JUDGMENT OF THE COURT (First Chamber)
28 March 1996 *

In Case C-272/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal Correctionnel, Arlon (Belgium), for a preliminary ruling in the criminal proceedings before that court against

Michel Guiot,

Climatec SA, as employer liable at civil law,

on the interpretation of Articles 59 and 60 of the EC Treaty,

THE COURT (First Chamber),

composed of: D. A. O. Edward (Rapporteur), President of the Chamber, P. Jann and L. Sevón, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: French.

after considering the written observations submitted on behalf of:

— the Public Prosecutor's Office, by Philippe Naze, deputy representing the public interest in labour matters before the Tribunal de Première Instance (Court of First Instance), Arlon,

— the Belgian Government, by Jan Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the Luxembourg Government, by N. Schmit, Conseiller de Légation (1ère classe) in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Guiot and Climatec SA, represented by André Bosseler, of the Arlon Bar; the Belgian Government, represented by Jan Devadder; the Luxembourg Government, represented by Luc Frieden, Avocat-Avoué, of the Luxembourg Bar; and the Commission, represented by Marie-José Jonczy and Hélène Michard, at the hearing on 28 September 1995,

after hearing the Opinion of the Advocate General at the sitting on 26 October 1995,

gives the following

Judgment

1 By judgment of 1 September 1994, received at the Court on 29 September 1994, the Tribunal Correctionnel (Criminal Court), Arlon, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 59 and 60 thereof.

2 That question was raised in the context of criminal proceedings against Mr Guiot, in his capacity as managing director of Climatec SA ('Climatec'), a company governed by Luxembourg law, and against Climatec itself, as employer liable at civil law, who are accused of having failed to pay, during the period from March 1992 to March 1993, contributions in respect of *timbres-fidélité* and *timbres-intempéries* (loyalty and bad-weather stamps), payable under Belgian legislation by reason of the employment of four workers by Climatec at a site in Arlon (Belgium). The principal amount due for the period in question is BFR 98 153.

3 Pursuant to the Belgian Collective Labour Agreement of 28 April 1988 ('the agreement'), concluded in the context of the Construction Sector Joint Committee, regarding the grant of loyalty stamps and bad-weather stamps and made obligatory by the Royal Decree of 15 June 1988 (*Moniteur Belge* of 7 July 1988, p. 9897), loyalty stamps and bad-weather stamps were payable in respect of those four workers employed in Belgium.

4 Article 2 of the agreement provides that all undertakings subject to the Construction Sector Joint Committee are liable to the Fonds de Sécurité d'Existence des Ouvriers de la Construction (Construction Workers' Subsistence Fund, hereinafter 'the Fund') for a total contribution of 9.12%, of which 9% is to cover loyalty

stamps for their workers and 0.12% is to cover running costs. Pursuant to Article 3 thereof, certain categories of undertaking are moreover liable to the Fund for a contribution of 2.1%, of which 2% is to cover bad-weather stamps for their workers and 0.10% is to cover running costs. Under Article 4(1) of the agreement, those contributions 'shall be calculated on the basis of the gross remuneration (100%) of the worker'.

5 Furthermore, Climatec is liable in the Grand Duchy of Luxembourg for two types of contributions to that State's social security scheme in respect of all the workers it employs, including those sent to work temporarily in another Member State.

6 In the first place, Article 1 of the Law of 28 January 1971 concerning compensatory wages for workers laid off during bad winter weather (*Mémorial* A, 1971, p. 36), provides that, in the event of lay-offs during bad winter weather occurring during the period from 16 November to 31 March, workers employed in the construction industry are entitled to an allowance to compensate for loss of wages ('compensatory wages'). Under Article 13, compensatory wages are payable both for single hours and for whole or consecutive days not worked. Under Article 15, the gross hourly rate is usually 80% of the normal gross hourly salary of the worker.

7 Secondly, the Grand Ducal Regulation of 21 July 1989 giving general binding effect to the 14th and 15th supplements to the Collective Labour Agreement for the construction industry between the Fédération des Entrepreneurs de Nationalité Luxembourgeoise and the Groupement des Entrepreneurs du Bâtiment et des Travaux Publics, on the one hand, and the Confédération Luxembourgeoise des Syndicats Chrétiens and the Confédération Syndical Indépendante, on the other (*Mémorial* A, 1989, p. 975), introduced, with effect from 1 January 1989, a requirement for the employer to pay an end-of-year premium in the amount of 3% of the gross salary. From 1 January 1993, Article 18 of and Annex IV to the Grand Ducal Regulation of 16 October 1993 giving general binding effect to the Collective Labour Agreement for the construction industry between the Onofhängege

Gewerkschaftsbond Letzebuerg (OGB-L) and the Letzebuerger Chreschtleche Gewerkschaftsbond (LCGB), on the one hand, and the Groupement des Entrepreneurs du Bâtiment et des Travaux Publics and the Fédération des Entrepreneurs de Nationalité Luxembourgeoise, on the other (*Mémorial* A, 1993, p. 1668), increased that premium to 4% of the gross salary. The premium is paid with the salary for December, on condition that the employee has been with the undertaking for a year when the premium falls due (31 December), and it may be reduced progressively by up to 100% for absences.

