OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 14 June 1990 *

Mr President,
Members of the Court,

1. Mr Noij, who has been living in the Netherlands at least since 1979, worked underground for 25 years as a miner in Belgium. He has accordingly been in receipt of a Belgian retirement pension since 1979, although at the time he was only 52. Since the Netherlands has a general insurance scheme to which all persons residing in that country are compulsorily affiliated, even if they do not carry on a professional or trade activity, Mr Noij was required to pay social security contributions calculated, in particular, on the basis of his Belgian retirement pension. Those contributions, amounting to 23% of that pension, were levied under the following general schemes: old-age pensions, insurance for incapacity for work, widows' and orphans' pensions, family allowances and insurance for exceptional medical expenses.

2. In the proceedings before the national court, Mr Noij claimed that (1) it was unnecessary for him to be insured under the general old-age insurance scheme since he was already in receipt of a Belgian pension, (2) in the event of his death, his widow would be entitled to a pension equal to 80% of his own pension, (3) he was entitled to receive from the Belgian State all the advantages arising from the Netherlands Law on sickness insurance and the Law establishing a general scheme for exceptional medical expenses, (4) before the implementation of a special arrangement between the Netherlands and Belgium he was entitled to family allowances under the Belgian legislation, (5) a periodic benefit on grounds of invalidity or incapacity for work under the relevant Netherlands scheme was equally superfluous since he was in receipt of an old-age pension and the two benefits could not be paid concurrently, (6) the only reason for continued insurance under the general scheme relating to incapacity for work is that certain benefits thereunder may be granted in order to facilitate living and working conditions whereas the corresponding Belgian scheme is linked to residence within the territory of that Member State. However, it is clear from the standpoint adopted by Mr Noij that he does not consider that he needs the last-mentioned benefits either.

3. A Netherlands Decree of 7 July 1982, which took effect on 1 January 1982, amended the legislation, with the result that former miners in receipt of a pension under the Belgian legislation, in so far as they do not carry on a professional or trade activity and do not receive a benefit under the Netherlands scheme, are not regarded as insured for the purposes of the various Netherlands schemes referred to above.

4. However, that provision does not resolve Mr Noij's situation, as far as 1979 is concerned, nor that of persons in receipt of

* Original language French

either a Belgian pension otherwise than as former miners, or an early retirement pension under the legislation of another Member State.

5. At the hearing neither the Netherlands Government nor the Commission disputed the fact that in such circumstances the charging of contributions under the different Netherlands schemes was inequitable. They pointed out that discussions were in progress within the Administrative Committee on social security for migrant workers with a view to preparing an amendment to Regulation No 1408/71 [1] to prevent such situations recurring.

6. But the problem remains of the contributions paid by the plaintiff in the main proceedings in respect of 1979. The solution depends, in particular, on whether the rules for determining the applicable legislation in Article 13 of Regulation No 1408/71 continue to apply to former frontier workers who do not take up a new employment in their country of residence. If so, Mr Noij would continue to be covered by the Belgian legislation alone, and could not be required to pay any social security contributions in the Netherlands. The judgment in Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821 could be open to the interpretation that that would be the case. In the operative part of that judgment the Court held as follows:

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

7. Until its amendment in 1981, Article 13 provided as follows:

'(1) A worker to whom this regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this title.

(2) Subject to the provisions of Articles 14 to 17:

(a) a worker 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 or if the registered office of place of business of the undertaking or individual employing him is situated in the territory of another Member State.'

8. In order to enable it to resolve the dispute before it, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred the following questions to the Court of Justice for a preliminary ruling:

1 — Regulation on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), updated by Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 1) and most recently amended by Regulation (EEC) No 2332/89 (OJ 1989 L 224, p. 1).

'(1) Do the rules on social security forming part of European Community law and intended to achieve freedom of movement for workers within the Community, in particular the rules on the determination of the national legislation applicable contained in Title II of Regulation (EEC) No 1408/71 of the Council of 14 June 1971, prevent a person who resides in the territory of one Member State (hereinafter referred to as "the State of residence") and who since ceasing the activity which he pursued in the territory of another Member State as an employed person has been in receipt of a retirement pension in respect of that activity by virtue of the social legislation of that other Member State from being charged contributions, partly on the basis of that retirement pension, as a person subject to compulsory insurance under the social legislation of the State of residence:

(a) if, after ceasing the activity pursued in the territory of the other Member State, he no longer worked at all?

