGB to the detriment of persons eligible for social benefits is null and void.

Pre-litigation procedure

8 By letter of 17 September 1997, the Commission formally requested the Federal Republic of Germany to submit observations on the compatibility with Community law of applying the KSVG to a German journalist, Mr Stutzer, who resides and works in Belgium but who also publishes articles in Germany. More generally, the Commission stated that collection of the artists' social charge in respect of the remuneration paid to artists and journalists who are not affiliated to the German social security scheme constituted an infringement of Articles 52 and 59 of the Treaty as well as of the provisions of Title II of Regulation No 1408/71.

9 In its reply of 21 November 1997, the Federal Republic of Germany confirmed that, under the KSVG, the undertaking which markets Mr Stutzer's publications is required to pay the artists' social charge in respect of the remuneration paid to Mr Stutzer, even though he is not subject to German social security legislation. If that were not the case, undertakings would have an interest in marketing the work of artists or journalists who are not subject to that legislation, which might lead to distortions of competition to the detriment of those artists and journalists who reside in Germany and who pursue their activities there.

10 The Federal Republic of Germany added that collection of the artists' social charge does not amount to double taxation, even indirectly, on the remuneration of artists and journalists residing in the other Member States. First of all, it is not the artists and journalists but the undertakings which market their work that are liable to that charge and, secondly, the second sentence of Paragraph 36a of the KSVG in conjunction with Paragraph 32 of Book I of the SGB prohibit those undertakings from passing on the charge in question to artists or journalists. Moreover, the remuneration of artists and journalists residing and working in Germany who, under German law, are not covered by the artists' social security is also subject to that charge.

11 In its reasoned opinion of 7 August 1998, the Commission maintained its arguments and its objections with reference to infringement of Articles 51, 52 and/or 59 of the Treaty and of Title II of Regulation No 1408/71. It called on the Federal Republic of Germany to take the measures necessary to comply with that opinion within two months of its notification.

12 By letter of 22 September 1998, the Federal Republic of Germany repeated the arguments set out in its reply to the formal notice.

13 Since the Federal Republic of Germany failed to comply with the reasoned opinion within the period allowed, the Commission decided to bring the present action.

The action

14 It must be made clear at the outset that the present action concerns the levying of the artists' social charge only in so far as the basis of assessment therefor includes the remuneration paid to self-employed artists and journalists who also work in another Member State where they have their habitual residence and are affiliated to a social security scheme in accordance with the provisions of Regulation No 1408/71.

15 According to the Commission, collection of the artists' social charge amounts, to the extent referred to in paragraph 14 of this judgment, to a double social security levy contrary both to Articles 13 and 14a of Regulation No 1408/71 and to Articles 51, 52 and/or 59 of the Treaty.

Infringement of Articles 13 and 14a of Regulation No 1408/71

16 The Commission observes that, according to Article 14a(2), a person normally self-employed in the territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State. Consequently, Mr Stutzer is subject to Belgian social security legislation and not to German social security legislation.

17 The Commission submits that the artists' social charge constitutes an employers' social contribution inasmuch as it is directly paid into the artists' social security fund and that, moreover, the resources of that fund are intended exclusively for the purpose of social security cover for artists and journalists.

18 Mr Stutzer, who is already required to make contributions in Belgium as a self-employed worker, has part of his remuneration made subject to the artists' social charge despite not being able to claim any benefits in Germany. Such a situation is contrary to Title II of Regulation No 1408/71.

19 That conclusion is not undermined by the fact that the artists' social charge is paid not by Mr Stutzer himself but by the undertaking which markets his work and that it is not entitled to pass on to him the costs arising from that charge. Indeed, there is nothing to prevent the taxable undertaking from taking into account such costs when fixing the remuneration for that journalist.

20 The Federal Republic of Germany denies that the artists' social charge is a social security contribution. That contribution benefits artists and journalists as a whole and is therefore not designed to ensure social protection for each of them individually. Moreover, its basis of assessment differs from that for the contributions paid by artists and journalists themselves. The artists' social charge should be regarded, in actual fact, as a parafiscal charge affecting all undertakings established in Germany which market the work of artists and journalists.

