OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 4 June 1987 *

Mr President,
Members of the Court,

1. The preliminary questions on which I am to give my Opinion today have been raised in two cases, the first brought before the Tribunal du travail (Labour Tribunal), Brussels, by Giancarlo Laborero, and the second before the Cour du travail (Labour Court), Mons, by Francesca Sabato, the widow of Giuseppe Mezzorecchia. Both plaintiffs are Italian nationals residing in Belgium. The cases were brought against the Office de sécurité sociale d'outre-mer (Overseas Social Security Office), which, on the basis of Article 51 of the Belgian Law of 17 July 1963 on overseas social security, refused to grant index-linking for Mr Laborero's pension and Mrs Sabato's survivor's pension, which it pays to them under that law.

2. Article 51 of that law, which is contained in Chapter VI entitled 'Adaptation of benefits to the cost of living', provides as follows:

'The provisions of this Chapter shall not be applicable to recipients of foreign nationality unless they are dependants of an insured person of Belgian nationality and reside in Belgium or unless they are nationals of a country which has entered into a reciprocal agreement which grants them such entitlement.'

3. The questions submitted by the two national courts seek in substance to ascertain whether the Belgian law in question falls within the scope of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community. [1]

4. They also ask the Court whether Article 51 of that law is compatible with the rule prohibiting discrimination on grounds of nationality laid down in Article 7 and Articles 48 to 51 of the EEC Treaty and Article 3 (1) of Regulation (EEC) No 1408/71. As regards the points made by the Office de sécurité sociale d'outre-mer, the defendant in the main proceedings, and the Belgian Government concerning the inappropriateness of the reference to Article 51 of the EEC Treaty, I should like to point out straight away that, even if it is Article 48 (2) which provides for the abolition of any discrimination based on nationality in order to ensure freedom of movement for workers, Article 51 serves the same purpose by contributing, in the field of social security, to the fullest possible realization of that fundamental freedom. The Court has accordingly held, in its judgment of 28 June 1978 in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, that the rule in Article 7 was implemented, as regards employed persons, by Articles 48 *to* 51 (paragraph 9). Similarly, in its judgment of 8 April 1976 in Case 112/75 *Sécurité sociale Nancy* v

* Translated from the French.

1 — For a codified version, see Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal, L 230, p. 6).

Hirardin [1976] ECR 553, the Court refers to the 'prohibition, contained in Articles 48 *to* 51 of the Treaty, of any discrimination based on nationality between workers of the Member States' (paragraph 9).

5. The actual principle that a condition regarding nationality or reciprocity,[2] such as Article 51 of the Belgian Law of 17 July 1963, is incompatible with Community law and in particular with Article 3 (1) of Regulation No 1408/71 is not in fact directly contested by any of the parties to these proceedings. However, the Office de sécurité sociale d'outre-mer and the Belgian Government consider that neither Mr Laborero nor Mrs Sabato meet the definition of 'employed or self-employed person' in Article 1 (a) (iv) of the regulation, first because they no longer carried out an activity as an employed or self-employed person at the time when they applied for a pension or pension review, and secondly because, owing to its special characteristics, the scheme in question cannot be regarded as being linked to the general Belgian social security scheme. Finally, they maintain that the 1963 law does not fall within the territorial scope of Regulation No 1408/71 because it relates exclusively to insurance periods completed outside the Community.

6. It follows that the main question confronting the two national courts is the question of the *definition of persons* covered by Regulation No 1408/71.

7. The persons covered by the regulation are in fact defined in Article 2 thereof as follows:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States . . . as well as to the members of their families and their survivors.'

8. The question in this specific case is therefore whether the plaintiffs in the main proceedings may be regarded as 'employed or self-employed persons' (or persons entitled under such a person) and whether the Belgian law in question, although concerned exclusively with occupations pursued outside the territory of the Member States of the Community, constitutes 'legislation of a Member State'.

9. The terms 'employed (and self-employed) person' and 'legislation' are defined in Article 1 (a) and (j) respectively of Regulation No 1408/71.

A — 'Employed person'

10. Article 1 (a) of Regulation No 1408/71 defines an 'employed person' mainly on the basis of the criterion whether the persons concerned are affiliated to various kinds of social security schemes so that, as the Court held in its *Hoekstra* judgment of 19 March 1964[3] concerning Council Regulation No 3, it covers 'all those who, as such and under whatever description, are covered by the *different* national systems of social security'.