(b) if, after ceasing that activity, he worked in the territory of the State of residence for some time, either as an employed person or as a self-employed person?

(2) Is the answer to Question 1 different if the activity carried on in the State of residence referred to in (b) above was of only secondary importance?'

I — Question 1(a)

9. The Gerechtshof (Regional Court of Appeal) 's-Hertogenbosch, in its earlier judgment on the case, considered that Regulation No 1408/71 was wholly inapplicable to Mr Noij because he was no longer carrying on an activity as an employed person.

10. As the Spanish Government has correctly pointed out, the Court held, in its judgment in Case 143/79 *Walsh* v *National Insurance Officer* [1980] ECR 1639, at paragraph 6, that

'it follows from certain provisions of Regulation No 1408/71 that it applies to certain categories of person who, when the contingency occurs, do not have the status of "employed persons" within the meaning of the law of employment. It would be contrary to the spirit of those provisions and to one of the essential objectives of the regulation, which is to guarantee to workers who move within the Community their accrued rights and advantages, to exclude from the scope of the regulation — by giving a restrictive interpretation to the definition of the term "worker" — any other case where, under the relevant legislation, the insurance continues to cover the insured against risks but the insured is no longer bound to pay contributions'.

11. Similarly, the Court stated in its judgment in Case 182/78 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik* [1979] ECR 1977, at paragraph 4, that

'even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security scheme, unless they are subject to special provisions laid down regarding them'.

12. It is undeniable, therefore, that Regulation No 1408/71 as such also applies to persons who no longer carry on a professional or trade activity.

13. The Netherlands Government, the Spanish Government and the Commission share that view and also acknowledge that the rules for determining the applicable legislation set out in Article 13(2) continue to operate with regard to persons who have temporarily stopped working but who may resume work subsequently, such as the claimants or recipients of sickness benefits who are referred to in the Court's judgments in Case 150/82 *Coppola* v *Insurance Officer* [1983] ECR 43, at paragraph 11, and in *Ten Holder*, cited above.

14. However, the Netherlands Government and the Commission draw attention to the terms in which Article 13(2) is couched. That provision lays down the principle that the *lex loci laboris* prevails over the law of the country in which the worker resides. It therefore applies to an active worker who pursues his occupation in a Member State other than that from which he originates or in which he resides. That provision cannot therefore apply to persons who have stopped work for good ('ex-workers').

15. The Netherlands Government and the Commission also point to the draw-backs which the opposite interpretation could entail for the pensioners themselves, and to the possible financial consequences for Member States with a general insurance scheme.

16. With regard to the pensioners themselves, it is inequitable if an 'ex-worker' who is in receipt under the legislation of the country in which he was last employed of an inadequate early retirement pension only is unable to avail himself of the opportunity to acquire new pension rights in the country of residence where its legislation does not make the acquisition of those rights conditional on the pursuit of a professional or trade activity and he is not required to pay contributions to that end or he does not find the level of those contributions excessive.

17. Furthermore, if persons having ceased to carry on any professional or trade activity are linked exclusively to the legislation of the country in which they were last employed, it could lead to abuses at the expense of Member States with a general insurance scheme, whether financed by contributions or by taxation. Certain persons may, towards the end of their career, go and work in such a country for a short period, then return to their country of origin where they cease to carry on any activity, whilst taking full advantage of the scheme of the country in which they were last employed without paying either contributions or taxes there.

