OPINION OF ADVOCATE GENERAL JACOBS
delivered on 22 April 1993 *

My Lords,

1. In this case the Hoge Raad of the Netherlands has referred to the Court five questions concerning the interpretation of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) as amended by Council Regulation (EEC) No 1390/81 (OJ 1981 L 143, p. 1) which extended its application to self-employed persons and their families moving within the Community (hereafter 'the Regulation').

2. The respondent in the main proceedings, Mr Zinnecker, is a German national who resided in the Federal Republic of Germany during 1982. He operated on a self-employed basis shops for the sale of foodstuffs both in Germany and, from 10 April to 24 October 1982, in the Netherlands. During that period he carried on his activities as to approximately one-half in the Netherlands and one-half in Germany. His shops in the Netherlands stood in the Slagharen pony park in Slagharen. It appears that he operated shops in the Netherlands not only during the period mentioned above, which is the material period for the purposes of the present proceedings, but each year during the period when the Slagharen park was open. He entered into oral contracts with the park operator each year on the basis of which he obtained the right to carry on his business there.

3. In respect of his activities in Germany during 1982, Mr Zinnecker was not compulsorily insured in that State for one or more of the contingencies covered by the branches of social security to which the Regulation applies. Nor was he covered by voluntary insurance. Although he could have registered for pension insurance (Rentenversicherung), he did not do so.

4. Netherlands legislation provides for a system of national insurance to which two categories of persons are affiliated: (a) persons resident in the Netherlands and (b) non-residents who work as employed persons in the Netherlands. Although Mr Zinnecker did not fall into either of those categories, the competent Dutch authorities sent him an assessment of the national insurance contributions due by him for the period between July and December 1982. The Dutch Government points out in its written observations that the assessment period started in July 1982 because Regulation No 1390/81 which extended the original Regulation No 1408/71 to cover the

* Original language: English.

self-employed and members of their family came into force on 1 July 1982.

5. According to the assessment sent to Mr Zinnecker, the amount due by him was HFL 8 335 calculated on the basis of an income of HFL 36 763. Following a complaint by him, the assessment was reduced repeatedly. According to the final assessment, the amount due by him was HFL 3 407 calculated on the basis of an income of HFL 16 339 and a period of 180 insured days. He appealed against that assessment to the Regional Court of Appeal (Gerechtshof) which set aside the assessment. The Secretary of State for Finance (Staatssecretaris van Financiën) appealed against the decision of the Regional Court of Appeal to the Hoge Raad.

6. The Hoge Raad has referred to the Court the following questions:

'1. In the case of a person residing in the second half of 1982 in Germany and carrying on activities as a self-employed person, in more or less equal proportions both in Germany — where he was not compulsorily insured under a social security scheme because he was not an employee, and also did not belong to a category assimilated thereto, and was also not insured on a voluntary basis — and in the Netherlands, must the question whether he was self-employed within the meaning of Regulation No 1408/71 be answered on the basis of the definition of the concept of a self-employed person applicable to the Netherlands or that applicable to Germany under Article 1(a)(ii) of the Regulation in conjunction with the corresponding paragraph C (Germany) and I (Netherlands) of Annex I thereto?

2. If the reply to the first question must be that the definition applicable to Germany is not decisive on its own, but that the definition applicable to the Netherlands may also, or solely, be decisive, does the fact that under Netherlands legislation a person as referred to in the first question is not covered by compulsory insurance because he is non-resident, render it impossible to deem Article 1(a)(ii), in conjunction with Annex I. I (Netherlands), applicable to him?

3. If the replies to Questions 1 and 2 are to the effect that the person referred to in the first question may be deemed to be self-employed solely on the basis of his activities in the Netherlands, is it then nevertheless necessary for the purposes of Article 14a(2)

of the Regulation also to take into consideration the activities carried on in Germany, which would result in the legislation of the latter State being applicable to the person concerned, or must solely the activities in the Netherlands be taken into consideration, which in accordance with Article 13(2)(b) would result in Netherlands legislation being applicable to him?