8 The Tribunal Correctionnel, Arlon, considered that the outcome of the criminal proceedings depended on the interpretation of the Treaty provisions on freedom to provide services and therefore decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Are Articles 7, 7a, 59 and 60 of the Treaty on European Union to be interpreted as meaning that the fact that a Member State makes it obligatory, by means of a collective agreement made binding by royal decree on all undertakings operating or coming to operate within its territory in exercise of the freedom to provide services, for employers to pay contributions in respect of *timbres de fidélité* and *timbres-intempéries* (loyalty and bad-weather stamps) which duplicate the obligations to contribute in the countries of origin of those undertakings, where they cover the same risks and have in practice a similar, if not identical, purpose, constitutes an infringement of the abovementioned articles inasmuch as the measure is *de facto* discriminatory, creating a serious obstacle to the achievement of freedom to provide services within the large internal market without frontiers as a result of the fact that that obligation gives rise to additional costs for Community undertakings, thus making them less competitive in the territory of the Member State in question?

More specifically, is the obligation for a construction undertaking established in another Member State and providing services in the construction sector in Belgium to pay *timbres de fidélité* and *timbres-intempéries* by virtue of the Collective Labour Agreement of 28 April 1988, made binding by the Royal Decree of 15 June 1988, compatible with Article 59 of the EEC Treaty (restrictions on freedom to provide cross-frontier services)?'

9 In that question the national court seeks in essence to ascertain whether Articles 59 and 60 of the Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first Member State to pay employer's contributions in respect of *timbres-fidélité* and *timbres-intempéries* for employees assigned to those works, where that undertaking is already liable for comparable employer's contributions with respect to the same employees and for the same period of work in the State where it is established.

10 Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in this respect, Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 12, and Case C-43/93 *Vander Elst* v *Office des Migrations Internationales* [1994] ECR I-3803, paragraph 14).

11 Even if there is no harmonization in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements of public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (see, in particular, Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 17, Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 18, and *Vander Elst*, referred to above, paragraph 16).

12 In this respect, the Court held in Case C-113/89 *Rush Portuguesa* ([1990] ECR I-1417, paragraph 18), that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the

employer is established; Community law also does not prohibit Member States from enforcing those rules by appropriate means.

13 In the circumstances, the questions to be considered are, first, whether the requirements imposed by the Belgian legislation have a restrictive effect on the freedom to provide services; second, if so, whether overriding requirements of the public interest in that area justify such restrictions on the freedom to provide services; and third, if so, whether that interest is already protected by the rules of the State where the service provider is established and whether the same result can be achieved by less restrictive rules.

14 National legislation which requires an employer, as a person providing a service within the meaning of the Treaty, to pay employer's contributions to the social security fund of the host Member State in addition to the contributions already paid by him to the social security fund of the State where he is established places an additional financial burden on him, so that he is not, so far as competition is concerned, on an equal footing with employers established in the host State.

15 Such legislation, even if it applies without distinction to national providers of services and to those of other Member States, is liable to restrict the freedom to provide services within the meaning of Article 59 of the Treaty.

16 The public interest relating to the social protection of workers in the construction industry may however, because of conditions specific to that sector, constitute an overriding requirement justifying such a restriction on the freedom to provide services.

17 However, that is not the case where the workers in question enjoy the same protection, or essentially similar protection, by virtue of employer's contributions already paid by the employer in the Member State of establishment.

18 In those circumstances, it is for the national court to determine whether the requirements imposed by the legislation of the State of establishment, in this case the Grand Duchy of Luxembourg, are similar or in any event comparable to those imposed by the legislation of the State where the service is provided, in this case the Kingdom of Belgium.

19 In this respect, it should be noted that, in the question submitted for a preliminary ruling, the national court pointed out that the Belgian and Luxembourg contributions at issue in practice cover the same risks and have a similar, if not wholly identical, purpose.

20 That finding is borne out by the case-file and the information provided in response to the written questions put by the Court, as well as by the arguments presented at the hearing. It appears that although the Luxembourg legislation differs from the Belgian legislation, in particular as regards the percentage of the premiums and the procedure for their payment, they both provide mechanisms intended, on the one hand, to protect workers in the construction industry against the risk of suspension of the work and, therefore, of loss of remuneration because of bad weather and, on the other hand, to reward their loyalty to the sector in question.

21 Since social protection of workers constitutes the only consideration of public interest capable of justifying restrictions on the freedom to provide services such as those at issue, any technical differences in the operation of the two schemes cannot justify such a restriction.

22 The reply to the question put by the national court must therefore be that Articles 59 and 60 of the Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer's contributions in respect of *timbres-fidélité* and *timbres-intempéries* with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable contributions, with respect to the same workers and for the same period of work, in the State where it is established.

Costs

23 The costs incurred by the Belgian, German and Luxembourg 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Tribunal Correctionnel, Arlon, by judgment of 1 September 1994, hereby rules:

Articles 59 and 60 of the EC Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer's

contributions in respect of *timbres-fidélité* and *timbres-intempéries* with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable contributions, with respect to the same workers and for the same period of work, in the State where it is established.

Edward Jann Sevón

Delivered in open court in Luxembourg on 28 March 1996.

R. Grass

Registrar

D. A. O. Edward

President of the First Chamber