OPINION OF ADVOCATE GENERAL COSMAS
delivered on 6 April 1995 *

1. In this case the Court of Justice has been requested by a decision of the Arbeidshof, Brussels, to give a preliminary ruling on the interpretation of 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, [1] and in particular Article 71(1)(b) in conjunction with Articles 13(2)(a) and 17 of that regulation.

I — Facts

2. The case has its origins in a dispute between the Rijksdienst voor Arbeidsvoorziening (Belgian National Employment Office, hereinafter 'RVA') and Joop Th. M. Van Gestel, a private employee with Netherlands nationality.

3. Mr Van Gestel was resident in Zoetermeer, Netherlands, and from 1 June 1980 was employed by B. V. Smithkline Beecham (hereinafter 'Smithkline', a company established in Zoetermeer. Subsequently he was temporarily transferred by Smithkline to an affiliated company, S. A. Norden Europe (hereinafter 'Norden'), which was established in Louvain-la-Neuve (Belgium), where he began working on 1 December 1988. For that purpose, at the end of October 1988, Mr Van Gestel moved to Belgian and took up residence in Overijse, where he still resides according to the findings of the court which has made the reference.

4. In view of that transfer, on 3 October 1988 Smithkline sent a letter on 3 October 1988 to the Netherlands Ministry of Social Affairs and Employment, seeking, pursuant to Article 17 of Regulation No 1408/71, exemption for Mr Van Gestel from the general rule laid down in Article 13 of the regulation so that he might continue to be subject to the Netherlands social security legislation. On 7 February 1989 the company sent a further letter to the Netherlands Ministry of Social Affairs and Employment requesting a decision on that application as soon as possible.

5. In fact the Netherlands Minister for Social Affairs and Employment and the Belgian Minister for Social Welfare agreed that Mr Van Gestel should continue to be covered by the Netherlands social security system for

* Original language: Greek.

1 — OJ, English Special Edition 1971 (II), p. 416, as amended and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6.

the period from 1 December 1988 to 30 November 1991 at the latest. Subsequently the Stichting Bureau voor Belgische Zaken (Office for Belgian Affairs), established in Breda, confirmed in a letter of 17 August 1989 to Smithkline that 'the Netherlands State Secretary for Social Affairs and Employment, after consultation with the Belgian Minister for Social Affairs, has decided that the employed person J. Th. M. Van Gestel, born on 13 April 1937, residing at Douzapad 37, 2722 AX Zoetermeer, who has been sent by you to work in Belgium, shall, pursuant to Article 17 of Regulation (EEC) No 1408/71, continue to be subject to Netherlands social security legislation until 30 November 1991 at the latest'.

On the attached declaration form E 101, dated 5 July 1989, Mr Van Gestel's address is given as 'Douzapad 38, 2722 AX, Zoetermeer' and it is stated that he was 'seconded ... for a period probably lasting from 1 December 1988 to 30 November 1991.'

6. Following a restructuring of the company after a merger, on 31 October 1990 Norden dismissed Mr Van Gestel and he was paid compensation in the Netherlands for termination of the employment relationship. Mr Van Gestel then applied to the Belgian Hulpkas voor Werkloosheidsuitkeringen (Unemployment Benefit Branch Office) for unemployment benefit from 1 November 1990. On Form C 4 which he submitted in connection with that application, he specified that, in view of the compensation paid to him in the Netherlands, he was not for the time being claiming payment of benefits but wished to be covered by the Rijksdienst voor Sociale Zekerheid (Belgian National Social Security Office) insurance. It should be noted that on Form C 4 his employer was given as Norden Europe SA, which declared that it had employed Mr Van Gestel in the Netherlands from 1 June 1980 to 30 November 1988 and in Belgium from 1 December 1988 to 31 October 1990, that no social security contributions were deducted from his salary and that he was employed in the capacity of export manager, a non-resident member of the middle management.