4. If a person as referred to in the previous questions is subject to Netherlands legislation, which for present purposes provides for a system of national insurance to which solely residents are affiliated, does it follow from Article 13(2)(b) of the Regulation that such a person, although non-resident, must be deemed to be an insured person for the purposes of that system?

5. If Question 4 is answered in the affirmative, is the person referred to insured in the Netherlands solely during the period in which he carries on activities on Netherlands territory?'

7. The first three questions raise in substance two issues. First, where a person carries on activities on a self-employed basis in the territory of two or more Member States, the law of which of those States determines whether he is a self-employed person within the meaning of Article 1(a)(ii) and, therefore, whether he falls within the personal scope of the Regulation? Secondly, there is the issue which legislation is applicable to a person in the position of Mr Zinnecker. By the fourth and fifth questions the referring court wishes to know, if it is established that a person in that position is subject to Netherlands legislation, whether such a person must be deemed to be insured under the Netherlands system of social security despite the fact that he is not resident in the Netherlands and if so whether he is insured under that system solely during the period in which he carries on activities in Netherlands territory.

8. Before discussing the issues identified above, I will examine the relevant provisions of the Regulation. For convenience, I will refer to the provisions of the Regulation as they appear in the consolidated version contained in Annex I to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

9. Article 2 determines the scope of application *ratione personae* of the Regulation. Article 2(1) provides as follows:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States ...'.

10. According to Article 1(a), for the purposes of the Regulation the terms 'employed person' and 'self-employed person' mean:

'(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies

covered by the branches of a social security scheme for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed,

or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons ... either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

...'.

11. Annex I to the Regulation states:

'I. Employed persons and/or self-employed persons

(Article 1(a)(ii) ... of the Regulation)

...

C. GERMANY

If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the Regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

...

(b) "self-employed person" means any person pursuing self-employment who is bound:

— to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons,

or

— to join a scheme within the framework of compulsory pension insurance.

...

I. NETHERLANDS

Any person pursuing an activity or occupation without a contract of employment shall be considered as a self-employed person within the meaning of Article 1(a)(ii) of the Regulation.

...'.

12. Title II (Articles 13-17) of the Regulation, headed 'Determination of the legislation applicable', contains choice-of-law rules determining the legislation applicable to migrant workers. The case-law of the Court makes it clear that the provisions of Title II have a twofold purpose. First, they are intended to prevent the simultaneous application of a number of national legislative systems to persons covered by the Regulation; secondly, they are intended to prevent such persons from being left without social security cover because there is no legislation which is applicable to them (see Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 12 of the judgment, and Case C-196/90 *De Paep* [1991] ECR I-4815, paragraph 18 of the judgment). In accordance with those objectives, Article 13(1) lays down the general rule that:

'... 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.'

13. As a general rule, a person is subject to the law of the Member State of his employment. Thus, according to Article 13(2)(b), a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State. That rule, however, is subject to certain exceptions including the exception provided for in Article 14a(2) which states:

'A person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State ... .'

Article 14a(2) is supplemented by Article 14a(4) which provides so far as material as follows:

'If the legislation to which a person should be subject in accordance with paragraphs 2 or 3 does not enable that person, even on a voluntary basis, to join a pension scheme, the person concerned shall be subject to the legislation of the other Member State which would apply apart from these particular provisions ... .'

14. I turn now to examine the questions referred by the national court as reformulated above.

15. As stated, the first issue raised by the questions referred is this: where a person carries on activities on a self-employed basis in the territory of two or more Member States, the law of which of those States determines

whether he is a self-employed person within the meaning of Article 1(a)(ii) and, therefore, whether he falls within the personal scope of the Regulation?

