# JUDGMENT OF THE COURT

19 March 2002 *

In Joined Cases C-393/99 and C-394/99,

REFERENCE to the Court under Article 234 EC by the Tribunal du travail, Tournai (Belgium), for a preliminary ruling in the proceedings pending before that court between

**Institut national d'assurances sociales pour travailleurs indépendants (Inasti)**

and

**Claude Hervein,**

**Hervillier SA** (C-393/99),

**Guy Lorthiois,**

**Comtexbel SA** (C-394/99),

on the validity of Article 14c(1)b, now Article 14c(b), of and Annex VII to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to

* Language of the case: French.

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), and as amended by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken and N. Colneric (Presidents of Chambers), C. Gulmann, D.A.O. Edward, J.-P. Puissochet (Rapporteur), M. Wathelet and V. Skouris, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Institut national d'assurances sociales pour travailleurs indépendants (Inasti), by L. Paeme, director,

— Mr Hervein, Hervillier SA, Mr Lorthiois and Comtexbel SA, by E. van Daele and P. Detournay, avocats,

— the Belgian Government, by P. Rietjens, acting as Agent,

— the Greek Government, by K. Grigoriou, I. Galani-Maragkoudaki and I. Bakopoulos, acting as Agents,

— the Council of the European Union, by F. Anton and E. Karlsson, acting as Agents,

— the Commission of the European Communities, by P. Hillenkamp and H. Michard, acting as Agents, assisted by R. Karpenstein, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the Institut national d'assurances sociales pour travailleurs indépendants (Inasti), represented by L. Renaud, its adviser, of the Greek Government, represented by I. Galani-Maragkoudaki and I. Bakopoulos, of the Council, represented by A. Lo Monaco, acting as Agent, and of the Commission, represented by H. Michard, at the hearing on 7 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 April 2001,

gives the following

## Judgment

1 By two judgments of 5 October 1999, received by the Court on 13 October 1999, the Tribunal du travail (Labour Court), Tournai (Belgium) referred two questions to the Court of Justice for a preliminary ruling under Article 234 EC on the validity of Article 14c(1)b, now Article 14c(b), of and Annex VII to Regulation (EEC) No 1408/71 of the Council 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), and as amended by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5) ('Regulation No 1408/71'), and on the scope of a declaration of invalidity.

2 Those questions were raised in proceedings brought by the Institut national d'assurances sociales pour travailleurs indépendants (national social security institute for self-employed persons, 'Inasti') against Mr Hervein and Hervillier SA, and against Mr Lorthiois and Comtexbel SA, over the social security contributions which Inasti claims in respect of the activities which Mr Hervein and Mr Lorthiois pursued as company directors in Belgium.

## The Community legislation

3 Articles 13 to 17 of Title II of Regulation No 1408/71 concern the determination of the legislation applicable to employed persons, to self-employed persons and to members of their families moving within the Community.

4 Under Article 13(1) of Regulation No 1408/71:

'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.'

5 Article 14c of Regulation No 1408/71 laid down special rules applicable to persons employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State. In the version updated by Regulation No 2001/83, it provides:

'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.'

6 Article 14d(1) of Regulation No 1408/71 provides:

'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 [this provision], as if he pursued his professional activity or activities in the territory of the Member State concerned.'

7 Annex VII to Regulation No 1408/71, to which Article 14c(1)(b) refers, and which lists the instances in which a person is to be simultaneously subject to the legislation of two Member States, covers, in paragraph 1, the situation where a person is self-employed in Belgium and gainfully employed in any other Member State except Luxembourg.

8 In order both to supplement Article 14c of Regulation No 1408/71 so as to take account of a situation where more than two activities in a combination of paid employment and self-employment are carried out in the territory of different Member States and in order to determine the method of implementation of Article 14c(1)(b) in accordance with paragraph 2 of that Article, the Council adopted Regulation No 3811/86. Under Article 4, that regulation was applicable as from 1 January 1987.

9 Article 1(1) of Regulation No 3811/86 replaced Article 14c of Regulation No 1408/71 with the following:

'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 1(2) of Regulation No 3811/86 inserted the following paragraph in Article 14d of Regulation No 1408/71:

'2. The person referred to in Article 14c(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.'

