OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 February 2005 [1]

1. The present reference from the Rechtbank (District Court), Amsterdam, concerns the interpretation of Article 13(1) and (2)(f) of Regulation No 1408/71 [2] and Article 39 EC.

2. The referring court seeks guidance in particular on the question whether Community law precludes legislation of a Member State under which a person who has been but is no longer employed in its territory remains compulsorily insured in respect of certain branches of social security only if he continues to reside there while remaining insured in respect of certain other branches of social security irrespective of his place of residence.

1 — Original language: English.

2 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ English Special Edition 1971(II), p. 416). The text of the Regulation incorporating amendments made to the end of 1995 may be found in Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1). A consolidated (but non-authoritative) version incorporating subsequent amendments is available on Eur-Lex (europa.eu.int/eur-lex).

Relevant provisions of the Regulation

3. Article 13, headed 'General rules', is the first provision in Title II of Regulation No 1408/71, headed 'Determination of the legislation applicable'.

4. Article 13(1) provides in the version applicable at the material time:

'Subject to Articles 14c and 14f, 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.'

5. Articles 14c and 14f concern specific situations which are not relevant to the present case.

6. Article 13(2) lays down a series of rules for determining which legislation applies in particular circumstances. The rules are expressed to be subject to Articles 14 to 17, constituting the remainder of Title II, which contain various special rules none of which is applicable in this case.

7. Article 13(2)(a) provides:

'a person 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 or place of business of the undertaking or individual employing him is situated in the territory of another Member State'.

8. Articles 13(2)(b) to (e) concern respectively self-employed persons, persons employed on vessels flying the flag of a Member State, civil servants and persons called up or recalled for service in the armed forces, or for civilian service, of a Member State.

9. Article 13(2)(f), inserted into Regulation No 1408/71 with effect from 29 July 1991 by Regulation No 2195/91, [3] provides that:

'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone'.

10. In addition to inserting Article 13(2)(f) into Regulation No 1408/71, Regulation No 2195/91 also inserted the following Article 10b into Regulation No 574/72 [4] with effect from 29 July 1991:

'The date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of [Regulation No 1408/71] shall be determined in accordance with that legisla-

3 — Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 (OJ 1991 L 206, p. 2).

4 — Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972(I), p. 159); for the latest consolidated version see Part II of Annex A to Regulation No 118/97, cited in footnote 2. A consolidated (but non-authoritative) version incorporating subsequent amendments is available on Eur-Lex (europa.eu.int/eur-lex).

tion. The institution designated by the competent authority of the Member State whose legislation becomes applicable to the person shall apply to the institution designated by the competent authority of the former Member State with a request to specify this date.'

National legislation

11. It appears from the documents before the court that the Netherlands social security system consists of, on the one hand, schemes applying exclusively to persons who are, or were when they became entitled to the benefit in question, employed, and, on the other hand, generalised schemes applying in principle to all residents or persons who are subject to Netherlands income tax on account of salaried employment in the Netherlands.

12. The schemes for employed persons provide for sickness benefit ('ZW' [5]), medical expenses cover ('ZFW' [6]), unemployment benefit ('WW' [7]) and invalidity benefit ('WAO' [8]).

13. Persons entitled to invalidity benefit (WAO), who are by reason of their invalidity no longer employed, remain compulsorily insured under all four schemes for employed persons, subject to the provisions summarised in point 19 below.

14. The generalised schemes provide for family benefits ('AKW' [9]), survivors' pension ('ANW' [10]), old-age pension ('AOW' [11]) and special medical expenses cover ('AWBZ' [12]).

15. Each of the laws regulating the generalised schemes provides that the category of insured persons may be extended or restricted by or pursuant to secondary legislation.

16. Those categories were so adjusted in the period to which the main proceedings relate.

5 — Ziektewet. This, and the other terms abbreviated, refers to the law governing the scheme, but I shall follow the common practice of using the abbreviations in the more general sense of the benefit or cover provided.

6 — Ziekenfondswet.

7 — Werkloosheidswet.

8 — Wet op de Arbeidsongeschiktheidsverzekering.

9 — Algemene Kinderbijslagwet.

10 — Algemene Nabestaanden Wet.

11 — Algemene Ouderdomswet.

12 — Algemene Wet Bijzondere Ziektekosten.

17. Initially the relevant secondary legislation, the 1989 Decree, [13] provided that a person who resided outside the Netherlands and who was entitled to, inter alia, invalidity benefit under the WAO was to be compulsorily insured under the generalised schemes.