18. Whilst I share those views put forward by the Netherlands Government and the Commission, I wish, in particular, to emphasize the following points:

19. (a) As a general rule, all persons are subject to the legislation of the country in which they reside, which is usually also the country in which they engage in an occupation. Article 13 of the regulation is designed merely to resolve such conflicts of legislation as may arise in cases where the place of residence and the place of employment are not in the same country or in other highly specific situations listed by that article. As soon as one of the situations referred to in Article 13 comes to an end once and for all, and in particular as soon as the person concerned ceases to carry on any professional or trade activity, the principle that the legislation of the country of residence applies should, in my view, again prevail. If that legislation makes affiliation subject to the pursuit of a professional or trade activity, nothing will happen for as long as the person in question does not work. If, on the other hand, that legislation provides for compulsory affiliation of all residents, including therefore 'ex-workers', to the social security scheme, such affiliation will occur automatically.

20. (b) In my view, it is impossible to draw a contrary inference from Article 13(1), according to which 'a worker to whom this regulation applies shall be subject to the legislation of a single Member State only'. In the first place, that passage cannot be read in isolation from Article 13(2), which defines the scope of that principle.

21. Secondly, in its judgments in *Perenboom*,[2] *Luijten*[3] and *Ten Holder* (at paragraph 15), the Court interpreted Article 13(1) as seeking to ensure that a person is not

'insured *over the same period* under the legislation of more than one Member State'.

A person who ceases to work in a country other than that in which he resides manifestly embarks upon a 'new period', hence the problem which Article 13 is designed to resolve no longer arises in relation to him.

22. Finally, in its recent judgment in *Kits van Heijningen*,[4] the Court expressed itself in the following terms:

'The *sole purpose*[5] of Article 13(2)(a) of Regulation No 1408/71 is to determine the national legislation applicable to *persons employed* in the territory of a Member State. As such, it is not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme. As the Court has pointed out several times, it is for the legislature of each Member State to lay down those conditions (see, in particular, the judgment in Case 275/81 *Koks* v *Raad van Arbeid* [1982] ECR 3013).'

23. The inference I draw from this is that where none of the situations referred to in

2 — Judgment in Case 102/76 *Perenboom* v *Inspecteur der Directe Belastingen, Nijmegen* [1977] ECR 815, at paragraph 11.

3 — Judgment in Case 60/85 *Luijten* v *Raad van Arbeid* [1986] ECR 2365, at paragraph 15.

4 — Judgment in Case C-2/89 *Bestuur van de Sociale Verzekeringsbank* v *Kits van Heyningen* [1990] ECR I-1755, at paragraph 19.

5 — Emphasis added

Article 13 of Regulation No 1408/71 obtains, that provision ceases to apply.

24. If a person who previously worked in another Member State resides or establishes his new residence in the territory of a Member State whose social security legislation provides for the compulsory affiliation of all residents, whether or not they are carrying on a professional or trade activity, Community law, as it now stands, cannot prevent the application of that legislation.

25. That being the scope of Article 13, it must be concluded that, as the Netherlands Government and the Commission state in the *Ten Holder* judgment, the Court can only have been referring to persons who 'cease' to carry on an activity in the territory of another Member State on only a temporary basis, for instance on grounds of sickness, maternity or unemployment.

26. (c) The fact that Article 13(1) refers to 'a worker to whom this regulation applies' (or, according to the present version of Regulation No 1408/71, 'persons to whom this regulation applies') is not, in my view, such as to call in question my interpretation of that article.

It is clear that for a provision of Regulation No 1408/71 to apply to a person, that person must form part of the category of persons to whom the regulation applies. However, that condition is not sufficient: it is also necessary that the person be in the situation covered by the provision in question. So far as Article 13(2)(a) is concerned, the situation is that of a person who resides in one Member State whilst carrying on an activity in another Member State.

27. (d) The interpretation that a worker in receipt of a pension may, in principle, be subject to the legislation of the State of residence is confirmed by an amendment to Regulation No 1408/71 made by the Council on 18 July 1989, that is to say after the date of the judgment in *Ten Holder*. That amendment consists in the addition of a second paragraph to Article 33, which is worded as follows: [6]

'Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments *under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence*, these contributions shall not be payable.'

