OPINION OF ADVOCATE GENERAL GULMANN
delivered on 18 November 1993 *

1. The Raad van Beroep (Social Security Court), The Hague, has submitted two questions on the interpretation of Regulation No 1408/71 on the application of social security schemes to employed persons and others. [1] Those questions arose in proceedings between a Belgian company, Rheinhold en Mahla, and the Bedrijfsvereniging voor de Metaalnijverheid (Professional and Trade Association for the Metal Industry) in the Netherlands which is responsible for collecting social security contributions in the sector concerned.

2. The background to the case is as follows.

Van Breugel Isolatie BV was a Dutch company which in 1983 and 1984 carried out insulation work for Rheinhold en Mahla. The work was carried out on a subcontractual basis in Belgium. In the order for reference it is stated that the workers who carried out that work 'had their main residence in the Netherlands and carried out the same type of work in that country, that there was an organizational relationship between Van Breugel in the Netherlands and the workers during their stay in Belgium and that manpower was made available in the Netherlands'. The Raad van Beroep therefore proceeded on the assumption that the workers were covered by the Netherlands social security scheme (see Article 14(1)(a) of Regulation No 1408/71) and that social security contributions were therefore payable in the Netherlands under Netherlands law in respect of the work in Belgium also. The contributions concerned were those under the laws on insurance against unemployment, incapacity for work and sickness.

3. Van Breugel later became insolvent without settling its debt to the Bedrijfsvereniging which subsequently decided that the unpaid contributions in respect of the work carried out in Belgium for Rheinhold en Mahla (a total of some HFL 50 000) were to be paid by the latter undertaking. The Bedrijfsvereniging took that decision pursuant to the Coördinatiewet Sociale Verzekering (Coordinating Law on Social Insurance, hereinafter 'the CwSV'). Under Article 16a to Article 16e of the CwSV a third party may under

* Original language: Danish.

1 — The version of Regulation (EEC) No 1408/71 relevant in these proceedings is that annexed to Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). Pursuant to Article 3 of Regulation No 2001/83 that version is applicable from 1 July 1982.

certain circumstances be held liable for payment of social security contributions. Under Article 16b of the CwSV a main contractor is liable for the contributions which a subcontractor should have paid for his employees.

Rheinhold en Mahla challenged the Bedrijfsvereniging's decision before the Raad van Beroep, denying that it could be held liable for the non-payment of the social security contributions.

4. The Raad van Beroep has decided on a number of Rheinhold en Mahla's objections and in its order for reference concluded that the conditions in the CwSV for holding Rheinhold en Mahla liable for non-payment of contributions by Van Breugel are met 'assuming that (legal) persons abroad may be held liable under the relevant provisions of the CwSV'.

The Raad van Beroep proceeds on the assumption that the decision on this issue hinges on whether the CwSV, in particular Article 16a to Article 16e, is within the scope of application of Regulation No 1408/71.

According to the order for reference the Raad van Beroep's doubts in that regard stem from the fact that the special rules on liability may 'go further than the coordination of the Netherlands system of social security aimed at by the CwSV' and that it is not certain that 'the scope of the regulation in question is so wide that [a third party], who is not a person covered by the regulation, may also be held liable thereunder'.

5. On that basis the Raad van Beroep submitted the following questions for a preliminary ruling:

'(1) Does the Coördinatiewet Sociale Verzekering fall within the matters covered by Regulation (EEC) No 1408/71?

(2) If the answer to Question 1 is in the affirmative, does this mean that Article 16a to Article 16e (Wet Ketenaansprakelijkheid) incorporated in the Coördinatiewet Sociale Verzekering may not and must not be excluded from the matters so covered, having regard to the purpose of Article 51 of the EEC Treaty?'

The national court's questions

6. In these proceedings it may be presumed that it is the law of the Netherlands which is applicable as regards the existence, calculation and collection of the social security contributions payable by the subcontractor *inter alia* for the work which it had performed for Rheinhold en Mahla. The Raad van Beroep found that the employees who performed work for the subcontractor in Belgium were workers posted to another State within the meaning of Article 14(1)(a) of Regulation No 1408/71, [2] that is to say that the employees were in one of the special situations for which the regulation derogates from the basic rule that employees are subject to the social security legislation in the State in which they are employed (see Article 13 of Regulation No 1408/71).

7. The question in these proceedings is whether the fact that Netherlands legislation is applicable as regards the legal relationship between the employee, the employer and the competent institution signifies that the rules in the Netherlands legislation on the liability of a third party as the main contractor for the employer's non-payment of social insurance contributions can be applied to a foreign undertaking in connection with work performed in another country.