18. The 1989 Decree was amended [14] with effect from 1 January 1999 so as to provide that, with effect from 1 January 2000, non-residents were no longer compulsorily insured under the general schemes. Under the general schemes for old-age pensions (AOW) and survivors' pensions (ANW), however, non-residents who had previously been subject to compulsory insurance were able to continue cover by paying voluntary contributions once the compulsory insurance had come to end. That option is exercisable by informing the Sociale Verzekeringsbank (the Netherlands social security institution) within one year of termination of the compulsory insurance.

19. The situation with regard to special medical expenses (AWBZ) is slightly more complicated. Provided that his income does not exceed a prescribed threshold, a recipient of invalidity benefit (WAO) remains compulsorily insured under the medical expenses scheme (ZFW); that is apparently the case with regard to the applicant. Such persons who are entitled by virtue of Regulation No 1408/71 to benefits under the regime of their Member State of residence also remain compulsorily insured under the special medical expenses scheme. For other persons, there is with effect from 1 January 2001 the possibility of voluntary insurance under the special medical expenses scheme.

20. There is a transitional provision covering family benefits (AKW): a recipient who would otherwise lose an existing right to family benefits by virtue of the amendment remains compulsorily insured until the youngest child has reached the age of 18. For other persons, there is no right to voluntary insurance under the family benefits scheme: the Netherlands Government has explained that there is sufficient provision under Chapter 8 of Title III of Regulation No 1408/71, which concerns benefits for, inter alios, dependent children of pensioners.

21. There appears to be disagreement between the referring court on the one hand and the defendant institution and the Netherlands Government on the other as to whether the terms of the voluntary insurance for old-age pensions (AOW), survivors' pensions (ANW) and special medical expenses cover (AWBZ) are the same as those of the previous compulsory insurance, in particular as to the income taken into account in setting the level of contributions and the existence of a maximum term of voluntary insurance cover for certain cate-

13 — Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1989 (Decree on the extension and restriction of the category of insured persons in respect of national insurance) of 3 May 1989, *Staatsblad* 1989, p. 164.

14 — By the Besluit uitbreiding en beperking kring verzekerden volksverzekeringen 1999 of 24 December 1998, *Staatsblad* 1998, p. 746.

gories of person. The Commission considers that the relevant legislation provides for a 10-year maximum for voluntary contributions to the old-age pension scheme, which could be a disadvantage for certain persons although apparently not, on the facts, for the applicant. It was in addition suggested at the hearing by counsel for the defendant institution that the two types of insurance may be treated differently for tax purposes.

The main proceedings and the questions referred

22. Mrs van Pommeren-Bourgondiën ('the applicant'), who has Netherlands nationality and resides in Belgium, worked in the Netherlands for her entire working life. In 1996 she became sick and since 1997 she has received invalidity benefit at the highest rate under the invalidity benefit scheme for employed persons (WAO).

23. After the change in legislation the applicant was informed that as from 1 January 2000 she was no longer compulsorily insured under the Netherlands general schemes and that national insurance contributions would therefore no longer be deducted from her invalidity benefit. It was also pointed out to her that she had the option of applying for voluntary insurance under the general schemes for old-age pensions (AOW) and survivors' pensions (ANW).

24. The applicant considered that the cessation of her compulsory insurance under those two schemes was contrary to Regulation No 1408/71 and brought proceedings against the defendant institution before the Rechtbank Amsterdam on that basis.

25. That court considers that, although it is clear from the case-law of the Court that a Member State is at liberty to determine that persons who have ceased working in that Member State are no longer insured under the social security scheme if they are no longer resident in that Member State, it is not clear whether a Member State can continue to apply its national legislation to such a person but nevertheless exclude him from a (substantial) part of the social security scheme on the ground that he is no longer resident in that Member State. It has accordingly referred the following questions for a preliminary ruling:

'(1) Does Article 13(2)(f) of Regulation No 1408/71 preclude legislation of a Member State under which a person who has ceased all occupational activity in its territory remains insured under that legislation only if he continues to reside there, whilst that person remains compulsorily insured under the legislation of that Member State in respect of certain other branches of social security irrespective of his place of residence?

(2) Is it material to the reply to the first question that under the legislation of that Member State the person has the option of being voluntarily insured in respect of a number of branches of social security, without such voluntary insurance being conditional on his remaining resident in that Member State?

If the answer to Question 1 is negative, the following question is referred in the alternative:

(3) In a situation such as that described above, is Article 39 EC to be interpreted as meaning that the replacement of compulsory insurance with voluntary insurance is incompatible with that article where cessation of compulsory insurance is brought about by the introduction of a residence requirement?'

26. Written observations have been lodged by the applicant, the defendant institution, the Belgian, Greek and Netherlands Governments and the Commission. The defendant institution, the Netherlands Government and the Commission were represented at the hearing. The applicant's written observations are extremely brief and merely endorse the comments made by the referring court.