16. The Dutch Government states that in order for a person who carries on activities on a self-employed basis in two or more Member States to fall within the personal scope of the Regulation it is sufficient that he is considered as a self-employed person within the meaning of Article 1(a)(ii), taking into account the definitions given in Annex I, under the law of one of the Member States where he carries on activities.

17. The Dutch Government claims that the fact that according to Dutch legislation a person in the position of Mr Zinnecker is not compulsorily insured because he does not reside in the Netherlands does not prevent such a person from being considered a self-employed person for the purposes of the Regulation. According to the Dutch Government, it follows from the definition of self-employed person given in Annex I in respect of the Netherlands that, as regards the activities which he carries on in the Netherlands, a person in the position of Mr Zinnecker is a self-employed person within the meaning of Article 1(a)(ii) notwithstanding the fact that he is not resident in the Netherlands. It follows, according to the Dutch Government, that he falls within the personal scope of the Regulation.

18. Mr Zinnecker states that whether a person is a self-employed person within the meaning of Article 1(a)(ii) depends on the definition of the term 'self-employed person' given in Annex I to the Regulation. Annex I gives different definitions of that term with regard to different Member States. It must therefore be determined which of the definitions contained in Annex I applies in the case where a person carries on activities in more than one Member State. According to Mr Zinnecker, the question whether a person is self-employed is governed by the law of the Member State where he exercises his activities. It follows that the definition of 'self-employed person' given by Dutch law should apply in relation to his activities in the Netherlands and the definition of 'self-employed person' given by German law should apply in relation to his activities in Germany.

19. The Commission claims that the question whether a person is an employed or a self-employed person within the meaning of Article 1(a) should be determined by the law of the Member State whose legislation is applicable on the basis of the choice-of-law rules provided for in Title II. The Commission concedes that this approach is not supported by the letter of Article 13(1) but argues that it is dictated by the objectives of Title II.

20. According to the Commission, if it were accepted that the provisions of Title II apply only to persons who are employed or self-employed persons within the meaning of Article 1(a), certain categories of migrant workers might find themselves in a situation where they would not benefit from the social security scheme of any Member State even though they satisfied the substantive requirements for affiliation to a national social security scheme. This would be the case, for example, if a person carried on activities in a

Member State whose system of social security applied exclusively to residents whereas he resided in the territory of another Member State whose system of social security applied exclusively to persons who were employed there. In such a case, the person concerned would not fall within the scope of the social security scheme of either Member State and therefore he would not be an employed or self-employed person within the meaning of Article 1(a). It follows that such a person would fall outside the personal scope of the Regulation and therefore the provisions of Title II could not be applicable to him. It is clear, however, that such an outcome would run counter to the objectives of the Regulation which is to provide a complete system of choice-of-law rules so as to ensure that the law of one Member State is applicable.

21. The Commission concludes that the question whether a person is employed or self-employed within the meaning of Article 1(a) should be determined on the basis of the law of the Member State whose legislation is applicable on the basis of the choice-of-law rules provided for in Title II. According to the Commission, therefore, it is necessary first to determine the law applicable to a person in the position of Mr Zinnecker according to the choice-of-law rules of Title II and then to determine whether such a person falls within the personal scope of the Regulation.

22. I have to say that I do not find persuasive any of the arguments that have been advanced. As the Commission stated in its oral observations, it is not clear to what conclusions Mr Zinnecker's arguments lead. While I agree with the Dutch Government that Mr Zinnecker falls within the personal scope of the Regulation, I do not think that the reasons which it gives fully support that conclusion.