8. As I understand the order for reference, the Raad van Beroep proceeded on the basis that it was the intention of the Netherlands legislature that the relevant rules on the liability of third parties should also apply to foreign undertakings in connection with work performed in other countries. That was confirmed in the observations of the Netherlands Government. In view of the fact that the rules in question are thus intended to have extra-territorial effect, irrespective of whether or not the rules are covered by Regulation No 1408/71, it is appropriate to consider what is the background to the national court's questions. It may be that the Raad van Beroep merely wishes to ensure that the result which is envisaged by the Netherlands legislature but not expressly apparent from the rules in question is also the result flowing from Regulation No 1408/71. Another possibility is that the questions were asked because the Raad van Beroep may have doubts as to whether the result envisaged under the Netherlands legislation might be incompatible with Community law. Moreover, there might be an interest in obtaining a ruling on whether Regulation No 1408/71 is applicable in the present context since Article 92 of that regulation lays a basis for the collection of contributions payable in the territory of another Member State.

2 — Article 14(1)(a) provides that: 'A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting'.

Whatever may be the background to the questions, there can be no ground for doubting the relevance of the Raad van Beroep's question whether a rule such as that in Article 16b of the CwSV is within the scope of Regulation No 1408/71.

9. What is more doubtful is whether the Court of Justice should give a ruling on the first of the questions referred to it, that is whether the CwSV as such is covered by Regulation No 1408/71.

The background to that question may be the view — possibly contended for by the Bedrijfsvereniging before the Raad van Beroep — that if the major part of certain legislation is undoubtedly within the scope of application of the regulation, it may be concluded that the legislation in its entirety is so covered.

10. It is apparent from the information given in these proceedings that the CwSV came into force in 1954 and is designed in particular, as is apparent from its name, to create common rules on the scope of a number of concepts which are relevant for the application of the various social security laws, including, for example, what is meant by the term 'pay'.

There can hardly be any doubt that such rules, which in key respects specify and supplement rules set out in social security legislation expressly enumerated in Article 4(1) of Regulation No 1408/71, are also covered by that regulation (see below for the case-law regarding the interpretation of Article 4(1)). Indeed, all those who have submitted observations in this case have assumed that in any event the major part of the rules in the CwSV are covered by Regulation No 1408/71.

11. But it cannot necessarily be concluded therefrom that the rule directly in point in this case, Article 16b, is necessarily also covered by Regulation No 1408/71. Just because a rule is contained in a law which is for the rest covered by the regulation, that does not mean that that rule must necessarily also be so covered. [3] Nor, by the same token, can it be concluded that because a rule is contained in a law which is clearly otherwise not covered by the regulation, it must for that reason fall outside the scope of application of the regulation. [4] The decisive factor must be whether the rule in question can be regarded as having a sufficiently relevant link for the purposes of the regulation with one of the branches of social security mentioned in Article 4(1) of Regulation No 1408/71.

12. On the basis of the information supplied regarding the content of the CwSV, the

3 — See for example the judgment of the Court of Justice in Case 39/76 *Mouthaan* [1976] ECR 1901, paragraphs 17 to 21.

4 — See for example the judgment of the Court of Justice in Case C-45/90 *Paletta* [1992] ECR 3423, paragraphs 13 to 17.

Court could presumably answer the first question in the affirmative, subject to the proviso that that answer does not necessarily imply that the provisions of Article 16a to Article 16e are also covered by Regulation No 1408/71. On the other hand it must also be recognized that there was no call in these proceedings to examine all the rules in the CwSV and that it may therefore be somewhat difficult to have an overview of the consequences of such an affirmative answer. Accordingly, and in view of the fact that the answer to that question would not be decisive and therefore is not necessary for a decision on the substantive issue in this case, I am inclined to suggest that the Court refrain from answering Question 1.

Is a rule such as Article 16b of the CwSV covered by Regulation No 1408/71?

13. The Court has been told that the current rules in Article 16a to Article 16e were introduced in 1981 by the Wet Ketenaansprakelijkheid (Law on ultimate responsibility for certain payments), which fundamentally altered the earlier rules on who is liable to pay social security contributions. Article 16a introduced liability for undertakings which make use of 'hired' manpower in cases where the undertaking which hired out the manpower does not pay social security contributions. As mentioned above, Article 16b introduced corresponding liability for main contractors in the event of non-payment by a subcontractor. Articles 16c, 16d and 16e contain supplementary rules regarding the liability referred to in Article 16a and Article 16b.

As mentioned above, the Raad van Beroep has taken the view that the present case concerns a situation covered by Article 16b. For that reason and also because there are a number of differences between situations concerning the hiring-out of manpower and situations regarding contracts for works that may be material to the legal assessment, I would propose that the Court confine its ruling to Article 16b.