The first question referred

27. By its first question the referring court asks whether Article 13(2)(f) of Regulation No 1408/71 precludes legislation of a Member State under which a person who has ceased all occupational activity in its territory remains insured under that legislation in respect of certain branches of social security only if he continues to reside there, while remaining compulsorily insured under the legislation of that Member State in respect of certain other branches of social security irrespective of his place of residence.

28. The Netherlands Government submits that that question should be answered in the negative; the defendant institution's observations are to the same effect, although it concludes that the first question does not require to be answered in the terms in which it is put given the existence of voluntary insurance (the subject-matter of the next question). The Belgian and Greek Governments and the Commission consider that the first question should be answered in the affirmative.

29. Article 13(2)(f) must be understood in its context, namely Title II of Regulation No 1408/71 of which it forms part. The aim of the provisions of Title II is to determine the legislation applicable to a person within the scope of the Regulation. That is stated in

Article 13(1), which provides that, subject to certain exceptions irrelevant in the present case, 'persons to whom this Regulation applies shall be subject to the legislation of a single Member State only'. It follows from that wording that the 'applicable legislation' for the purpose of Article 13(2)(f) means the legislation of a single Member State, and thus the legislation of that Member State in its entirety.

30. In *Commission* v *Belgium* [15] the Court noted that Article 13(2)(f) 'provides for the application of the legislation of a Member State in the territory of which the person concerned is residing only if no other legislation is applicable and, in particular, only if that to which the person concerned had previously been subject ceases to be applicable to him. ... [T]he fact that the legislation of a Member State ceases to be applicable constitutes a condition for the application of that provision, [which] does not itself define the conditions in which the legislation of a Member State ceases to be applicable'. [16] Those conditions are on the contrary to be determined in accordance with that legislation. [17]

31. In the main proceedings, however, it is not the case that the Netherlands social security legislation in its entirety has ceased to be applicable: the applicant remains subject to the Netherlands' schemes for employed persons and the generalised scheme for special medical expenses cover (AWBZ). Although it is correct that the Netherlands could lawfully provide in accordance with Article 13(2)(f) for its social security legislation as a whole to cease to be applicable to non-residents who have ceased all occupational activity in its territory, it has not done so. I am accordingly of the view that Article 13(2)(f) is inapplicable in the present case.

32. That is not to say, however, that the approach of the Netherlands is necessarily compatible with the other provisions of Title II. It is clear that the effect of its exclusion of certain persons to whom the Regulation is applicable from cover under part of its social security regime is that such persons are either covered by no legislation in respect of certain branches of social security or, if they seek and obtain cover in respect of those branches under the legislation of the Member State of their residence, covered by two national legislations concurrently.

33. As the Belgian and Greek Governments and the Commission submit, the latter situation is manifestly contrary to Article 13(1), which has been held to 'exclude ... any possibility of the overlapping of several

15 — Case C-347/98 [2001] ECR I-3327.

16 — Paragraphs 29 and 31.

17 — Article 10b of Regulation No 574/72, set out in point 10 above.

national legislations in respect of one and the same period'. [18]

34. More generally, both situations are contrary to the scheme and spirit of the Regulation, and in particular Title II thereof. The Court has repeatedly ruled that the provisions of that Title are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue but also to ensure that persons covered by the Regulation are not left without social security cover because there is no legislation which is applicable to them. [19]

35. The Netherlands Government refers to settled case-law to the effect that it is for the legislation of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme [20] and in particular to *de Jaeck*. [21]

36. That case concerned a person who was simultaneously self-employed in one Member State and employed in another Member State. The Court was asked for a ruling on the interpretation of Article 14c(1)(b) of Regulation No 1408/71, which provided at the material time [22] that a person in such a situation was to be subject in certain circumstances, including those of the main proceedings, to the legislation of each of those Member States as regards the activity pursued in its territory. The Court held that 'where Article 14c(1)(b) of the Regulation is applicable, Community law does not preclude the legislation of one of the two Member States from insuring the person in question against only some of the risks covered by its social security scheme, provided that there is no discrimination in that regard between nationals of that State and nationals of other Member States'.

37. That ruling was thus explicitly limited to situations 'where Article 14c(1)(b) ... is applicable'. It will be recalled that the rules in both Article 13(1) and (2) of the Regulation are expressed to be subject to, inter alia, Article 14c, which constitutes a specific exception to the general rules laid down by Article 13(1) and (2) — an exception which has the plain justification that the person concerned is simultaneously employed and/or self-employed in two Member States. I do

18 — Case 102/76 *Perenboom* [1977] ECR 815, paragraph 11.

19 — Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28.

20 — Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12, and Case C-245/88 *Daalmeijer* [1991] ECR I-555, paragraph 15.

21 — Case C-340/94 [1997] ECR I-461, paragraph 37.