7. By a decision of 7 February 1991, the Provincial Unemployment Inspector for Vilvoorde rejected Mr Van Gestel's application for unemployment benefit, on the ground that the claimant had to show that during the reference period, namely from 1 November 1987 to 31 October 1990, he had completed 600 working days, or days treated as such. That decision specified, in connection with the latter condition that, according to Article 67 of Regulation No 1408/71, account could be taken only 'of your periods of employment and of like periods in any other EEC country, on condition ... that after those periods abroad and before your application for benefits you have worked in Belgium or have been in receipt of compensation under Belgian social security'.

Mr Van Gestel appealed against that decision to the Arbeidsrechtbank, Brussels, asking

that his entitlement to unemployment benefit be recognized.

8. By a judgment of 2 December 1991, that court held his claim admissible and well-founded, annulled the administrative decision of the Unemployment Inspector, and ruled that he was entitled to unemployment benefit from 1 November 1990. The judgment was based on the finding that the 'competent institution' within the meaning of Regulation No 1408/71 was the Netherlands institution and that, during the entire period of his employment in Belgium, Mr Van Gestel had resided there, so that his situation was governed by Article 71(1)(b)(ii) and not Articles 67 and 69.

9. The RVA appealed against that judgment to the Arbeidshof, Brussels, maintaining that in this case Article 67(3) of the regulation should be applied for the following reasons:

— first, in this case, it is not the Kingdom of the Netherlands which is the 'competent State' but the Kingdom of Belgium, since Mr Van Gestel was working in Belgium and residing there 'for the complete duration of the transfer', so that the basis for applying Article 17, and consequently for applying the agreement between the competent authorities of the two countries, was absent;

— secondly, Article 71, as interpreted by the Court, [2] deals with workers, who, during their last employment, were residing in a Member State other than that in which they were employed. Moreover, according to the RVA, Mr Van Gestel had not shown that, during the period in which he was working in Belgium, either he or his employer had paid unemployment contributions to the competent Belgian social security body. The RVA asked that the judgment at first instance be annulled and the decision of the regional inspector confirmed 'on all points'.

10. The respondent, Mr Van Gestel, contended that the appeal should be dismissed, emphasizing that, as was apparent from the documents which he had produced, he had gone to reside in Belgium 'before being seconded' and maintained that, following the agreement between the competent Netherlands and Belgian ministries, his Belgian employer, Norden Europe SA, 'deducted the social security premiums during the period from November 1988 to October 1990 and paid them in the Netherlands via the Netherlands subsidiary.'

2 — On this point the order for reference cites the Court's judgment in Case C-128/83 *Caisse Primaire d'Assurance Maladie de Rouen* v *Guyot* [1984] ECR 3507.

II — Questions referred for a preliminary ruling

11. By judgment of 18 November 1993 [3] the Arbeidshof, Brussels, held that, in order to reach a decision, it was necessary to refer questions to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EC Treaty and stayed proceedings until the Court of Justice had given a ruling on the following questions:

'Must Article 71(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that it does not apply to unemployed persons who during their last employment resided in the Member State in which they worked, even where, in derogation from Article 13(2)(a) of that regulation, and pursuant to Article 17, therein referred to, the competent authorities of two Member States are in agreement that the employed person is to remain subject to the social security legislation of one of those Member States, not being the one in whose territory the unemployed person was employed?

As a secondary point, and should the Court of Justice be of the opinion that in such a case the State designated in the derogating agreement, which is not the one in which the unemployed person last worked, is the competent State, as provided in Article 71(1), is that also the case, and can the provisions of Article 71(1)(b)(ii) apply, where that agreement came into being when the employed person resided and worked in the territory of one and the same Member State and during that last employment resided and worked without interruption in that same Member State, in which his employer was also established, and that Member State is *not* the one to whose social security legislation the agreement made him subject during that employment?'

12. Those questions seek essentially to ascertain how the provisions of Regulation No 1408/71 relating to unemployment, in particular Article 71, should be interpreted and applied where two Member States have decided by mutual agreement, making use of the possibility of derogation available in Article 17 of the regulation, to allow an employed person to be subject to legislation other than that which would be applicable to him pursuant to the rules set out in Articles 13 to 16 of the regulation, before he became unemployed.