14. It has been stated that the special rules on liability were prompted by the wish to combat problems arising in conjunction with actual, serious misuse of 'the hiring-out of manpower' and 'subcontracting' with a view to avoiding payment of social security contributions. It is not disputed that the rules are appropriate means for combating such misuse and rules with the same object are said to exist in Belgium and Germany in any event, albeit with more limited or different scope.

15. Rheinhold en Mahla claim that a rule such as Article 16b of the CwSV is not within the scope of Regulation No 1408/71 whereas everyone else who has submitted observations in these proceedings, namely

the Bedrijfsvereniging, the Netherlands, German and Greek Governments, and the Commission, submits that such a rule is covered by that regulation.

16. In the Commission's observations it is argued, rightly in my view, that even rules which are not contained in laws which directly regulate the branches of social security listed in Article 4 of Regulation No 1408/71 are covered by the regulation if they can be regarded as having a sufficiently relevant link with those laws and that that is the case of provisions which lay down rules on the collection of social security contributions from employers.

17. It has not been disputed in these proceedings that according to the case-law there is no significance in the fact that the CwSV is not included in the declaration made by the Netherlands Government pursuant to Article 5 of Regulation No 1408/71 on what legislation falls within the scope of the regulation. [5]

18. It is also true that the Court of Justice has avoided a restrictive interpretation of the scope of Article 4(1) and that it proceeds on the basis that the regulation applies to the social security schemes concerned in their entirety (see the judgment in *Jansen* in which the Court held that the German rules on the reimbursement of social security contributions were within the ambit of the earlier regulation, No 3). [6]

19. Nor can there be any doubt that the regulation is applicable to national rules on the collection of social security contributions having regard *inter alia* to the Court's judgment in the case of the *Foot-Ball Club d'Andlau* in which it stated that it follows from the regulation that 'if an employer established in a Member State other than the one whose social security legislation is applicable to the worker is not bound to pay contributions to the social security authorities of his own State, he is obliged to pay those laid down by the legislation which is applicable to the worker'. [7]

It may therefore be assumed that rules on the collection of social security contributions in connection with the branches of social security listed in Article 4 from amongst others foreign employers are within the scope of Regulation No 1408/71.

20. Apart from Rheinhold en Mahla, everyone who has submitted observations in these

5 — See Case 70/80 *Vigier* [1981] ECR 229.

6 — Case 104/76 *Jansen* [1977] ECR 829, paragraph 6, fourth subparagraph.

7 — Case 8/75 *Caisse Primaire d'Assurance Maladie de Sélestat* v *Foot-Ball Club d'Andlau* [1975] ECR 739, paragraph 17.

proceedings concludes that the same must apply to rules under which, in the event of non-payment by the employer, payment may be demanded from persons other than the direct employer that is to say persons who are not party to the relationship between the employee, the employer and the competent institution.

They consider it immaterial that the obligation to pay extends to third parties, not just to the employer.

21. However the question arises whether that view is necessarily correct. The Raad van Beroep, rightly in my view, stated that a third party such as Rheinhold en Mahla does not directly fall within the persons covered by the regulation.

As mentioned above, there are clear indications in the regulation (see Article 4(2) and Article 92) that rules on the obligation of an employer to pay social security contributions are covered by the regulation. But there are no such clear indications that the regulation is applicable to the rules on the liability of third parties for payment of social security contributions. [8]

22. It must be assumed in my view that an answer to the question cannot be derived with any certainty from any of the express rules in the regulation or from the case-law.

The question must be resolved on the basis of an assessment of whether it may be concluded from the aims of the regulation that its provisions, including primarily the provisions on the applicable legislation in Article 14(1)(a), also apply to rules under which the competent institution may, pursuant to national law, demand payment of social security contributions from third parties.

23. As mentioned above, it is undisputed that: (a) rules on liability such as those in question are suitable for protecting against actual abuses; (b) they are therefore an appropriate means for protecting the basis for financing social security schemes; and (c) they can accordingly be regarded as affording protection to employees in general.

8 — The regulation contains only one express provision relating to the legal position of third parties, namely Article 93 on the rights of institutions responsible for benefits against liable third parties.

But according to the information given, failure by an employer to make a payment does not have a direct influence on the size of the benefits paid to the employees in question. For the individual employees, the only significance of the rules on liability is that the general basis for financing social security schemes is protected.

Article 16b is thus primarily designed to protect the financial basis by reducing the risks that would otherwise flow from the bankruptcy of an employer. In my view that risk is different from those that are covered by the legislation listed in Article 4(1).

24. Other factors that may be cited as militating against holding the regulation applicable to the rule at issue are: (a) account must also be taken of the interests of third parties in other countries; (b) it is possible that liability for a foreign undertaking might inhibit the free movement of services; and (c) there should be requirements as to the clarity of provisions leading to the application of national rules which impose on foreign undertakings obligations in connection with action carried out in other countries.

