covered by a social security scheme in any other capacity.

In such a case, the residence requirements laid down by the legislation of a Member State for affiliation to a social security scheme may be applied, in the absence of any provision in that regulation whose application, whether directly or by analogy, would make it possible to set aside a residence requirement of that kind.

2. The question whether the fact that a person is in receipt of a benefit linked to the termination of his last employment confers on him the status of a compulsorily insured person, where he has definitively stopped work and gone to reside in another Member State in which he has no occupation and is not covered by a social security scheme in any other capacity, is governed by the conditions for affiliation to a social security scheme and, consequently, by the applicable national legislation.

REPORT FOR THE HEARING
in Case C-245/88 *

I — Facts and written procedure

Mr Daalmeijer, a Netherlands national, was born on 5 October 1917. He is married to Mrs G. A. Boer, who is also a Netherlands national and who was born on 26 March 1918. Mr Daalmeijer worked in the Netherlands and most recently, from August 1969 until 1 May 1974, in Belgrade, Yugoslavia, as a civil servant at the Netherlands Ministry of Defence. On that date he took early retirement and has been in receipt of an allowance under the Uitkeringswet Gewezen Militairen (Netherlands Law on Allowances for Former Members of the Armed Forces). It is apparent from the order for reference that since 1 May 1974 Mr Daalmeijer and his wife have been living in France and that neither of them has subsequently pursued an activity, either as employed persons or as self-employed persons.

On 5 October 1982, upon reaching the age of 65, he acquired entitlement to an old-age pension under the Algemene Ouderdomswet (Netherlands General Old-age Law). By decision of the Sociale Verzekeringsbank (Social Insurance Bank) of 23 March 1983, the calculation of that pension involved the deduction of an amount corresponding to the periods in which Mr Daalmeijer and his wife were deemed not to have been insured (eight and 15 years respectively).

By order of 23 September 1986, the decision of the Sociale Verzekeringsbank was annulled by the Raad van Beroep (Social Security Court), Amsterdam, on the ground that the reduction of Mr Daalmeijer's pension by reason of his wife's

* Language of the case: Dutch.

position was incorrect. Mr Daalmeijer appealed against that decision to the Centrale Raad van Beroep (Court of last instance in social security matters).

It is apparent from the order for reference that, on the basis of the factors examined at the hearing, the Centrale Raad van Beroep is asking whether a national of a Member State loses the guarantees conferred on migrant workers by Article 51 of the EEC Treaty merely by virtue of moving to another Member State, when he would not have lost such guarantees if he had continued to live in the Member State of which he is a national. The Centrale Raad also saw fit to draw attention to the consequences which the Court's judgment of 12 June 1986 in Case 302/84 (*Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821) might have in the present case, raising the question, in particular, whether that judgment should be interpreted as covering long-term benefits and benefits of the same kind as those received by the appellant. In that judgment the Court held as follows:

'Article 13(2)(a) of Regulation (EEC) No 1408/71 must be interpreted as meaning that a worker who ceases to carry on an activity in the territory of a Member State and who has not gone to work in the territory of another Member State continues to be subject to the legislation of the Member State in which he was last employed, regardless of the length of time which has elapsed since the termination of the activity in question and the end of the employment relationship.'

Article 13(1) and (2)(d) of Regulation (EEC) No 1408/71 provides as follows:

'(1) Subject to Article 14c, persons to whom this regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this title.

(2) Subject to Articles 14 to 17:

...

(d) civil servants and persons treated as such shall be subject to legislation of the Member State to which the administration employing them is subject.'

Finally, the Centrale Raad also took account of the Court's judgment of 24 September 1987 in Case 43/86 (*Bestuur van de Sociale Verzekeringsbank* v *de Rijke* [1987] ECR 3611), in particular paragraph 17, as regards the possibility that a Netherlands national may be insured on a voluntary basis under the scheme established by the Old-age Law when he moves abroad, and thus cease to be compulsorily insured under that Law.

In the light of the foregoing considerations, the Centrale Raad decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a (former) official under Article 13(2)(d) of Regulation (EEC) No 1408/71 subject to the legislation of the Member State in whose service he was last employed, even if he and his wife

have gone to live in the territory of another Member State, where neither of them has carried on real and actual activities for the purposes of Article 13(2) where they are also not otherwise subject to the legislation of that other Member State by virtue of that provision?

(2) If Question 1 is answered in the affirmative, can residence requirements such as those laid down in Article 6(1)(a) of the Netherlands Algemene Ouderdomswet be applied to the person concerned in respect of the period during which he (and his wife) resided in a Member State other than the State in whose service he was last employed, where he could be considered by virtue of national law to have continued to live during his last period of employment?

(3) If Question 1 is answered in the negative and/or Question 2 is answered in the affirmative, what would the answer be if the person referred to in Question 1 received a benefit from the Netherlands during the period in which he was residing in the territory of a Member State other than the Netherlands in connection with the termination of his last employment in the service of the Netherlands (a benefit which by virtue of national law did not result in his being insured under the Old-age Law)?'

The order for reference was received at the Court Registry on 2 September 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by: Mr H. C. M. Daalmeijer; the Sociale Verzekeringsbank, represented by B. H. ter Kuile and E. H. Pijnacker Hordijk, of the Hague Bar and the Brussels Bar; the Commission of the European Communities, represented by R. Barents, a member of its Legal Department, acting as Agent; the Netherlands Government, represented by E. F. Jacobs, Secretary-General at the Ministry of Foreign Affairs; and the Danish Government, represented by J. Molde, Legal Adviser at the Ministry of Foreign Affairs.

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 and to assign the case to the Third Chamber.

Following the hearing on 27 September 1989 and after hearing the Opinion of the Advocate General on 7 November 1989, the Third Chamber considered that it was necessary to apply Article 95(4) of the Rules of Procedure.

By the decision of 6 March 1990, the Third Chamber referred the case to the full Court.

By order of 14 March 1990, after hearing the Advocate General, the Court decided to reopen the oral procedure.

II — The relevant Netherlands legislation

At the time of the contested decision, the Old-age Law did not make provision for independent pension rights for married women. On the other hand, a married man could claim a married man's pension, in which the periods of insurance completed by his wife were taken into account.

Persons insured under the Old-age Law may, on reaching the age of 65, claim an old-age pension (Article 7). According to Article 6(1):

'An insured person for the purposes of this law is a person who has reached the age of 15 and has not yet reached the age of 65 provided that:

(a) he is a Netherlands resident;

(b) he is not a Netherlands resident but is subject to income tax by reason of his employment within the Netherlands.'

The Old-age Law provides for notional periods of insurance for the period prior to 1 January 1957 and Article 13 lays down that the amount of the married man's pension is to be reduced by 1% for each year that he was not insured and by 1% for each year that his wife was not insured.

At the time when Mr Daalmeijer was last employed, Article 3(4) of the Old-age Law was applicable and was worded as follows:

'A national of the Netherlands residing outside the Netherlands who is in the employment of a Netherlands public body, together with his spouse and children in respect of whom he is entitled to child allowance under the Algemene Kinderbijslagwet, shall be regarded as residing within the Netherlands.'

III — Summary of the written observations submitted to the Court

Mr Daalmeijer points out that the Ministry of Defence regarded him as a Netherlands resident because it deducted contributions under the Old-age Law from his pension during the period from 1974 to 1982. For that reason he considers that the wording of the Centrale Raad van Beroep's third question, according to which a benefit payable by the Netherlands in connection with the termination of the last employment of the person concerned in the Netherlands 'by virtue of national law did not result in his being insured under the Old-age Law' is inaccurate.

He maintains that it was only when he requested an extract from the population registry for Wassenaar that he noticed that his municipality had deleted him from the register following his departure for Yugoslavia in 1969. However, the municipality re-registered him since from 1953 to 1974 and until 1983 he had been the owner of a property in Wassenaar which was let

out. In his view, he and his spouse are both resident in Wassenaar, as is apparent from his current passport and also from the fact that the contributions under the Old-age Law were deducted from his pension by the Ministry of Defence.

Both the Sociale Verzekeringsbank, the defendant in the main proceedings, and the other interested parties submitted observations on each of the national court's questions. Those observations must therefore be grouped together in the same order as the questions.

Question 1

According to the *Sociale Verzekeringsbank*, the national court seeks a ruling from the Court on whether Community law contains rules for determining the Member States' social security legislation applicable to former workers and civil servants.