More specifically, the question arises in this case whether a person such as the respondent in the main proceedings, who continues to be insured in the State in which he was previously employed, but becomes unemployed

3 — OJ 1994 C 1 p. 14.

in another Member State where he resides and works, may avail himself of Article 71(1)(b) and claim unemployment benefits in the State in which he resides.

13. In order to reply to the questions posed by the national court, it is indispensable at the outset to set out the legislative provisions and case-law applicable to this case, which are the provisions of Regulation No 1408/71 relating to the applicable law and to unemployment, and the case-law of the Court concerning those provisions.

III — Legislative background and case-law relating thereto

14. As is well-known, Regulation No 1408/71 was adopted by the Council pursuant to Article 51 of the EEC Treaty and is aimed at the coordination of national legislation on social security. Its purpose is to ensure freedom of movement for workers, by guaranteeing within the Community, firstly, equality of treatment for all nationals of Member States under the various national legislations and secondly, social security benefits for workers regardless of their place of employment or of residence. [4]

15. In the context of that coordination, the provisions of Title II of the regulation, in particular Articles 13 to 17 thereof, constitute a complete and uniform system of conflict rules, determining the legislation applicable to the questions of social security governed by the regulation. Those provisions, as the Court has reiterated, are intended not only to prevent 'the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that the persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them.' [5] It is precisely for that reason that Article 13(1) of the regulation sets out the principle that persons to whom the regulation applies are to be subject to the legislation of a single Member State only and that 'that legislation shall be determined in accordance with the provisions of this Title'. Article 13(2)(a) lays down as a general rule that '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.'

16. That general principle, providing for application of the *lex loci laboris*, is formulated, however, subject to Articles 14 to 17,

4 — See the fifth recital in the preamble to Regulation No 1408/71.

5 — See the judgment in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, at paragraph 12. See also the judgment in Case 60/85 *Luijten* [1986] ECR 2365, at paragraph 14.

which introduce special rules to take account of certain specific situations. As the Court has had occasion to state in its judgment in *Brusse* 'In fact, in certain specific situations the unreserved application of the rule set out in Article 13(2)(a) might create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would entail delays in the forwarding of employees' files and, therefore, place obstacles in the way of their freedom of movement'. [6]

17. More particularly, Article 17, the last article in Title II, sets out the possibility of providing for exceptions to Articles 13 and 16 in situations which, although not specially envisaged by those articles, nevertheless require different rules from those contained in Title II of Regulation No 1408/71. Moreover, the task of identifying those situations and determining the legislation to be applied is entrusted by Article 17 to the Member States concerned which may, by common agreement, derogate from Articles 13 to 16 provided, however, that the agreement is concluded 'in the interests of certain workers.'

Availing themselves of that possibility, the Member States involved in the present case, that is to say, the Kingdoms of Belgium and the Netherlands, decided that Mr Van Gestel should remain subject to Netherlands social security legislation. Under that agreement, the validity of which has not been impugned by any party, it follows that, despite moving his place of work from the Netherlands to Belgium, Mr Van Gestel remains, in derogation from the principle laying down application of the *lex loci laboris*, subject to the system laid down in the Netherlands social security legislation. It is thus that legislation which is in principle exclusively applicable even where the person concerned becomes unemployed.

18. That finding applies, however, only in so far as the specific provisions of the regulation do not lay down otherwise. As the Court acknowledged in its judgment in Case 227/81 *Aubin*: 'That general provision, however, which appears in Title II of Regulation No 1408/71, headed "Determination of the Legislation Applicable", applies only in the absence of provision to the contrary in the special provisions relating to the various categories or benefits which constitute Title III of the same regulation.' [7] In the same judgment, the Court goes on to specify that 'That is precisely the case with Chapter 6 of Title III on unemployment, the provisions of which ... ensure that migrant workers receive

6 — Case 101/83 [1984] ECR 2223, at paragraph 16. See also the judgment in Case 58/87 *Rebmann* [1988] ECR 3467.