23. I am also unable to accept the arguments of the Commission. As the Commission itself concedes, its approach is not supported by the terms of Article 13(1). According to that provision only 'persons to whom this Regulation applies' are subject to the choice-of-law rules of Title II. It follows that Title II applies only to persons who are covered by Article 2, i. e. persons who are employed or self-employed within the meaning of Article 1(a). To use, therefore, the choice-of-law rules specified in Title II in order to decide whether a person is a self-employed person within the meaning of Article 1(a) would amount to a *petitio principii*. In addition, for the reasons that I shall explain, the Commission's approach is contrary not only to the terms but also to the general scheme of the Regulation. The Commission states that its view finds support in the judgment of the Court in Case 39/76 *Metaalnijverheid* v *Mouthaan* [1976] ECR 1901, paragraph 6. It is clear, however, that in that case the Court was concerned with a different issue and did not examine the issue which arises in the present case.

24. What follows provides, in my view, a solution which is compatible with the terms and the scheme of the Regulation and also gives effect to the Commission's justifiable concern to ensure that the objectives of the rules provided for in Title II are fulfilled.

25. It must first be noted that in principle the Regulation applies only to persons who are affiliated to a national social security scheme. This is made clear by the fourth recital of the preamble to the original version of Regulation No 1408/71 (OJ, English Special Edition 1971 (II), p. 416) which provides as follows:

'Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons.'

26. The same principle is followed by Regulation No 1390/81 (OJ 1981 L 143, p. 1) which extended Regulation No 1408/71 to cover the self-employed and members of their family. The last recital of the preamble to that regulation provides as follows:

'Whereas ... it is necessary to stipulate in an Annex, what the terms "employed person" and "self-employed person", introduced in Regulation (EEC) No 1408/71, mean when the person concerned *is insured under a social security scheme* which applies to all residents or to certain categories of resident or to the entire working population of a Member State ...' (my emphasis).

27. In accordance with that principle, Article 1(a) defines the terms 'employed person' and 'self-employed person' by reference to persons who are affiliated to a national social security scheme. As the Commission points out, whether a person is employed or self-employed within the meaning of Article 1(a) does not depend on the law of the Member State where that person exercises his employment but on whether that person is insured within a social security scheme for employed or self-employed persons in a Member State.

28. It is clear that in order for a person to be a self-employed person within the meaning of Article 1(a)(ii), it is sufficient that he is affiliated to a social security scheme and meets the conditions specified in that provision in only one Member State. It is not a requirement that in order for a person to fall within the scope of Article 1(a)(ii) he must be affiliated to the social security schemes of two or more Member States. It follows that in order for a person in the position of Mr Zinnecker to be a self-employed person within the meaning of Article 1(a)(ii), it is sufficient that he is affiliated to a social security scheme and meets the requirements of that provision, having regard to the provisions of Annex I, in one of the Member States where he carries on activities.

29. The conditions for affiliation to a national social security scheme are not

specified by Community law but remain in principle a matter for the Member States. I say 'in principle' because the Court has accepted that the concepts of employed person and self-employed person are terms of Community law and must be interpreted broadly (see e. g. with regard to self-employed persons, Case 300/84 *van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1986] ECR 3097). The Court has also held that a person comes within the scope of the Regulation if he satisfies the substantive conditions for affiliation to a national social security scheme laid down by national law even if the steps necessary for affiliation to that scheme have not been completed (see Case 39/76 *Metaalnijverheid* v *Mouthaan* [1976] ECR 1901, paragraph 10 of the judgment).

30. It should be noted, however, that although Member States are in principle free to determine the conditions for affiliation to their national social security schemes, they are not entitled to determine the territorial scope of their own legislation. That is a matter for Community law. In Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1827, the Court stated at paragraph 21 of the judgment:

'The provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned. As the Court pointed out in its judgments ... in Case 276/81 (*Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027) and in Case 275/81 (*Koks* v *Raad van Arbeid* [1982] ECR 3013), "the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable" since they are "under an obligation to comply with the provisions of Community law in force".'

It is clear therefore that the rules laid down in Title II take precedence over the rules of the Member States determining the territorial scope of their social security laws. This approach is justified by the objective of Title II which, as already stated, is to ensure that persons to whom the Regulation applies are subject to the legislation of one, and only one, Member State. If the Member States were entitled to replace the choice-of-law rules provided for in Title II with their own rules, that objective would be defeated. A person could find himself subject to the legislation of two or more Member States or outside the scope of the legislation of any Member State.