11. It is to be noted first of all that the second indent of Article 1 (a) (ii), which is also mentioned in the question submitted by the Tribunal du travail, Brussels, cannot be

2 — See in this regard the judgment of 22 June 1972 in Case 1/72 *Frilli* v *Belgian State* [1972] ECR 457 and the judgment of 25 October 1979 in Case 159/78 *Commission* v *Italy* (1979] ECR 3247.

3 — Case 75/63 *Mrs M. K. H. Hoekstra (née Unger)* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, in particular p. 185.

applicable to the instant cases because the scheme concerned is not for all residents or for the whole working population and Annex I, to which it refers, contains the words 'does not apply' in the case of Belgium. The relevant provision in this case is Article 1 (a) (iv) because the insurance scheme in question is a *voluntary* scheme. That provision provides that, for the purposes of Regulation No 1408/71, 'employed person' or 'self-employed person' means 'any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:

if such person carries out an activity as an employed or self-employed person,

or

if such person has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same Member State.'

12. Secondly, it is not disputable or disputed that the pensions, survivors' pensions and other benefits which Mr Laborero and Mrs Sabato receive do in fact belong to one of the 'branches dealt with in this Regulation', listed in Article 4 (1), namely old-age and survivors' benefits.

13. Finally, contrary to what is suggested by the Office de sécurité sociale d'outre-mer and the Belgian Government, there can be no doubt that both Mr Laborero and Mrs Sabato, as the survivor of Mr Mezzorecchia, fulfil the condition in the first indent of Article 1 (a) (iv) ('any person who is .... insured'). No argument can in fact be derived from the fact that at the present time neither Mr Laborero nor Mrs Sabato is employed or self-employed. By definition, any old-age or survivors' benefit is not paid until the time when the person who was subject to a social security scheme has ceased working. Moreover, Article 2 (1) refers to persons who *are* or *have been* subject to social security legislation and to their *survivors*. The use of the present tense in the first indent of Article 1 (a) (iv) clearly refers to the time when the person concerned was insured under the social security scheme. Both Mr Laborero and Mr Mezzorecchia were in fact engaged in paid employment during their voluntary affiliation to the scheme established by the 1963 law and were still in employment when the risk insured against materialized.

14. Furthermore, Mr Laborero also fulfils the condition in the second indent of Article 1 (a) (iv). He had 'previously been compulsorily insured for the same contingency' under the Belgian Law of 16 June 1960 'placing under the control and guarantee of the Belgian State the institutions administering social security for persons employed in the Belgian Congo and Ruanda-Urundi and providing a guarantee by the Belgian State of social security benefits in favour of such persons', which was designed to ensure the continuity of the colonial social security scheme based on colonial decrees later repealed by the new independent States. In its judgments of 31 March 1977 in Case

86/76 *Bozzone* v *Office de sécurité sociale d'outre-mer*, [1977] ECR 687 and 11 July 1980 in Case 150/79 *Commission* v *Belgium* [1980] ECR 2621 the Court found that all those provisions were 'legislation' for the purposes of Regulation No 1408/71 and thus came to the conclusion that the regulation did apply to persons who have been subject to that insurance scheme.

15. In paragraph 25 of its written observations in Case 82/86 the Office de sécurité sociale d'outre-mer argues that Mr Laborero does not fulfil that condition since he was admitted to the scheme established by the 1963 law 'not because he had previously been insured under the colonial scheme but because he elected to pay contributions under the new scheme'. That argument cannot be accepted. First of all, any voluntary insurance implies by definition a positive choice on the part of the person subscribing to it. Secondly, even though Article 1 (a) (iv) was historically based on the *Hoekstra* judgment, cited above, which extended the concept of 'wage-earner or assimilated worker' to persons 'admitted as beneficiaries of a voluntary insurance scheme under national law governed by principles analogous to those of the compulsory insurance' ([1964] ECR 177 at p. 187), the fact remains that that article does not contain any suggestion of such a similarity of principle.

