1. Freedom of establishment is not confined to the right to create a single establishment within the Community but entails the right to set up and maintain, subject to observance of the relevant professional rules of conduct, more than one place of work within the Community. That applies also to a person who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity.

2. Articles 48 and 52 of the Treaty preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. Those articles must therefore be interpreted as meaning that a Member State may not refuse to exempt self-employed persons working within its territory from the contributions provided for under the national legislation on social security for self-employed persons, where employment is coupled with a self-employed activity, on the ground that the employment which is capable of giving entitlement to such exemption is pursued within the territory of another Member State.

REPORT FOR THE HEARING
delivered in Case 143/87 *

I — Facts and procedure

A — *The national legislation applicable in the main proceedings*

Royal Decree No 38 of 27 July 1967 establishing the social security scheme for self-employed persons (*Moniteur belge* of 29 July 1967) lays down the contributions to be paid by 'any natural person carrying on in Belgium an occupational activity in respect of which he is not bound by a contract of employment or fixed conditions of employment' (Article 3 (1)).

For the purposes of that definition an officer of a company is deemed to engage in an occupational activity, unless it is demonstrated that he acts without remuneration (Article 2 of the Royal Decree of 19 December 1967 laying down general rules for the implementation of Royal Decree No 38 of 27 July 1967 (*Moniteur belge* of 28 December 1967)).

As regards the contributions to be paid, Article 12 (2) of Royal Decree No 38, as amended by the Law of 12 July 1972 amending certain provisions on social security for self-employed persons (*Moniteur belge* of 14 July 1972), provides that:

'A person subject to the scheme who, in addition to the activities which make him subject to this decree, habitually pursues by

* Language of the Case: French.

way of principal occupation another occupational activity is not liable to pay any contributions if his income as a self-employed person' does not reach a certain level.

A habitual and principal occupation within the meaning of Article 12 (2) is further defined in Article 35 of the Royal Decree of 19 December 1967, as amended by the Royal Decree of 15 July 1970. Under the terms of this provision:

'(1) For the purposes of Article 12 (2) of Royal Decree No 38, a person subject to the scheme shall be regarded as pursuing "habitually ... by way of principal occupation" an occupational activity in addition to his activities as a self-employed person during the year in respect of which contributions are due if:

(a) his employment as a manual worker, clerical worker, miner or sailor on a ship flying the Belgian flag meets the definition of a principal occupation within the meaning of the scheme applicable to those categories of workers;

(b) where the activity he pursues is covered by another pension scheme established by or under a law, by a provincial regulation or by the Belgian Railways, that activity is carried on over at least eight months or 200 days during the year or, in the case of activities in day-time or evening education, corresponds to six-tenths at least of the number of hours required for the payment of a full salary.

(2) ...

(3) For the purposes of this article, employment by an international or supranational organization of which Belgium is a member shall be treated as employment as a manual worker or clerical worker, as the case may be, within the meaning of paragraph 1.'

B — *Background to the main proceedings*

Mr Christopher Stanton, a British national, is employed in the United Kingdom and in that capacity pays contributions to the British social security scheme for employees.

Since 1979 Mr Stanton has also been a director of a Belgian insurance company, L'Étoile 1905, which is a subsidiary of the British company which employs him. During certain periods of the year, he attends meetings of the Board of Directors of L'Étoile 1905 in Brussels. By reason of this activity, Mr Stanton was automatically affiliated in Belgium to the Caisse nationale auxiliaire d'assurances sociales pour travailleurs indépendants (Auxiliary National Social Insurance Fund for Self-employed Persons).

The Institut national d'assurances sociales pour travailleurs independants (National Social Insurance Institution for Self-employed Persons) (Inasti) requested Mr Stanton and L'Étoile 1905, which was jointly liable, to pay contributions in respect of the fourth quarter of 1979 and the first two quarters of 1980.

On 29 December 1982 Mr Stanton and L'Étoile 1905 brought an action against Inasti before the tribunal de travail (Labour Tribunal), Brussels, for a declaration that Mr Stanton was not subject to the social security scheme for self-employed persons, as defined by the Belgian legislation, and

that Mr Stanton and L'Étoile 1905 could not therefore be held jointly liable to pay contributions.