11 Finally, Article 2 of Regulation No 3811/86 supplemented Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159, 'the implementing regulation') by laying down several provisions intended to facilitate the simultaneous application of the legislation of the two States to which the persons referred to in Article 14c(b) of Regulation No 1408/71 are subject.

**The main proceedings and the questions referred for a preliminary ruling**

*Case C-393/99*

12 Until 6 October 1986, Mr Hervein, a French national resident in France, was simultaneously chairman/director-general and director or assistant director of companies established in both France and Belgium, *inter alia* in Hervillier.

13 In France, where company directors are considered to be employees for the purposes of social security cover, Mr Hervein was affiliated to and paid contributions to the general social security scheme for employees.

14 Inasti commenced proceedings against Mr Hervein and Hervillier SA in the Tribunal du travail, Tournai, for the payment of the social security contributions in respect of his employment in Belgium from 1 July 1982 to 31 December 1986. Inasti argued that Mr Hervein was subject to the social security scheme for self-employed persons in Belgium because he was self-employed there under Belgian legislation although he was subject, in France, to the social security scheme for employees. Under Article 14c(1)(b) of Regulation No 1408/71 in conjunction with Annex VII thereto, a person who is self-employed in Belgium and in paid employment in France is to be subject to the legislation of both those States.

15 Mr Hervein and Hervillier SA disputed that Mr Hervein was subject to the Belgian scheme on the ground that, although he was treated in France as an employee for the purposes of social security cover, he was not engaged in paid employment there.

16 As it was uncertain as to the categorisation of the activity pursued in France by Mr Hervein, the Tribunal du travail, Tournai, by judgment of 6 June 1995, decided to stay proceedings and refer a question to the Court of Justice for a preliminary ruling. By its judgment in Case C-221/95 *Hervein and Hervillier* [1997] ECR I-609, ('*Hervein I*') the Court held:

'For the purposes of Articles 14a and 14c of Regulation (EEC) No 1408/71..., "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.'

17 Following that judgment, the proceedings were resumed before the Tribunal du travail, Tournai. Mr Hervein and Hervillier SA cited the Opinion of the Advocate General in *Hervein I*, cited above, in which he concluded that Article 14c(1)(b) of and Annex VII to Regulation No 1408/71 were invalid, and they asked the Tribunal du travail, Tournai, to refer a question to the Court of Justice on the validity of those provisions. However Inasti opposed such a reference on the ground that the judgment in *Hervein I* was final. Furthermore, it argued, on the basis of the ruling given by the Court of Justice, that Mr Hervein was required to pay contributions to the Belgian social security scheme for the self-employed.

18 The Tribunal du travail, Tournai, held that, in accordance with the interpretation adopted by the Court in *Hervein I*, Mr Hervein had to be regarded as being in paid employment in France and self-employed in Belgium. Consequently, he ought also to be subject to the Belgian social security legislation pursuant to Article 14c(1)(b) of Regulation No 1408/71, read in conjunction with Annex VII to that regulation. However, it raised the question whether those provisions were compatible with Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC).

19 It was against that background that the Tribunal du travail, Tournai, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are Article 14c(1)(b) 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, 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 in order 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?'

*Case C-394/99*

20 Mr Lorthiois, who is resident in France, is director, chairman of the board of directors and managing director of a company established in France. As such, he is affiliated to and pays contributions to the French social security scheme for employees. At the same time, he is chairman of the board of directors of Comtexbel SA, a company established in Belgium.

21 Inasti brought proceedings against Mr Lorthiois and Comtexbel SA before the Tribunal du travail, Tournai, on the same grounds as those put forward in the case of Mr Hervein, for the payment of social security contributions in respect of the activities pursued by Mr Lorthiois in Belgium for the period 1 January 1987 to 31 December 1988.

22 On similar grounds to those set out in the proceedings concerning Mr Hervein and Hervillier SA, the Tribunal du travail, Tournai, decided to stay proceedings and refer the same questions to the Court as those referred in those proceedings.

23 By order of the President of the Court of 22 November 1999, Cases C-393/99 and C-394/99 were joined for the purposes of the written and oral procedure and the judgment.

## Preliminary observation

24 In Case C-393/99, the first question concerns the validity of Article 14c(1)(b) of Regulation No 1408/71, as in force until 31 December 1986. With effect from 1 January 1987, as pointed out at paragraphs 8 and 9 of this judgment, that provision was amended and became Article 14c(b). In view of the period in respect of which Inasti is claiming contributions from Mr Lorthiois and Comtexbel SA, the first question in Case C-394/99 must be taken to refer to Article 14c(b), in force as from 1 January 1987.

25 However, as regards the questions referred by the Tribunal du travail, Tournai, in the two cases, the substance of the rule at issue is the same in each version and, for practical reasons, in the remainder of this judgment both versions will be

referred to as 'Article 14c(b)'. The same will apply to Article 14c(1)(a), which became Article 14c(a).

## Admissibility of the questions referred for a preliminary ruling

26 Inasti, the Belgian Government and the Council dispute the admissibility of the questions referred. In essence, they argue that the Court interpreted Article 14c(b) of and Annex VII to the Regulation in its judgment in *Hervein I* and in Case C-340/94 *De Jaeck* [1997] ECR I-461, without declaring them invalid, although the Advocate General had urged it to do so and it could have done so of its own motion. The Court thus accepted the validity of those provisions and, in the absence of any new matters coming to light in the meantime, the questions of the Tribunal du travail, Tournai, amount to calling into question decisions which are *res judicata*.

27 Those arguments must be rejected. If the Court, when dealing with a question referred to it for a preliminary ruling, does not rule on a point of law on which no question has been referred and which, moreover, has not been raised by the parties or other participants in the proceedings before it, that does not mean that it has given a definitive ruling on the point in question. Moreover, nothing prevents the Court, at the request of a national court and in the context of the Court's collaboration with that court pursuant to Article 234 EC, from ruling on the validity of a measure taken by the Community institutions, which it has already had occasion to interpret.

28 The questions referred by the Tribunal du travail, Tournai, are thus admissible.

## The first question

*Observations submitted to the Court*

29 Inasti and the Belgian Government submit *inter alia* that application of Article 14c(b) of Regulation No 1408/71 should result in identical treatment of all workers who are self-employed in Belgium, whether they are also in paid employment in Belgium or in another Member State. They are all affiliated to social insurance schemes for self-employed persons in Belgium on the same terms. The principles which the Court applied in its judgments in Case 143/87 *Stanton* [1988] ECR 3877 and Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, according to which a person who is self-employed in one Member State must, if he is also in paid employment, be treated in the same way whether that paid employment is in the same State or in another Member State, have thus been respected. Those judgments laid down an obligation of non-discrimination but did not in any way preclude the applicability of two social security regimes at the same time. Moreover, the situation covered by Article 14c(b) is different from that which gave rise to the judgment in Case C-53/95 *Kemmler* [1996] ECR I-703, in which the Court held that a Member State could not require contributions to be made 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, as that was a situation in which a worker was self-employed in two Member States rather than self-employed in one and in paid employment in the other.

30 Moreover, Inasti, the Belgian Government and the Council submit that to apply the social security legislation of another Member State to self-employment in Belgium would lead to a *de facto* harmonisation of social security legislation whereas the Treaty provides only for coordination.

31 Finally, Inasti argues that the adoption of Article 14c(b) changed nothing for workers simultaneously in paid employment in France and self-employed in Belgium, as compared with the previous situation under the 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 supplemented by the administrative agreements of 23 December 1953 and of 25 and 26 January 1956, under which persons in that situation were already affiliated to two schemes.

32 The Commission points out that Regulation No 1408/71 does not seek to change the structure or content of national legislation on social security or to harmonise that legislation, but merely to coordinate it. Thus, the criticism that Article 14c(b) of and Annex VII to Regulation No 1408/71 only concern certain Member States is misplaced. That state of affairs, which does not constitute discrimination on grounds of nationality, derives from the terms of reference of Regulation No 1408/71.

33 Article 14c(b) was adopted in response to the concern of several Member States about the practice, adopted by certain persons, of apportioning their professional activity between different Member States in order to avoid payment of social security contributions in respect of part of that activity.

34 That provision, although derogating from the general rule, laid down by Article 13(1) of Regulation No 1408/71, that a person is to be subject to the legislation of only one Member State, does not as such constitute an obstacle to the freedom of movement of workers or the right of establishment in so far as it does not result in double contributions in respect of one activity but provides for parallel contributions for persons pursuing simultaneously two different activities from which they derive two separate incomes. The Court has also held, in its

judgment in Case 19/76 *Triches* [1976] ECR 1243, that Article 51 of the EC Treaty (now, after amendment, Article 42 EC) confers on the Council the freedom to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reason of disparities between the national schemes in question.

