JUDGMENT OF THE COURT (Sixth Chamber)
18 May 1995 *

In Case C-327/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van Beroep, The Hague (Netherlands), for a preliminary ruling in the proceedings pending before that court between

Rheinhold & Mahla NV

and

Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid

on the interpretation 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and of Article 51 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn, G. F. Mancini, C. N. Kakouris, and J. L. Murray (Rapporteur), Judges,

* Language of the case: Dutch.

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

after considering the written observations submitted on behalf of:

— Rheinhold & Mahla NV, by W. A. H. Pierik and S. Feenstra, tax advisers,

— Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, by C. R. J. A. M. Brent, acting Head of the Legal Service for Social Security Affairs of the Gemeenschappelijk Administratiekantoor, acting as Agent,

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

— the German Government, by E. Röder, Adviser, and C-D. Quassowski, Administrative Director, both of the Federal Ministry of the Economy, acting as Agents,

— the Greek Government, by F. Georgakopoulos, Deputy Legal Adviser in the State Legal Service, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and B. J. Drijber, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Rheinhold & Mahla NV, of the Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, represented by F. W. M. Keunen

and M. Haarms, legal advisers of the Gemeenschappelijk Administratiekantoor, acting as Agents, of the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, and of the Commission at the hearing on 16 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1993,

gives the following

Judgment

1 By order of 26 June 1992, received at the Court on 31 July 1992, the Raad van Beroep (Social Security Court), The Hague, referred two questions for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6; hereinafter 'Regulation No 1408/71'), and of Article 51 of the EEC Treaty.

2 The questions arose in a dispute between Rheinhold & Mahla NV ('Rheinhold') and the Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Board of the Professional and Trade Association for the Metal Industry; 'the Bedrijfsvereniging') concerning social security contributions claimed by the latter from Rheinhold.

3 During 1983 and 1984, Van Breugel Isolatie BV ('Van Breugel'), a company registered in the Netherlands, carried out insulation work in Belgium as a subcontractor for Rheinhold, a Belgian company.

4 In 1985, Van Breugel became insolvent as a result of financial difficulties. During the liquidation it became apparent that it had not paid to the Bedrijfsvereniging, which is the association responsible for collecting social security contributions in the business sector covering Van Breugel, various contributions due in respect of work performed under the subcontract by its workers who resided in the Netherlands. The total amount of unpaid contributions was HFL 49 263.42.

5 On 30 December 1986, since Van Breugel's assets were insufficient, the Bedrijfsvereniging demanded payment of the contributions from Rheinhold pursuant to Article 16b(5)(a) and Article 16b(8) of the Coördinatiewet Sociale Verzekering of 24 December 1953 (Netherlands Law on the coordination of social security provisions with the provisions on the taxation of wages and salaries, Staatsblad, p. 577), which was in force at that time.

6 The purpose of that Law (hereinafter 'the CwSV') is, first, to coordinate the various branches of social security (unemployment, sickness, invalidity etc.) with each other, in particular by establishing a single contribution, and, secondly, to coordinate the various branches of social security with Netherlands legislation on the taxation of wages and salaries, in particular by defining common concepts and establishing identical rules for collection.

7 Under Article 16b(5)(a) of the CwSV, the main contractor is jointly and severally liable with the subcontractor for the payment of contributions and advance payments on account of contributions for which the subcontractor is liable in relation to the activities of the workers he employs in connection with the subcontract.

8 Article 16b(8) provides that the joint and several liability of the main contractor, as provided for in Article 16b(5), cannot be incurred unless the subcontractor fails to pay the contributions or advances due.

9 The above provisions were inserted in the CwSV by the Wet Ketenaansprakelijkheid (Law on ultimate responsibility for certain payments) of 4 June 1981 (Staatsblad, p. 370) to deal, in particular, with the problem of dubious subcontracting. Their aim is to ensure the collection of contributions in those sectors of the economy, particularly the building sector, where subcontractors and occasional suppliers often evade payment. Before the provisions were adopted, it was not always possible to recover the sums due when such undertakings became insolvent.