For its part, Inasti brought proceedings on 21 September 1984 against Mr Stanton and L'Étoile 1905 before the tribunal de travail, Brussels, for the payment of contributions. By a judgment of 27 November 1986, the tribunal ordered the joinder of the two cases and directed that the pleadings be re-opened.

Mr Stanton sought exemption from the payment of contributions and relied on Article 12 (2) of the Royal Decree No 38 of 27 July 1967 and Article 35 (1) of the Royal Decree of 19 December 1967.

Inasti claimed that the wording of those provisions of the Belgian legislation clearly indicate that the Belgian Government never intended to exempt from the payment of contributions workers who pursue their principal occupation abroad and, by virtue of that fact, are covered by a pension scheme which is governed by foreign legislation not applicable in Belgium.

Mr Stanton considers that the view taken by Inasti is contrary to the principles of equal treatment and freedom to provide services secured by the EEC Treaty and Community legislation.

The tribunal de travail, Brussels, (13th Chamber) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the refusal by a Member State to exempt wholly or in part a national of another Member State providing services in the first State from payment in the first State of social security contributions under the scheme for self-employed persons in respect of activities of a secondary nature pursued in that capacity in that State even though he is subject to the social security legislation of the second State in respect of his principal activity as an employed person, solely on the ground that his activity as an employed person pursued "habitually and by way of principal occupation" takes place outside the territory of the Member State in which the service is provided, compatible with the wording and spirit of Article 7, Article 8 (1) and (7), Article 52, the first paragraph of Article 59, the third paragraph of Article 60 and Article 65 of the Treaty of Rome of 25 March 1957 establishing the European Economic Community (approved by the Belgian Law of 2 December 1957)?

(2) If the reply to that question is in the negative, are the applicable Community provisions incompatible with paragraphs 1 and 3 of Article 35 of the Belgian Royal Decree of 19 December 1967 laying down general rules for the implementation of Royal Decree No 38 of 27 July 1967 on the social security scheme for self-employed persons, inasmuch as only an activity pursued in Belgium is regarded as an occupational activity other than that pursued as a self-employed person, even where those paragraphs do not contain an express provision to that effect?'

The order making the reference was received at the Court Registry on 11 May 1987.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by:

Christopher Stanton and L'Étoile 1905, represented by Jean Bayart and François-Xavier de Dorlodot, both of the Brussels Bar;

Inasti, represented by J. Lejuste, Deputy Director-General of Inasti;

the Belgian Government, represented by J. Buchmann, Minister for Small Business, acting as agent;

the Commission of the European Communities, represented by its Legal Adviser E. Lasnet, assisted by F. Herbert, of the Brussels Bar, acting as agents.

By a decision of 30 November 1987 the case was assigned to the Third Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

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 — Summary of the written observations submitted to the Court

Mr Stanton and L'Étoile 1905 point out first of all that under Article 2 of the Royal Decree of 19 December 1967 a director of a company is deemed to pursue an activity which entails liability to adhere to the social security scheme for self-employed persons if the activity is presumed to be remunerated. This presumption may be rebutted if it can be proved that there is no remuneration. As the Belgian Court of Cassation held in a judgment of 2 June 1980 (*Pasicrisie* 1980, I, p. 1211), such proof can only be established by production of the resolution to this effect adopted by the competent decision-making body of the company.

Mr Stanton and L'Étoile 1905 state that such proof could not be provided for any of the directors of the company, whether Belgian or foreign. They point out, however, that only Mr Stanton was automatically affiliated and prosecuted by Inasti in order to recover contributions.

Therefore, Mr Stanton and L'Étoile 1905 consider that the questions which actually arise for the national court should be formulated in such a manner as also to take account of the aforementioned terms of the national legislation, which have the effect of making nationals of one Member State who provide services in Belgium subject to more stringent conditions than those required of Belgian nationals as regards proof that the conditions which give rise to liability to adhere to the social security scheme for self-employed persons are not met.