35 Moreover, it was in order to prevent the persons concerned from having to pay an abnormally high amount by way of contributions that Regulation No 3811/86 inserted a new paragraph 2 in Article 14d of Regulation No 1408/71. As is clear from the explanatory memorandum to the proposal for a Council Regulation which resulted in the adoption of Regulation No 3811/86, Article 14d was amended 'in order to preserve, in the interests of the workers concerned, the advantages attaching in respect of contributions to certain national legislations in the simultaneous pursuance of paid employment and self-employment (lower contribution, exemption from contribution, full contribution but calculated on the basis of other data,...)'. Accordingly, in cases where Article 14c(b) applies, it is for the Member States to ensure that the contribution claimed in parallel with the contribution already paid in another Member State by the worker is objectively justified, is commensurate with that worker's activity and confers on him an additional social security benefit. If, in spite of Article 14d, as amended by Regulation No 3811/86, application of Regulation No 1408/71 were to lead, in a specific case, to the imposition of an additional burden on the worker which was not objectively justified and was disproportionate, that state of affairs might constitute an obstacle to the right of establishment. However, that obstacle would in that case be the result of the national legislation at issue and not of Article 14c(b).

36 In the alternative, should the Court consider that Article 14c(b) constitutes an obstacle to the freedom of movement of persons, the Commission submits that that provision might be justified in the light of Articles 48 and 52 of the Treaty. In that regard, in reliance on the judgments in Case 46/76 *Bauhuis* [1977] ECR 5 and Case C-39/90 *Denkavit* [1991] ECR I-3069, the Commission contends that the Council is entitled, like the Member States, to cite justification for obstacles to fundamental freedoms.

37 The Commission adds that, in its judgment in *Kemmler*, cited above, the Court not only accepted that national legislation under which a self-employed person is subject to the social security legislation of two Member States may be justified if it affords additional social security cover, but held, more generally, that such legislation is compatible with Article 52 of the Treaty if it is 'duly justified'. In the circumstances now in point, the grounds stated in the explanatory memorandum for the insertion of Article 14c(b) and Annex VII in Regulation No 1408/71 constitute due justification as regards Articles 48 and 52 of the Treaty.

38 Mr Hervein and Hervillier SA and Mr Lorthiois and Comtexbel SA (hereinafter 'Mr Hervein and the other defendants') point out, first of all that, until 1982, persons in their position were subject to the bilateral Franco-Belgian Treaty on Social Security of 17 January 1948. The minutes of the meetings held between the Belgian and French Governments on 25 and 26 January 1956 state 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 law is applicable. That is in particular the case as regards a director of a company in France who is simultaneously *administrateur* of Belgian branches of the same company'. On the basis of those documents, the Tribunal du travail, Tournai, ordered Inasti, by judgment of 3 February 1987, to repay with interest to Mr Hervein and to Hervillier SA the contributions in respect of self-employment charged but not due between 1974 and 1982. Article 14c(b) of Regulation No 1408/71, which replaced that bilateral agreement, required Mr Hervein thereafter to pay contributions in both France and Belgium.

39 According to Mr Hervein and the other defendants, supported by the Greek Government, such a situation is inequitable and infringes Articles 48 and 52 of the Treaty. They argue that, in its judgments in *Stanton*, *Wolf and Others* and *Kemmler*, cited above, the Court held that Articles 48 and 52 of the Treaty preclude the legislation of a Member State from requiring persons who are already employed or self-employed in another Member State, in which they are habitually resident and affiliated to a national social security scheme, to contribute to a scheme for self-employed persons because such legislation

disadvantages the pursuit of professional activities in more than one Member State. Articles 48 and 52 of the Treaty preclude, *a fortiori*, a Council regulation from having the same effect. It is true that, in the three judgments cited above, the Court accepted the possibility that an obstacle to the pursuit of professional activity outside the territory of a single Member State may be justified in cases where the national legislation offers some additional social security cover. However, in exercising its legislative power, the Council is not entitled to rely on such justification.

