OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 14 July 1993 *

Mr President,
Members of the Court,

1. This case has come before the Court by way of a reference for a preliminary ruling under Article 177 of the EEC Treaty by the Sozialgericht (Social Court), Münster, in the context of the proceedings pending before that court between Mr Hoorn and the Landesversicherungsanstalt Westfalen (Regional Insurance Office for Westphalia).

The question referred to the Court essentially turns on whether a complementary agreement to the Convention on Social Insurance of 29 March 1951 between the Federal Republic of Germany and the Kingdom of the Netherlands is compatible with Articles 48(2) and 51 of the EEC Treaty and Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. [1] More particularly the case concerns Complementary Agreement No 4 of 21 December 1956 on the settlement of rights acquired between 13 May 1940 and 1 September 1945 by Dutch workers under the German social insurance scheme.

2. For present purposes it should be recalled that Article 2(1) thereof provides that periods of insurance completed between 13 May 1940 and 1 September 1945 by Dutch workers under the German pension insurance scheme are to be taken into account as if they had been completed under the legislation of the Netherlands, if the persons concerned ceased working before 1 September 1945 and returned to the Netherlands by 31 December 1945. Under paragraph 2 of that article, Netherlands nationals not previously affiliated to the Netherlands social insurance scheme were to be deemed so affiliated from the date on which they began to work in Germany; that provision, it should however be stated, is to apply only if it results in a more favourable outcome for the person concerned.

3. I come now to the facts underlying the present proceedings.

By a decision of 24 November 1989 the Landesversicherungsanstalt, Westphalia, under Article 2(1) of the aforementioned Complementary Agreement, dismissed the request for an old-age pension submitted by Mr Hoorn, a Netherlands citizen who had

* Original language: Italian.

1 — Consolidated version of 10 December 1992, OJ 1992 C 325, p. 1.

been forced to work in a factory in Dortmund, Germany, during the Second World War, from 31 July 1943 to 31 March 1945.

Mr Hoorn contested that decision, contending in the first place that Complementary Agreement No 4 was no longer applicable to him under Article 2(2) thereof.

He pointed out that following the reform of social security legislation carried out in the Netherlands by means of a series of laws which entered into force between 1957 and 1967 the rights acquired under the earlier system by workers to whom an old-age pension had not yet been granted were commuted by the payment of a *pro tanto* sum in redemption of the insurance periods covered by the previous system. The application thereof meant that Mr Hoorn received an amount significantly less than the income which he would have been granted under the German invalidity and old-age insurance scheme: for that reason Complementary Agreement No 4 is alleged not to apply to the present case, inasmuch as under the reservation mentioned in Article 2(2), the renvoi to Netherlands legislation is effective, in the case of persons like himself not affiliated to the social security scheme before May 1940, only where that would result in a more favourable outcome for such persons.

Similarly, Mr Hoorn maintained that the provisions of Article 2 of the Agreement conflicted with Article 3 of Regulation No 1408/71, inasmuch as he was suffering discrimination in contrast to German forced workers and Dutch frontier workers for whom access to the German assurance scheme is possible, and with Article 8 thereof which provides that conventions concluded in that connection between the Member States must be based on the principles and in the spirit of the Regulation.

4. On those grounds, by an order of 19 June 1992, the German court stayed the proceedings in order to seek a ruling from the Court of Justice on the validity of the Agreement, to the extent to which it did not permit the persons referred to therein to claim rights against the German invalidity and old-age insurance scheme for workers.

5. That having been said, it should be stated straight away that to the extent to which the question raised by the Sozialgericht, Münster, turns on the validity and interpretation of Complementary Agreement No 4 to the Convention between Germany and the Netherlands, it falls outside the competence of the Court. In fact, it is for the national court to interpret and establish whether, should the legal fiction laid down in Article 2(2) of the Agreement not result in a more favourable outcome for those con-

cerned, the application of the principle of the transfer of pension rights laid down in paragraph 1 would suffice.