31. Since Member States are not entitled to determine the territorial scope of their own legislation, it follows that a Member State may not deny affiliation to its social security scheme to a person who fulfils the substantive requirements for affiliation to that scheme on the ground that that person is not resident in the territory of that State. Nor may a Member State extend its law so as to make subject to its own social security scheme persons who according to the choice-of-law rules of Title II are subject to the social security scheme of another Member State.

32. Two conclusions can be drawn from the above. On the one hand, according to Article 1(a), the scope of application of the Regulation is defined by reference to persons who are affiliated to the social security scheme of a Member State and, in principle, it is up to the Member States to specify the conditions for affiliation to their own social security schemes. On the other hand, according to Title II, a Member State is not entitled to determine the territorial scope of its own legislation. A systematic interpretation of the Regulation requires that Article 1(a) should be interpreted in the light of Title II. It follows that a Member State should not be able to determine whether a person is self-employed within the meaning of Article 1(a) and, therefore, whether he falls within the scope of application of the Regulation, on the basis of its domestic rules determining the territorial scope of its legislation.

33. I therefore reach the conclusion that whether a person is a self-employed person within the meaning of Article 1(a)(ii) depends on whether he satisfies the substantive requirements for affiliation to a social security scheme of a Member State, and meets the requirements specified in that provision, excluding the requirements concerning the territorial application of that scheme laid down by national law. The advantage of that approach is that it is consistent with the case-law of the Court holding that the concept of self-employed person should be interpreted broadly, and also that it prevents a person who fulfils the substantive requirements for affiliation to a social security scheme from finding himself in a situation where he is not subject to any national law because Title II cannot be applied.

34. I will now examine whether Mr Zinnecker is a self-employed person within the meaning of Article 1(a)(ii) on the basis of the above conclusion.

35. As already stated, under Netherlands law persons who are resident in the Netherlands are subject to compulsory social security insurance and under Annex I any person pursuing an activity or occupation without a contract of employment is a self-employed person for the purposes of Article 1(a)(ii) in relation to the Netherlands. It follows that, excluding the requirement of residence, a person in the position of Mr Zinnecker satisfies the substantive requirements for affiliation to the Dutch social security scheme by virtue of his activities in the Netherlands and that he is, therefore, a self-employed person within the meaning of Article 1(a)(ii). It follows that he falls within the scope of application *ratione personae* of the Regulation. It is therefore unnecessary to consider the applicability of the provisions of Annex I in relation to Germany referred to in the national court's first question and set out in paragraph 11 above.

36. Since a person in the position of Mr Zinnecker falls within the scope of application of the Regulation, the law applicable to him is determined by the choice-of-law rules provided for in Title II. It should be noted, in this context, that although Annex I defines as a self-employed person for the purposes of Article 1(a)(ii) in relation to the Netherlands any person pursuing an activity or occupation without a contract of employment, it cannot be the purpose of that

provision to determine the territorial scope of Netherlands law. Whether Netherlands law applies to a particular person is determined solely by the rules laid down in Title II of the Regulation and not by the provisions of Annex I which concern only the scope of application of the Regulation. I turn, therefore, to consider which Member State's law applies to a person in the position of Mr Zinnecker in accordance with the rules of Title II.

37. According to Article 14a(2), a person who is normally self-employed in the territory of two or more Member States is subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity there. It appears from the facts as set out in the order for reference that during the material time Mr Zinnecker divided his time as to approximately one-half in the Netherlands and one-half in Germany. It follows that at the material time, he was subject to the legislation of Germany where he resided.