40 Furthermore, Mr Hervein and the other defendants dispute the Council's claim that the provisions at issue are necessary in order to prevent persons who are simultaneously in paid employment in one Member State and self-employed in another Member State from paying lower contributions than those pursuing the two activities in only one Member State. It is precisely to prevent that outcome that Article 14d(1) of Regulation No 1408/71 provides that a person who is employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State and who is subject to the legislation of the former Member State, pursuant to Article 14c(a) of Regulation No 1408/71, is to be treated as if he pursued his professional activity or activities in the territory of that State. Moreover, as contributions are calculated in a very different way from one Member State to another, it would not be true to say that membership of a scheme in only one Member State always results in the payment of lower contributions. The Council's argument appears even more unconvincing since the adoption of Regulation No 3811/86. First, Article 14c(b), in the version resulting from that regulation, no longer provides that a person who is employed simultaneously 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 each of these Member States, only as regards the activity pursued in its territory. Second, Article 14d(2) of Regulation No 1408/71, as amended by Regulation No 3811/86, could just as easily have the effect of reducing as of increasing the rate of contribution.

41 Finally, Mr Hervein and the other defendants point out that Annex VII covers only some of the Member States. Accordingly, even if the provisions at issue

could, in certain cases, have the result that the person concerned benefits from additional cover, they none the less have the effect of accentuating the disparities which already result from the national laws and of creating inequality of treatment between nationals of the Member States according to the place where they pursue their activities.

*Findings of the Court*

42 The validity of Article 14c(b) of and Annex VII to Regulation No 1408/71 must be appraised in the light of Articles 48 and 51 of the Treaty on freedom of movement for workers and Article 52 of the Treaty on freedom of establishment as regards the free movement of self-employed persons.

43 The rule set out in Article 14c(b), the scope *ratione personae* of which is determined by Annex VII to Regulation No 1408/71, is capable of covering both persons who are self-employed in one Member State and who use or wish to use their right to freedom of movement to pursue paid employment in another Member State and persons who are in paid employment in one Member State and use or wish to use their right to freedom of establishment to pursue an activity as a self-employed person in another Member State.

44 Article 48 of the Treaty provides for *inter alia* the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. In particular, it establishes the right, subject to limitations justified on grounds of public policy, public security or public health, to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.

45 Article 51 of the Treaty provides that the Council, acting unanimously, is to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, *inter alia* by making arrangements to secure for migrant workers and their dependants both the aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries and the payment of benefits to persons resident in the territories of Member States.

46 Article 52 of the Treaty provides that freedom of establishment is to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

47 The provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State (judgment in *Stanton*, cited above, paragraph 13).

48 Articles 48 and 52 of the Treaty therefore preclude the legislation of a Member State which exempts persons whose principal occupation is employment in that Member State from the obligation to pay contributions to the scheme for self-employed persons in the same State, where self-employment is a secondary occupation, but withholds such exemption from persons whose principal occupation is employment in another Member State (*Stanton*, cited above, paragraph 14). The effect of such legislation is to disadvantage the pursuit of occupational activities in more than one Member State because it places workers making that choice at a disadvantage compared with those who pursue all their activities in the Member State which adopts that legislation.

49 Similarly, in the absence of due justification, such as the provision of additional social security cover to the persons concerned, Article 52 of the Treaty precludes legislation 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 (judgment in *Kemmler*, cited above, paragraphs 12 and 13). Such legislation disadvantages the pursuit of occupational activity in a second Member State because the social security contributions it entails yield no return for the persons concerned.

50 However, the Treaty did not provide for the harmonisation of the social security legislation of the Member States. In particular, as regards employees, Article 51 provides only for the coordination of the legislation. Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, are therefore unaffected by that provision (see, in particular, Case 41/84 *Pinna* [1986] ECR 1, paragraph 20, *De Jaeck*, cited above, paragraph 18, and *Hervein I*, cited above, paragraph 16).

51 Accordingly, the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to Articles 48 and 52 of the Treaty if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return.

52 Thus, the system put in place by Regulation No 1408/71 is merely a system of coordination, concerning *inter alia*, in Title II of that regulation, the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement. It is inherent in such a system that the level of contributions to be paid in respect of the pursuit of the same activity will differ according to the Member State where that activity is wholly or partly pursued or according to the social security legislation to which that activity is subject (see, to that effect, Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraph 29).

53 Furthermore, where it simply determines which legislation is applicable to various situations, as it did in Title II of Regulation No 1408/71, the Community legislature cannot define the content of national social security legislation; it is for the national authorities to ensure that such legislation is consistent with Articles 48 and 52 of the Treaty.

