OPINION OF ADVOCATE GENERAL MISCHO

delivered on 16 November 2000 [1]

1. This reference for a preliminary ruling relates to a negative conflict of laws arising from differing interpretations by the Belgian and the Netherlands social security institutions of the terms 'partially unemployed' and 'wholly unemployed' in Article 71(1)(a)(i) and (ii) of Regulation (EEC) No 1408/71 of the Council 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 ('the Regulation'), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983. [2]

I — Legal background

2. The relevant provisions of Community law are set out in Articles 13 and 71(1)(a)(i) and (ii) of the Regulation.

3. Article 13 provides:

'1. Subject to Article 14c, 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.

2. Subject to Articles 14 to 17:

(a) 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;

1 — Original language: French.

2 — OJ, English Special Edition 1971 (II), p. 416; Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 6).

(b) ... '.

4. Article 71(1)(a)(i) and (ii) provides:

'An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) A frontier worker who is partially or intermittently unemployed in the undertaking which employs him shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution.

(ii) A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense.'

II — Facts

5. According to the order for reference and the documents from the national court, Mr De Laat, a Netherlands national, resides in the Netherlands with his family. He was employed in a managerial capacity by Amstelstad Belgium at Bree in Belgium from 1 December 1994 until 30 November 1996 inclusive, the latter being the date on which that employment was terminated. Mr De Laat was re-engaged by Amstelstad Belgium as a window-cleaner under a part-time contract of employment for 13 hours per week with effect from Monday 2 December 1996.

6. According to the observations of the Netherlands Bestuur van het Landelijk Instituut Sociale Verzekeringen ('the LISV'), at the material time Amstelstad Belgium was experiencing financial difficulties but did not wish to lose Mr De Laat's services; moreover, he resumed full-time employment with Amstelstad Belgium in February 1997.

7. The national court relates that, on 30 November 1996, Mr De Laat applied

to the LISV for unemployment benefit under the Netherlands Werkloosheidswet (Law on Unemployment; 'the WW') in respect of a period of partial unemployment commencing 2 December 1996.

8. The LISV refused that application on the basis of Article 71(1)(a)(i) of the Regulation and referred Mr De Laat to the competent Belgian institution on the ground that it considered him to be partially unemployed. Because of the continuing link with the State of employment, in the form of the part-time contract of employment between Mr De Laat and Amstelstad Belgium, he could not claim unemployment benefit in the Netherlands, the State of residence, but was covered by the legislation of the State of employment, in this case, by Belgian legislation.

9. Mr De Laat also applied to the competent Belgian institution for payment of an 'income-guarantee benefit', stating that as from 2 December 1996 he was obliged to work for his employer on a part-time basis.

10. The competent Belgian institution rejected his claim on the ground that Mr De Laat was to be regarded, under Belgian law and — in the view of that institution — under Article 71(1)(a)(ii) of the Regulation, as a wholly unemployed frontier worker and therefore as covered by the legislation of the State of residence, namely, the Netherlands.

11. Mr De Laat has not challenged the decision of the competent Belgian institution and has simply appealed against the decision of the LISV. The Arrondissementsrechtbank (District Court), Roermond ('the national court'), having examined the conflicting decisions of the competent Belgian and Netherlands institutions and being uncertain as to the interpretation of the terms 'partially unemployed' and 'wholly unemployed' within the meaning of Article 71(1)(a)(i) and (ii) of the Regulation, has referred a number of questions to the Court.

III — The questions

'(1) When determining whether a frontier worker is partially unemployed and therefore on the basis of Article 71(1)(a)(i) of Regulation No 1408/71 may claim benefit from the competent Member State, or is wholly unemployed and therefore on the basis of Article 71(1)(a)(ii) of Regulation No 1408/71 may claim benefit

from the Member State in which he resides, is it relevant whether under the national legislation of the competent Member State or of the Member State in which he resides the worker in question is to be regarded as partially or wholly unemployed or should "partially unemployed" and "wholly unemployed" be given a univocal — Community — construction?

(2) If the classification under national law is relevant, which classification should prevail where the view adopted under the law of the competent Member State and that under the law of the Member State in which the worker resides lead to different results?

(3) If the classification under national law is irrelevant and "partially unemployed" or "wholly unemployed" must be given a univocal — Community — construction, what criterion should then be applied?

(4) Is it of decisive importance in that regard whether or not there is a continuing link with the State of employment, and if so, what conditions must be satisfied for there to be such a link? Is there such a link if:

(a) there is a concrete prospect that the employee may be re-employed by the former employer, or

(b) the employee continues to work in the same State, even though to a lesser extent?

(5) Alternatively, when determining whether the criterion referred to in Question 3 above is fulfilled, should a more formal test be applied, such as, for example, whether or not there is a continuing employment relationship for the purposes of labour law?

(6) Having regard to the answers to the above questions, is a frontier worker who, immediately following termination of his full-time employment, commences work with the same employer under a part-time contract of employment to be regarded as a partially

unemployed frontier worker within the meaning of Article 71(1)(a)(i) of the Regulation or as a wholly unemployed frontier worker within the meaning of Article 71(1)(a)(ii) of the Regulation?'

IV — Observations submitted to the Court

12. In respect of the interpretation of the terms 'partially unemployed' and 'wholly unemployed' within the meaning of the Regulation, the LISV has referred to the case-law of the highest Netherlands court, the Centrale Raad van Beroep (Higher Social Security Court), according to which a person is wholly unemployed where, at the time unemployment arises, a link can no longer be deemed to exist between employer and employee in the form of a concrete prospect that the latter will be re-employed. On the other hand, where there is a continuing link, the worker is regarded as partially or intermittently unemployed; if partially unemployed, he must apply to the competent Member State for unemployment benefit.

13. The Belgian Government states that in Belgium, in cases of partial employment, the period of inactivity does not confer a right to compensation for unemployment. The only recompense is a limited right to 'income-guarantee benefit'. This is a fixed sum paid to wholly unemployed people who accept part-time employment and therefore lose their unemployment benefit. In the absence of income-guarantee benefit, such part-time workers would have a lower income than they had previously received in the form of unemployment benefit.

14. As this income-guarantee benefit is regarded as a benefit for wholly unemployed people, it is also granted to workers in part-time employment in the Netherlands who reside in Belgium and who previously received unemployment benefit in Belgium for all days of the week. Situations where a person is partially unemployed, on the other hand, are those involving the temporary suspension of a contract of employment, whether in whole or in part. Belgian legislation recognises *inter alia* the following circumstances: suspension of the contract on account of *force majeure*, technical problems or bad weather, or where there is insufficient work for economic reasons. The benefit granted in this case is to compensate for hours not worked because of unforeseen circumstances and is in proportion to the number of hours for which performance of the contract of employment has been suspended. The Belgian Government takes the view that the terms 'partially unemployed' and 'intermittently unemployed' in Arti-

cle 71(1)(a)(i) of the Regulation largely cover the same cases as Belgian law.

15. Relying on various judgments of the Court, the Portuguese Government takes the view that a frontier worker bound to a particular employer by a full-time contract of employment, who, on termination of that contract, commences work with the same employer under a part-time contract of employment must be regarded as a partially unemployed frontier worker within the meaning of Article 71(1)(a)(i) of the Regulation.

16. The Commission points out, first, that under Article 13(1) of the Regulation, persons covered by the Regulation are subject to the legislation of only one Member State and that, according to the case-law of the Court, the Regulation must be interpreted so as to avoid not only any positive conflict but also any negative conflict between the social security schemes of Member States.

17. The second principle to be taken into account, set out in Article 13(2)(a) of the Regulation, is that the Regulation is based on the principle of *lex loci laboris*, according to which the person concerned is covered by the social security scheme of the Member State where he works.

18. In respect of Article 71 of the Regulation, which provides for an exception to that principle, the Community legislature has started from the premiss that in the case of a frontier worker who becomes unemployed and is therefore present in his State of residence, the institution best placed to assist him and from which he can most easily receive the benefits to which he is entitled is the competent institution of the State of residence.

19. If, on the other hand, links with the State of employment have not been completely severed, notably because the person concerned still has employment there, even if only part-time, then the logic of that exception to the principle of *lex loci laboris* no longer holds good, and the principle reasserts itself.

20. According to the Commission, 'a frontier worker is "partially unemployed" if he has continuing employment (other than full-time employment) in the territory of the State of employment, so that he remains subject to the social security scheme of the State of employment under Article 13(2)(a)

of the Regulation. However, a frontier worker who is "wholly unemployed" is a person who has lost any employment or social security link with the State of employment'.

V — Appraisal

21. It should be noted at the outset that the Regulation does not set up a common scheme of social security, and that its sole objective is to coordinate national schemes. [3] It sets out criteria of applicability in order to avoid situations where a migrant worker is not covered by any social security scheme or is covered simultaneously by the schemes of more than one Member State.

22. However, that is clearly the type of problem on which a ruling is sought: the national court asks whether a worker in Mr De Laat's situation is covered by the Netherlands social security scheme as a wholly unemployed person or by the Belgian social security scheme as a partially unemployed person or, as the Belgian Government is essentially maintaining, by both these schemes at the same time.

Questions 1 and 2

23. By its first question, the national court essentially asks whether 'partially unemployed' and 'wholly unemployed' should be given a uniform Community construction. All the Member States that have submitted observations to the Court, as well as the Commission, agree that the answer to this question should be in the affirmative.

24. This response should obviously be endorsed.

25. It is clear from settled case-law that 'the essential object of Regulation No 1408/71 adopted under Article 51 of the Treaty is to ensure that social security schemes governing workers in each Mem-

3 — See, *inter alia*, Case 21/87 *Borowitz* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, paragraph 23.

ber State moving within the Community are applied in accordance with *uniform Community criteria*'.[4] [5]

26. As regards the legislation applicable in a given situation, the Court has stated that it follows from the provisions of Title II of Regulation No 1408/71 'that the application of national legislation is determined by reference to criteria drawn from the rules of Community law'. Although 'it is for the legislature 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 under such a scheme, it must be emphasised that this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member State is applicable'.[6]

27. Having regard to the answer I propose be given to the first question, there is no need to reply to the second question.

Questions 3, 4, 5 and 6

28. By the third, fourth and fifth questions, the national court asks what criteria can be applied in order to determine, under Community law, whether a worker is partially unemployed or wholly unemployed.

29. By its sixth question, the national court asks whether a person in Mr De Laat's situation is to be regarded as a frontier worker who is partially unemployed within the meaning of Article 71(1)(a)(i) of the Regulation or as a frontier worker who is wholly unemployed within the meaning of Article 71(1)(a)(ii) thereof.

30. Clearly, under Community law, such a worker cannot be regarded as wholly unemployed.

31. The ordinary meaning of the term suggests that a wholly unemployed worker

4 — Emphasis added.

5 — Case 69/79 *Jordens-Vosters* v *Bedrijfsvereniging voor de Leder- en Lederverwerkende Industrie* [1980] ECR 75, paragraph 11.

6 — Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, paragraph 14.

is a worker who, following termination of the employment relationship, no longer has a job, and is looking for work.

32. Indeed, this is also the definition that the Commission, in a proposal submitted to the Council on 12 January 1996 and not yet adopted, [7] wishes to incorporate in the Regulation.

33. According to that proposal, the term 'wholly unemployed' 'refers to the position of a formerly employed person whose employment relationship has been severed or has expired'.

34. That definition would cover not only workers whose contracts have expired and those who have been dismissed, but also those who have resigned [8] from their employment. I consider this to be acceptable given that, in any case, the object of the Regulation is not to define the substantive rights to which a wholly unemployed worker may be entitled. Such rights are defined by national legislation. Thus, it may be the case that in one Member State a worker who has voluntarily resigned from his employment will not receive compensation for unemployment, while in another Member State the reverse might be true.

35. It can be concluded, therefore, that the term 'wholly unemployed', within the meaning of the Regulation, refers to the position of a formerly employed person whose employment relationship has been broken off or has expired and who is looking for new employment. [9]

36. As Mr De Laat worked in Belgium throughout the period in question, he cannot be regarded as a wholly unemployed worker.

37. On the other hand, the question arises whether Mr De Laat is partially unemployed or a part-time employee. There is no doubt that, under Community law, a person who has a contract of employment and is involuntarily placed in the position of

7 — Proposal for a Council Regulation amending, for the benefit of unemployed persons, Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1996 C 68, p. 11), paragraph 9.

8 — However, it is clear from one of the documents provided by the national court that Mr De Laat was made redundant. He remained without a contract of employment for one day (a Sunday).

9 — The fact that he is looking for employment is proved by registration with the competent body.

working fewer hours than the number contractually provided for must be regarded as partially unemployed.

38. Should a situation such as the one in this case, where a reduction in working hours was implemented in the same undertaking but by means of *a new contract*, be deemed to fall within this definition?

39. At first sight, one might be tempted to answer this question in the affirmative in all cases where the worker had first been dismissed and where the old (full-time) contract was immediately followed by the new (part-time) contract.

40. However, that approach is problematic in view of the difficulty of determining objectively whether the worker concerned has actually freely chosen to move to reduced hours. The new contract will very often be formulated in identical terms in both situations.

41. The possibility cannot be totally excluded that, unlike Mr De Laat, a worker in fact wishes to continue working only if his hours are reduced and that he arranges to be assigned to other duties in the undertaking for that purpose, but that he is nevertheless tempted to apply to the competent authorities for compensation for loss of earnings in the form of benefits payable for partial unemployment.

42. Furthermore, if a worker who has entered into a new contract of employment with his employer for reduced working hours should be regarded as partially unemployed, it is not clear how his situation would differ from that of a worker who enters into such a contract with a new employer. Logically, therefore, the latter would also have to be regarded as partially unemployed.

43. To regard a person who enters into a new, part-time contract of employment with a new employer as partially unemployed, in so far as the person concerned still intends to resume full-time work, could give rise to uncertainties. It would effectively mean that the worker's intentions had to be taken into account, which is precisely what the Regulation aims to prevent.

44. To my mind, the interpretation of 'partially unemployed' must be based pri-

marily on Article 71(1)(a)(i) of the Regulation, which provides that:

'A frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State...'.

45. The words 'which employs him' imply a continuity in the employment relationship, that is to say, they suggest that moving from full-time to part-time work has been within the same undertaking, and that the contract has not been broken off or modified by an addendum reducing the working hours.

46. It should be noted that this in no way prejudices the substantive rights which a person in Mr De Laat's situation might enjoy in the State whose legislation applies to him under the Regulation.

47. Consequently, if the applicable legislation, as determined by the criteria of Community law, confers rights to certain allowances on workers who are employed part-time because it deems them eligible for compensation for unemployment, it is self-evident that a worker cannot be refused such allowances on the pretext that he resides in another Member State.

48. Indeed, a refusal would amount to direct contravention of the principle of non-discrimination set out in Article 48 of the EC Treaty (now, after amendment, Article 39 EC).

49. Ultimately, therefore, I take the view that a person who has a contract of employment and is involuntarily [10] placed in the position of working fewer hours than the number provided for in that contract must be regarded as partially unemployed within the meaning of Article 71(1)(a)(i) of the Regulation.

50. However, the national court has not asked the Court to interpret the term

10 — This should be objectively documented by the existing, unamended contract.

'partially unemployed' in relation to part-time employment. Indeed, it makes no difference into which of these two categories a worker falls from the point of view of the legislation applicable under the Regulation. Both Article 71(1)(a)(i) (partially unemployed frontier workers) and Article 13(2)(a) (employed workers, including those working part-time) apply the same criterion, namely that of where the employment is pursued.

51. Essentially, the national court would like to know whether a worker in Mr De Laat's situation may be regarded as wholly unemployed within the meaning of the Regulation, as a consequence of which, under Article 71(1)(a)(ii), the legislation of the Member State in which he resides would be the legislation applicable to him.

52. It is common ground that Mr De Laat was in paid employment throughout the period at issue, on the basis of which he was covered under Article 13(2)(a) by the legislation of the Member State where he was employed, namely, Belgium.

53. Moreover, it is settled law that 'Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a person covered by that regulation who is employed part-time in the territory of a Member State is subject to the legislation of that State both on the days on which he pursues that activity and on the days on which he does not'. [11]

54. I therefore propose that the Court reply as follows to the third, fourth, fifth and sixth questions:

'A frontier worker who is in paid employment cannot be regarded as wholly unemployed within the meaning of Regulation No 1408/71. He is covered by the legislation of the Member State where he is employed, even if he resides in the territory of another Member State'.

11 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 15.

VI — Conclusion

55. On the basis of all the foregoing considerations, I propose that the Court reply as follows to the questions referred by the Arrondissementsrechtbank te Roermond:

(1) The terms 'partially unemployed' and 'wholly unemployed' in Article 71(1)(a) of Regulation (EEC) No 1408/71 of the Council 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 must be given a Community interpretation.

(2) A frontier worker who is in paid employment cannot be regarded as wholly unemployed within the meaning of Regulation No 1408/71. He is covered by the legislation of the Member State where he is employed, even if he resides in the territory of another Member State.