38. The fact that German law does not provide for a system of compulsory insurance to which persons in the position of Mr Zinnecker are affiliated does not render the provisions of Article 14a(2) any less applicable in the case of such a person. Article 14a(4) makes clear that the choice-of-law rule of Article 14a(2) applies provided that the person concerned has the right to join a pension scheme on a voluntary basis in the Member State where he resides. It is only if the law of that Member State does not enable the person concerned even on a voluntary basis to join a pension scheme that the provisions of Article 14a(2) become inapplicable and the person concerned becomes subject to the law of one of the other Member States in which he carries on self-employed activities. As stated, Mr Zinnecker had the right to register for pension insurance in Germany but did not do so. It is clear, therefore, that the law applicable to a person in his position is determined by Article 14a(2) and that he is consequently subject to the legislation of Germany.

39. Under Article 14a(2), when a person is self-employed in two or more Member States the law of one of those States is solely applicable. This becomes clear from Article 14d(1) which states that the person referred to in, *inter alia*, Article 14a(2) shall be treated, for the purposes of the application of the legislation laid down in accordance with that provision, as if he pursued all his activities in the territory of the Member State concerned. It follows that a person in the position of Mr Zinnecker is subject to the law of Germany as regards both his activities in Germany and those in the Netherlands. It is not the case that the legislation of the Netherlands applies in relation to his activities in the Netherlands and the legislation of Germany applies in relation to his activities in Germany. That would be contrary to the letter and the spirit of Articles 14a(2) and 14d(1) and also of

Article 13(1) according to which, subject to the exceptions provided for in the Regulation, a person to whom the Regulation applies is subject to the law of one Member State only.

40. I have come to the conclusion that Mr Zinnecker is subject to German law. The result of that conclusion appears to be that he is insured neither in the Netherlands nor in Germany. This undesirable consequence, however, is not the result of the choice-of-law rules provided for in the Regulation. It is the result of the fact that German law provides only for voluntary insurance in relation to persons in the position of Mr Zinnecker and that he has chosen not to take such insurance.

41. It should be noted that the situation would be different if he carried on activities as a self-employed person solely in the Netherlands. As stated, under Article 13(2)(b), a person who is self-employed in the territory of one Member State is subject to the legislation of that State even if he resides in the territory of another Member State. It follows that if Mr Zinnecker had been self-employed solely in the Netherlands, he would have been subject to Dutch law notwithstanding the fact that he was resident in Germany. In such a case, the requirement of residence laid down in Dutch legislation could not be relied on in order to deny him affiliation to the Dutch compulsory social insurance scheme. If that were possible, Article 13(2)(b) would have no effect. The effect of that provision is precisely to replace the condition of residence with a condition that the person is self-employed in the territory of the Member State concerned (see, in this context, Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755 at paragraph 21 of the judgment).

42. Before concluding, I should point out a difference between the approach proposed by the Commission and the approach that I have followed above.

43. It will be remembered that according to the Commission, it is necessary first to determine the law applicable to a person in the position of Mr Zinnecker according to the choice-of-law rules of Title II and then to determine whether such a person falls within the personal scope of the Regulation.

44. The Commission comes to the conclusion that, according to Article 14a(2), Mr Zinnecker is subject to German law. It proceeds to examine whether under German law he is a self-employed person within the meaning of Article 1(a). Since he is not affiliated to a compulsory or voluntary insurance scheme in Germany, the Commission comes to the conclusion that he is not a self-employed person for the purposes of Article 1(a) and, therefore, that he falls outside the scope of application *ratione personae* of the Regulation.

45. According to the Commission, since he is not covered by the Regulation, it follows that whether he is affiliated to a compulsory scheme of social insurance in the Netherlands depends on the provisions of the Netherlands legislation including the provisions

determining the territorial scope of that legislation. Since under Netherlands law a person who carries on self-employed activities is subject to compulsory social security insurance only if he is resident in the Netherlands, the Commission concludes that Mr Zinnecker is not subject to that scheme.