In that regard, the Sociale Verzekeringsbank considers that the provisions of Title II of Regulation No 1408/71, being conflict rules of Community law in the field of social insurance, are not applicable to former workers. Those provisions merely lay down the principle of the applicability of the law of the place of employment as the conflict rule for determining the legislation applicable to migrant workers. Although Article 13(1) of Regulation No 1408/71 does indeed provide that the persons to whom that regulation applies are subject only to the legislation of a single Member State and that such legislation is determined in accordance with the provisions of Title II, analysis of the scope and the wording of those provisions clearly reveals that they apply only to persons who carry on an activity, whether as employed persons or otherwise. The application of the principle of the law of the place of employment to the working population alone can be explained, moreover, by the fact that the Member State' social security schemes generally couple affiliation to the social security scheme with work in the Member State in question. Entitlement to benefits and the obligation to pay contributions are normally linked to occupational earnings. If the principle of the applicability of the law of the place of employment were not applied as a conflict rule, there would be a risk of a frontier worker being excluded from social insurance both in the State in which he resides and the State in which he is employed.

As for the consequences for the purposes of this case of the Court's judgment in *Ten Holder*, the Sociale Verzekeringsbank acknowledges that the judgment usefully filled a gap in Title II of Regulation No 1408/71 with regard to the position of former workers but considers that it is formulated in terms which go beyond the scope of the category of case submitted to it. In that case, it was necessary to determine the legislation applicable to an employed person who had temporarily stopped work in the Federal Republic of Germany on grounds of sickness, was in receipt of German sickness benefits and returned to live in the Netherlands; the Court considered, on the basis of a broad interpretation of Article 13(2)(a) of Regulation No 1408/71, that he was still covered by the legislation of the Member State in which he was last employed.

According to the Sociale Verzekeringsbank, that solution was understandable because entitlement to benefit — which, in principle, was provisional — for a person who interrupts his activities, for instance on

grounds of sickness, maternity or unemployment, must be directly connected with his last employment. If the rule of the applicability of the law of the place of employment were abandoned in such circumstances, a migrant worker who settled in another Member State during a temporary interruption of his activities would be subject to the legislation of that Member State. Similarly, a worker residing in a Member State other than that of his employment would cease in principle to be insured in the latter State whenever he interrupted his professional or trade activity on grounds of sickness. That would place the worker concerned at a disadvantage amounting to an obstacle to the free movement of workers.

However, the application of the Court's judgment in *Ten Holder* in a case such as this, where a worker has ceased to carry on any activity, would give rise to unacceptable results. In the first place, the principle of freedom of movement of workers would be affected and, secondly, the consequences for the Member States would be unfair.

The principle of freedom of movement for workers must extend to former workers who 'remigrate', that is to say workers who, after ceasing to carry on their professional or trade activity outside the Member State of origin, continue to reside on the territory of that State or settle there. If they were denied affiliation to the social security scheme of the Member State of origin, pursuant to the Court's judgment in *Ten Holder*, that category of former workers would be in a less favourable position than if they had not carried on an activity outside the territory of the Member State of origin. When the interests of former workers who have 'remigrated' are incompatible with those of former workers who have 'migrated', such as Mr Daalmeijer, it is the interests of the first category which must prevail in the light of the principle of freedom of movement.

With regard to the consequences for the Member States of the application in this case of the judgment in *Ten Holder*, the Sociale Verzekeringsbank makes the following points: a Member State with a general social security scheme would be obliged to extend insurance cover to any person terminating his career in another Member State, even if he has not retained any residence link with the first Member State. Since the obligation to contribute to a general social security scheme is normally based on the taxable domestic income of the insured in the Member State concerned, a former migrant worker would accordingly continue to be insured in the Member State in which he was last employed, usually without being required to pay contributions to that end to that State in respect of his income, normally taxable in the State of residence. According to the Sociale Verzekeringsbank, that could give rise to abuses, inasmuch as a worker might be tempted at the end of his career to move to the labour market of a Member State with a general social security scheme in order to be able to enjoy the unrestricted advantages of that scheme, without otherwise having any link with that Member State or being required to pay contributions to that end in respect of income earned in the State in which he resides.

It follows from the foregoing that the answer to Question 1 must be in the negative.

