# JUDGMENT OF THE COURT (Fifth Chamber)
29 June 1994 *

In Case C-60/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

**R. L. Aldewereld**

and

**Staatssecretaris van Financiën**

on the interpretation of 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 by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida (Rapporteur), President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg, Judges,

* Language of the case: Dutch.

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Aldewereld, by G. Meier, Belastingadviseur,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and Pier Giorgio Ferri, Avvocato dello Stato,

— the Commission of the European Communities, by M. Patakia and B. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by J. W. de Zwaan, acting as Agent, and the Commission at the hearing on 27 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 10 February 1994,

gives the following

## Judgment

1 By judgment of 3 March 1993, received at the Court on 10 March 1993, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court

for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of 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 by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 That question was raised in proceedings between Mr Aldewereld and the Staatssecretaris van Financiën concerning the payment of social security contributions for 1986.

3 Mr Aldewereld is a Netherlands national who was resident in the Netherlands when he took a job with an undertaking established in Germany, which posted him immediately to Thailand, where he worked during 1986.

4 It is apparent from the judgment making the reference that as a result of that employment Mr Aldewereld was liable in Germany to pay social security contributions in respect of sickness, unemployment, old age and accidents, and that his employer deducted the corresponding contributions directly from his salary in 1986.

5 In respect of the same year, the Netherlands tax authority demanded from him as a Netherlands resident mandatory contributions under Netherlands social insurance legislation, which does not require that the person concerned pursues his professional or trade activity in that State.

6 Mr Aldewereld brought an action before the Gerechtshof (Regional Court of Appeal), Arnhem (Netherlands), which held that the provisions of Article 13(1) and (2)(a) of the regulation meant that the person concerned must be subject to the legislation of the State where he is resident rather than of the State where his employer is established.

7 Mr Aldewereld applied to the Hoge Raad der Nederlanden for review of that decision. The Hoge Raad first considered whether Regulation No 1408/71 was able to provide a solution to the case in point, since Articles 13 to 17 of the regulation related only to the situation of persons working in the territory of a Member State or on board a vessel flying the flag of a Member State. If that question were to be answered in the affirmative, the Hoge Raad wondered whether, as the Gerechtshof held, it followed from the provisions of Article 13(1) and (2)(a) of the regulation that the person concerned must be subject to the legislation of the State in which he is resident.

8 Having regard to those considerations, the Hoge Raad der Nederlanden stayed the proceedings and requested the Court of Justice to give a preliminary ruling on the following question:

'Do the rules forming part of European Community law which are designed to achieve freedom of movement for workers within the Community, and in particular the rules on determining the national legislation applicable set out in Title II of Regulation (EEC) No 1408/71 of the Council of 14 June 1971, preclude the collection of contributions under the social legislation of the State of residence from a person who resides in one Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the Member States, on the basis of which employment he is liable to pay contributions under the social legislation of the other Member State?'

9 Under Article 13(1) of Regulation No 1408/71,

'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.'

10 Since it is agreed that a person in Mr Aldewereld's situation falls within the scope *ratione personae* of the regulation, as defined in Article 2 thereof, the rule in Article 13(1), cited above, that the legislation of a single Member State is to apply is in principle applicable and the national legislation applicable is determined in accordance with the provisions of Title II of that regulation.

11 However, none of the provisions of that title relates directly to the situation of a worker who, like Mr Aldewereld, is employed by an undertaking in the Community but works wholly outside the Community.

12 The Netherlands Government contends that the absence from the regulation of a conflict rule expressly referring to the situation in question is not a gap, but is the result of the fact that such a situation is not covered by Articles 48 to 51 of the Treaty. Accordingly, Community law does not preclude a person such as Mr Aldewereld from being required to pay contributions twice for the same period.

13 That contention cannot be accepted.

14 It follows from the case-law of the Court (see to that effect, in particular, the judgment in Case 237/83 *Prodest* v *Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153, paragraph 6) that the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. In a case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.

15 The applicable legislation must therefore be determined on the basis of the tenor and the aims of Title II of the regulation.

16 The Commission contends that as Community law stands at present it would be reasonable and appropriate to permit a worker such as Mr Aldewereld to choose the legislation applicable, on the ground that, in a situation such as this, Title II of the regulation favours neither the legislation of the worker's State of residence, nor the legislation of the State where the undertaking is established.

17 That contention must be rejected.

18 The only provision of Title II of the regulation providing for an option exercisable by a worker, namely Article 16, relates to 'persons employed by diplomatic missions and consular posts' and 'auxiliary staff of the European Communities'. Those workers are in a special situation which is not comparable to that of the worker in this case.

19 In the case of persons employed by diplomatic missions and consular posts, the option granted enables their home State to avoid problems recruiting its own nationals which may result from the application of the legislation of the Member State in which they are employed, when the social security legislation of the State of origin is more favourable to them. The same considerations explain the option granted to auxiliary staff of the European Communities.

20 Except in those special cases, the applicable legislation is derived objectively from the provisions of Title II of the regulation, taking into account the factors connecting the particular situation with the legislation of the Member States.

21 In a situation such as that in the main proceedings, the only factors connected with the legislation of a Member State are, on the one hand, the worker's residence and, on the other hand, the place where his employer is established. The choice of criterion to determine the legislation applicable to that situation must therefore be made from those factors.

22 As the Italian Government correctly pointed out, according to the scheme of the regulation, the application of the legislation of the Member State in which the worker resides appears to be an ancillary rule which applies only where that legislation has a link with the employment relationship. Accordingly, when the worker does not reside in any of the Member States where he works, it is normally the legislation of the Member State where his employer has its registered office or place of business.

23 According to Article 14(2)(b) of the regulation, unlike a 'member of the travelling or flying personnel of undertakings operating international transport services for passengers or goods', a person normally employed in the territory of two or more Member States is subject

'(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers having their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity'.

24 In a case such as that in the main proceedings, the legislation of the Member State of the worker's residence cannot be applied, since there is no factor connecting that legislation with the employment relationship, unlike the legislation of the State where the employer is established, which must therefore be applied.

25 It follows that, according to the scheme of the regulation, in the absence of a provision dealing expressly with the case of a person in Mr Aldewereld's situation, such a person is covered by the legislation of the Member State where his employer is established.

26 Accordingly, it should be stated in reply to the question from the national court that the rules of Community law which are designed to achieve freedom of movement for workers within the Community, and in particular the rules on determining the national legislation applicable set out in Title II of Regulation No 1408/71, preclude the collection of contributions under the social legislation of the State of residence from a person who resides in one Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the Member States, on the basis of which employment he is liable to pay contributions under the social legislation of the other Member State.

## Costs

27 The costs incurred by the Netherlands and Italian Governments and the Commission of the European Communities, 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 (Fifth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 3 March 1993, hereby rules:

**The rules of Community law which are designed to achieve freedom of movement for workers within the Community, and in particular the rules on determining the national legislation applicable set out in Title II of 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 by Council Regulation (EEC) No 2001/83 of 2 June 1983, preclude the collection of contributions under the social legislation of the State of residence from a person who resides in one Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the Member States, on the basis of which employment he is liable to pay contributions under the social legislation of the other Member State.**

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 29 June 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber