OPINION OF ADVOCATE GENERAL JACOBS
delivered on 23 March 2000 *

1. This case concerns the compatibility with Regulation No 1408/71 [1] of the refusal by the competent authority in Germany (the Landesversicherungsanstalt Westfalen; 'LVA Westfalen') to pay a subsidy towards the contributions to the statutory Netherlands sickness insurance scheme compulsorily paid by the claimant Mr Movrin, a Netherlands national resident in the Netherlands and in receipt of old-age pensions from both the LVA Westfalen and the competent authority in the Netherlands. Under German legislation pensioners compulsorily or voluntarily affiliated to a statutory sickness insurance scheme or privately insured with a sickness insurance scheme are entitled to such a subsidy except where they live in another Member State and are compulsorily insured there in that State's statutory sickness insurance scheme.

The national legislation

2. The German Sozialgesetzbuch Erstes Buch (Social Security Code, Book I) provides that subsidies for expenditure on sickness insurance may be claimed as statutory pension insurance. [2] The other relevant provisions are in the Sozialgesetzbuch Fünftes Buch (Social Security Code, Book V, 'SGB V'), which governs the statutory sickness insurance scheme, and the Sozialgesetzbuch Sechstes Buch (Social Security Code, Book VI, 'SGB VI'), which governs the statutory pension insurance scheme. Their effect may be summarised as follows.

3. The German pension insurance institutions pay half the sickness insurance contributions payable by recipients of a German pension compulsorily affiliated to the statutory sickness insurance scheme in Germany, even if they live in another Member State; [3] those contributions are calculated on the basis of the amount of pension received from the statutory insurance scheme. [4] The payment towards the

* Original language: English.

1 — The latest consolidated version is that published as Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1997 L 28, p. 1. Although Regulation No 118/97 entered into force after the Landesversicherungsanstalt Westfalen had taken the decision contested in the main proceedings, the relevant provisions are the same.

2 — Paragraph 23.

3 — SGB V, Paragraph 249A.

4 — SGB V, Paragraph 226.

contributions is made directly to the sickness insurance institution. [5] In addition the German pension insurance institutions pay half the sickness insurance contributions payable by recipients of a German pension voluntarily affiliated to the statutory sickness insurance scheme in Germany or covered by private sickness insurance with an undertaking established in Germany or another Member State, even if they live in another Member State; that payment is made directly to the pensioner. [6] I will refer to both types of payment as a subsidy. The German pension insurance institutions pay no subsidy however towards payment of the sickness insurance contributions payable by the recipient of a German pension who is resident in another Member State where he is compulsorily affiliated to that State's statutory sickness insurance scheme.

Relevant Community legislation

4. Article 1(t) of Regulation No 1408/71 provides:

'*benefits* and *pensions* means all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.

5. The first sentence of Article 10(1) of Regulation No 1408/71 provides:

'Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

6. Article 27 of Regulation No 1408/71 provides:

'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides and who is entitled to benefits under the legislation of the latter Member State, taking account where appropriate of the provisions of Article 18 and Annex VI, shall, with the members of his family, receive such benefits from the institution of the place of residence and at the expense of the institution as though the person concerned were a pensioner whose pension

5 — SGB V, Paragraph 255(1).
6 — SGB VI, Paragraph 106(1).

was payable solely under the legislation of the latter Member State.'

Facts

7. Mr Movrin, a Netherlands national resident in the Netherlands, completed insurance periods in both the Netherlands and Germany; he has been entitled to an old-age pension from the Netherlands authorities since 1 August 1995 and from the German authorities since 1 September 1995. Under Netherlands law he is required to pay sickness insurance contributions, calculated by reference to the cumulative amount of his Netherlands and German pensions. Recipients of a Netherlands pension receive compensation designed to offset sickness insurance contributions; Mr Movrin receives such compensation but it is calculated by reference to his Netherlands pension alone.

8. In November 1996 Mr Movrin asked the LVA Westfalen to pay him the sickness insurance subsidy in respect of the proportion of his Netherlands sickness insurance contributions attributable to his German pension. The LVA Westfalen refused by decision of 9 January 1997. After the LVA Westfalen had dismissed his objection against that decision, he unsuccessfully brought proceedings before the Sozialgericht (Social Court), Münster. On appeal, the Landessozialgericht (Regional Social Court) Nordrhein-Westfalen quashed the decision of the Sozialgericht and sent the case back for rehearing. The Sozialgericht, uncertain whether the refusal to grant the subsidy was compatible with Community law, referred to this Court the following question:

'Is European Community law infringed where the defendant refuses to grant a subsidy in respect of the cost of Netherlands sickness insurance to the plaintiff, who receives a normal old-age pension from the defendant?'

Analysis

9. Mr Movrin submits that the subsidy is an old-age cash benefit within the meaning of Article 10(1) of Regulation No 1408/71 and must accordingly be exported pursuant to that provision; in similar vein the Commission argues that the subsidy is a pension supplement within the meaning of Article 1(t) of Regulation No 1408/71 and therefore subject to Article 10(1). The German Government however considers that the subsidy is not a 'benefit' within the meaning of Article 1(t) of the Regulation and is therefore not within the scope of Article 10(1). The observations of the LVA Westfalen, on the other hand, are based on the premiss that the sickness insurance subsidy is a sickness benefit and that Article 27 of Regulation No 1408/71 accordingly applies, with the result that the German institution has no obligation to pay the subsidy.

10. The essential question is whether the subsidy is an old-age cash benefit within the meaning of Article 10(1) of Regulation No 1408/71, in which case it will be payable to Mr Movrin notwithstanding that he is not resident in Germany. The subsidy cannot be within the scope of Article 10(1) unless it falls within the scope of 'benefits and pensions' defined in Article 1(t); I will accordingly address that issue first.

Is the subsidy within Article 1(t)?

11. In my view, the sickness insurance subsidy, intended to contribute to payment of sickness insurance contributions, is a benefit within the meaning of Article 1(t) of Regulation No 1408/71.

12. The Court has stated on numerous occasions that a benefit may be regarded as a social security benefit in so far as it is granted without any individual and discretionary assessment of personal needs to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71.[7] That list includes both sickness benefits (Article 4(1)(a)) and old-age benefits (Article 4(1)(c)). The classification of a benefit in a branch of social security is essentially determined by the characteristics of each benefit, in particular its purpose and the conditions of its grant.[8] As the Commission notes, it is clear from the national legislation that both those factors point to the subsidy's being an element of old-age pension. The subsidy is granted by the pension institutions and is calculated on the basis of the level of sickness insurance contributions, which in turn is based on the pension received. The amount of the subsidy accordingly depends on the level of the pension without any discretionary assessment by the authorities. Moreover payment of the subsidy is both conditional on entitlement to a pension and payable as of right to recipients of a pension, again without any discretionary assessment. It is accordingly in the nature of an allowance supplementary to a pension within the meaning of Article 1(t) of the Regulation.

13. The German Government argues that the fact that, at least in the case of a pensioner compulsorily affiliated to the German statutory sickness insurance scheme, the subsidy is paid by the pension insurance institution not to the pensioner but directly to the sickness insurance institution means that it cannot constitute a 'benefit' within the meaning of Article 1(t) of Regulation No 1408/71. As the Commission points out, however, the payment is none the less made for the benefit and

7 — See for example Case C-66/92 *Acciardi* v *Commissie Beroepszaken Administratieve Geschillen in de Provincie Noord-Holland* [1993] ECR I-4567, paragraph 14 of the judgment.

8 — Case 249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, paragraph 11 of the judgment.

account of the pensioner: its effect is accordingly to supplement the pension in real terms and it thus falls within the scope of Article 1(t). It may be noted that Article 1(t) of Regulation No 1408/71 expressly includes in the definition of 'benefits' 'payments made by way of reimbursement of contributions'. Payment of a subsidy towards a contribution has the same effect; indeed the view could equally be taken that the sickness-contribution subsidy falls within this limb of Article 1(t). Moreover the German Government appeared to accept at the hearing that the subsidy payable (by way of payment to the pensioner) in respect of sickness insurance contributions where the pensioner is either voluntarily affiliated or covered by private insurance falls within Article 1(t); I cannot however see any difference of principle between that type of subsidy and the subsidy by way of direct payment to the sickness insurance institute where the pensioner is compulsorily affiliated to a statutory scheme. I am accordingly not convinced by the German Government's argument.

Is the subsidy payable to non-residents?

14. If the subsidy is an allowance supplementary to a pension (or if it amounts to a payment made by way of reimbursement of contributions) and hence a benefit within the meaning of Article 1(t) of the Regulation, it is clearly an old-age benefit within the meaning of Article 10(1) thereof. The Court has held that the purpose of that provision is to promote the free movement of workers by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another: the protection given must therefore necessarily extend to cover benefits which, while created within the confines of a particular scheme, are given effect by increasing the value of the pension which would otherwise accrue to the recipient. [9] Moreover it is clear from that principle not only that the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated: [10] the objective pursued by Article 10 is to safeguard not only the payment of benefits acquired but also the acquisition of entitlement to them. [11] Article 10 therefore means that a person may not be precluded from acquiring or retaining entitlement to the benefits, pensions and allowances referred to in that provision on the sole ground that he does not reside within the territory of the Member State in which the institution responsible for payment is situated. [12] Since, as the Commission points out, Mr Movrin's lack of entitlement to the subsidy is attributable precisely and solely to the fact that he is

9 — Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, paragraphs 20 and 21 of the judgment.

10 — Case 92/81 *Camera* v *INAMI* [1982] ECR 2213, paragraph 14 of the judgment.

11 — See the Opinion of Advocate General da Cruz Vilaça in Joined Cases 379/85 to 381/85 and 93/86 *CRAM Rhône-Alpes* v *Giletti* [1987] ECR 955, paragraph 69.

12 — *Giletti*, paragraph 17 of the judgment.

resident in another Member State, the national court's question must be answered in the affirmative.

15. The LVA Westfalen's implicit argument that the subsidy is a sickness benefit and hence by virtue of Article 27 of the Regulation not payable by it is in my view misconceived. As noted by Mr Movrin and the Commission, that argument cannot be reconciled with the judgment of the Court in *Aulich*.[13] That case concerned the status of a similar allowance towards sickness insurance contributions provided for under the Reichsversicherungsordnung (German social insurance code). The Court ruled that, since the allowance was not granted after materialisation of the risk designated by the person entitled, it could not be within the scope of Article 27, which was limited to sickness (or maternity) benefits after materialisation of the risk insured against. The Court stressed that a distinction must be drawn between insurance contributions and insurance benefits. The allowance at issue was not a benefit paid in the event of sickness; on the contrary, it was a payment towards contributions to sickness insurance, which insurance was a precondition for the entitlement to benefits payable, in case of sickness, by the sickness insurance institution. Or, in the rather more elegant formulation of Advocate General Gand in *Dekker*,[14] an earlier case concerning the same allowance:

'There is an inherent contradiction between the concept of contribution and that of benefit; the first is a condition precedent to the creation of a right, the second presupposes the existence of a right.'

16. The German Government has raised the argument that the Netherlands' treatment of recipients of pensions from both the Netherlands and another Member State is contrary to Community law, and in particular Article 33 of Regulation No 1408/71. Unlawful conduct of that nature cannot, the German Government continues, give rise to an obligation on the part of Germany to subsidise the resulting contributions, at least where, as here, Mr Movrin is in fact in a better financial position than he would be if he were resident in Germany.

17. The German Government's reasoning is as follows. It asserts that, where a recipient of a German pension resides in another Member State, either the health system of that State will be financed exclusively by tax, as in the United Kingdom, in which case no deduction will be made from the pension to cover his sickness insurance so

13 — Case 103/75 *Aulich* v *Bundesversicherungsanstalt für Angestellte* [1976] ECR 697.

14 — Case 33/65 *Dekker* v *Bundesversicherungsanstalt für Angestellte* [1965] ECR 901, at p. 909.

that the payment of a subsidy would not be justified, or the health system will be essentially financed by contributions. In the latter case, the Member State in question should, when setting the level of contributions, take account only of the pension paid by it; any pension paid by another Member State's statutory pension insurance scheme should be disregarded. According to the German Government's information, all Member States except the Netherlands proceed on that basis. In all those States, therefore, sickness insurance costs do not reflect the German pension received, so that any relief by way of sickness insurance subsidy is irrelevant.