In this connection it is sufficient to refer to the abundant case-law of the Court clarifying that under the division of competences underlying Article 177 of the EEC Treaty it is for the national court and not the Court to interpret national law [2] including, therefore, bilateral conventions concluded between two Member States; it is also for the national court to assess, within the context of its legal order, the relationship of convention provisions with other legislation.

It may perhaps also be observed that the submission of the question to the Court in actual fact presupposes that the Sozialgericht, Münster, has resolved the interpretative problem raised by the aforementioned Article 2(2) by rejecting the arguments urged by Mr Hoorn. Otherwise it would indeed be difficult to understand the interest in making the reference for a preliminary ruling.

6. For those reasons, therefore, it seems that the question referred to the Court must be construed as seeking to ascertain whether Articles 48 and 51 of the EEC Treaty and, more particularly, Articles 3 and 8 of Regulation No 1408/71, are to be interpreted as precluding the application of Article 2 of Complementary Agreement No 4.

7. As to the compatibility of Complementary Agreement No 4 with Regulation No 1408/71, one cannot but point out that there is no conflict between the two sets of provisions; or, in other words, if a conflict is theoretically conceivable, such conflict is already entirely resolved by the provisions of the Regulation.

Article 3 enshrines as a fundamental principle the Community system laid down in Article 48 of the Treaty, that is to say the prohibition of discrimination based on nationality. In addition to stipulating that the 'persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State', it goes on to make an exception for the 'special provisions' laid down in the Regulation itself. Exceptions to the general scope of the principle are therefore permitted on account of the specific nature of certain situations. Those 'special provisions' certainly include Article 7 which, together with Articles 6 and 8, governs the relationship between the Regulation and

2 — See on this point, amongst others, judgments in Case 38/77 *Enka* v *Inspecteur der Invoerrechten en Accynzen* [1977] ECR 2203; Case 296/84 *Sinatra* v *FNROM* [1986] ECR 1047; Case 240/87 *Deville* v *Administration des Impôts* [1988] ECR 3513; and Case C-227/89 *Ronfeldt* v *Bundesversicherungsanstalt fur Angestellte* [1991] ECR I-323.

social security conventions concluded between Member States.

Now, Article 6 provides generally for the Regulation to supersede all social security agreements concluded exclusively between two or more Member States prior to the date of entry into force of the Regulation; [3] by way of derogation therefrom Article 7 provides that the application of certain multilateral social security conventions, and of certain provisions of the bilateral conventions listed in Annex III to the Regulation, is to remain unaffected: amongst those particular mention is made of Articles 2 and 3 of Complementary Agreement No 4 to the Convention of 29 March 1951 between Germany and the Netherlands. Accordingly, under Article 7(2) of the Regulation, such provisions are to 'continue to apply'.

8. Thus is resolved in advance any conflict between the provisions of the Regulation and those of conventions already concluded between the Member States: accordingly, no problem can arise as to the compatibility with the Regulation of the specific and possibly different provisions contained in those conventions whose applicability is safeguarded by Article 7(2).

9. On the other hand it is worth noting that the agreement in question regulates the specific situation of Netherlands nationals engaged as forced labour during the Second World War and, by regularizing their social security position, seeks to mitigate the unfavourable consequences for those concerned of events connected with that conflict. In that respect and in regard to provisions of national law not originating in a convention, the Court has already had occasion to state that the principle of equal treatment does not automatically apply to specific schemes relating to periods prior to 1945. [4] The special nature of those situations is, moreover, recognized in Regulation No 1408/71 itself which in Article 4(4) excludes from its sphere of application 'benefit schemes for victims of war or its consequences'.

10. Nor, it seems to me, is it appropriate in the present case to invoke Article 8 of the Regulation which authorizes the Member States, as need arises, to conclude conventions with each other based on the principles and in the spirit of the Regulation. It is evident from a reading of Articles 6, 7 and 8, taken together, that Article 8 concerns conventions which may be concluded between the Member States *after* the entry into force of Regulation No 1408/71 and the application of the provisions thereof, and does not lay down criteria in the light of which the application of the agreements unaffected by virtue of Article 7 may be assessed.