Mr Stanton and L'Étoile 1905 state first of all that as the Court has held, in particular in the judgment of 3 December 1974 in Case 33/74 (*Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299), the judgment of 18 January 1979 in Joined Cases 110 and 111/78 (*Ministère public* v *Van Wesemael* [1979] ECR 35), and the judgment of 17 December 1981 in Case 279/80 (*Webb* [1981] ECR 3305), Article 59 of the Treaty, which is applicable to a company directorship, directly confers rights on individuals which must be upheld by national courts.

They go on to stress that, as the Court held in its judgment of 3 February 1982 in Joined Cases 62 and 63/81 (*Seco* v *EVI* [1982] ECR 223), the prohibition of discrimination on grounds of nationality laid down in Articles 7 and 59 of the Treaty applies to all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result.

According to Mr Stanton and L'Étoile 1905, it is clear from these cases that the fact that the company's sole British director is treated differently without objective justification contravenes the aforementioned provisions of the Treaty in two ways, namely:

(i) By imposing on Community citizens requirements which are more rigorous than those imposed on nationals of the host State, as regards proof that the conditions governing liability to join the social security scheme for self-employed persons are not met (proof that directorship is unremunerated);

(ii) By refusing to exempt a Community citizen from the payment of contributions to the scheme for self-employed persons where the employment which ordinarily confers entitlement to such exemption is pursued outside the territory of the Member State in which the services are provided.

Inasti disputes the observations formulated by Mr Stanton and L'Étoile 1905 and argues, in the first place, that Article 59 cannot have direct effect, as it is dependent on the adoption by the Council, under the second paragraph of Article 7 of the Treaty, of the necessary implementing regulations. Council Regulation No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal 1981, L 143, p. 1) only entered into force on 1 July 1982, that is to say after the period of the dispute.

Inasti states secondly that the contested Belgian legislation is not discriminatory, as it is applied in the same way to persons in identical situations.

In support of that assertion Inasti states first of all that the situation of a worker who is employed in the United Kingdom and works as a self-employed person in Belgium cannot be compared to that of a person who pursues all his occupational activities in Belgium.

Inasti takes the view that employment pursued habitually and as a principal occupation in another Member State falls under a scheme specific to that Member State. Foreign legislation can have no effect on the application of Belgian social legislation, in the absence of any international social security convention dealing with the problem of double liability in a situation such as that which is the subject of the main proceedings.

According to Inasti, it is also clear from Article 35 of the Royal Decree of 19 December 1967 that employment capable of giving rise to exemption from payment of contributions must be covered by a pension scheme mentioned in the Belgian legislation, which excludes any pension scheme governed by foreign legislation, with the

sole exception of employment in the service of an international organization of which Belgium is a member.

Inasti proposes that the reply to be given to the national court should be that the contested provisions of the Belgian legislation did not infringe any provision of the EEC Treaty in respect of the period in question, before the entry into force of Council Regulation No 1390/81 of 12 May 1981.

The Belgian Government states that it shares the point of view expressed by Inasti.

It wishes nevertheless to point out that in light of the jurisdiction retained by the Member States until the adoption of the aforementioned Community legislation only provisions of national law which contravene the fundamental objectives of the Treaty, such as the principle of non-discrimination as between nationals of the host State and citizens of other Member States, can be called in question.

The contested Belgian legislation applies without distinction to Belgian nationals and to Community citizens and does not contain or give rise to any indirect discrimination against nationals of other Member States.

The Belgian Government is thus of the opinion that the national regulations comply with the principles laid down by the Court in paragraph 18 of its judgment of 28 June 1978 in Case 1/78 (*Kenny* v *Insurance Officer* [1978] ECR 1489), to the effect that the prohibition of discrimination on grounds of nationality is 'not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality.'

The Belgian Government proposes that the reply to be given to the questions asked should be as follows:

'The refusal to exempt, wholly or in part, a national of a Member State who provides services from the payment of social security contributions due in another Member State as a self-employed person on the sole ground that his habitual principal occupation is pursued outside the territory of the State in which the service is provided is not contrary to the wording and the spirit of Articles 1, 7, 8 and 52, the first paragraph of Article 59, the third paragraph of Article 60 and Article 65 of the Treaty of Rome of 25 March 1957 establishing the European Economic Community.