28. That provision necessarily implies that, in the view of the Council, the recipient of a pension under the legislation of Member State A is in principle subject to the legislation of Member State B in which he resides, where the latter envisages a general insurance scheme automatically applicable to all residents. Otherwise, the problem of paying contributions in the country of residence could not even arise. In my view, therefore, the conclusion may be drawn from the new paragraph (2) of Article 33 that the Community legislature itself considered that the principle in Article 13,

6 — Council Regulation (EEC) No 2332/89 of 18 July 1989 amending Regulation (EEC) No 1408/71 (OJ 1989 L 224, p. 1).

according to which persons to whom the regulation applies are subject only to the legislation of the Member State in which they carry on an activity as employed or self-employed persons, even if they reside in the territory of another Member State, no longer applies once such persons definitively cease to carry on a professional or trade activity.

29. To summarize, I therefore propose an initial conclusion to the effect that Community law, as it now stands, does not preclude a worker who ceases to carry on a professional or trade activity abroad and who does not take up a new activity in his country of residence from being subject to the legislation of his country of residence where that legislation is based on the principle of compulsory insurance for all residents, without prejudice of course to the pension rights conferred on him, and, where appropriate, the concomitant duties imposed on him by the legislation of the country in which he was last employed (for example, deduction of sickness insurance contributions).

30. However, does that principle necessarily imply that the worker must pay contributions under the various social security schemes of the country of residence even where he considers himself to be sufficiently covered by the rights which he acquired under the legislation of the country in which he was last employed?

31. In that regard I agree above all with the view expressed by the Commission, according to which Mr Noij cannot be required to pay contributions under the Algemene Wet Bijzondere Ziektekosten (Netherlands General Law on Exceptional Medical Expenses). It follows from the order for reference that the plaintiff in the main proceedings is entitled to receive *from the competent Belgian institution* the advantages resulting from that law. As the Commission also points out, it is possible to infer from the Court's judgment in Case 275/83 *Commission* v *Belgium* [1985] ECR 1097 in connection with Article 33 of Regulation No 1408/71 that, where the benefits granted in the country of residence in accordance with Article 28a are payable by the institution of another Member State, that institution alone is authorized to deduct contributions, no contribution being chargeable in the country of residence.

32. The new paragraph (2) added to Article 33 in 1989 merely reaffirms expressly the principle which the Court had already deduced from Article 33 as amended by Council Regulation (EEC) No 2864/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December), p. 15). If that principle was already implicit in Article 33 as it stood in 1972, it must have been applicable in 1979, the year in which Mr Noij claims he was wrongly charged contributions.

33. The question remains of the contributions claimed from the applicant under the other Netherlands social security schemes.

34. Does it follow from the absence in other areas of provisions similar to Article 33 that Community law as it now stands does not preclude the charging of such contributions? Or is it possible to deduce from Articles 48 to 51 of the Treaty a general principle prohibiting that practice?

35. Of relevance here may be a principle frequently reaffirmed by the Court, particularly in its judgment in *de Rijke*,[7] according to which:

'the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'.

36. In my view, however, it follows from the case-law in question that this rule comes into operation only where the application of a provision of Regulation No 1408/71 may itself give rise to the aforesaid consequence. In this case the advantages which the Belgian legislation guarantees to Mr Noij are left intact *de jure*. It is only because the legislation of the country of residence requires him to pay contributions intended, in theory at least, to bring him new advantages that he loses *de facto* a portion of his Belgian pension.

37. The fact remains that where a worker who has taken early retirement considers that, under the legislation of the State in which he previously worked, he receives an adequate pension and all the desirable social guarantees (sickness insurance, family allowances and, possibly, a pension for his widow) and the contributions which he is required to pay in the country of residence constitute an extremely heavy burden for him that is unrelated to the advantage that the additional pension to which he may be entitled at the age of 65 may bring him, it would be inequitable to require him to pay those contributions. Hence there are sound reasons for amending Regulation No 1408/71 to enable such former workers to be exempted at their request from the application of the social legislation of their country of residence.

38. Nevertheless, under the legislation currently in force, it is impossible to reply to the question submitted by the Hoge Raad by stating that Community law precludes the compulsory charging of contributions provided for by the national social security schemes of a country with a general insurance scheme except, where appropriate, sickness insurance contributions.