10 The liability of the main contractor is subject to two qualifications. First, it cannot be incurred if there is any reason to believe that non-payment of the sums due is not attributable either to the main contractor or to the subcontractor (Article 16b(9)). Secondly, the main contractor may seek to guard against such liability by paying into a frozen account, opened in the name of the subcontractor, the part of the price payable to the latter which corresponds to the contributions. The account must be opened with a banking institution and be used exclusively for the payment of contributions. It appears in any event that the main contractor may incur liability even if he acts in good faith.

11 Rheinhold brought an action before the Raad van Beroep against the said decision of the Bedrijfsvereniging demanding payment of the contributions not paid by Van Breugel. Before that court, the Bedrijfsvereniging maintained that, by virtue of Regulation No 1408/71, Article 16b(5)(a) and Article 16b(8) of the CwSV also applied to a main contractor established abroad.

12 The Raad van Beroep was uncertain as to whether the CwSV, and in particular Article 16b(5)(a) and Article 16b(8) thereof, was covered by Regulation No 1408/71, and decided to refer the following two questions to the Court of Justice for a preliminary ruling:

'1. Does the Coördinatiewet Sociale Verzekering fall within the matters covered by Regulation (EEC) No 1408/71?

2. If the answer to Question 1 is in the affirmative, does this mean that Article 16a to Article 16e (Wet Ketenaansprakelijkheid) incorporated in the Coördinatiewet Sociale Verzekering may not and must not be excluded from the matters so covered, having regard to the purpose of Article 51 of the EEC Treaty?'

The first question

13 In its first question, the national court asks whether Regulation No 1408/71 applies to national legislation which, like the CwSV, coordinates the various branches of social security in a Member State.

14 In answering that question, reference must first be made to Article 4(1) and (2) of the regulation, which provide:

'1. This regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1'.

15 Moreover, in Case 104/76 *Jansen* v *Landesversicherungsanstalt Rheinprovinz* [1977] ECR 829, paragraph 7, the Court held that Article 4 determines the matters covered by Regulation No 1408/71 in terms which make it clear that the national social security schemes are subject in their entirety to the application of the rules of Community law.

16 It is therefore not only the special rules relating to the various branches of social security referred to in Article 4(1) which may fall within the scope of the regulation, but also legislation which, like the Netherlands CwSV, is designed, on the one hand, to ensure coordination amongst a number of those branches, in particular by establishing a single contribution, and, on the other hand, to coordinate those various branches of social security with the legislation on the taxation of wages and salaries by defining common concepts and establishing identical rules for collection.

17 In that respect, it is not significant that the CwSV does not appear in the declaration made by the Netherlands State pursuant to Article 5 of Regulation No 1408/71.

18 The Court has held on several occasions that the fact that a State has not mentioned a law in that declaration does not have the effect of excluding that law *ipso facto* from the scope of Regulation No 1408/71 (see Case 35/77 *Beerens* v *Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249, paragraph 9, and Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, paragraph 15).

19 The answer to the first question must therefore be that Regulation No 1408/71 applies to legislation which, like the CwSV, coordinates the various branches of social security in a Member State.

The second question

20 First of all, according to the national court, it is to be assumed in this instance that, in carrying out insulation work in Belgium on behalf of Rheinhold, Van Breugel

acted in the capacity of subcontractor. It is on that basis that this question is to be answered.

21 In its second question, therefore, the national court essentially asks whether provisions which, like Article 16b(5) and Article 16b(8) of the CwSV, make a main contractor liable for social security contributions not paid by a defaulting subcontractor fall within the scope of Regulation No 1408/71, having regard to the purpose of Article 51 of the Treaty.

22 The fact that a rule is contained in a law which falls outside the scope of the regulation does not necessarily imply that that rule itself falls outside the scope thereof (see Case 69/79 *Jordans-Vosters* v *Bedrijfsvereniging voor de Leder-en Lederverwerkende Industrie* [1980] ECR 75 and Case C-45/90 *Paletta* v *Brennet* [1992] ECR I-3423). Conversely, the fact that a law such as the CwSV may fall within the substantive scope of Regulation No 1408/71 does not necessarily mean that each of its provisions is covered by the regulation.