As regards the period prior to the entry into force of Regulation No 1390/81 of 12 May 1981, the provisions of Article 35 (1) of the Royal Decree of 19 December 1967 are not in conflict with Community provisions. They entail no discrimination against nationals of other Member States.'

The Commission of the European Communities is of the opinion that the Court should reformulate the questions in such a manner as to give a ruling only on the interpretation of the Community provisions referred to by the national court.

The Commission considers, however, that Articles 8 and 65 of the Treaty are not relevant to the resolution of the dispute in the main proceedings as they relate respectively to the transitional period for the

six original Member States and the possibility of discriminatory treatment by one Member State of nationals of other Member States.

Thus, in the Commission's opinion, it is necessary only to interpret the Treaty provisions which relate to equal treatment, freedom of establishment and freedom to provide services.

The Commission notes that the argument put forward by Inasti is based on the principle of the territoriality of social security systems, which is applicable until Community regulations coordinating the various national systems in this field are adopted. By virtue of Article 2 of Council Regulation No 1390/81 of 12 May 1981 that regulation does not grant any rights in respect of the period prior to 1 July 1982.

It is, however, clear from the judgment of 9 July 1975 in Case 20/75 (*D'Amico* v *Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891), and the judgment of 28 June 1978 in the *Kenny* case, cited above, that the Member States are required, even in fields which are not, or not yet, governed by Community legislation and remain a matter exclusively for national law, to observe the fundmental principles of Community law, in particular the prohibition on discrimination.

As the Court has consistently held, in particular in the judgment of 12 December 1974 in Case 36/74 (*Walrave* v *Union cycliste* [1974] ECR 1405 ('workers')), the judgment of 26 June 1974 in Case 2/74 (*Reyners* v *Belgian State* [1974] ECR 631 ('establishment')) and the judgment of 3 December 1974 in the *Van Binsbergen* case, cited above ('provision of services'), Articles 48, 52 and 59 of the Treaty constitute the specific implementation, in the context of the free movement of workers, the right of establishment and provision of services, of the general prohibition of discrimination on grounds of nationality provided for in Article 7 of the Treaty.

In the context of freedom of establishment the prohibition on discrimination is of central and direct importance (judgment of 12 February 1987 in Case 221/85 *Commission* v *Belgium* [1987] ECR 719), whereas in the context of the freedom to provide services the Court also makes reference to restrictions which 'may prevent or otherwise obstruct the activities of the person providing the service' (judgment in *Van Binsbergen*, cited above). This difference may be explained by the specific purpose of these two freedoms guaranteed by the Treaty and, more particularly, by the fact that freedom of establishment is directed towards optimum integration of the person concerned in the host Member State, which presupposes the thoroughest possible assimilation of Community citizens in that Member State.

Referring to the judgment of 12 March 1974 in Case 152/73 (*Sotgiu* v *Deutsche Bundespost* [1974] ECR 153), the judgment of 3 February 1982 in Case 62/81 *Seco* v *EVI* cited above, the judgment of 15 January 1986 in Case 41/84 (*Pinna* v *Caisse d'allocations familiales* [1986] ECR 1), and the judgment of 27 March 1985 in Case 249/83 (*Hoeckx* v *Openbear Centrum voor Maatschappelijk Welzijn* [1985] ECR 973), the Commission stresses that the prohibition of discrimination covers both direct discrimination and indirect or disguised discrimination, that is to say 'all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result' (paragraph 8 of the *Seco* judgment, cited above).

The Commission considers that the disputed national legislation contains no direct

discrimination based on the nationality of the persons concerned and that it is therefore necessary to examine whether it gives rise to indirect discrimination.

To this end it is necessary to compare not the situation of Belgian nationals and that of Community citizens who pursue all their occupational activities in Belgium, as both employed and self-employed persons, but the situation of persons who work as self-employed persons in Belgium and are either exempted from contributions or excluded from that exemption on the ground that their principal occupation as employees is not carried on in Belgium.