25. The interests of the foreign third parties concerned should in my view be taken into account in the Court's assessment. If the regulation does apply to a rule such as the CwSV with the result that foreign undertakings are also liable for payments, that might have serious economic consequences for third parties acting in good faith.

If the rule on liability in question is extended to apply to foreign undertakings, they will necessarily be obliged to acquaint themselves with Netherlands legislation. It may perhaps be asserted that that requirement is not unreasonable if they make use of Dutch subcontractors. In addition, under the Netherlands rules it is possible for main contractors to lodge the proportion of the contract sum which corresponds to the social security contributions payable in a blocked bank account and thus to limit the risk which application of the CwSV would entail for them.

But that does not rule out the possibility that application of the Netherlands rules on liability to foreign undertakings might have far-reaching and unpredictable consequences for the latter and that those consequences will have a more burdensome effect for foreign undertakings than for Dutch undertakings in so far as the foreign undertakings will be

called upon to acquaint themselves with and act in accordance with foreign legislation. [9]

26. Rheinhold en Mahla have claimed that the application of the Netherlands rule at issue to foreign main contractors might serve to limit the free movement of services which is the aim of Article 59 et seq. of the Treaty (and thus indirectly also the free movement of workers which is the aim underlying Article 48 of the Treaty).

Everyone else who has submitted observations in this case questions to a greater or lesser extent whether that view is correct and contends in any event that any such restrictions cannot signify that Regulation No 1408/71 is not to apply to a rule such as that contained in Article 16b of the CwSV.

27. It can hardly be disputed that the application of the Netherlands rule to foreign undertakings may be perceived by those undertakings as a burden that might reduce their interest in making use of services from Dutch subcontractors. On the other hand the practical significance of the restriction should not be overestimated. As mentioned above, undertakings which have a clear understanding of the legal position have an opportunity to limit the risk to a considerable extent. The main obstacle to the free movement of services will presumably be the uncertainty that might arise amongst recipients of trans-national services if they form the impression that there is a risk that they may be obliged to comply with rules in the legislation of the person providing the services without that being set out in clear rules, that is to say without there being a clear basis for their obligation in that respect. [10]

28. It is in my view not altogether easy on the basis of those considerations to rule on the national court's question. There are normally good grounds for extending the scope of application of the regulation where, as here, that may be said to a certain, albeit limited, extent to protect the interests of employees and to obviate disadvantages they might face by virtue of working in another Member State. In addition, there may also be argued to be good substantive reasons for the Netherlands rule at issue to have extra-territorial effect.

9 — As I understand the Netherlands rules, they involve — as the name of the 1981 amending law indicates — a 'chain of liability', that is to say that the person ultimately liable for payment may be an undertaking which, as a main contractor, perhaps at two, three or four removes, has made use of services from a subcontractor which in the implementation of its subcontract has accepted services from other subcontractors and so on. If my understanding of the Netherlands rules and their consequences in such situations is correct, the result may be that for example a French main contractor which has used a Belgian undertaking as a subcontractor which in turn has made use of a Dutch subcontractor to perform part of its subcontract may be liable for payment of any social security contributions which the Dutch subcontractor fails to pay.

10 — The Court has of course stressed on a number of occasions that Community legislation must be unequivocal and its application must be predictable for those who are subject to it (see *inter alia* the judgments in Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11, and in Case 169/80 *Gondrand Frères* [1981] ECR 1931, paragraph 17).

Against that, however, stands the fact that as mentioned above Regulation No 1408/71 does not, in my view, contain rules that give sufficiently clear indications that a rule such as Article 16b of the CwSV should apply to foreign third parties (the legal position of whom is otherwise with only one express exception not dealt with in the regulation).

Taking account of the consideration regarding a third party in another country referred to above and considerations regarding the free movement of services, I conclude that there is not a sufficiently unequivocal legal basis for interpreting Regulation No 1408/71 in such a way as to cover a national rule like Article 16b of the CwSV.

29. If the grounds which, as mentioned above, may be cited for giving rules like Article 16b of the CwSV extra-territorial effect carry such force that the Member States consider that rules on the matter ought to be adopted, that could be done in my view by adopting Community rules on the matter, if necessary amending Regulation No 1408/71. If such a rule was adopted, it would not properly be possible in my view to question its lawfulness on the grounds that it might serve to restrict free movement of services. As mentioned above, some of the restrictive effects would be removed by virtue of the legal situation having become clear and in any event the restrictive effects would be justified by and also proportionate to the objective meriting protection that would constitute the basis for such a rule.

Conclusion

30. In the light of the foregoing I suggest that the Court of Justice give the following answer to the question submitted by the Raad van Beroep:

A provision such as Article 16b of the Coördinatiewet Sociale Verzekering does not fall within the scope of application of Regulation No 1408/71.