23 As the Advocate General has rightly pointed out in point 16 of his Opinion, the decisive factor is that there must be a link between the provision in question and the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71, and that link must be direct and sufficiently relevant.

24 In so far as concerns the scope of that regulation, Article 4(1) and (2) provide that it is to apply in particular to schemes concerning the obligations of an employer in respect of sickness and maternity benefits, invalidity benefits, old-age benefits,

survivor's benefits, benefits in respect of accidents at work and occupational diseases, unemployment benefits, death grants, and family benefits.

25 Moreover, the Court held in Case 8/75 *Caisse Primaire d'Assurance Maladie Sélestat* v *Football Club d'Andlau* [1975] ECR 739 that, pursuant to Regulation No 3, which preceded Regulation No 1408/71, the obligation to pay contributions imposed by social security legislation also applies to an employer established in another Member State on the territory of which the worker temporarily pursues his activity.

26 However, the situation envisaged by the provision at issue here is very different. It concerns not the obligation of an employer situated in another Member State to pay social contributions for which he is liable under Netherlands legislation, but the obligation of a third party established in another Member State to pay to the Bedrijfsvereniging amounts corresponding to the social contributions left unpaid by an employer established in the Netherlands.

27 Although a certain link undeniably exists between the social security obligations of an employer and the liability of a main contractor as laid down by provisions such as Article 16b(5) and Article 16b(8) of the CwSV, it has to be said that the link is indirect only.

28 The principle established by the Netherlands legislation that the main contractor is to be liable is not based upon the existence of an employer-employee relationship between the main contractor and the workers in respect of whom the contributions are payable, but follows from the fact that the main contractor used the

services of a subcontractor, who did not pay the social contributions for which he was liable in relation to the activities of his workers within the context of works commissioned by the main contractor.

29 Thus, under Article 16b(5) and Article 16b(8) of the CwSV, that contractor is not, strictly speaking, liable to pay social contributions. In fact, he has to compensate the Bedrijfsvereniging for its loss of revenue by reason of the employer's non-payment of social contributions.

30 In those circumstances, such third-party liability cannot be regarded as having a direct and sufficiently relevant link with the scope of Regulation No 1408/71, as defined by Article 4 of that regulation.

31 It might be otherwise if the applicability of the provisions in question were linked to the proof of fraud on the part of the main contractor. Such might be the case if it were proved that the latter was in fact the true employer of the workforce for which social security liabilities remained unpaid.

32 It follows, therefore, that provisions which, like Article 16b(5) and Article 16b(8) of the CwSV, make a main contractor jointly and severally liable for unpaid contributions and advance payments on account of contributions due from a subcontractor in relation to the activities of workers used by him in the context of the said works do not fall within the scope of Regulation No 1408/71.

33 That conclusion is confirmed, moreover, by the fact that the only provision in Regulation No 1408/71 which concerns the rights of institutions responsible for

benefits against liable third parties is Article 93 and that article is not in any way concerned with the recovery from third parties of social contributions payable by an employer.

34 The answer to the second question must therefore be that provisions which, like Article 16b(5) and Article 16b(8) of the CwSV, make a main contractor liable for social security contributions left unpaid by a defaulting subcontractor do not fall within the scope of Regulation No 1408/71.

Costs

35 The costs incurred by the German, Netherlands and Greek Governments and by 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 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 questions referred to it by the Raad van Beroep, The Hague, by order of 26 June 1992, hereby rules:

1. **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 consolidated by**

Council Regulation (EEC) No 2001/83 of 2 June 1983, applies to legislation which, like the Coördinatiewet Sociale Verzekering, coordinates the various branches of social security in a Member State.

2. Provisions which, like Article 16b(5) and Article 16b(8) of the Coördinatiewet Sociale Verzekering, make a main contractor liable for social security contributions left unpaid by a defaulting subcontractor do not fall within the scope of Regulation No 1408/71.

Schockweiler Kapteyn Mancini

Kakouris Murray

Delivered in open court in Luxembourg on 18 May 1995.

R. Grass F. A. Schockweiler

Registrar President of the Sixth Chamber