39. I therefore propose that the Court answer Question 1(a) as follows:

'As they now stand, the Community rules on social security do not prevent a person who resides in the territory of one Member State and who since ceasing his activity as an employed person in the territory of another Member State has been in receipt of a retirement pension in respect of that activity by virtue of the social legislation of that other Member State from being charged contributions, partly on the basis of that retirement pension, as a person subject to compulsory insurance under the social legislation of the State of residence if, after ceasing his activity in the territory of the other Member State, he no longer worked at all. Such contributions must, however, be levied in accordance with the provisions of Title III of Regulation No 1408/71 concerning pensioners.'

7 — Judgment in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, at paragraph 14.

II — Question 1(b) and Question 2

40. In my view my proposed answer to Question 1(a) renders Questions 1(b) and 2 devoid of purpose. Nevertheless, it is worth considering whether a person in receipt of a pension 'from abroad' who resumes a professional or trade activity in the country in which he resides must pay the contributions provided for by the social legislation of that country.

41. Let me remind the Court that once a person carries on an activity in the country in which he resides, he is subject to the legislation of that country. In my view, it is unnecessary to refer to the rules of Article 13 for determining the applicable legislation in order to establish that, since it is self-evident. Consequently such a person must also pay all the contributions provided for by that legislation.

42. The situation would be different only in the event of the application of Article 14d(2) of Regulation No 1408/71, which provides as follows:

'The provisions of the legislation of a Member State under which a pensioner who is pursuing a professional or trade activity is not subject to compulsory insurance in respect of such activity shall also apply to a pensioner whose pension was acquired under the legislation of another Member State, unless the person concerned expressly asks to be so subject . . . '

43. In countries in which compulsory insurance does not depend on the pursuit of a professional or trade activity, that provision is evidently inapplicable, but if recipients of a 'national' pension were to be exempted from compulsory affiliation, recipients of a pension 'from abroad' would have to be treated in the same way.

44. What is the position at present once such a person stops work for good? In my view, that person remains subject to the legislation of the country of residence on the same conditions as other 'ex-workers' who reside there.

45. The problem encountered in connection with the first question as regards sickness insurance contributions would not seem to arise in these circumstances since affiliation to the scheme of the country in which the person concerned last worked will probably in the meantime have replaced affiliation to the scheme of the State responsible for paying the pension. In any event the answer suggested in connection with Question 1(a) is such as to cover the two possibilities.

46. As for the problem tackled in the second question, it is sufficient to refer to the judgment in *Kits van Heijningen*, cited above, in which the Court held that

'There is nothing in Article 1(a) or Article 2(1) of Regulation No 1408/71 which permits certain categories of persons to be excluded from the scope of the regulation on the basis of the amount of time they devote to their activities. Consequently, a person must be considered to be covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1) of the regulation, irrespective of the amount of time which that person devotes to his activities' (paragraph 10).

47. I therefore propose that the Court answer Question 1(b) and Question 2 as follows:

'The situation is the same if, after ceasing his activity in the territory of the Member State responsible for paying the retirement pension, the person in question carried on an activity for some time in the territory of the State of residence, either as an employed person or as a self-employed person, even if that activity was of only secondary importance'.

Conclusion

48. I therefore suggest that the questions submitted by the Hoge Raad should be answered as follows:

'(1) As they now stand, the Community rules on social security do not prevent a person who resides in the territory of one Member State and who since ceasing his activity as an employed person in the territory of another Member State has been in receipt of a retirement pension in respect of that activity by virtue of the social legislation of that other Member State from being charged contributions, partly on the basis of that retirement pension, as a person subject to compulsory insurance under the social legislation of the State of residence if, after ceasing his activity in the territory of the other Member State, he no longer worked at all. Such contributions must, however, be levied in accordance with the provisions of Title III of Regulation (EEC) No 1408/71 concerning pensioners.

(2) The situation is the same if, after ceasing his activity in the territory of the Member State responsible for paying the retirement pension, the person in question carried on an activity for some time in the territory of the State of residence, either as an employed person or a self-employed person, even if that activity was of only secondary importance.'