18. The Netherlands however is a special case, since a pension paid by another Member State's statutory pension scheme is taken into account in full when calculating sickness insurance contributions. The German Government considers that that is incompatible with Regulation No 1408/71, in particular Article 33.[15] An unlawful measure cannot give rise to a legal obligation on the part of the German institution which pays the pension on the basis of which the contributions are calculated to pay a subsidy towards those contributions. Such a subsidy is at the very least precluded in circumstances such as those of the present case in which the contribution which the applicant must pay to the Netherlands sickness insurance institution on the basis of his German pension (5.4%) is *less* than the contribution he would have to pay on the basis of his German pension (7%) if he were resident in Germany and compulsorily affiliated to the German sickness insurance institution. The applicant is thus in a better position than he would be if he were in Germany. Since there is no disadvantage, a sickness insurance subsidy is not objectively justified.

19. Article 33(1)[16] of Regulation No 1408/71 provides:

'The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Article 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.'

20. I cannot see how the Netherlands' conduct is contrary to that provision. Article 33(1) seeks to ensure that a pensioner cannot be required, because he resides in the territory of a Member State, to pay compulsory insurance contributions to cover benefits payable by an institution of another Member State. It accordingly

15 — See paragraph 19 below.

16 — Article 33(2) is not relevant to this case.

precludes the institution of a Member State responsible for payment of a pension from charging contributions to cover the sickness and maternity benefits payable by an institution of another Member State. [17] Deductions from pensions may thus be made by the institution of a Member State only in respect of those insured persons who in return receive sickness and maternity benefits from the institution of the same Member State responsible for such benefits; such deductions may not be made where the benefits in question are not borne by an institution of that Member State. [18] There appears in this case to be no question of the Netherlands' deducting contributions from Mr Movrin's pension in respect of benefits borne by the German sickness insurance institution (which indeed stresses in its written observations that it is not responsible for Mr Movrin's sickness insurance).

21. In any event, and as the Commission submitted at the hearing, even if the conduct of the Netherlands were, as alleged, unlawful, that could not override rights conferred on Mr Movrin by Regulation No 1408/71; the appropriate course would be for the Commission (or Germany) to institute infringement proceedings.

22. Nor can I see how Mr Movrin's rights under Community social security law could be extinguished by the circumstance that, as alleged, he in fact pays lower overall sickness insurance contributions as a Netherlands resident than he would as a German resident. What is relevant is that denial of the subsidy on the ground that he is resident in the Netherlands puts him in a worse position than he would be in if he were resident in Germany, and that is clearly contrary to the general principle of freedom of movement for workers underpinning the Regulation.

23. I accordingly conclude that the sickness insurance contribution subsidy is a 'benefit' within the meaning of Article 1(t) of Regulation No 1408/71 and an old-age cash benefit within the meaning of Article 10(1) of the Regulation. It is therefore payable notwithstanding that the putative recipient resides in a Member State other than that of the paying institution. In the light of that conclusion, which is sufficient to answer the referring court's question, I do not consider that it is necessary to consider the arguments variously raised by Mr Movrin and the Commission concerning Articles 6, 48 and 51 of the EC Treaty (now, after amendment, Articles 12, 39 and 42 EC), Article 3(1) of Regulation No 1408/71 and Regulation No 1612/68. [19]

17 — Case C-140/88 *Noij* [1991] ECR I-387, paragraphs 11 and 14 of the judgment.

18 — Case 275/83 *Commission* v *Belgium* [1985] ECR 1097, paragraph 3 of the judgment.

19 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

Conclusion

24. For the above reasons the question referred by the Sozialgericht, Münster, should in my opinion be answered as follows:

A sickness insurance contribution subsidy such as that payable by virtue of Paragraph 249A of the Sozialgesetzbuch Fünftes Buch and Paragraph 106(1) of the Sozialgesetzbuch Sechstes Buch is a 'benefit' within the meaning of Article 1(t) 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 and an old-age cash benefit within the meaning of Article 10(1) of that Regulation. It is therefore payable to the recipient of a German pension who is resident in another Member State where he is compulsorily affiliated to that State's statutory sickness insurance scheme.