In the Commission's view, covert discrimination exists if investigation reveals that the exclusion from the exemption from contributions affects Community citizens more than nationals of the host State and this difference of treatment is not justified on objective grounds.

In this respect the Commission wishes to emphasize that Inasti's argument implies that a person who decides to give his activities a Community dimension is made to bear an additional financial burden. That is to say, both a salaried employee from another Member State who is considering pursuing a supplementary activity as a self-employed person in Belgium and a self-employed person working in Belgium who wishes to take up employment in another State suffer a financial disadvantage in comparison with a Belgian national who focuses his activities in Belgium.

Referring to the judgment of 28 November 1978 in Case 16/78 (*Choquet* [1978] ECR 2293), the judgment of 12 July 1984 in Case 107/83 (*Ordre des avocats* v *Klopp* [1984] ECR 2971), and the judgment of 10 July 1986 in Case 79/85 (*Segers* v *Bedrijfsvereniging* [1986] ECR 2375), the Commission states that in such circumstances the Court has held that where the national regulations at issue do not in themselves constitute an impediment to the free movement of persons they may nevertheless be deemed to be contrary to Community law if their application obstructs the persons concerned to such an extent that in practice they interfere with the free exercise of the rights guaranteed by Articles 48, 52 and 59 of the Treaty.

It is significant that in those judgments the Court took account of the fact that the obstacles to the free movement of persons stemmed in fact, in the absence of specific Community rules, from the need to protect certain aspects of the national public interest, namely road safety in the *Choquet* case and the proper administration of justice in the *Klopp* case. The Court nevertheless considered that such measures could not result in the right to freedom of movement being robbed of its very substance, namely 'the freedom to set up and maintain . . . more than one place of work within the Community' (paragraph 19 of the Klopp judgment).

The Commission considers that this principle must apply *a fortiori* when the obstacle to free movement results not from an impediment to access to or the pursuit of an activity but from the imposition of a disproportionate financial burden where that does not provide additional protection for the person concerned. In this respect the Commission refers to the judgment of 9 June 1964 in Case 92/63 (*Nonnenmacher* v *Sociale Verzekeringsbank* [1964] ECR 281), and the judgment of 5 December 1967 in Case 19/67 (*Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 345).

As regards more particularly the freedom to provide services, the Commission, referring to paragraph 10 of the judgment in the *Van Binsbergen* case and to paragraphs 14 and 17 of the judgment in the *Webb* case, cited above, argues that the refusal to grant exemption from contributions, contested in the main proceedings, is justified not by 'specific requirements [which] have as their purpose the application of rules governing such activities' in Belgium but by the wish to confer benefits only on persons providing services who are established in Belgium.

The Commission proposes that the reply to be given to the questions of the national court should be as follows:

'(1) Articles 7 and 52 and the first paragraph of Article 59 of the EEC Treaty, properly construed, preclude any form of discrimination based directly or indirectly on nationality resulting from the application of criteria which appear to be neutral but in practice lead to the same result.

This may in particular be the case where it appears that a contributory scheme for self-employed persons such as that described by the tribunal du travail, Brussels, prevents only or mainly non-Belgian Community citizens who pursue a secondary activity as self-employed persons from benefiting from the exemption from contributions.

(2) A contributory scheme for self-employed persons such as that described by the tribunal du travail, Brussels, constitutes in any event a disproportionate obstacle to the freedom to provide services in so far as the actual exercise of such freedom to provide services from another Member State is subject, where the principal occupation of the person providing services continues to be his employment in his Member State of origin, to a burden to which a person providing services whose principal occupation is employment in Belgium is not subject.

(3) Such a scheme also constitutes a disproportionate obstacle to the free movement of workers provided for by Article 48 *et seq.* of the EEC Treaty in so far as the exclusion from the exemption from contributions is based on the fact that the employment which is the principal occupation of the person concerned is pursued in another Member State.'

Y. Galmot
Judge-Rapporteur