54 In the light of the foregoing observations, whether the provisions of Article 14c(b) comply with the requirements of Articles 48, 51 and 52 of the Treaty cannot be determined on the basis of the differences, in terms of social security contributions or benefits, between situations in which a worker is simultaneously in paid employment and self-employed in a single Member State and situations in which a worker pursues such activities in different Member States. It therefore remains to be determined whether, on its own, the rule laid down by the Community legislature that, in certain specific situations and contrary to the general principle established by Regulation No 1408/71, a person working in more than one Member State is simultaneously subject to the legislation of two Member States rather than the legislation of only one, disadvantages the pursuit of occupational activities in more than one Member State, since being subject to the legislation of two Member States is of necessity more complicated for those concerned than being subject to the legislation of only one Member State.

55 On that point, it is no doubt sometimes simpler to be subject to the legislation of only one Member State. That is so if a person pursuing several activities of the same nature in a single Member State is subject to only one social security scheme: being subject to several social security schemes where such activities are pursued in several Member States makes their pursuit more complicated than it would be in a single Member State. But this is not always the case. The concurrent pursuit of activities as an employed (or self-employed) person in different occupational sectors, even if in a single Member State, can also entail being subject to cover by several different social security schemes.

56 Similarly, where activities as an employed and self-employed person are pursued simultaneously in a single Member State, it is quite common for membership of more than one social security scheme to be compulsory. In such a case, the fact that the pursuit of activities of a different nature in two or more Member States entails the application of the social security legislation of two Member States does not necessarily complicate matters and indeed may simplify them in so far as the application of the social security legislation of the Member State where the activity is pursued may be simpler, given that it is tailored to the conditions under which the activity is pursued in that State, than the application to that activity of the social security legislation of another Member State.

57 The position thus varies according to the particular circumstances, even though, admittedly, where one of the Member States concerned has unified social security legislation or where an activity of the same type is classified differently in those Member States, as is the case with the activities of Mr Hervein and Mr Lorthiois, the simultaneous application of the legislation of two Member States may be more complicated for the person concerned than the application of the legislation of a single Member State.

58 However, just as it does not follow from Articles 48 and 52 of the Treaty that the exercise of the right to freedom of movement for persons pursuing an occupational activity will never result in variations in the level of social security

contributions which they may be required to pay or in the level of social security cover afforded to them, it equally does not follow from those articles that, in the absence of harmonisation of social security legislation, neutrality as regards the complexity, for the persons concerned, of the administration of their social security cover will be guaranteed in all circumstances.

59 Accordingly, at the request of several Member States and to take account of the particular features of the organisation of social security in those States, the Council provided, in Article 14c of Regulation No 1408/71, that a person who is employed simultaneously in the territory of certain Member States and self-employed in the territory of certain other Member States is to be subject to the legislation of two different Member States simultaneously, one by virtue of his employment and the other by virtue of his self-employment, whereas if those activities were pursued simultaneously in other Member States, he would be subject to the legislation of only one State, determined on the basis of his paid employment. In so doing, the Council fulfilled its function of coordinating the application of social security legislation for migrant workers by determining the legislation applicable to the persons concerned.

60 It should be added that, at the same time, the Council took measures to ensure, as far as possible in a system which merely coordinates, equality of treatment for migrant workers. Thus, the provisions of Article 14d of Regulation No 1408/71, under which a person who is simultaneously employed and self-employed in the territory of different Member States and who, by virtue of Article 14c(a) of Regulation No 1408/71, is subject to the social security legislation of a single State, is treated, for the purposes of application of that legislation, as if he pursued his occupational activity or activities in the territory of the Member State concerned, seek to prevent a situation where that worker, unlike a worker in the same position who is subject to the legislation of two States under Article 14c(b), finds that some of his activities are not covered by any social security legislation.

61 It was in pursuit of the same objective that the Council adopted Regulation No 3811/86, applicable as from 1 January 1987. First, by inserting a new paragraph 2 in Article 14d, providing that the person referred to in Article 14c(b) is to 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 that Member State, the Council reminded the Member States of their obligation to treat workers subject to the provisions of Article 14c(b) without discrimination as compared with workers pursuing all their activities in a single Member State. Second, in adopting several provisions, listed in Article 2 of Regulation No 3811/86, intended to facilitate the aggregation of benefits provided under the two sets of applicable legislation, the Council reminded the Member States of their obligation to ensure that no social security contribution is to be charged if it does not yield any return.