7 — [1982] ECR 1991, at paragraph 11

unemployment benefit in the conditions most favourable to the search for new employment.' [8] Thus an exception to the general principle providing for application of the *lex loci laboris* is laid down in Section 3 of Chapter 6, which deals in a single article, Article 71, with the case of unemployed persons who, during their last employment, were residing in a Member State other than the 'competent State'.

19. Article 71(1) contains distinct provisions according to whether the unemployed person is a frontier worker ((a)) or not ((b)). As the order for reference makes clear, Mr Van Gestel falls into the second category of unemployed persons. For that category, Article 71(1)(b) provides as follows for those who, like Mr Gestel, are wholly unemployed:

'(b) (i) an employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.'

20. Those rules, like the other special rules which provide for attachment to the social security system of the State of residence, [9] are based on considerations of social policy and practical efficacy. More especially, with regard to Article 71, the Court has held in its judgment in *Rebmann* that they are 'concerned to avoid practical drawbacks which a frontier worker would suffer by being attached to the State of employment. His

8 — Case 227/81 *Aubin*, cited above, at paragraph 12. See also the judgments in Case 39/76 *Mouthaan* [1976] ECR 1901, and Case 58/87 *Rebmann*, cited above.

9 — Regulation No 1408/71 also provides for exceptions to the principle of application of the *lex loci laboris* in Article 25(2) for sickness and maternity benefits, and in Article 39 for invalidity benefits.

obligation to make and keep himself available to the employment services may in fact be performed more easily in the State of residence. Moreover, the authorities of that State are in a better position to pay unemployment benefit, by ensuring that the person concerned satisfies the conditions for the receipt of the benefit, at the same time facilitating his return to employment'. [10] The Court also held in its judgment in *Bergemann* [11] that that 'possibility of receiving unemployment benefits in the State of residence is justified for certain categories of workers who retain close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside. It is reasonable that workers who have such links with the State in which they reside should be accorded the best conditions in that State for finding new employment.' In the same judgment the Court emphasizes that, according to the ninth recital in the preamble to Regulation No 1408/71, Article 71 is intended to guarantee to migrant workers unemployment benefits under the most favourable conditions for seeking new employment. [12]

21. Thus it appears that, for reasons of efficacy and practicality, Regulation No 1408/71 provided for derogations, like that of Article 71, to the general rule imposing application of the legislation of the State of employment and that those derogations relate to particular cases where application of the legislation of the State of residence would appear most appropriate and in conformity with the interest of employed persons. In order to achieve that objective, Article 71(1)(b) of Regulation No 1408/71 offers, as the Court recognized in the *Aubin* and *Miethe* judgments, a person other than a frontier worker who is wholly unemployed 'a choice. He may apply to the unemployment benefit scheme in the State in which he was last employed, or claim benefit in the State where he resides. In the case of a wholly unemployed worker who elects to be governed by the legislation of the State where he resides, that choice is made essentially — indeed exclusively — by the worker's making himself available to the employment office of the State from which he is claiming the benefits. The worker may not, however, either aggregate the unemployment benefit from both States or, if he has made himself available only to the employment office in the territory of the Member State where he resides, claim unemployment benefits from the State in which he was last employed.' [13]

22. Contrary to the case of frontier workers who become wholly unemployed, in respect of whom, pursuant to the express provisions of Article 71(1)(a)(ii), the institution of the place of residence has exclusive competence, in the case of non-frontier workers who become wholly unemployed, under Article 71(1)(b) evidently the legislation of no one Member State is exclusively applicable, but the person concerned is entitled to elect between, on the one hand, the legislation of

10 — Cited above in footnote 6, at paragraph 14.

11 — Case 236/87 [1988] ECR 5125, at paragraph 20. See also the judgment in Case 76/76 *Di Paolo* [1977] ECR 315 and the judgments in Case 1/85 *Miethe* [1986] ECR 1837 and Case C-216/89 *Reibold* [1990] ECR I-4163.