3 — It should, however, be pointed out in that connection that the Court has made it clear that Articles 48(2) and 51 of the Treaty must be interpreted as precluding the loss by a worker of social security advantages as a result of the inapplicability of conventions concluded between two or more Member States and incorporated into their national law: see judgment in *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte*, cited above.

4 — See the judgments in Case 79/76 *Fossi* v *Bundesknappschaft* [1977] ECR 667, Case 9/78 *Directeur Régional de la Securité Sociale de Nancy* v *Gillard* [1978] ECR 1661, and Case 207/78 *Ministère Public* v *Even* [1979] ECR 2019.

On that premise, therefore, and on the basis that that interpretation is adopted, it does not seem that Article 2 of the Complementary Agreement is contrary to the 'principles and ... spirit of [the] Regulation'. Even though the terms in which it is couched are in fact based essentially on the principles of the aggregation of insurance periods and the 'exportability' of social security benefits, it also acknowledges the principle of the transfer of entitlement to benefit. In fact, on the basis of Article 48, if the total duration of the insurance periods completed under the legislation of a Member State is less than one year and, for that reason, they do not give rise under that legislation to any right to social security benefits, such periods are to be taken into consideration by the competent institutions of each of the other Member States concerned in order to determine the rights of the worker, and in order to calculate the actual amount of the benefit; in such a situation no *pro rata* apportionment of the benefits themselves is possible.

If therefore the principle of the transfer of rights to benefit is, within the limits outlined, accepted by Regulation No 1408/71, it seems difficult to aver that provisions inspired by it are contrary to the principles and the spirit of the Regulation.

11. Finally, it must be examined whether the maintenance in force of Complementary Agreement No 4 alongside Regulation No 1408/71 and the consequent loss of benefits which would have accrued to the applicant as a result of the application of the other provisions of the Regulation itself is compatible with Articles 48(2) and 51 of the Treaty.

Now, even having regard to the absolutely special nature of the situation which the contested agreement seeks to provide for, it does not appear to conflict with the objective of contributing to the greatest possible degree of freedom of movement for workers. If indeed in order to attain that objective, Article 51 specifically requires social security rights acquired in the different Member States to be observed and taken into account in the calculation of the total period of insurance, the provisions of the agreement which take into consideration insurance periods completed under the social security scheme of a State other than the State of origin of the person concerned and merely direct the latter to pay the relevant benefits do not constitute an impediment to the attainment of the objective pursued by that article. On the other hand the different treatment accorded to German forced labourers, as also to Dutch workers and those who stayed in Germany at the end of the conflict, may be objectively justified inasmuch as in that case affiliation to the German social security scheme did not have that provisional and exceptional character to be found in the cases governed by the Agreement. The requirement of equal treatment laid down in Article 48(2) of the Treaty — and which in the field of freedom of movement for workers gives effect to the general principle of non-discrimination enshrined in Article 7 — cannot evidently be

infringed by provisions which govern different situations differently.

There is perhaps no need to mention that in the case under examination the alleged discrimination was in no way linked to the nationality of the persons concerned.

At most, as the Commission points out in its observations, there might be a problem of the compatibility with Community law of the Netherlands provisions amending the social security system, but manifestly that problem goes beyond the terms of the question before the Court for a preliminary ruling.

Conclusion

12. On the basis of the foregoing considerations I therefore propose that the following reply should be given to the question submitted by the Sozialgericht, Münster:

Neither Articles 48 and 51 of the EEC Treaty nor the provisions of Regulation (EEC) No 1408/71 preclude the application of Article 2 of Complementary Agreement No 4 to the Convention between the Federal Republic of Germany and the Kingdom of the Netherlands on social security of 29 March 1951, under which the insurance periods completed under German legislation by Dutch forced labourers during the Second World War are deemed to have been completed under the legislation of the Netherlands.