62 Having regard to those circumstances, Article 14c(b) is not incompatible with Articles 48, 51 and 52 of the Treaty.

63 However, in situations falling within Article 14c(b), the Member States whose legislation is applicable simultaneously must ensure compliance with the requirements of Articles 48, 51 and 52 of the Treaty.

64 Thus, in a situation such as that in which Mr Lorthiois finds himself, where, given the extent of his activities in Belgium, the contributions he is required to pay do not afford him any additional social security cover, Article 52 clearly precludes a claim for such contributions from him (see *Kemmler*, cited above, paragraphs 12 and 13; see also, to that effect, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 10).

65 Where, in contrast, the contributions claimed under the legislation of the two States applicable simultaneously under Article 14c(b) result in social security cover in both places, Articles 48, 51 and 52 of the Treaty do not in principle preclude the charging of such contributions and the payment of the various benefits provided under the legislation of the two States must be made in the light of the relevant coordinating provisions appearing in Regulation No 1408/71, in particular those introduced by Article 2 of Regulation No 3811/86, intended *inter alia* to regulate the cases of aggregation of benefits provided under the two sets of legislation applicable and to facilitate such aggregation where the type of benefit in question makes this possible.

66 However, it must be observed, as the Court held in Case C-227/89 *Rönfeldt* [1991] ECR I-323, that Articles 48 and 51 of the EEC Treaty preclude the loss of social security advantages under conventions operating between two or more Member States and incorporated in their national law. In such cases, the provisions of Regulation No 1408/71 must be disapplied. The same solution would be called for under Article 52 of the Treaty in a case such as that of Mr Hervein, if it proved that, before the entry into force of Article 14c(b), the bilateral Franco-Belgian Social Security Convention of 17 January 1948 exempted company directors working simultaneously in France and Belgium from payment of the social security contributions prescribed by the Belgian scheme for self-employed persons, and that Mr Hervein was, under that convention, initially exempt from contributions in Belgium. The provisions of Article 14c(b) should not then be used against him in order to require the payment of contributions to the Belgian scheme for self-employed persons.

67 The answer to be given to the national court is therefore that examination of the question referred does not disclose any factor of such a kind as to affect the validity of Article 14c(b) of and Annex VII to Regulation No 1408/71. However, it is, where appropriate, for the national court hearing disputes in the context of the application of that provision, first, to ascertain that the legislation of the

States concerned applied in that context is applied in accordance with Articles 48 and 52 of the Treaty, and in particular that the national legislation whose conditions for application are at issue does afford social security cover for the person concerned, and, second, to determine whether that provision should, exceptionally, be disapplied at the request of the worker concerned where it would cause him to lose a social security advantage which he originally enjoyed under a social security convention in force between two or more Member States.

## The second question

68 In the light of the answer given to the first question, there is no need to reply to the second question.

## Costs

69 The costs incurred by the Belgian and Greek Governments, the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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,

in answer to the questions referred to it by the Tribunal du travail de Tournai by judgments of 5 October 1999, hereby rules:

**Examination of the questions referred has not disclosed any factor of such a kind as to affect the validity:**

— **of Article 14c(1)(b) of and Annex VII to Regulation No 1408/71 of the Council 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;**

— **of Article 14c(b) of and Annex VII to that regulation, as amended by Council Regulation (EEC) No 3811/86 of 11 December 1986.**

However, it is, where appropriate, for the national court hearing disputes in the context of the application of that provision, first, to ascertain that the legislation of the States concerned applied in that context is applied in accordance with Articles 48 and 52 of the Treaty (now, after amendment, Articles 39 EC and 43 EC), and in particular that the national legislation whose conditions for application are at issue does afford social security cover for the person concerned, and, second, to determine whether that provision should, exceptionally, be disapplied at the request of the worker concerned where it would cause him to lose a social security advantage which he originally enjoyed under a social security convention in force between two or more Member States.

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|---|---|---|
| Rodríguez Iglesias | Jann | Macken |
| Colneric | Gulmann | Edward |
| Puissochet | Wathelet | Skouris |

Delivered in open court in Luxembourg on 19 March 2002.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President