12 — See the judgment in *Bergemann*, cited above, at paragraph 18.

13 — See Case 227/81 *Aubin*, cited above, at paragraph 19. See also the judgment in Case 1/85 *Miethe*, cited above, at paragraph 9.

the State to whose social security he is subject which is generally the Member State of employment (*lex loci laboris*) and, on the other, the legislation of the Member State of residence (*lex loci domicilii*). The persons concerned exercise that option by making themselves available either to the employment services in the State in which they were last employed (Article 71(1)(b)(i)), or to the employment services in the State where they reside (Article 71(1)(b)(ii)). [14] In other words, in that situation the relevant State is the one to whose employment services the worker has made himself available.

23. That right is provided because, as Advocate General Lenz observed in his Opinion in Case 1/85 *Miethe*, cited above, in the case of non-frontier workers, a relationship primarily with the State in which they reside 'is not always decisive in the sense that the worker leads his entire life, other than his working life, in the country and it is thus the real centre of his interests. Instead, there is a strong possibility of a close relationship with the State in which he is employed and for that reason he may not necessarily have an interest in returning to the State in which he resides when his employment comes to an end.' [15] It is therefore clear that the right to choose provided for in Article 71 is based on the idea that it is objectively more reasonable that the unemployed person's efforts to find new employment should be made in the place which is the centre of his interests and where he maintains his closest links.

24. The possibility of making such a choice is made subject, as follows both from the formulation of the heading to Section 3 of Chapter 6 relating to unemployment and the wording of Article 71(1)(b), to the condition that, during the unemployed person's last employment at the end of which he became unemployed, the Member State of his residence was other than the 'competent State'. The 'competent State' within the meaning of that provision is the Member State on whose territory the competent social security body with which the person concerned is insured is situated. [16] It is that interpretation that the Administrative Commission of the European Communities on Social Security for Migrant Workers adopted in its Decision No 131 of 3 December 1985 concerning the scope of Article 71(1)(b)(ii) of Council Regulation No 1408/71 relating to the right to unemployment benefits of workers, other than frontier workers, who, during their last employment, were residing in the territory of a Member State other than the competent State. [17] In that decision, the Administrative Commission accepted that 'the determining factor for the application of Article 71 in its entirety is the fact that the person concerned resided during his last employment in a Member State other than the one to the legislation of which he was subject, which does not necessarily correspond to the one in which he was employed'. That has, furthermore, been confirmed recently by the Court in its judgment in Case C-287/92 *Maitland Toosey*, [18] when it stated that 'It follows both from the title of the section in Regulation No 1408/71 of which Article 71 constitutes the sole article, and from the case-law of the Court, [19] that the factor that determines whether Article

14 — See the judgment in Case 1/85 *Miethe*, at paragraph 9.

15 — [1986] ECR 1838, especially at p. 1841.

16 — See Article 1(q) and (o) of Regulation No 1408/71.

17 — OJ 1986 C 141, p. 10 (third recital in the preamble to the decision).

18 — [1994] ECR I-279, at paragraph 13. See also Case 76/76 *Di Paolo*, cited above, at paragraph 11.

19 — The judgment refers to *Di Paolo*, *Guyot* and *Bergemann*, cited above.

71 applies at all is the residence of the person concerned in a Member State other than that to whose legislation he was subject during his last employment.'

Consequently the provision of Article 71 at issue is applicable in every case where the place of residence [20] is not the same as the place of social security insurance, which is the Member State in whose territory the competent social security institution is situated.