21 According to the Federal Republic of Germany, the artists' social charge does not infringe Title II of Regulation No 1408/71. That charge does not affect, either directly or indirectly, artists or journalists residing and working outside Germany. Rather, it affects German undertakings which market their work, which cannot pass on the charge to the artists or journalists concerned. Moreover, if the obligation to pay the artists' social charge were to be abolished, undertakings which market the work of artists and journalists would not increase, as a result, the remuneration which they pay to them. On the contrary, such abolition would entail distortions of competition to the detriment of artists and journalists who are subject to the German social security legislation as well as to the detriment of undertakings which market their work.

22 It must be borne in mind that the objective of Regulation No 1408/71, as stated in the second and fourth recitals of the preamble, is to ensure free movement of employed and self-employed workers within the Community, while respecting the special character of national social security legislation, by drawing up only a system of co-ordination.

23 To that end, as is clear from the fifth, sixth and tenth recitals, that provision upholds the principle of equality of treatment of workers under the various national laws and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement.

24 It is in the light of those principles and objectives that the Court must determine whether or not the legislation called in question by the Commission in the present

case is contrary to Article 13 of Regulation No 1408/71, according to which, subject to certain exceptions which are not relevant here, a worker is subject only to the legislation of a single Member State in order to avoid, as is clear from the eighth recital in the preamble to that regulation, the overlapping of applicable national legislation and the complications which could follow.

25 It must be borne in mind in that respect that the fact that a worker is required to pay, in respect of the same earned income, social charges arising under the legislation of several States, although he can be an insured person only in respect of the legislation of one State, means that the worker must pay contributions twice over, contrary to the provisions of Article 13 of Regulation No 1408/71 (see in particular Case 102/76 *Perenboom* [1977] ECR 815, paragraph 13, and Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 26).

26 However, in the present case, it is common ground that the artists' social charge affects not the artists and journalists themselves but the undertakings which market their work. Moreover, it is not disputed that those undertakings are not entitled to pass on the costs arising from the aforementioned charge to the remuneration they pay artists and journalists.

27 Under the German legislation, the artists' social charge should not, therefore, in particular, have any impact on those artists and journalists who provide services in Germany and who also pursue an activity as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme. In that respect, if the services provided by the artists and journalists in Germany give rise to social security contributions in the State of affiliation, that contribution cannot be greater than that for which they would have been liable if those services had been provided in the second State. Consequently, those workers are not penalised by reason of the fact that they provide their services in a Member State other than the State of affiliation.

28 Furthermore, since undertakings which market the works of artists and journalists are prohibited from passing on the cost of the artists' social charge to the remunerations of the persons concerned, the scheme in question, by including the remuneration paid to artists and journalists who do not fall within the scheme established under the KSVG within the basis of assessment for the artists' social charge, seeks to ensure equality of treatment of all the artists and journalists providing services in Germany. Where the remuneration paid is equal, the undertakings bear a total cost that does not differ according to whether the recipient of such remuneration is insured under the KSVG or another social security scheme. The system thus ensures so far as possible equality of treatment for all the artists and journalists working in Germany, in accordance with the objectives of Regulation No 1408/71, by not encouraging undertakings to resort to one category in preference to another.

29 Admittedly, depending on the level of personal contributions borne by self-employed artists and journalists in the various Member States, such a system can lead, in certain cases, to a situation where, for the same remuneration offered by the undertaking using the services of various artists and journalists in Germany, the final level of remuneration, after the levying of the aforementioned contributions, is less for an artist or journalist falling within the scope of a scheme other than that established by the KSVG than for an artist or journalist insured under that legislation. However, such a situation is inherent in the mechanism of straightforward co-ordination resulting from Regulation No 1408/71, which leaves the Member States competent to determine their own social security schemes and, in particular, to set the level of the contributions required of workers and economic operators, while providing in certain cases that a worker working in a Member State falls under the social security legislation of another Member State.