The *Commission* also considers that employed persons, self-employed persons and civil servants who cease to carry on any

activity do not fall within the scope of Title II of Regulation No 1408/71. The provisions under that title are based on the principle of the *lex loci laboris* and extend to a person engaging in an activity in a Member State other than that from which he comes or in which he resides. Workers in receipt of sickness benefits are to be treated in the same way, as the Court has held in its judgment in *Ten Holder.*

The Commission also refers to the adverse consequences with regard to freedom of movement for workers and for the Member States mentioned by the Sociale Verzekeringsbank which would result from the application of Article 13(2) of Regulation No 1408/71 to workers who no longer carry on an activity.

Accordingly, Question 1 must be answered in the negative.

The *Netherlands Government* observes that the reference rules in Title II of Regulation No 1408/71 must be regarded as applying exclusively to any person who is a worker within the meaning of Article 2(a) of that regulation or who has the status of a worker, in its current sense, because he can be regarded as part of the working population. Accordingly, a former civil servant who is not in receipt of any benefit and who has not carried on any activity after the termination of his employment relationship cannot be regarded as still being dependent on the labour market in order to support himself or, consequently, as still forming part of the working population. According to the Netherlands Government, that person does not therefore have the status of a worker, in its current sense, and is not therefore covered by Title II of the aforesaid regulation so far as the reference rules relating to the applicable legislation are concerned.

The *Danish Government* also emphasizes the significant differences between the Member States with regard to the financing of social security schemes. It points out that in most Member States, including the Netherlands, old-age pensions are financed by means of contributions from those entitled to benefits. In such a case, the Danish Government finds it reasonable that an entitled person should in general receive benefits proportionate to the contributions which he has paid. Where, as in Denmark, retirement pensions are financed by society through taxation, it also finds it reasonable that an entitled person should receive benefits only on the basis of the periods in which he was able to contribute to the financing of the social security scheme by reason of his residence in the country. If that method of calculation were prohibited, it would no longer be possible to justify the maintenance of a scheme not financed by contributions.

In its view, the *Ten Holder* judgment concerns only the choice of the applicable law, but neither the rules for determining the applicable law which are set out in Article 13 of Regulation No 1408/71 nor the interpretation of those rules by the Court are of any assistance for the purpose of resolving the relevant question in this case, namely the determination of the law which must be applied in accordance with those rules.

Question 2

The *Sociale Verzekeringsbank* considers it unnecessary to answer this question in the event that the Court gives a negative answer

to Question 1. Accordingly, its observations on Question 2 are merely of a subsidiary nature

In its view, the Centrale Raad is essentially asking whether the conflict rules in Title II of Regulation No 1408/71 have 'binding force'. In that regard, the Sociale Verzekeringsbank considers that although the Court has not yet expressly ruled on that question, the judgment of 23 September 1982 in Case 276/81 (*Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027) would seem to suggest some readiness to recognize the 'binding force' of those provisions. In that judgment the Court decided that the provisions of Title II of Regulation No 1408/71 preclude the application of a conflict rule set out in the national legislation rendered applicable under the rules of Community law. The Sociale Verzekeringsbank sees no reason why the Court should take a different view when the criteria of territoriality in the legislation of a Member State do not expressly refer to the legislation of other Member States. Such criteria, which are connected with the residence of the person concerned or his employer, are designed primarily to delimit the scope of the legislation in question and are therefore in the nature of conflict rules as well.

On the basis of those considerations, the Sociale Verzekeringsbank observes that the conflict rules of Community law would be wholly ineffective if the legislation rendered applicable were to exclude the persons concerned from insurance cover in accordance with its own criteria of territoriality. However, the fact that the conflict rules of Community law have 'binding force' does not mean that a Member State whose legislation is rendered applicable can no longer impose on those concerned conditions of affiliation other than those prescribed by its own conflict rules and criteria of territoriality. Criteria such as the age and status of a worker are totally unconnected with the reciprocal delimitation of the scope of the legal systems of the Member States and are not therefore affected by the conflict rules of Community law either. That view is borne out by the consistent case-law of the Court, according to which it is for the legislation of the Member States to lay down the conditions governing the right or the duty of affiliation to a social security scheme.

Having regard to the foregoing considerations, the Sociale Verzekeringsbank suggests that the Court's answer to Question 2 — if the Court considers it necessary to give an answer — should be that the residence requirements imposed for reference to the legislation of a Member State cannot be relied upon as against a person to whom the legislation concerned must be applied under the provisions of Title II of Regulation No 1408/71.