16. Finally, in agreement, it seems, with the Belgian Government, I consider that the mere continuation on an optional basis of insurance under the same scheme under which a person had previously been compulsorily insured falls within the concept of insurance 'on an optional continued basis' mentioned in Article 1 (a) (i) and (ii).

17. Finally, both Mr Laborero and Mr Mezzorecchia were insured 'under the social security scheme of a Member State for employed or self-employed persons'.

18. In the context of Article 1 (a), that is to say the definition of 'employed person', that reference simply emphasizes, as I have already indicated, that 'it is therefore by being covered by the social security system of a Member State and not because of how the occupation in question is classified under national law that a Community citizen becomes "moored" to Regulation No 1408/71'.[4]

19. Moreover, Article 4 (2) states that: 'This Regulation shall apply to all general and *special* social security schemes, whether contributory or non-contributory . . . '.

20. In those circumstances, Article 1 (a) (iv) cannot be interpreted as requiring that, in order to be treated as an 'employed person', a person must be insured under a general scheme of a Member State or, if he is insured under a special scheme, that the special scheme must be linked to, or incorporated in, a general State scheme.

21. Secondly, the fact that Article 13 of the 1963 law provides that 'the legislation relating to social security for employed persons' (i. e. the general Belgian social security scheme) is not applicable to persons insured under the overseas social security scheme is not such as to deprive the scheme established by that law of its character of a 'social security scheme'.

22. On the contrary, that provision merely confirms that the rules which it lays down,

4 — See Mr Advocate General Darmon's Opinion of 23 April 1986 in Case 300/84 *A. J. M. van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECR 3107.

although independent and distinct from the general Belgian social security scheme for employed persons, are sufficiently comprehensive to constitute a true, self-contained 'scheme' of its own.

23. It may be noted, moreover, that special schemes are amongst the legislation and schemes specified by the Belgian Government in its declarations made pursuant to Article 5 of Regulation No 1408/71. The fact that the overseas social security scheme is not mentioned in its declarations does not mean that the scheme does not fall within the scope of the regulation.[5] It therefore seems to be that the Belgian Government also takes the view that a special scheme may in principle come under Regulation No 1408/71.

24. It follows from all the foregoing that Mr Laborero has the status of 'employed person' and Mrs Sabato the status of survivor of an 'employed person' for the purposes of Regulation No 1408/71.

25. It therefore remains for me to examine whether the 1963 Belgian law constitutes 'legislation' of a Member State for the purposes of the regulation.

B — 'Legislation'

26. According to Article 1 (j) of Regulation No 1408/71, the term 'legislation' means 'in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4 (1) and (2)'.

27. In its judgment in *Bozzone*, cited above, the Court observed in paragraph 10 that 'this definition is remarkable for its breadth, including as it does all provisions laid down by law, regulation and administrative action by the Member States and must be taken to cover all the national measures applicable in this case' ([1977] ECR 687, at p. 696). In that case, the fact that the 1960 Belgian law did not merely guarantee benefits acquired under the colonial scheme but, by subsequent amendments, supplemented it by providing for the grant of additional benefits and in particular adapted it to the cost of living according to the rules in force in Belgium was sufficient for the Court to find that as a whole those provisions constituted 'legislation'.

28. The 1963 Belgian law, as repeatedly amended, together with the various royal decrees adopted for its implementation, assuredly has the character of 'legislation' as so defined. In Chapter I it creates the Office de sécurité sociale d'outre-mer, defining its responsibilities and laying down provisions regarding its administration. Chapter II defines the scope of application of the law and specifies the amount of the contributions to be paid. The following chapters contain special provisions applicable to the various types of insurance for which it provides: old-age and survivors' insurance, sickness and invalidity insurance, health-care insurance. Chapter VI deals with the adjustment of benefits to the cost of living and Chapter VII with supplementary insurance. The last two chapters contain special transitional and final provisions.

29. All those provisions form a 'legislative' body of national measures establishing a voluntary social security scheme for persons

5 — See the judgment of 29 November 1977 in Case 35/77 *Beerens* v *Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249. See also the judgment of 27 January 1981 in Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229.

pursuing their occupation in countries other than the Member States of the Community.

30. Is the fact that the legislation relates exclusively to occupations pursued outside the Community of such a nature as to take it outside the scope of Regulation No 1408/71?

