conflict rules to be applied in each situation.

Since recipients of supplementary pensions are not in one of the situations referred to in those articles, the principle that the legislation of a single Member State only is to apply cannot be invoked for their benefit.

2. Supplementary pensions paid under schemes established by industrial agreements, which do not constitute legislation within the meaning of Article 1(j) of Regulation No 1408/71, do not come within the scope *ratione materiae* of that regulation. Article 33, which prohibits Member States from making deductions from statutory pensions of Community nationals where the cost of the benefits received in return is not borne by one of their institutions, may not be relied upon against a Member State which, under its sickness scheme, provides for a contribution to be deducted from supplementary pensions based on industrial agreements and paid to persons residing in another Member State who receive sickness benefits pursuant to the legislation of that State.

REPORT FOR THE HEARING
in Case C-253/90 *

I — Legal background

National legislation

1. The Law of 9 August 1963 establishing and organizing a compulsory sickness and invalidity insurance scheme (Moniteur Belge, 1 and 2 November 1963, p. 10555), provides in Article 121(10), as amended by Article 161 of the Law of 8 August 1980 concerning the budget proposals for 1979/80 (Moniteur Belge, 15 August 1980, p. 9514), for a deduction to be made from statutory old-age, retirement, service-related and survivors' pensions or any other advantage replacing such a pension and from any benefit intended to supplement a pension. The proceeds of that deduction are to be paid to the Institut National d'Assurance Maladie (National Sickness Insurance Institution).

Following the judgment of the Court of Justice in Case 275/83 *Commission* v *Belgium* ([1985] ECR 1097), the abovementioned provisions no longer apply to the statutory pensions of Community nationals residing in a Member State other than Belgium. However, they continue to apply to the supplementary pensions of those nationals.

* Language of the case: French.

Community legislation

2. Article 13(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6), provides that

'... persons to whom this regulation applies shall be subject to the legislation of a single Member State only.'

In the words of Article 33 of that regulation

'The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorized to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.'

II — Facts and procedure

3. On 29 September 1988 the Commission sent a formal letter pursuant to Article 169 of the EEC Treaty, pointing out that the abovementioned Belgian legislation was incompatible with the Community rules in so far as it led to the deduction of sickness insurance contributions from the supplementary retirement benefits of persons who, because they resided in a Member State other than Belgium, received sickness benefits in that other Member State. In that letter the Commission requested the Belgian Government to submit its observations within two months of receipt of the letter.

4. In its reply of 9 December 1988, the Belgian Government challenged the Commission's analysis, stating that extra-statutory benefits were excluded from the substantive scope of Regulation No 1408/71, that the principle that the legislation of a single Member State only is to apply was not relevant in this instance, that Article 33 of that regulation was inapplicable and that the position adopted by the Commission led to unequal treatment between migrant workers and those remaining in Belgium, to the disadvantage of the latter.

5. The Commission took the view that those arguments were not relevant, and therefore on 29 December 1989 issued a reasoned opinion requesting the Belgian Government to take the necessary measures to comply therewith within two months of its notification.

6. By letter of 19 April 1990, the Belgian Government challenged the reasoned opinion, putting forward a number of arguments based on the inapplicability of Regulation No 1408/71 to benefits not within its substantive scope and, consequently, on the inapplicability of the

principle that the legislation of a single Member State only is to apply.

7. The Commission then brought these proceedings. The application was lodged at the Court Registry on 20 August 1990.

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.

III — Forms of order sought by the parties

8. The *Commission* concludes that the Court should:

(i) declare that, by deducting sickness insurance contributions from supplementary retirement benefits or any other benefit replacing statutory old-age, retirement, service-related and survivors' pensions for Community nationals residing in another Member State under whose legislation they are entitled to sickness benefits, the Kingdom of Belgium has failed to fulfil its obligations under Article 13(1) in conjunction with Article 33 of Regulation (EEC) No 1408/71 of the Council;

(ii) order the Kingdom of Belgium to pay the costs.

The *Kingdom of Belgium* concludes that the Court should:

(i) declare the Commission's application unfounded;

(ii) order the Commission to pay the costs.

IV — Pleas in law and arguments of the parties

9. The *Commission* takes the view that the deductions made by the Belgian authorities from supplementary retirement pensions or any other benefit replacing statutory old-age, retirement, service-related or survivors' pensions paid by their services to persons residing in another Member State are incompatible with Article 13(1) in conjunction with Article 33 of Regulation No 1408/71, on the ground that those persons are compulsorily subject to the sickness insurance scheme of the Member State of residence and that, consequently, insurance against the risk of sickness is the responsibility not of the Belgian State but of that other Member State.

In that respect, the Commission points out that Article 13(1) sets out the fundamental principle that the legislation of a single Member State only is to apply, while Article 33 gives concrete form to that principle in the sphere of sickness insurance contributions deducted from old-age benefits, which are covered by that regulation.

10. In support of that assertion, the Commission argues, in the first place, that the principle that the legislation of a single Member State only is to apply may be invoked to the advantage of the workers concerned as a general principle which, although exemplified in Article 13(1) of Regulation No 1408/71, existed before that regulation was adopted; its application,

accordingly, is not to be confined to the situations covered by that regulation. The principle is thus applicable in the present case even though the substantive scope of that regulation does not include supplementary retirement schemes.

