JUDGMENT OF THE COURT
5 MAY 1977[1]

H.O.A.G.M. Perenboom v Inspecteur der directe belastingen of Nijmegen (preliminary ruling requested by the Hoge Raad of the Netherlands)

Case 102/76

Social security for migrant workers — Work performed in another Member State — Payment of contributions on remuneration required by the State of residence — Not permissible

(Regulation No 3 of the Council, Article 12, Regulation No 1408/71 of the Council, Article 13)

Both Article 12 of Regulation No 3 and Article 13 of Regulation No 1408/71 prevent the State of residence from requiring payment, under its social legislation, of contributions on the remuneration received by a worker in respect of work performed in another Member State and therefore subject to the social legislation of that State.

In Case 102/76

Reference to the Court under Article 177 of the EEC Treaty by the Hoge Raad of the Netherlands for a preliminary ruling in the action pending before that court between

H.O.A.G.M. PERENBOOM, Nijmegen,

and

INSPECTEUR DER DIRECTE BELASTINGEN (Inspector of Direct Taxes) of Nijmegen,

on the interpretation of certain provisions of Regulations Nos 3 and 1408/71 of the Council in relation to the obligation, imposed on an employed person in the Member State in which he resides, to pay contributions on wages earned in another Member State which are subject, in that State, to assessment to social security contributions,

1 — Language of the Case: Dutch.

THE COURT

Composed of: H. Kutscher, President, A. M. Donner and P. Pescatore (Presidents of Chambers), J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Mr Perenboom, a Netherlands national, resident in the Netherlands, worked for 143 days in the Federal Republic of Germany in 1972, after having obtained his certificate of advanced secondary and general education. During that year he did not engage in any employment in the State of residence.

During the said period of work he was subject to German income tax and social security contributions in respect of wages received in that State. He was not, however, subject to any tax in the Netherlands.

In 1972, principally on account of his age (17) and his residence in the Netherlands, he fulfilled the conditions for affiliation to the Netherlands 'general insurance' scheme. As a result of his membership of the scheme, the Netherlands authorities assessed the wages received by Mr Perenboom in Germany to the social security contributions laid down by the general insurance scheme. For this purpose, those authorities assessed Mr Perenboom's earnings for contributions corresponding to the 217 days out of 360 during which he remained in the Netherlands and did not work in Germany.

Mr Perenboom appealed against that assessment.

His complaint having been dismissed, Mr Perenboom brought an action before the Gerechtshof, Arnhem. In support of this action, which the Gerechtshof dismissed by judgment of 31. 1. 1975, he argued in particular:

— that, since he did not receive any earnings in the Netherlands in 1972, he could not be required to pay contributions in that country in respect of non-existent earnings;
— that, on the same portion of his income — namely 4 015 guilders,

representing the remuneration for his work in Germany — he was unjustly charged twice over for contributions to social insurance calculated on the basis of a certain percentage, under the *Rentenversicherung* (Pension Insurance Scheme) in the Federal Republic of Germany, and under the *Algemene Ouderdomswet* (General Law on Old-age Insurance) in the Netherlands.

The Inspector of Direct Taxes, Nijmegen, argued on the contrary that:
- for the purposes of determining the insured person's income assessable for contributions the place where the income was earned is irrelevant;
- as regards payment of the contested contributions, there are no rules providing for an exception where and in so far as the income is subject to corresponding contributions in another State.

The case having come before the Hoge Raad, the latter referred Article 12 of Regulation No 3 and Article 13 of Regulation No 1408/71 for interpretation by the Court, in order to ascertain the following:

'1. If a worker resides for a whole calendar year in one Member State (hereinafter referred to as the "State of residence") and for a part of that year works in another Member State with the result that in that part of the year he is subject to the social security legislation of the other Member State and is not an insured person under the legislation of the State of residence in the same part of the year but for the remaining portion of the year is subject to the legislation of the State of residence, does Article 12 of Regulation No 3 of the Council of the European Economic Community, whether or not in conjunction with other rules of Community law, permit the wages earned by the worker in the other Member State to be taken into account in the State of residence for the levying of a contribution for social insurance so that the total annual income of the worker, including the wages earned in the other Member State, is charged proportionately to the period during which the legislation of the State of residence is applicable, although under the system of the State of residence the extent of the entitlement derived from the insurance is not dependent on the payment of contributions in the sense that if an insured resident has no income assessable for contributions and subject to charge for a number of years this leads to a reduction in the entitlement?

2. How is the admissibility to be adjudged if the employment in the other Member State occurs after 1 October 1972, that is to say after the entry into force of Article 13 of Regulation No 1408/71 of the Council of the European Communities?'

In its order making the reference, the Hoge Raad stated:
- that, *inter alia*, the objections put forward by the person concerned in the present case do not raise the question whether the social insurance legislation of the Netherlands and of the Federal Republic of Germany can be simultaneously applicable but rather the question whether, in the circumstances of the case, the person concerned can be obliged to pay the contested contributions in the Netherlands;
- that the employment undertaken by the person concerned in the Federal Republic of Germany was carried out partly before and partly after 1 October 1972, the date on which Regulation No 3 of the Council was replaced by Regulation No 1408/71 of the Council.

2. The Commission of the European Communities, represented by its Legal Adviser, Norbert Koch, acting as Agent,

assisted by Auke Haagsma, submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Written observations submitted by the Commission of the European Communities

The Commission states, first, that in replying to the national court a distinction should be made between the question of the legislation applicable and that of the basis of assessment for contributions to be used under that legislation.

(1) In connexion with the first point, the Commission examines the relevant systems established by Regulation No 3 and by Regulation No 1408/71.

(a) As regards the system established by *Regulation No 3,* it notes that Article 12 thereof lays down the following general principle:

'... wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if they reside in the territory of another Member State ...'

Although it is true that the abovementioned principle is only applicable 'save as otherwise provided' in Article 13 to 15 of the regulation, nevertheless of all those provisions, the only one that could possibly apply is Article 15, which empowers the Member States to

'... vary the provisions of Articles 12 to 14 of this regulation for determining the legislation to apply in respect of certain workers or groups of workers ...'

To the best of the Commission's knowledge, and in so far as the present case is concerned, neither the Federal Republic of Germany nor the Netherlands has made use of that power. Therefore there is nothing to prevent the application in this case of the rule in the abovementioned Article 12. According to the case-law of the Court in Cases 92/63 *Nonnenmacher* ([1964] ECR 281) and 19/67 *Van der Vecht* ([1967] ECR 345), although that rule does not prevent the simultaneous application of two different national legislative systems, it does prohibit the application of the legislation of a Member State other than that in which the person concerned is employed, in so far as the said legislation requires him to contribute to the financing of a social security institution which will not give him additional advantages in respect of the same risk and over the same period. Thus the exclusive nature of the legislation applicable is given limited recognition in Regulation No 3.

(b) As regards the system established by Article 13 *et seq.* of *Regulation No 1408/71,* it corresponds to the system contained in Regulation No 3 to a large extent. Article 13 (1) expressly recognizes that the legislation applicable is of an exclusive nature, in that it provides that 'A worker ... shall be subject to the legislation of a single Member State only'. However, there is an exception to that rule in Article 15 (3) of the regulation which provides that in respect of invalidity, old-age and death (pensions), the person concerned may join the voluntary or optional continued insurance scheme of a Member State, even if he is compulsorily subject to the legislation of another Member State, to the extent that such overlapping is admitted by the national legislation.

Therefore the difference to be found between the two regulations is not very great on this point. It remains evident in the case where the social security legislation of the second State provides for the payment of a contribution which in effect affords additional advantages and applies to the same risks over the same period: in such a case overlapping of the two systems is authorized by Regulation No 3, whereas it is prohibited by Regulation No 1408/71.

The Commission concludes that in the present case German social security legislation should be applied to the person concerned for the period during which he worked in the Federal Republic of Germany, but that no provision of Community law prevents the legislation of the Netherlands from being applied to him for the remainder of 1972.

(2) On the second point, concerning the basis of assessment for contributions, the Commission examines, first, the national social security schemes at issue in this case.

As regards the Netherlands scheme (general insurance), it observes that it applies to any person aged between 15 and 65

— who is domiciled in the Netherlands;
— who is not domiciled in the Netherlands, but is subject to income tax by reason of employment within the territory of that State.

But as regards the obligation on persons domiciled in the Netherlands to be insured, the question whether any income is received, and if so, from what source, is of absolutely no relevance in so far as the Netherlands system of general insurance is concerned, and therefore it is understandable that liability to pay the contribution does not, in that case, have any direct connexion with the source of income.

On the other hand, the German system (*Arbeiterrentenversicherung* — workers' pension insurance), which compulsorily applies to 'any employed person', establishes a direct link between the obligation to be insured, and thus to pay contributions, and the income received, together with its source. However, in determining the contribution, there is no direct connexion with the period in respect of which the contribution is payable.

After noting that neither Regulation No 3 nor Regulation No 1408/71 nor any of the implementing regulations contains specific provisions concerning the basis of assessment for contributions, the Commission observes that according to the general rule set out in Articles 13 *et seq.* of Regulation No 1408/71, a worker within the meaning of the regulation who works in the territory of a Member State other than that where he resides is subject only to the legislation of one State as regards compulsory insurance, namely the first.

This rule of conflict of laws does not mean that where the person concerned is domiciled in the Netherlands, the Netherlands authorities cannot, as in the present case, take the annual taxable income as the basis of assessment for contributions, and in so doing, take into consideration income received abroad. It does imply, however, that in taking the taxable income thus determined as the basis of assessment for contributions, income received abroad during the period for which another social security scheme was applied must, by virtue of the rules of Community law on conflict of laws, particularly Articles 13 *et seq.*, be deducted from that income in calculating the contribution.

The result, according to the Commission, is that although the Netherlands authorities correctly interpreted the rules on conflict of laws relating to the legislation to be applied as regards the application of the national social insurance scheme to the period during which the person concerned was not employed in the Federal Republic of

Germany, they nevertheless took into consideration, in connexion with the said scheme, matters which, by virtue of the rules on conflict of laws mentioned above, depended exclusively on the laws of another Member State. That conclusion is wholly valid only as regards Regulation No 1408/71. As regards Articles 12 *et seq.* of Regulation No 3, according to the case-law of the Court two national legal systems may not be applied simultaneously in the case of a contribution to a social security institution which does not afford additional advantages. However, since in this case the Netherlands legislation is the 'second' legislation, and since there is no direct connexion between the contribution and the rights resulting from it, the principle of the exclusive application of the legislation of the State of employment is equally valid for Regulation No 3.

In the light of these observations, the Commission suggests that the questions referred should be answered as follows:

'1. The provisions concerning the legislation to be applied, contained in Articles 12 to 15 inclusive of Regulation No 3 of the Council of the European Economic Community and in Articles 13 to 17 inclusive of Regulation No 1408/71 of the Council of the European Communities, form part of the fundamental provisions of those regulations.

2. The fact that social security legislation, applied to a given situation in accordance with those provisions, contains a provision by virtue of which account must be taken of factors which, according to the aforesaid provisions, relate exclusively to the law of another Member State, must be considered as incompatible with those provisions.

3. Neither Articles 12 to 14 inclusive of Regulation No 3 of the Council of the European Economic Community, nor Articles 13 to 17 inclusive of Regulation No 1408/71 of the Council of the European Communities authorize any Member State other than that in whose territory a worker is employed to apply its social insurance scheme established by law to that person if the result is that the worker or his employer have to bear increased charges which are not accompanied by additional social security advantages.'

III — Oral procedure

The Commission of the European Communities submitted its oral observations at the hearing on 9 March 1977.

The Advocate-General delivered his opinion at the hearing on 30 March 1977.

Decision

1 By order of 13 October 1976, which reached the Court on 21 October 1976, the Hoge Raad of the Netherlands has referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 12 of Regulation No 3 (JO 1958, No 30/561 of 16 December 1958) and of Article 13 of Regulation No 1405/71 (OJ, English Special Edition 1971 (II), p. 416).