31. In view of what the Court decided in a relatively recent case, the answer to that question can no longer be open to doubt.

32. In its judgment of 23 October 1986 in Case 300/84 *A. J. M. van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097 at p. 3116) the Court ruled that: 'National social security rules which apply to persons who pursue or who have pursued activities either wholly or partly outside the Community must be regarded as "legislation" within the meaning of Article 2 of Regulation No 1408/71'.

33. The Court arrived at that conclusion after deciding that 'the *essential criterion* for determining the scope of the term is not the place in which the occupation was pursued but the *link which exists between the worker*, regardless of the place in which he pursued or is pursuing his occupation, and the *social security scheme in a Member State* under which he has completed periods of insurance' (paragraph 29).

34. That conclusion is in line with previous case-law under which an insured person's attachment to a social security scheme of a Member State was the decisive criterion for deciding whether Regulation No 1408/71 was applicable.

35. In the judgment of 11 July 1980 in *Commission* v *Belgium*, cited above, which concerned the Law of 16 July 1960, the Court had already emphasized the institutional aspect of that connecting factor by pointing out that the scheme in question was a 'scheme introduced by a Belgian law and administered under the control of the Belgian State by a public body subject to Belgian law the effects of which are produced, in general, not in the former Belgian colonies but principally in the Belgian metropolitan territory' ([1980] ECR 2621, paragraph 7 at p. 2629). All those factors are also present in the present cases.

36. Although it concerned a scheme applicable to activities pursued in countries with which Belgium then had special relations, the judgment in question was worded in quite general terms so as also to cover a scheme relating to activities pursued exclusively 'in a totally independent country' (see the wording of the question of the Cour du travail, Mons). The Court had in fact stated that 'the mere fact that all the payments are based on periods of insurance completed prior to 1 July 1960 *outside Community territory* does not prevent the Community regulations on social security from applying' (*Commission* v *Belgium* [1980] ECR 2621, paragraph 7 at p. 2629 and 2630).

37. The judgment of 16 November 1972 in Case 16/72[6] and the judgment of 10 March 1977 in Case 75/76[7] quoted by the Office de sécurité sociale d'outre-mer and the

6 — Case 16/72 *Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein* [1972] ECR 1141.

7 — Case 75/76 *Kaucic* v *Institut national d'assurances maladies-invalidité* [1977] ECR 495.

Belgian Government do not contradict that argument in any way. On the contrary, the reason why the insurance periods completed in a non-member country did not have to be taken into account under Council Regulation No 3 in those cases was precisely that the benefits acquired had not been acquired under the legislation of a Member State but on the basis of an agreement concluded beween a Member State and a non-member country and on the basis of the legislation of a non-member State.

38. Moreover, in those judgments the Court referred to 'insurance periods completed' under legislation and 'social security benefits acquired' under such legislation and not, as the Office de sécurité sociale d'outre-mer and, to some extent, the Belgian Government interpret those judgments, to 'periods of work' or 'benefits paid' in a non-member State. The Court was careful not to extend the application of the Community legislation to insurance periods completed under the *social security scheme of a non-member country,* whereas in the cases in question it is a matter of guaranteeing to Community citizens the benefit of that legislation from the moment they were, or are, subject to a *social security scheme of a Member State,* irrespective of the place where the insurance periods covered by that scheme were completed.

39. It is not therefore a question of requiring a Member State to take into account periods of work completed exclusively outside the Community for undertakings established outside the Community (see p. 34 of the observations of the Office de sécurité sociale d'outre-mer in Case 82/86) but of ensuring that when a Member State has a social security scheme concerning such activities and gives nationals of other Member States access to it, it applies it to such nationals according to the same conditions as those applying to its own nationals.

40. In other judgments quoted by the Belgian Government and the Office de sécurité sociale d'outre-mer, concerning more generally the principle of freedom of movement for workers, the Court has also refused to make theplace where the activity is carried out the only criterion for the application of Community law.