22 — *de Jaeck* concerned facts which arose in 1984. With effect from 1 January 1987 Article 14c was amended by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5) so as to extend its provisions to cover two or more activities by way of employment and self-employment in two or more Member States.

not see how a ruling explicitly limited to such exceptional situations can help in the interpretation of Article 13(1) and (2) in the context of the very different situation of persons who are not simultaneously employed and/or self-employed in two Member States.

38. I accordingly remain of the view that it is not compatible with the scheme of the Regulation for the Netherlands to exclude certain persons to whom the Regulation is applicable from cover under part of its social security regime.

The second question referred

39. By its second question the referring court asks whether it is material to the reply to the first question that under the legislation of the first Member State the persons concerned have the option of being voluntarily insured in respect of a number of branches of social security.

40. As is clear from the above, the conflict rules set out in Title II of the Regulation are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue but also to ensure that persons within its scope are not left without social security cover because there is no legislation which is applicable to them.

41. It appears to me that the provision of voluntary insurance in the circumstances at issue may well have the effect that persons concerned end up subject to no legislation covering certain branches of social security, contrary to the Regulation.

42. The defendant institution stated at the hearing that of the 30 000 persons affected by the change in its legislation, only 8 000 opted for voluntary insurance while the remainder, despite having been individually informed of that possibility, chose not to avail themselves of it.

43. The unavoidable conclusion from those figures is that 22 000 persons who were formerly covered by the Netherlands generalised schemes are no longer so covered; they are accordingly not insured under Netherlands legislation with regard to survivors' or old-age pensions, or in some cases special medical expenses cover; they may in addition, depending on their circumstances, not be insured thereunder with regard to family benefits.

44. It appears from the documents before the Court that persons affected by the change in the Netherlands legislation have one year from notification to opt for voluntary insurance. It may be, as the defendant institution and the Netherlands Government submit, that it suits those persons at present not to have such cover, for reasons to do with their personal circumstances. It appears likely however that they will have no possibility of cover should they change their mind after expiry of the one-year period: as the Commission points out, it seems probable that such persons will not be able to obtain cover in Belgium for the branches concerned since for as long as Netherlands legislation as a whole has not ceased to be applicable to them they do not satisfy the conditions of Article 13(2)(f). Such a situation is clearly contrary to the principle underlying Title II of the Regulation that persons within its scope are not to be left without social security cover because there is no legislation which is applicable to them.

45. Moreover the Court has stated that the principle that persons subject to the Regulation are to be covered by only one social security system reflects the broader requirement that the system to be applied should be predictable, itself an illustration of the principle of legal certainty. [23] Those interests are in my view patently not served by a change in legislation which leaves persons in a state of legislative limbo.

46. Furthermore, it is in any event clear that making available voluntary insurance in circumstances such as those of the present case would not be compatible with Community law in general or the Regulation in particular unless such insurance were offered on terms that were no less advantageous than those of the compulsory insurance which it replaced. Less favourable terms would plainly discriminate against non-residents, and might be a hindrance to the free movement of persons. They would also, as the Commission submits, constitute discrimination on grounds of nationality, contrary to Article 12 EC, since it may reasonably be supposed that there are many more nationals of other Member States than Netherlands nationals who have worked in the Netherlands and who reside in another Member State.

47. Finally on a practical level, it would be difficult to establish that the terms of such voluntary insurance were, in all possible situations, at least equally advantageous; such difficulties would further prejudice legal certainty. Although any such assessment would of course be a matter for the national court, it seems to me that the principle of legal certainty will not be well served if that

23 — Case C-178/97 *Banks* [2000] ECR I-2005, paragraph 41.

court is required to carry out a detailed assessment of the precise way in which voluntary insurance works to the advantage or disadvantage of given individuals. Such an assessment may indeed not be practically feasible, if only because it will not normally be possible to predict with certainty how a given individual's personal circumstances may change over time.

The third question referred

48. The national court's third question is put only in the event that the first question is answered in the negative: since I propose that that question should be answered in the affirmative, the third question does not in my view arise.

Conclusion

49. I accordingly consider that the questions referred by the Rechtbank, Amsterdam, should be answered as follows:

(1) Article 13(1) and (2)(f) of Council Regulation No 1408/71/EEC of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community preclude legislation of a Member State under which a person who has ceased all occupational activity in its territory remains compulsorily insured under that legislation in respect of certain branches of social security only if he continues to reside there, whilst that person remains insured under the legislation of that Member State in respect of certain other branches of social security irrespective of his place of residence.

(2) It is not material to the reply to the first question that under the legislation of that Member State the person has the option of being voluntarily insured in respect of a number of branches of social security, without such voluntary insurance being conditional on his remaining resident in that Member State.