The *Commission* notes that it is unnecessary to examine Question 2 unless the Court gives an affirmative answer to Question 1.

Relying on the aforesaid judgment in *Kuijpers*, the Commission points out that the rules for determining the applicable legislation in Title II of Regulation No 1408/71 are designed to prevent a situation from arising, on account of a worker's movements from one Member State to another, which is not covered by legislation or is covered by several legislative systems simultaneously. Those rules provide for the national legislation applicable to be designated in accordance with a uniform

criterion and would be meaningless if the Member States retained the power themselves to define, under their national legislation, the scope *ratione personae* of their own legal system by means of territorial criteria. The application of those rules for determining the legislation applicable cannot, however, ensure that migrant workers are always affiliated to a social security scheme. Thus, for instance, if a worker does not fulfil the conditions laid down by the applicable legislation with regard to age or wages earned, he will not be insured. Nor will he be insured if he does not fulfil other conditions which do not involve a 'territorial' aspect.

Having regard to those considerations, the Commission considers that Question 2 should be answered in the negative.

The *Netherlands Government* also maintains that the rules in Regulation No 1408/71 for determining the applicable legislation must be regarded as taking precedence over national territorial criteria. It refers to the case-law of the Court to support its view that the measures adopted in pursuance of Articles 48 to 51 of the Treaty must be interpreted as designed not only to prevent the legal position of migrant workers in matters of social security from being adversely affected but also, at the very least, to place migrant workers in the same position as they would have been in if national law alone had applied. In its view, that aim precludes the applicability of the provisions of Title II of the regulation from being barred by national territorial criteria which would place a migrant worker in a less favourable position.

According to the Netherlands Government, although it follows from the case-law of the Court that the Member States are free to lay down the conditions for cover under the national social security scheme, it is clear nevertheless that the territorial criteria which serve to delimit the social security scheme of one Member State from the schemes of other Member States constitute an exception to that principle.

In conclusion, the Netherlands Government observes that, in this case, the residence requirements laid down in Article 6(1)(a) of the Old-age Law cannot be relied upon as against the person concerned and Question 2 should therefore be answered in the negative.

The *Danish Government* proposes that if the Court answers Question 1 in the affirmative, its reply to Question 2 should be that, in calculating the old-age pension of an entitled person who had worked in one Member State and then established his residence in another Member State in which he had not carried on a professional or trade activity, the first State may disregard periods of residence in the second Member State in determining the amount of the pension. It its view, that applies particularly in the case of a pension financed not by contributions but by society through taxation.

Question 3

According to the *Sociale Verzekeringsbank*, this question is badly worded since it suggests that in the event of a negative answer to Question 1, it would still be

possible for Question 2 to be answered in the affirmative. It is apparent from the manner in which it was formulated by the Centrale Raad that Question 2 is devoid of purpose in the event of a negative answer to Question 1. The Sociale Verzekeringsbank also observes, in connection with the subject-matter of Question 2, that it is difficult to establish the extent to which the circumstances referred to by the national court in Question 3 may influence the answer to the question whether it is necessary for the conflict rules of Community law to be recognized as having 'binding force'.

In any event the Sociale Verzekeringsbank considers that the answer to Question 3 is already implicit in its proposed answer to the first two questions.

The *Commission* has not submitted any observations on Question 3. Having regard to the points it made with regard to the first two questions, it proposes that the Court should declare that the provisions on determining the applicable legislation, as they now stand in Title II of Regulation No 1408/71, are not applicable to persons who have definitively ceased to carry on a professional or trade activity.

The *Netherlands Government* emphasizes that the answer to this question cannot, in its view, differ from that which it suggested previously, in the event that the person concerned is in receipt of a long-term benefit under an old-age or invalidity insurance scheme. On the other hand, since recipients of a short-term benefit under an unemployment or sickness insurance scheme are in principle dependent on the labour market in order to support themselves, they retain the status of workers, in the current sense of the term.

Where such persons are also workers within the meaning of Article 1 of Regulation No 1408/71, they are covered, according to the Netherlands Government, by the rules in Title II of that regulation for determining the legislation applicable. In that case, Question 3 should be answered in the affirmative.

J. C. Moitinho de Almeida
Judge-Rapporteur