25. On this point it should be noted that in its Decision No 131 of 3 December 1985, the Administrative Commission of the European Communities on Social Security for Migrant Workers lists the cases in which Article 71(1)(b)(ii) of Regulation No 1408/71 applies to workers. However, the same decision makes clear in its use of the words 'in particular' that the list is indicative and cannot be considered to have enumerated exhaustively the categories of workers who may come within the provisions of Article 71(1)(b), nor to have excluded certain other categories who have maintained close ties with their country of habituàl residence. [21] Moreover, the Court has accepted that the Administrative Commission cannot adopt acts of a legislative character and that its decisions are not binding as far as the interpretation and application of the Community rules with which it deals are concerned. [22]

26. In order to complete this account of the legislative background, I should lastly point out that under Article 67(3) of the regulation, workers who are covered by Article 71(1)(b)(ii) are expressly exempted from satisfying the condition set out in Article 67 as regards aggregation of periods of insurance or employment for the purpose of the award of unemployment benefit. Specifically Article 67(3) provides, in connection with those workers, that

'Except in the cases referred to in Article 71(1)((a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

— in the case of paragraph 2, periods of employment,

20 — According to Article 1(h), 'residence' means habitual residence. See below for the criteria for determining residence in application of Article 71.

21 — See on this point the judgment in *Bergemann*, cited above, at paragraph 16.

22 — See the judgments in Case C-102/91 *Knoch* [1992] ECR I-4341 and Case C-98/90 *Romano* [1981] ECR 1241.

in accordance with the provisions of the legislation under which the benefits are claimed.'

Thus if it were considered that Article 71(1)(b) did not cover cases such as that of Mr Van Gestel, then for aggregation of periods of insurance and employment the above condition would have to be fulfilled. It was not, however, fulfilled, since the person concerned, precisely because of the agreement concluded between the competent Belgian and Netherlands authorities, remained subject to Netherlands social security legislation and consequently never did complete periods of insurance or employment under the Belgian social security system. Conversely, if it is considered that cases such as Mr Van Gestel's do fall under Article 71(1)(b), then aggregation becomes possible since, as Article 67(3) expressly provides, the condition laid down therein is no longer necessary.

IV — Reply to the questions referred for a preliminary ruling

27. In accordance with the legislation and case-law described above, an employed person who is not a frontier-worker falls under Article 71 and is entitled to the benefit of choice when, during his last employment, he was covered by a social security institution of a Member State other than that in which he resides.

The usual situation to which the provision applies is where the employed person resides in a Member State other than that in which he is employed. Given the principle of the application of the *lex loci laboris* formulated by Article 13(2)(a) of the regulation, it would appear in such a case that the competent State — that is to say, the State of the competent social security institution — is not the Member State in which the worker resides. Thus, for instance, the Court has accepted that Article 71(1)(b)(ii) is applicable to the case of a worker who had transferred her residence to a State other than the State of employment for family reasons, namely her desire to live with her spouse and children, given that in such circumstances she certainly had better prospects of finding employment in the State of residence than in the State of employment. [23] Conversely, in *Guyot*, where the person concerned, who was of German nationality, resided where she was employed, that is to say, in Germany, and then, when she resigned from her job, moved to France to join her husband, the Court held that Article 71 of Regulation No 1408/71 was not applicable in view of the fact that she was unemployed and in the course of her last employment had resided in the Member State in which she was employed. [24]

23 — Judgment in *Bergemann*, cited above, at paragraph 21.
24 — Judgment cited above.

28. As compared with the preceding cases, this case has a special feature, namely that the place where the person concerned was insured for social security purposes is different from the place where he was last employed which in turn is where he resides. Mr Van Gestel remained subject to the social security legislation of one Member State, the Netherlands, whilst thenceforth working and residing in another, Belgium. That situation arose because the Member States involved decided, pursuant to Article 17 of the regulation, that the Netherlands social security system would continue to apply to Mr Van Gestel despite the fact that he had been transferred to Belgium and had also transferred his residence there. However the fact that his places of employment and residence are the same does not prevent application of Article 71 to his case, in so far as the determining fact, as stated above, for application of that provision is that the person concerned resided during his last employment in a Member State other than the one to the legislation of which he was subject. In other words, the residence of the person concerned must be situated in a Member State other that the 'competent State' within the meaning of the regulation. Consequently, the reply to that question depends on whether that condition is fulfilled in this case.

29. As far as place of residence is concerned, it is clear from the order for reference that the national court regards it as common ground that the person concerned was residing in Belgium during the reference period. That factual circumstance is disputed only by the Italian Government. In its observations the latter emphasizes that the national court did not examine, as it should have done, whether that condition was satisfied and the person concerned cannot be regarded as residing in Belgium, on the ground that, as it appears from the facts of the case, in particular from the temporary nature of Mr Van Gestel's transfer and from the fact that the possibility of derogation provided for in Article 17 had been applied to his case, his stay in Belgium had a provisional character. On that point, it should be noted that in its judgment in *Di Paolo*, cited above, the Court held that by 'the the Member State where the worker resides' within the meaning of Article 71(1)(b)(ii) of the regulation, is meant the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated.

30. In accordance with the Court's settled case-law, in order to determine the State of residence for the purposes of applying the provision in question, account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances. [25] However, as the Court emphasized in *Knoch*, [26] it is for the national court to apply those criteria to the case

25 — See the judgments cited above, *Di Paolo*, at paragraph 22, *Reibold*, and *Knoch*, at paragraph 23.

26 — Cited above, at paragraph 24.

before it. The Court is not empowered, under Article 177 of the Treaty, to apply provisions of Community law to specific cases. Consequently it is not for the Court to examine the question whether, in this case, the person concerned did in fact reside in Belgium, but is bound by the findings of the court which made the reference on that point.

31. As regards the term 'competent State', as is clear from the case-law of the Court, [27] this must be defined, for the purposes of applying Article 71, in conformity with the general rules set out in Title II of the regulation concerning the determination of the legislation applicable. As indicated above, that title lays down the general principle that the *lex loci laboris* should be applied to the worker, but Article 17 allows the Member States to provide, by common agreement, for exceptions to that principle. The consequence of such an agreement is that the worker is made subject to a social security system other than that indicated by the *lex loci laboris*, that is to say, other than the system of the Member State in which he is working. In the present case, as stated above, pursuant to the agreement between the competent Belgian and Netherlands ministries, the validity of which has not, moreover, been disputed, Mr Van Gestel was made subject to the Netherlands social security system. That means that in this case the Kingdom of the Netherlands is the 'competent State' within the meaning of Article 71(1). Consequently we are faced with a case where the worker is subject to the social security system of one Member State whilst residing in another.

27 — Judgment in Case 145/84 *Cochet* [1985] ECR 801, at paragraph 11.

32. I therefore take the view that an employed person who, like Mr Van Gestel, is, under an agreement concluded pursuant to Article 17 of the regulation, subject to the social security legislation of one Member State, but after his transfer resides and works in another Member State where he becomes unemployed may rely on application of Article 71(1)(b)(ii) and claim payment of unemployment benefits from the competent institutions of the State in which he resides.

33. That interpretation accords with the purpose of the provision in question. It should be noted that Article 71 is intended to guarantee to migrant workers unemployment benefits under the most favourable conditions for seeking new employment and the possibility for the migrant worker of receiving unemployment benefits in his State of residence is justified for certain categories of workers who retain close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside. It is precisely those ties with the State in which they reside that give workers the best conditions for finding new employment in that State.

34. Refusal to apply Article 71(1)(b)(ii) and in consequence to grant unemployment benefits to a worker in Mr Van Gestel's situation would be contrary to the purpose of the provision as described above. An employed person like Mr Von Gestel, who, while subject to the social security system of the Member State in which he worked before his transfer, thenceforth works and resides in another

Member State, will very probably have formed close ties of a personal as well as vocational nature with that latter State, so that his prospects of finding new employment are more favourable there than in the State of his insurance. I therefore consider that application of the provision in question to such cases accords with the aim pursued by the provision.

35. Conversely, not to apply the provision in such a case would deprive the worker of the possibility of remaining in the Member State where he was resident and working at the time when he became unemployed in order to find work. As the German Government has also pointed out in its observations, I do not see why the worker should be placed at such a disadvantage simply because the Member States concerned have concluded an agreement, availing themselves of the option given to them by Article 17 of the regulation. That would run counter to the interest of the person concerned, and it is precisely that interest that agreements of that type should serve in accordance with the express terms of the article in question.

36. In its second question the national court asks whether, should the Court be of the opinion that the answer to the first question is that Article 71(1)(b) of the regulation applies to unemployed persons who, although they were residing in the Member State in which they worked before becoming unemployed, are, pursuant to Article 17, subject to the legislation of another Member State, Article 71(1)(b)(ii) also applies

— where that agreement came into being when the employed person resided and worked in the territory of one and the same Member State, and

— during that last employment resided and worked without interruption in that same Member State, in which his employer was also established, and

— that Member State is not the one to whose social security legislation the agreement made him subject during that employment.

In accordance with the foregoing, that question must be answered in the affirmative, to the effect that the provision does also apply in the circumstances to which the national court refers in its second question, provided, obviously, that the conditions examined

above laid down in Article 71(1)(b)(ii) are satisfied.

37. More particularly, as regards the fact that the agreement pursuant to Article 17 was concluded at the time when the employed person was already working and residing on the territory of one and the same Member State, it must be pointed out that, as is made clear in the case-law of the Court, in particular in Case 101/83 *Brusse*, [28] the point at which an agreement under Article 17 was concluded has no particular importance. It should be recalled that in that judgment the Court stated that '[t]here is nothing in the wording of Article 17 to indicate that recourse to the derogation made available to the Member States by that provision is possible only as regards the future. On the contrary, it follows from the spirit and scheme of Article 17 that an agreement within the meaning of that provision must also be capable, in the interests of the worker or workers concerned, of covering past periods.'

38. It is also immaterial, for the purposes of applying Article 71(1)(b) that the employed person resided and worked on the territory of the Member State where his employer was also established. Neither the place of last employment nor the place where the employer is established affect the application of that provision. As indicated above, the determining fact for the application of Article 71 is the residence of the person concerned in a Member State other than the 'competent State'.

39. Finally, with regard to the fact that the Member State paying the unemployment benefits is not that to whose social security system the person concerned is subject, it is true that application of Article 71(1)(b) allows a worker such as Mr Van Gestel to receive unemployment benefits from the competent institution of a State in which he has not paid contributions for the duration of his employment. That is, however, a direct consequence of the legislature's intention which was, as shown above, to enable migrant workers to draw unemployment benefits in the State in which they have the best prospects of finding new employment, by giving them the right to choose between the State of insurance and the State of residence.

40. That consequence is, moreover, independent of the existence, between the Member States, of an agreement concluded pursuant to Article 17 of the regulation. As the Commission notes in its observations, on the hypothesis, in the present case, that there had been no agreement then, on the basis of the principle of the application of the *lex loci laboris*, Mr Van Gestel would be subject to the Belgian system of social security and, like any other insured person, would be entitled to unemployment benefits in Belgium. If,

28 — [1984] ECR 2223, at paragraphs 20 to 23.

therefore, Mr Van Gestel, while having been transferred to Belgium, had retained his residence in the Netherlands, he could also, pursuant to Article 71(1)(b), have applied for unemployment benefits in that State whilst not subject to Netherlands legislation for social security purposes.

41. Accordingly the circumstances set out in the second question have no effect on the conclusion which we reached above with regard to the application of Article 71(1)(b)(ii) to cases such as the one examined here.

V — Conclusion

42. In view of the foregoing, I would suggest that the Court reply in the following terms to the questions referred to it by the national court for a preliminary ruling:

Article 71(1)(b)(ii) of Council Regulation 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 must be interpreted as applying to an employed person who, pursuant to an agreement concluded in pursuance of Article 17 of the regulation, remains subject to the social security system of the State in which he was previously employed, but who becomes wholly unemployed in another Member State where he was residing and working.