2 Those questions have been referred in the context of a dispute between the Netherlands administration and a Netherlands worker who, although he was resident in the Netherlands in 1972, worked, during the course of that same year, in the Federal Republic of Germany, first from 14 June to 18 August and then from 2 October to 21 December.

3 It appears from the file in the case that the worker was covered by the social legislation of the Federal Republic of Germany and paid contributions in respect of the said periods of work, while for the remainder of the year he was subject to the Netherlands General Insurance Scheme ('Volksverzekeringen'), which is applicable to all persons between the ages of 15 and 65 who are resident in the Netherlands or who, although not so resident, are employed on the territory of the said State.

4 Because he was subject to that scheme, the worker paid taxes under the legislation of the State of residence by way of contributions on the salary received in the State in which he was employed, in proportion to the part of the year during which he did not work in that State.

5 The person concerned contested the legality of that taxation, arguing in particular that since he was taxed in the State in which he was employed, on the basis of the salary which he received there, he cannot also be required to pay contributions in respect of a part of that income in the State of residence and thus be subjected to double taxation, which is contrary to the general principles of law and unacceptable from the point of view of Community law.

6 The competent national authority has observed, on the contrary, that for the purposes of the application of the Netherlands general insurance scheme it does not matter, in determining the income liable to tax under that scheme, whether that income arose in the Netherlands or in another State.

7 By the first question, the national court asks the Court to state whether, in the case of a worker who has been employed during a part of the year in a Member State other than the State of residence and has been subject, during that period, to the social legislation of the State of employment, while being subject to the social legislation of the State of residence for the remainder of the year, Article 12 of Regulation No 3 permits the salary received by that worker and taxed in the State in which he was employed, in accordance with the social legislation applicable there, also to be taxed by way of contributions in the State of residence in proportion to the part of the year during which

the person concerned was not working in the State in which he was employed.

8 By its second question, the national court puts the same question in relation to the interpretation of Article 13 of Regulation No 1408/71.

9 Those two questions must be examined jointly.

10 Article 12 of Regulation No 3 provides as follows: 'Save as otherwise provided under this Head, wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if they reside in the territory of another Member State ...'.

11 Article 13 (1) of Regulation No 1408/71, which provides that a worker 'shall be subject to the legislation of a single Member State only', excludes any possibility of the overlapping of several national legislations in respect of one and the same period.

12 Moreover, it is perfectly clear that in the situation envisaged by the national court the worker was not subject to the general insurance legislation of the State of residence in respect of the period during which he worked in the other Member State and by virtue of which he was subject to the social legislation of that State.

13 The fact that a worker is required to pay, in respect of the same earned income, social charges arising under the application of several national legislations, although he can be an insured person only in respect of one of those legislations, involves the worker in payment of contributions twice over, contrary to the provisions of Regulation No 3 and of Regulation No 1408/71 cited above.

14 Accordingly, since the social legislation of the Member State of residence is not applicable in respect of periods of work performed in another Member State, the remuneration received by a worker for that work does not constitute a basis of assessment for contributions levied, even partially, under that legislation and is exempt, therefore, from the social charges arising from its application.

15 For these reasons, the answer to the questions referred is that both Article 12 of Regulation No 3 and Article 13 of Regulation No 1408/71 prevent the State of residence from requiring payment, under its social legislation, of contributions on the remuneration received by a worker in respect of work performed in another Member State and therefore subject to the social legislation of that State.

Costs

16 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

17 As these proceedings are, in so far as the parties to the main action are concerned, 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 Hoge Raad of the Netherlands by order of 13 October 1976, hereby rules:

Both Article 12 of Regulation No 3 and Article 13 of Regulation No 1408/71 prevent the State of residence from requiring payment, under its social legislation, of contributions on the remuneration received by a worker in respect of work performed in another Member State and therefore subject to the social legislation of that State.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

A. Van Houtte
Registrar

H. Kutscher
President