OPINION OF ADVOCATE GENERAL JACOBS
delivered on 9 June 1993 *

My Lords,

1. In this case, a request for a preliminary ruling from the Labour Division of the Corte Suprema di Cassazione, Italy, the Court is asked to reconsider its case-law on whether a Member State is permitted to make the right to voluntary continued insurance conditional upon prior affiliation to that State's social security scheme. The Corte Suprema has referred the following question:

'Is Article 9(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971, in so far as it provides that "the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State" to be interpreted as meaning that a worker may be admitted to voluntary continued insurance even if he has not completed, in a number of Member States, including the Member State in which the request is made, different periods of insurance that can be aggregated but has completed a single previous period of employment as a migrant worker in one other Member State and has obtained in that State the relevant compulsory insurance required for admission to voluntary insurance in the State in which he has requested admission to voluntary continued insurance?'

2. In what follows I shall refer to 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, as 'the Regulation'. The Regulation was amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6). Subsequent amendments (see the consolidated version published, for information only, in Official Journal 1992 C 325, p. 1) did not introduce any changes which are relevant to the present case. Article 9(2) of the Regulation is in the following terms:

'Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.'

3. Mrs Baglieri is an Italian national who worked in Germany from 23 August 1965 to

* Original language: English.

4 April 1975, during which time compulsory contributions under German social security legislation were paid on her behalf. She then returned to Italy. On 17 December 1979 she applied to the appellant social security institution (hereafter 'the INPS'), claiming the right to make voluntary insurance contributions in Italy. She wished to make such contributions in order that she might meet the requirements for the award of an invalidity pension in Italy. It appears that at no time has Mrs Baglieri been employed in Italy or been affiliated to any Italian social security scheme.

4. The INPS refused Mrs Baglieri's application and she appealed to the Pretura di Siracusa, which allowed her appeal on the ground that her right to make voluntary contributions in Italy was guaranteed by Article 9(2) of the Regulation. The INPS appealed in its turn, first to the Tribunale di Siracusa and then to the Corte Suprema di Cassazione, which is the final court of appeal in Italy. The INPS argues that Article 9(2) of the Regulation does not require a Member State to take into account periods of insurance completed in another Member State where the person concerned has never been affiliated to a scheme of compulsory insurance in the first State.

The existing case-law

5. It is clear from the order for reference that the Corte Suprema is aware that the question referred has in effect already been answered by the Court in Case 70/80 *Vigier* v *Bundesversicherungsanstalt für Angestellte* [1981] ECR 229. That case concerned a right for the victims of National Socialist persecution to make retroactive voluntary contributions to a German social security scheme. Under the applicable legislation, the right was conditional upon the person concerned having the status of an insured person under German law. The Court stated, at paragraphs 18 to 20 of the judgment:

'From the order making the reference it appears that ... in order to have the status of insured person it is necessary to have paid at least one contribution as a worker to a German social insurance institution.

According to the case-law of the Court, in particular its judgment of 24 April 1980 in Case 110/79 *Coonan* [1980] ECR 1445, where national legislation makes affiliation to a social security scheme conditional on prior affiliation by the person concerned to the national social security scheme, Regulation No 1408/71 does not compel Member States to treat as equivalent insurance periods completed in another Member State and those which must have been completed previously on national territory.

Consequently ... Article 9(2) of Regulation No 1408/71 must be construed as meaning that it does not require a social insurance institution of a Member State to take into account periods of insurance completed under the legislation of another Member State when the worker concerned has never paid, in the first Member State, the contribution required by law in order to create his status as an insured person under the legislation of that Member State.'

As Advocate General Reischl explained in his Opinion, at p. 248:

'The latter provision [i. e. Article 9(2)] is merely a provision on the *aggregation* of insurance periods, that is to say, its effect is to assimilate foreign insurance periods in so far as benefits depend on the duration of the period of insurance, with the result that recourse may be had to it in order to decide, for example, whether there was a minimum period of insurance of 60 months *in toto*. But the purpose of the provision is not to *create* the status of insured person; rather, it presupposes such a status. ... As the Federal Insurance Office for Clerical Staff rightly points out, that question is in principle unaffected by the Community law on social security. Rather, the creation of the status of insured person is a matter for national law and an essential condition precedent for the application of Regulation No 1408/71.'

6. The principle established in *Vigier* has been reaffirmed in subsequent cases, most recently in Case 368/87 *Hartmann Troiani* v *Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333. That case concerned the right to make voluntary retroactive payment of insurance contributions which had been reimbursed upon the marriage of the contributor. Under the applicable national legislation, the right to make such contributions was conditional upon affiliation to a compulsory insurance scheme in the Member State in question. The Court stated at paragraphs 12, 15 and 16 of the judgment:

'It should be noted at the outset that national legislation making the right voluntarily to make retroactive payments of pension-insurance contributions subject to certain conditions falls within the concept of continued insurance within the meaning of Article 9 of Regulation No 1408/71.

...

As regards Article 9(2) of Regulation No 1408/71, the object of that provision is to guarantee that periods of insurance completed in different Member States are treated as equivalent so that the persons concerned can satisfy the condition of a minimum length of insurance periods where national legislation makes admission to a voluntary or optional insurance scheme subject to such a condition.

On the other hand, it is clear from the wording of Article 9(2) that it does not govern the other conditions to which the legislation of any Member State may make subject the acquisition of a right, such as the right to contribute to a national scheme of voluntary or optional continued insurance.'

The Court stated, furthermore, that such a result was consistent with Articles 48 and 51 of the Treaty. As the Court observed at paragraph 21 of the judgment:

'It is true, as the Court ruled in its judgment of 25 February 1986 in Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, paragraph 19, that the aim of Articles 48 and 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose

the advantages in the field of social security guaranteed to them by the laws of an individual Member State. However, as the Court held in its judgments of 24 April 1980 in Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraph 12 and of 24 September 1987 in Case 43/86 *Sociale Verzekeringsbank* v *de Rijke* [1987] ECR 3611, paragraph 12, 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, provided always that in this connection there is no discrimination between nationals of the host State and nationals of other Member States. ...'.

7. It can be seen, therefore, that in its case-law the Court has repeatedly affirmed the principle that it is for the Member State concerned to lay down the conditions for affiliation to the social security schemes of that State and that such conditions are not affected by provisions such as Article 9(2) of the Regulation, which are concerned exclusively with the aggregation of periods of insurance completed in different Member States for the purpose of satisfying conditions relating to the minimum length of insurance periods. It follows that Article 9(2) cannot prevent a Member State from making admission to voluntary or optional continued insurance conditional upon prior affiliation to a social security scheme in that State.

Should the case-law be reconsidered?

8. The Corte Suprema suggests however that the Court might wish to reconsider its interpretation of Article 9(2) of the Regulation. As reasons for such a proposed reinterpretation the Corte Suprema refers, in the first place, to 'the pending removal of all limitations on the freedom of movement of workers' within the Community, by which the Corte Suprema appears to mean the establishment of the internal market envisaged by Article 8a of the Treaty. In the second place, the Corte Suprema refers to what it describes as 'principles of the EEC Treaty relating to the free movement of workers within the countries of the Community and hence to their social security' which are, it suggests, 'designed to safeguard (and treat as equivalent) situations which have already been acquired in the territory of the Community'. Finally, the Corte Suprema suggests that an unduly restrictive interpretation of Article 9(2) might place workers who move within the Community at a disadvantage as compared with those who have worked in non-member States.

9. As the Commission convincingly shows in its written observations, none of the arguments advanced by the Corte Suprema provides a reason for modifying the Court's existing interpretation of Article 9(2). In what follows I shall however briefly consider those arguments.

(a) The completion of the internal market

10. As I have said, the first consideration advanced by the Corte Suprema relates to the completion of the internal market pursuant to Article 8a of the Treaty as amended by the Single European Act, which provides that:

'The Community shall adopt measures with the aim of progressively establishing the

internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 8b, 8c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

As the Commission points out, three Council Directives have in fact been adopted which extend the right to reside in another Member State to certain categories of persons — namely persons of independent means, pensioners and students — some of whom did not previously benefit directly from the right to free movement under the Treaty. [1] The Commission has also made a proposal for a Council Regulation amending Regulation No 1408/71, which if adopted by the Council would in principle extend the scope of the Regulation to include all insured persons; at present, of course, the Regulation covers employed and self-employed persons only, together with members of their families and their survivors. [2]

11. Those Directives, and the proposed amendment to the Regulation, all have the objective of ensuring the completion of the internal market pursuant to Article 8a of the Treaty, as their preambles make clear. It is plain however from the wording of Article 8a that that Article is not in itself intended to have the effect of harmonizing provisions of the Member States relating to the free movement of persons. Even when the date 31 December 1992 specified in Article 8a has passed, it cannot be regarded as having such an effect.

12. That conclusion is confirmed by an examination of Articles 100a and 100b of the Treaty, which were inserted into the EEC Treaty by the Single European Act to facilitate the achievement of the objectives of Article 8a. It must first of all be noted that fiscal provisions, those relating to the free movement of persons and those relating to the rights and interests of employed persons are all excluded from the scope of Article 100a: see Article 100a(2). As regards provisions which do fall within the scope of Article 100a, the first subparagraph of Article 100b(1) provides that during 1992 the Commission and each Member State shall draw up an inventory of provisions which have not yet been harmonized pursuant to that Article. By the second subparagraph of Article 100b(1):

1 — See Council Directive 90/364/EEC on the right of residence, Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, and Council Directive 90/366/EEC on the right of residence for students (OJ 1990 L 180, p. 26, p. 28 and p. 30 respectively). It is to be noted that the last Directive was annulled by the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, on the ground that the wrong Treaty basis had been employed (Article 235 rather than Article 7). The Court however preserved the effects of the Directive pending its re-enactment using the correct Treaty basis.

2 — For the text of that proposal see OJ 1992 C 46, p. 1.

'The Council, acting in accordance with the provisions of Article 100a, may decide that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State.'

Thus, even in the case of provisions which fall within the scope of Article 100a — the Article of the Treaty which is dedicated to the specific purpose of securing the completion of the internal market in accordance with Article 8a — further action of the Council is still required before the provisions of Member States must be recognized as equivalent. In the case of provisions, such as the ones presently in issue, which fall outside the scope of Article 100a, that conclusion must, it seems to me, follow *a fortiori*. Such a conclusion would moreover be consistent with the Declaration on Article 8a of the Treaty annexed to the Final Act adopting the Single European Act, which states that setting the date of 31 December 1992 'does not create an automatic legal effect'. While the status and effect of the declaration have yet to be clarified, [3] it is clear that, to the extent that it can be taken into account in interpreting Article 8a, it is incompatible with the view that setting that date had the effect of transforming the scope of the social security regulations.

3 — On the status of that declaration and on the possible legal effects of the time-limit set in Article 8a, see H. G. Schermers 'The effect of the date 31 December 1992' in *Common Market Law Review* 28 (1991) pp. 275-289. See also A. G. Toth 'The legal status of the declarations annexed to the Single European Act' in *Common Market Law Review* 23 (1986) pp. 803-812.

13. It can be seen therefore that the passing of the date set for the completion of the internal market cannot in itself have the effect of requiring Member States to recognize affiliation to a social security scheme of another Member State as equivalent to affiliation to its own social security scheme, even if such mutual recognition were regarded as necessary for the establishment of the internal market. It follows that the Court's existing case-law on Article 9(2) of the Regulation is not immediately affected by the passing of that date. Thus, in the absence of legislation providing for such mutual recognition, each Member State retains the right to lay down the conditions required for affiliation to its own social security schemes.

(b) The free movement of workers

14. Nor, it seems to me, can the Court's existing interpretation of Article 9(2) be affected by any considerations based on the principles of the Treaty relating to the free movement of workers. As we saw above in paragraph 6, the Court has emphasized that its existing interpretation is fully consistent with both Article 48 and Article 51 of the Treaty. There is of course no doubt that the provisions of the Regulation must be interpreted in accordance with the aim of Articles 48 and 51, which is to ensure that a worker does not, as a result of exercising his right of free movement under the Treaty, lose advantages in the field of social security guaranteed to him under the laws of an individual

Member State: see Case 254/84 *De Jong* v *Sociale Verzekeringsbank* [1986] ECR 671, at paragraph 15 of the judgment, and Case 368/87 *Hartmann Troiani*, cited above in paragraph 6, at paragraph 21. It does not however follow that a worker who exercises his right of free movement should have the right to be affiliated to a social security scheme in the Member State of his choice. Indeed, in the absence of harmonization of the social security legislation of the Member States, such a freedom of choice might place an intolerable burden on those Member States with relatively generous social security provisions.

15. In the present case, it is clear that Mrs Baglieri did not lose, as a result of working in Germany, any right to make voluntary insurance contributions which she enjoyed under Italian law. It is true that if she had worked in Italy, rather than in Germany, she would have had the opportunity of acquiring such a right. On the other hand, however, she would not have acquired the rights she now possesses as a result of her affiliation to a German social security scheme. A potential obstacle to the free movement of workers would of course arise if, as a result of having worked in more than one Member State, a worker were unable to satisfy the conditions for entitlement to social security benefits in any of the Member States in which he had worked. That obstacle is however removed by the provisions of the Regulation, including Article 9(2), which permit the aggregation of insurance periods completed in different Member States.

(c) Equal treatment with migrant workers in third countries

16. Finally, the Corte Suprema suggests that the Court's existing interpretation of Article 9(2) may have the effect that workers who have exercised their right to free movement within the Community are treated less favourably, under national legislation, than those who have worked in a non-member State. It appears that, under Italian legislation, special provision is made for the payment of insurance contributions on behalf of such workers in order to protect their rights to Italian social security benefits. Community law does not of course preclude a Member State from conferring such advantages on persons who go to work in a non-member State, and such provisions may be thought necessary in order to safeguard the position of those working in a third country which has not concluded any bilateral agreement with the Member State in question. It is equally the case, however, that Community law does not require similar advantages to be conferred on migrant workers who go to another Member State. The position of such workers is in any event protected by the provisions of the Regulation, which provides for equal treatment with the host Member State's own nationals as well as for the aggregation of insurance periods completed in different Member States.

Conclusion

17. I reach the conclusion, therefore, that the considerations advanced by the Corte Suprema provide no reason to depart from the Court's existing case-law on Article 9(2) of the Regulation. As we have seen, that case-law makes it clear that, for the purposes of applying Article 9(2), it is for the Member State concerned to lay down the conditions of affiliation to its national schemes of social security, provided that there is no discrimination between the Member State's own nationals and those of other Member States.

18. I am accordingly of the opinion that the question referred by the Corte Suprema di Cassazione should be answered as follows:

Article 9(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 must be interpreted as meaning that it does not require a Member State to take into account periods of insurance completed under the legislation of another Member State, where the person concerned has never been affiliated to a social security scheme in the first Member State and such affiliation is a condition required for admission to voluntary or optional continued insurance under the legislation of that State.