41. In its judgment of 12 July 1984 in Case 237/83 *Prodest Sàrl* v *Caisse primaire d'assurance maladie de Paris* [1984] ECR 3153 the Court ruled that: 'The provisions of Community law concerning the free movement of workers within the Community . . . must be interpreted as meaning that the principle of non-discrimination applies to the case of a national of a Member State who is employed by an undertaking of another Member State even during a period in which the employee temporarily works outside the territory of the Community for that Community undertaking, and that in connection with the application of the national provisions of the Member State in which that undertaking is established concerning the retention of affiliation to the general social security scheme of that State during the temporary posting of the employee in question to a non-member country, any provision which discriminates against nationals of other Member States must be disregarded'.

42. It thereby transposed to the circumstances of the case before it the principle which it had laid down in its judgment of 24 October 1974 in Case 36/74 *Walrave and Koch* v *Association union cycliste internationale and Others* [1974] ECR 1405, in

which the question was whether it was important that the activities in question were pursued within the territory of the Community or outside it, namely that 'by reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as those relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community' (paragraph 28).

43. It therefore seems wrong to me to read into the *Prodest* judgment a more restrictive application of the *Walrave* judgment, as the Office de sécurité sociale d'outre-mer suggests in paragraph 21 of its written observations in Case 82/86. The wording of paragraph 6 (second sentence) and paragraph 7 of the *Prodest* judgment clearly shows that the Court merely applied the decision in *Walrave* to 'a case such as this'. There is therefore no justification for asserting that the Court considered the relevant legal link to the territory of the Community insufficient if the activity had been carried on exclusively and not temporarily outside that territory and the other factors (employment by an undertaking established in a Member State, insurance under a Member State's social security system) remained the same. Nor is there any justification for asserting that in social security matters the Court referred more to the employment relationship than to the fact that the person concerned was insured under a Member State's social security scheme.

44. What was true in the *Walrave* and *Prodest* judgments of Articles 7, 48 and 59 of the EEC Treaty and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 257) must also be true of Regulation No 1408/71, in particular Article 3 (1) thereof implementing the fundamental rule of non-discrimination in the field of social security for migrant workers.[8]

45. The answers to the questions submitted by the two Belgian courts can therefore only be in the affirmative — the Belgian Law of 17 July 1963 on overseas social security does fall within the scope of Regulation No 1408/71 which in Article 3 (1) prohibits all discrimination based on nationality.

46. In this regard I should also like to point out that the fact that Article 3 (1) of Regulation No 1408/71 merely constitutes, like Articles 48 to 51 of the EEC Treaty, the specific application of the principle laid down in Article 7 of the Treaty in the field of the free movement of workers, in particular the field of social security for migrant workers, renders the points raised by the Office de sécurité sociale d'outre-mer in paragraphs 12, 14 and 15 of its written observations in Case 82/86 entirely superfluous and artificial.

47. That being the case, no argument based on the fact that Article 7 applies only 'without prejudice to any special provisions contained therein [the EEC Treaty]' can be relevant. In particular, since the Court has held that Article 7 of the EEC Treaty, as implemented by Article 48 of the Treaty and Article 3 (1) of Regulation No 1408/71, is indeed directly applicable within the scope of application of that regulation,[9] it is that provision which prohibits the application in

8 — See the judgment of 28 June 1978 in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, paragraphs 9 to 11 at p. 1496.

9 — See the judgment of 28 June 1978 in Case 1/78, *supra*, [1978] ECR 1489, paragraph 12 at p. 1497.

the legal system of each Member State of any provision of national law affected by that regulation which, like Article 51 of the 1963 Belgian law, treats recipients of social security benefits differently depending on their nationality.

48. In view of all the foregoing considerations I propose that the Court should reply to the question submitted by the Tribunal du travail, Brussels, and the Cour du travail, Mons, as follows:

'(1) Regulation (EEC) No 1408/71, in particular Article 2 (1) thereof, must be interpreted as meaning that it applies to Community citizens who, having carried out or carrying out an activity as employed or self-employed persons, were, or are, insured under the voluntary insurance scheme established by the Belgian Law of 17 July 1963 on overseas social security.

(2) Article 7 of the EEC Treaty, as implemented by Articles 48 to 51 of the EEC Treaty and Article 3 (1) of Regulation (EEC) No 1408/71, prohibits Member States from denying nationals of other Member States of the Community covered by that regulation, by applying to them conditions regarding nationality and reciprocity, the right to have the social security benefits which are payable to them index-linked.'