30 Moreover, in so far as the system at issue prohibits the passing on of the artists' social charge to remunerations, its abolition with regard to artists and journalists not affiliated to the scheme established by the KSVG would not change any aspect of either their remuneration or the level of the social charges to which that

remuneration may, in some circumstances, be subject under the social security scheme to which those artists and journalists are affiliated.

31 The system at issue thus ensures so far as possible equality of treatment of all self-employed artists and journalists providing services in Germany, as stated in paragraphs 28 to 30 of the present judgment, without penalising those self-employed artists and journalists who are covered by a social security scheme of another Member State when they provide services in Germany, by comparison with the circumstances in which they provide similar services in their State of affiliation, as observed in paragraphs 26 and 27 of the present judgment.

32 That system is therefore compatible with Article 13 of Regulation No 1408/71 according to which persons to whom that regulation applies are subject, in principle, to the legislation of a single Member State only. Under Article 2 of the regulation, the persons to whom it applies are, in a case such as that in point here, the workers themselves and it follows from the foregoing that the aforementioned system has no impact on their particular situation. It must be concluded that, so far as concerns self-employed artists and journalists, as 'workers' for the purposes of Regulation No 1408/71, the system at issue does not infringe the rule that the social security of only one Member State must be applied to such workers. The fact that their work also gives rise, as regards the undertakings which market it, to the payment of a charge designed to finance the German self-employed artists' and journalists' social charge does not affect that conclusion, despite the fact that, if it had in addition an impact on the workers themselves, that charge would fulfil the criteria enabling it to be characterised as a social contribution for the purposes of the application of Article 13 of Regulation No 1408/71.

33 In that regard, the artists' social charge is to be distinguished, for example, from contributions such as the social debt repayment contribution (CRDS) or the

general social contribution (CSG), which gave rise to two judgments of the Court of 15 February 2000 C-34/98 *Commission* v *France* [2000] ECR I-995, and C-169/98 *Commission* v *France* [2000] ECR I-1049 and which affected directly workers covered by the social security legislation of Member States other than the French Republic.

34 The artists' social charge must also be distinguished from contributions such as the employers's contributions which gave rise to Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223, which led to a double contribution being required of employers using workers affiliated to a social security scheme in force in a Member State and employing temporarily those workers in another Member State, without the contributions paid in that other Member State giving entitlement to any social advantage. Those contributions constituted an additional charge for that employer by imposing, in fact, social charges more burdensome than for service providers established in the territory where the services were provided. They could therefore have an impact on the decision of that employer on whether to use those workers, whom they thus affected indirectly. In the present case, the artists' social charge appears to be totally neutral inasmuch as the undertakings which market in Germany the works of self-employed artists and journalists who also pursue their activity in another Member State, where they have their habitual residence and are affiliated to a social security scheme, are not, according to the information in the file prepared by the Commission, liable to contributions to social security schemes covering such artists and journalists.

35 The Commission claims however that the artists' social charge indirectly affects the income of artists and journalists. When setting the remuneration for them, the undertakings which market their work are in a position to take account of the costs arising from that charge, despite legislation prohibiting them from passing on those costs to remuneration.

36 It must be pointed out that it is common ground that the German legislation prohibits undertakings from passing on the costs arising from the artists' social charge on to the remuneration which they pay to artists and journalists. Accordingly, under the terms of that legislation, the existence or non-existence of

that charge is not to have any impact on the remuneration paid to artists and journalists, which must be based on totally independent factors.

37 The question of whether national legislation complies with Community law cannot be determined on the assumption that that legislation is not complied with. Only established conduct on the part of the public authorities showing that that legislation does not in reality constitute the rule applied could provide grounds for departing, in the context of examination of an action for failure to fulfil obligations lodged under Article 169 of the Treaty, from the national provisions in question and examining a practice diverging from them.