11. In the second place, the Commission points out that, according to the case-law of the Court in the context of disputes relating to situations prior to the entry into force of Regulation No 1408/71, the aim of Articles 48 and 51 of the EEC Treaty is to establish the greatest possible freedom of movement for workers, and includes the abolition of statutory obstacles capable of putting migrant workers at a disadvantage. It follows that those provisions must in any case be interpreted as meaning that they are intended to prevent migrant workers from being put at a disadvantage. Thus the Court held that the application of national legislation other than that of the country of employment was prohibited where it obliged the person concerned to contribute to the financing of a social security institution which was unable to provide him with additional benefits in respect of the same risk and of the same period (see judgment in Case 92/63 *Nonnenmacher* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 281).

Similarly, the Court confirmed the principle that a Member State other than the country of employment is prohibited from applying its social security legislation where to do so would lead to an increase in the charges borne by workers without any corresponding supplementary protection by way of social security (see judgment in Case 19/67 *Bestuur der Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 345).

12. According to the Commission, it follows from that case-law that the principle that a worker is to be subject to the legislation of a single Member State only is intended to avoid any plurality or purposeless confusion of contributions and liabilities which would result from the application of several national legislative systems. The Court has thus drawn a parallel between the scheme applicable where contributions are concerned and that applicable with regard to entitlement to benefits. The Commission further points out that while the Member States are free to legislate in the spheres which come within their competence, they may not rely on their national legislation to avoid their obligations under Community law. The Commission considers, accordingly, that no Member State is authorized, in order to finance its own sickness insurance scheme, to levy contributions, even deductions from benefits not covered by Regulation No 1408/71, if the legislation of another Member State is designated by the Community rules as the applicable legislation.

13. The Commission also points out that the Court held in Case 275/83 *Commission* v *Belgium* ([1985] ECR 1097) that deductions from pensions may not be made by a Member State where the benefits corresponding to that deduction are not the responsibility of an institution of that Member State. With regard to the situation of a worker who is entitled to two pensions under different national schemes, Articles 27 to 32 of Regulation No 1408/71 are specifically intended to designate the legislation of a single Member State to grant sickness benefits. In this instance, there is no essential difference between contributions deducted from statutory pensions and those deducted from supplementary pensions. Those deductions are all laid down in the same statutory provisions and are intended to finance the general sickness insurance scheme.

14. Finally, the Commission contends that the argument put forward by the Belgian Government claiming that the deduction in question is not a social security contribution but that it resembles a solidarity tax is of no relevance because that characteristic also covers deductions from pensions. Moreover, that argument did not prevent the Court from declaring in Case 275/83, cited above, that Article 33 of Regulation No 1408/71 had been infringed. The decisive factor as regards the application of the regulation is not the basis for the contributions but the purpose to which they are put, since it is at that level that a break is observed in the parallelism between contributions and entitlement to benefits.

15. The *Belgian Government* contends, first of all, that the Belgian legislation called into question is primarily intended to stabilize the financial position of the health care system. The deduction provided for in Article 121(10) of the Law of 9 August 1963 is far from being a social security contribution because it is effected irrespective of whether or not the recipient of the pension or supplementary benefit receives health benefits under the Belgian scheme. That deduction thus bears more resemblance to a solidarity tax on the overall amount of pensions and benefits and is made only if that overall amount exceeds a certain level regarded as the ceiling for granting the preferential scheme for the refund of health charges.

16. The Belgian Government then points out that the sole objective of Regulation No 1408/71 is to establish rules for the coordination of social security schemes in order to avoid placing migrant workers in an unfavourable legal position, as stated in the judgment in the *Nonnenmacher* case, cited above. The Belgian rules entail no discrimination with regard to those workers because the solidarity contribution deducted from the supplementary pension affects both recipients of the pension residing in Belgium and those residing in another Member State.

17. The Belgian Government contends, moreover, that Article 1(j) of Regulation No 1408/71 excludes the provisions of industrial agreements from the scope of that regulation. That exclusion was justified by the need for supplementary social security schemes to be coordinated at national level. It follows that Article 33 of the regulation cannot apply to supplementary pensions. The Belgian Government states that it was for that reason, moreover, and in consequence of the judgment in the case of *Commission* v *Belgium* cited above, that when it adapted the Belgian rules to Article 33 of the regulation it did so in respect of statutory pensions alone.

18. According to the Belgian Government, the principle that the legislation of a single Member State only is to apply, invoked by the Commission, is not based on any provision of Community law or on the existence of a general principle in the national laws of the Member States. The Court has always related the concept that the legislation of a single Member State only is to apply to the interpretation of a specific provision in a regulation. If there were a general unwritten principle in Community law that the legislation of a single Member State only was to apply, there would be no reason to mention such a principle in Articles 13 and 33 of Regulation No 1408/71.

19. The Belgian Government observes finally that the legal ground on which the Commission bases the alleged infringement is incorrect. In support of its claim that the Belgian legislation did not comply with Community law, the Commission should not have referred to articles of Regulation No 1408/71 which do not apply to supplementary pensions; it should have relied on the infringement of the general principle, applicable to situations not covered by Article 13(1) of that regulation, that the legislation of a single Member State only is to apply.

P. J. G. Kapteyn
Judge-Rapporteur