46. The result of the approach followed by the Commission may thus seem the same as the result which I have reached. There is, however, a difference in the consequences. According to the Commission, Mr Zinnecker falls outside the scope of application of the Regulation. It appears, therefore, that on the approach proposed by the Commission, it would be open to the Netherlands to make subject to its social security scheme persons in the position of Mr Zinnecker by extending the territorial scope of its legislation. This would not be possible under the approach that I have proposed since, according to that approach, Mr Zinnecker falls within the scope of the Regulation and therefore the law applicable to him is solely determined by the provisions of Title II.

47. It seems to me that the approach which I have proposed is more in conformity with the objectives and the scheme of the Regulation. If the approach proposed by the Commission were accepted, it would follow that the Netherlands could extend its law so as to make it applicable to a person in the position of Mr Zinnecker without such extension bringing him within the scope of the Regulation. That, however, would run counter to the scheme of the Regulation according to which persons who are affiliated to the social security scheme of a Member State fall within its scope. It would also mean that Mr Zinnecker would be subject to Netherlands law without benefiting from the provisions of the Regulation. In my view, therefore, the consequences of the Commission's approach provide an additional reason why that approach should not be followed. The lacuna which results from the absence of compulsory insurance under German law should not be filled by enabling the Netherlands unilaterally, and outside the scheme of the Regulation, to extend its own legislation. If it is considered appropriate to fill such a lacuna, it should be done by amending the Regulation.

48. For completeness, I shall examine an alternative approach which, if it were followed, would lead to the same result as that reached by the Commission, i. e. that a person in the position of Mr Zinnecker falls outside the scope of the Regulation. That approach has the advantage of simplicity but, as I shall explain, it runs counter to the objectives of Title II.

49. As stated, in order for a person in the position of Mr Zinnecker to be a self-employed person within the meaning of Article 1(a)(ii), he must be affiliated to a social security scheme, such as provided for in that provision, in one of the Member States where he carries on activities. It could be argued that Mr Zinnecker falls outside the scope of the Regulation because he is

affiliated to such a scheme neither under German law nor under Netherlands law. It is clear that he is not a self-employed person within the meaning of Article 1(a)(ii) under German law because he is not affiliated to any social security scheme in Germany. It could be argued that he is not a self-employed person within the meaning of Article 1(a)(ii) under Netherlands law either. This is because, under Netherlands law, a self-employed person is affiliated to the national social security scheme only if he is resident in the Netherlands and, as already stated, the effect of the definition of the term self-employed person provided in Annex I in respect of the Netherlands is not to set aside that residence requirement. It could be concluded therefore that Mr Zinnecker is not a self-employed person within the meaning of Article 1(a)(ii) under Netherlands law because he is not resident in the Netherlands.

50. That approach, however, runs counter to the objectives of Title II. This is because, according to that approach, the reason why a person in the position of Mr Zinnecker is not a self-employed person within the meaning of Article 1(a)(ii) is not that he does not satisfy the substantive requirements for affiliation to the Dutch social security scheme but that he does not satisfy the requirement of residence laid down by Dutch law. If that view were accepted, therefore, it would be possible for a Member State to determine whether a person is self-employed within the meaning of Article 1(a)(ii) and therefore whether he falls within the scope of the Regulation, on the basis of its own rules of territorial application. However, as I have already stated, that would be contrary to the objectives of Title II and the scheme of the Regulation. It follows that that approach must be rejected.

51. Since I have concluded that German law is alone applicable to a person in the position of Mr Zinnecker, there is no need to answer the fourth and the fifth questions posed by the national court.

Conclusion

52. I am accordingly of the opinion that the questions asked by the national court should be answered as follows:

Where a person is resident in Germany and carries on activities as a self-employed person partly in Germany and partly in the Netherlands and falls within the scope of the Regulation because if he were resident in the Netherlands he would have been subject to compulsory insurance in that Member State, Council Regulation (EEC) No 1408/71 must be interpreted as meaning that he is subject exclusively to German legislation.