38 Moreover, in infringement proceedings under Article 169 of the Treaty, it is incumbent upon the Commission to prove the existence of the alleged infringement and to place before the Court the information needed to enable it to determine whether there is such an infringement (see, in particular, Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 59).

39 However, in its pleadings, the Commission does not adduce any evidence to show that the remuneration paid to artists and journalists was, in practice, influenced by the obligation on the undertakings which market their work to pay the artists' social charge.

40 Since the system at issue does not result in the application of the social security legislation of more than one Member State to self-employed artists and journalists who have their work marketed in Germany but who reside and pursue part of their self-employed activities in another Member State, neither does it infringe the rule laid down in the first sentence of Article 14a(2) of Regulation No 1408/71 according to which a person normally self-employed in the territory of two or more Member States is subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State.

41 Accordingly, the Commission's objection that Articles 13 and 14a of Regulation No 1408/71 are infringed must be rejected.

Infringement of Articles 51, 52 and/or 59 of the Treaty

42 According to the Commission, Articles 51, 52 and/or 59 of the Treaty also preclude the levying of the artists' social charge on the remuneration paid to artists and journalists who also pursue an activity as self-employed workers in another Member State where they have their habitual residence and are affiliated to a social security scheme. The Court has held in its judgments in *Seco*, cited above, and in Case C-53/95 *Kemmler* [1996] ECR I-703, that the EC Treaty precludes a Member State from requiring contributions which do not confer entitlement to any additional social security cover to persons who reside in another Member State in which they are already affiliated to a social security scheme.

43 The Federal Republic of Germany denies any infringement of Article 51, 52 and/or 59 of the Treaty. It contends that the artists' social charge is also levied on the remuneration paid to certain artists and certain journalists who, although residing and working in Germany, are not affiliated to the artists' social security scheme. Moreover, the judgments in *Seco* and *Kemmler*, cited above, are not relevant in that they concern direct charges affecting employers and self-employed persons respectively and impairing freedom to provide services, whereas the artists' social charge affects directly only undertakings which market the work of the self-employed artists and journalists concerned without impairing the freedom to provide services.

44 In formulating its objection, the Commission is merely contemplating, from the point of view of Articles 51, 52 and 59 of the Treaty, the same objection as it made in the context of Articles 13 and 14a of Regulation No 1408/71.

45 It is appropriate, first of all, to examine the argument of the Commission based on the judgment in *Kemmler*, cited above. It is true that the Court held, in paragraph 14 of that judgment, that Article 52 of the Treaty precludes a Member State from requiring contributions to be paid to the social security 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, that obligation affording them no additional social security cover.

46 However, as the Court has pointed out in paragraphs 36 to 39 of the present judgment, the Commission has not demonstrated that the artists' social charge affects, even indirectly, the remuneration paid to artists and journalists who pursue a self-employed activity in another Member State where they have their habitual residence and are affiliated to a social security scheme.

47 Next, as regards the reasoning of the Commission based on the judgment in *Seco*, cited above, it is true that the Court held, at paragraph 15 of that judgment, that Community law precludes a Member State from requiring an employer, established in another Member State and temporarily carrying out work, using workers who are nationals of non-member countries, in the first Member State, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits.

48 However, as has already been observed in paragraph 34 of the present judgment, the Commission has not shown that the German undertakings which market the work of artists and journalists who also pursue their activity in another Member State, where they have their habitual residence and are affiliated to a social security scheme, are in a similar situation.

49 Finally, it must be borne in mind that the application of the artists' social charge to the remuneration paid to artists and journalists who pursue their activity in another Member State, where they have their habitual residence and are affiliated to a social security scheme, is not such as to discourage, contrary to Articles 52 or 59 of the Treaty, German undertakings from marketing the work of those artists and journalists. Those undertakings are liable to the same extent for the artists' social charge as regards the remuneration which they pay to artists established in Germany.

50 Accordingly, the Commission's objection alleging infringement of Articles 51, 52 and/or 59 of the Treaty must be dismissed.

51 It follows from all the foregoing considerations that the Commission's application must be dismissed.

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to pay the costs.**

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber