2. A person who:

— was compulsorily insured against the contingency of 'sickness' successively as an employed person and as a self-employed person under a social security scheme for the whole working population;

— was a self-employed person when this contingency occurred;

— at the said time and under the provisions of the said scheme, nevertheless could have claimed sickness benefits in cash at the full rate only if there were taken into account both the contributions paid by him or on his behalf when he was an employed person and those which he made as a self-employed person;

constitutes, as regards British legislation, a 'worker' within the meaning of Article 1 (a) (ii) of Regulation No 1408/71 for the purposes of the application of the first sentence of Article 22 (1) (ii) of this regulation.

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Pescatore Sørensen

Delivered in open court in Luxembourg on 29 September 1976.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 13 JULY 1976 [1]

Mr President,
Members of the Court,

I. A — Mr Brack, the claimant in the main action, a British citizen born in 1906, was insured from 1948 to 1957 — that is for nine years — under the social security scheme of the United Kingdom as an employed person. After 1957 he worked as a self-employed accountant. It

1 — Translated from the French.

is in this capacity that he continued to pay national insurance contributions.

In 1971, having reached the age of 65, he had become entitled, either as an employed person or as self-employed, to a retirement pension under section 30 of the National Insurance Act 1965, provided that he gave up all gainful employment. He would then have been freed from the obligation to pay contributions in respect of unemployment and sickness benefit.

He decided, however, to continue working as a self-employed person.

As a result, he was liable to continue to pay the said contributions until he actually retired or reached the age of 70 years.

During his last working years, the claimant's health was several times seriously affected. In order to recover from the after-effects of various infections and a serious operation he went to France on medical advice on 23 September 1974 to stay with friends for a period of convalesence. Some days later, during his stay in that country, he had a severe attack of neuritis which, according to the opinion of two French doctors, required immediate medical attention and at least four weeks off work. Nevertheless, on 25 October 1974 the claimant returned to the United Kingdom and worked again for a short time before going into hospital once more. Each time he had to stop work, apart from when he fell ill in France, the claimant received sickness benefits in cash and in kind.

The file does not show clearly whether the claimant received benefits *in kind* from the National Health Service on the ground of his illness in France. In any case, the Insurance Officer, to whom his claim was referred by his local insurance office, refused to provide him with benefits *in cash* for the period of his absence from work in France, on the basis of section 49 (1) of the 1965 Act and regulations 7 (1) (b) and 7 (1 A) of the National Insurance (Residents and Persons Abroad) Regulations 1948, under which a person shall be disqualified from receiving any benefit for any period during which he is absent from Great Britain unless he was continuously unable to work during the six months preceding his absence and that his condition remained unchanged during his absence, or that he went abroad for the specific purpose of receiving treatment for an ailment for which he was already suffering before he left Great Britain.

Like the National Insurance Commissioner who referred the case to you, I must at this point digress in order to describe in detail the position of the claimant under the British system:

It has not been clearly shown that, during his stay in France, the claimant actually made use of the option provided for in regulation 5 (2) of the Residence and Persons Abroad Regulations to pay voluntarily the contributions which he would have had to pay as a self-employed person resident in Great Britain (under regulation 5 A of the regulations made under section 10 of the National Insurance Act 1965, if he had remained in Great Britain he would moreover have been exempted from paying contributions and credited with payment thereof during the period of incapacity for work). It is, however, clear that he paid these contributions until he left for France and began to pay them again on his return to the United Kingdom.

Under British law at the time when he submitted his claim either employed person's contributions or self-employed person's contributions alone would have been sufficient to entitle him to a retirement pension at a reduced rate (regulation 7 of the National Insurance (Widow's Benefit and Retirement Pensions) Regulations 1972) or to unemployment or sickness benefit at the

weekly rate at which a retirement pension would have been payable if he had actually retired (section 19 (3) of the 1965 Act).

On the other hand, the rate of sickness benefit to which he was entitled depended on the rate of the retirement pension (excluding any increase) which would have been paid to him if he retired and the latter rate itself depended on the reply to the question whether he satisfied the following two conditions:

First, that 156 contributions had actually been paid between the date of entry into insurance and the date of attaining pensionable age: this condition was satisfied by taking into account either his contributions as an employed person alone, or his contributions as a self-employed person alone;

Secondly, that the yearly average of contributions paid or credited as at the date of attaining pensionable age was not less than 50; this was only the case if his contributions as an employed person were added to his contributions as a self-employed person (section 4 (1) of Schedule 2 to the 1965 Act).

Consequently, irrespective of the condition of residence referred to above, it was necessary to add together the contributions paid as an employed person and as a self-employed person in order for the claimant to be able to receive sickness benefit at the full rate.. This factor will be of decisive importance in forming the reply which I shall suggest you should give.

Having terminated this digression, it is an appropriate moment to recall that the claimant appealed from the decision of the Insurance Officer to the 'Local Tribunal'. As, on 25 March 1975, this tribunal upheld the decision in question, the claimant appealed further to the National Insurance Commissioner.

The claimant died on 21 October 1975 and his widow was appointed to proceed with his claim.

B – It is under these circumstances that the National Insurance Commissioner refers certain questions to you under Article 177 and awaits the replies thereto which will also enable him to settle numerous other similar cases. In its written observations the Government of the United Kingdom joins in expressing the same concern.

Whether the Commissioner gives rulings on appeals or whether there is no judicial remedy under national law against his decisions, I consider that he constitutes, in any case, a 'tribunal' within the meaning of Article 177. You are therefore competent to rule on the questions referred to you.

The decision of the Commission itself states that the claimant was refused sickness benefits in case under the British system on the ground of his absence from the national territory. In the Commissioner's view, if, at the material time, the claimant had been a worker within the meaning of Regulation No 1408/71, he would have been, under the terms of Article 22 (1) (a) of this regulation, a worker 'whose condition necessitates immediate benefits during a stay in the territory of another Member State' and would therefore have been entitled to sickness benefits in cash under this provision of Community law.

Briefly, the problem may be put in the following terms:

Must a worker, who is a national of a Member State and who has been subject as an employed person to the social security legislation of this Member State, be regarded as a 'worker' within the meaning of Regulation No 1408/71 even though, when he submitted his claim for benefit, he was classified as a 'self-employed' person for the purposes of the relevant system and is he

therefore entitled, if he falls ill in the territory of a Member State other than that in which he is resident, to cash benefits under the provisions of this regulation, as if he had fallen ill in his State of origin, notwithstanding any contrary provision of national law?

Thus, the present action does not directly raise any problem of the aggregation of periods taken into account under the laws of two different countries for the purpose of acquiring and retaining the right to the social security benefits (Article 51 (a) of the Treaty), but it does raise the problem of the effect of a stay in the territory of a Member State as regards the payment of benefit to a person who has worked in another Member State (Article 51 (b)). It is thus more a problem of discrimination within one country between a worker who is actually employed and a worker who is merely treated as such, the former being able to benefit from the terms of Regulation No 1408/71, but the latter being unable to do so although he has also paid compulsory contributions intended to cover him against a corresponding risk. The question is whether such a worker may be unable to benefit from such assimilation as a result of an extraneous factor which cannot be relied upon against an employed worker, using the term in the strict sense of Regulation No 1408/71.

The answer to the first question referred to you is thus of fundamental importance to the solution of the action: it involves defining the classes of persons covered by a scheme which, as we shall see, applies to all persons — employed or self-employed — who have been successively or alternately employed and self-employed. The three other subsidiary questions deal with the possible classification to be given to the status of the claimant. To put it more precisely, the National Insurance Commissioner would like to know under what other heading in Article 1 (a) the claimant must be classified:

— either by reason of the manner which the scheme with which he was compulsorily insured is administered or financed;
— or by reason of the fact he might be regarded as having been insured on an optional continuing basis.

You will thus be led to consider both the Community regulations and British legislation. This is a special feature of the interpretation which you are called upon to give within the context of Article 177. Furthermore, as Annex V refers expressly to British legislation, it will be necessary to give a brief account of its provisions.

II. A — Let us begin with the British social security scheme, a branch of law which, according to Professor Garner (Administrative Law, 4th edition, p. 247 to 249), may be described as the 'corner-stone of the Welfare State'.

In this respect I could not do better than to refer to the account which appears in the Appendix to the written observations of the United Kingdom Government. As regards the case which concerns us we find in particular that: since 1946 insurance against prolonged incapacity for work has been extended in the United Kingdom to all persons who are gainfully occupied and that the pensioner's insurance scheme covers all persons who are no longer of an age to work, whether or not they are gainfully occupied. The benefits provided for were contributory and the persons for whom insurance was obligatory were divided into three classes:
(1) employed persons,
(2) self-employed persons,
(3) non-employed persons.

The British scheme is peculiar in that certain persons are classified as employed although they have concluded no contract of service, while others are classified as self-employed although they are bound by a contract of service.

This legislation was subsequently amended, in particular in 1965, when the

legislation applicable to the claimant was enacted, in order to increase the rates of contribution and benefits and a number of new benefits, including some non-contributory ones, were introduced. The classes of persons affected were not altered, but the dichotomy between the nature of the occupation engaged in and its classification in the corresponding category became more marked.

Thus, at the material time the British legislation was a very flexible system, based on several legal fictions and assimilations.

Important reforms introduced after the decision of the Council of the European Communities of 1 January 1973 adjusting the documents concerning the accession of new Member States to the European Communities (OJ L 2, of 1. 1. 1973, p. 1), but before the facts giving rise to the action took place, have further accentuated this tendency of the British legislation.

B — Although it entered into force after the material time the Social Security Act involves substantial changes. This Act abolished the division of the insured population into three separate and in principle mutually exclusive classes. It provided for four classes of contributions: the contributions of the first two classes are obligatory, those of the third are voluntary and those of the fourth are of purely fiscal significance.

The contributions of the first class are payable both by the persons and by their employers; the employed person is defined as anyone who is gainfully employed either under a contract of service or as the holders of offices the emoluments of which are subject to income tax under the same rules as apply to persons employed under a contract of service. Such a person may be self-employed from the point of view of labour law as the criterion is firmly fiscal.

The contributions of the second class are payable by self-employed persons, who are defined as persons gainfully employed other than as 'employed earners' within the meaning of the Act: they may however be employed persons from the point of view of labour law.

Finally, the voluntary contributions of class three are payable by 'earners' or by others so as to secure, preserve or enhance their rights to benefits.

In the mind of the legislature these contributions are normally paid by persons who are or have been 'earners' but whose obligatory contributions, because of cessation or interruption of employment or low earnings during employment, are not sufficient to entitle them to benefits at the standard rate.

It follows from the non-exclusivity of the classes that a person may be liable to pay concurrently contributions as an employed earner (or person treated as such) and as a self-employed earner (or person treated as such). As a result, it may be that a person whose obligation to pay contributions does not derive exclusively from his status as an employed person and who is thus a self-employed person will nevertheless have to be regarded as an employed person for the purposes of social security. On the other hand, a worker may be liable for Class 2 contributions, payable by self-employed persons, although he is an employed person from the point of view of labour law.

Since 1975 all persons from whose remuneration income tax is deducted at source, whether or not they are in fact employed persons, are obliged to pay employed persons' contributions. The contributions are earnings-related and, like income tax, are deducted from remuneration.

In practice, therefore, it is a *fiscal criterion* which form the basis of classification in one of these classes and this classification bears little relation to the exercise of activities as an employed

or a self-employed person; furthermore, it may be modified by regulations.

Under this scheme, non-contributory benefits are paid without any distinction based on the class to which the insured persons belong or have belonged or, since 1975, according to the class of contributions (if any) which they pay or have paid.

As regards contributory benefits, for example, sickness benefits in cash, these are paid without any distinction based on the class to which the insured persons belong at the time of realization of the risk insured against, or, since 1975, on the class of contributions, if any, which they pay at that time. However, the payment of contributions is taken into account for the purposes of the acquisition or retention of a right to benefits.

The cash benefits in respect of the different types of risks are identical and payable at a flat rate. They bear no relation to the pay lost.

For those who, like the claimant, were over normal pensionable age, the rate at which such benefits are payable is determined once and for all by reference to the contribution record as it stood at the date of attaining pensionable age (section 18 (2) of the 1965 Act).

However, an increase in retirement pension (under the graduated pension scheme which came into force in April 1961) may, where appropriate, be awarded as the result of supplementary contributions or contributions paid (not credited) after the attainment of normal pensionable age. But the additional earnings-related contributions, the principle of which had been adopted in 1966, and the corresponding earnings-related supplement do not come into play in the case of those who, like the claimant, were not in Class 1 and therefore were not liable to pay graduated (earnings-related) contributions. The cash sickness benefits payable under section 19 (3) are thus not affected by these increases.

In the administration of the scheme no distinction of any kind based on differences in the class of the contributor or, from 1975, the class of contributions paid by him is made.

Consequently, to return to the observations of the Government of the United Kingdom, a person's change of status, for example, from employed person to self-employed person, brings about no loss of benefit rights resulting from contribution periods already completed, so long as those periods remain the ones to be taken into account, even though the benefits in question are in fact inappropriate to his new status. The only problem which may arise is whether a short-term change of place of residence or stay of the person concerned may have such an effect in the light of the provisions of Regulation No 1408/71.

If, as the British Government says, it has never been possible on the basis of the 'classes' to make a clear distinction between those persons who may be regarded as employed and the others, questions may arise as to the consistency of the concept of 'employed persons' adopted by the authors of Regulation No 1408/71 with legislation like the British social security legislation and as to the conformity of the criterion concerning liability to pay contributions as an employed person, or the criterion based on the manner in which the scheme is administered or financed.

III. A — It is appropriate at this point to recall the state of the Community regulations on the eve of the accession of the three new Member States. If I may summarize the spirit of these regulations, as elucidated by your case-law, I would say that it extends beyond the national territories and aims at abolishing the discrimination existing in social security

matters by adopting a wider concept of the Community territory and the status of 'worker' or that 'it (Article 4 of Regulation No 3) follows a general tendency of the social law of Member States to extend the benefits of social security in favour of new categories of persons by reason of identical risks' (Judgment of 27 October 1971 in Case 23/71, *Janssen* v *Alliance National de Mutualités Chrétiennes* [1971] ECR 864).

While Regulation No 3 spoke of 'migrant' workers, your case-law has considerably increased the scope covered by this expression by holding that freedom of movement for workers entailed the right to move freely not only in search of employment, but also for medical reasons and even for short periods as a tourist.

In your judgment given on 19 March 1964 in Case 75/63 *Hoekstra* (née *Unger)* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* ([1964] ECR 177), which concerned a person who was no longer a worker, you held that Article 19 (1) of Regulation No 3 (which corresponds to Article 22 (1) of Regulation No 1408/71) 'precludes any rule of national law from subjecting the grant of the benefits in question ... to conditions more onerous than those which would be applied if the person concerned had fallen ill while in the territory of the State to which the insurer belongs'. Thus you adopted the opinion of Mr Advocate-General Lagrange who considered (loc. cit. p. 193) that 'contrary to what the court of first instance appears to think, this interpretation of Article 19 is completely in accordance with the objectives of Article 51 of the Treaty. It is to adopt 'such measures in the field of social security as are necessary to provide freedom of movement for workers'. It is clear that any measure which assimilates the territory of the various Member States to the territory of the State of origin for the benefit of the various payments is fully in conformity with such an objective'. He adds 'Let us note in this connexion that the provisions contained in Article 51 (a) and (b) are not exclusive, being preceded by the words ' to this end'.

This case-law has been confirmed by your judgment of 11 March 1965 given in Case 31/64, *'De Sociale Voorzorg' Mutual Insurance Fund* v *Bertholet* ([1965] ECR 81), of 9 December 1965 in Case 44/65, *Hessische Knappschaft* v *Maison Singer & Fils,* ([1965] ECR 965) and of 12 November 1969, in Case 27/69, *Caisse de Maladie des Chemins de Fer Luxembourgeois* v *Compagnie Belge d'assurance generales sur la vie et contre les accidents,* ([1969] ECR 405).

As in the present case no problem arises as to the acquisition and retention of the right to benefits or as to the calculation of such benefits, and as the only difficulty arises from the temporary stay of the person concerned in the territory of a Member State other than his State of origin, it may be thought that this difficulty can be resolved on the basis of that case-law alone. This, however, presupposes the prior settlement of the definition of the term 'worker' and we are thus brought back to the first question.

On this point you accepted in your judgement of 19 December 1968 in Case 19/58, *De Cicco* v *Landesversicherungsanstalt Schwaben* ([1968] ECR 473), that periods of contribution to the craftsmen's insurance scheme completed in Italy are insurance periods within the meaning of Articles 1(p), 24, 27 *et seq.* of Regulation No 3 for the purposes of obtaining an invalidity pension in another Member State. On that accasion you said in particular that the provision appearing in Article 4 of this Regulation which uses the expression 'wage-earners or assimilated workers' is based on a wide conception of the persons to whom it applies in as much as it subjects to the provisions of the regulation not only wage-earners in the strict sense of the word but in addition all those 'assimilated' to such workers.

Similarly, you held in your judgment of 27 October 1971 in Case 23/71, *Janssen,* ([1971] ECR 859) that the insurance periods completed as a wage-earner under the social security scheme of another Member State must be taken into account in establishing the right to benefits of self-employed persons in Belgium.

If, in fact, a self-employed Belgian who is temporarily or permanently resident abroad cannot there receive a more extensive protection than that available in Belgium, this is solely because you have subordinated the extension of the provisions of a general social security scheme to the condition that it must entitle 'those benefiting from it to a degree of protection against one or more risks *comparable* to that granted in respect of the risk concerned under the general scheme' and because the Community legislature has itself introduced a limitation by providing in Annex V (Belgium) of Regulation No 1408/71 that as long as self-employed persons receive medical treatment under the Law establishing a compulsory sickness and invalidity insurance scheme, they shall not receive the same protection as employed persons within the meaning of Article 1 (a) (i) of the regulation.

B — In order to try to 'codify' your case-law and also to take account of changes which had taken place in the legislation of the various Member States, the Community legislature adopted on 14 June 1971 Regulation No 1408/71 (OJ, English Special Edition 1971 (II), p. 416). However, this regulation only came into force on the first day of the seventh month following the publication in the Official Journal of the European Communities of implementing Regulation No 574/72 of the Council of 21 March 1972 (OJ), English Special Edition 1972 (I), p. 159), that is, on 1 October 1972.

Its title states that it concerns 'the application of social security schemes to *employed* persons and their families moving within the Community'.

This regulation attempted to reconcile two somewhat contradictory tendencies:

first, in accordance with the recitals set out in its preamble, the regulation generally only refers to workers and not to 'employed' persons;

secondly, it avoided, as far as possible, speaking of 'assimilated' workers and attempted to define each time what was to be understood by 'assimilated' workers, in particular in the case of schemes applying to the whole population.

It does, however, contain circumlocutions which have the same sense as assimilation. Thus, Article 34 provides that a pensioner who is entitled to benefit in kind under the legislation of a Member State as a result of pursuing a professional or trade activity 'shall ... be considered as a worker' for the purposes of the special provisions concerning sickness benefit. This provision was introduced in order to permit the reimbursement of expenses incurred by insured persons as a result of medical treatment received during a stay in in the territory of a Member State other than the State competent to pay the expenses if it was for any reason impossible to carry out the necessary formalities during the stay.

Article 2 (3) of the regulation provides that it 'shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this regulation applies', that is, to the extent to which they are not covered by a special scheme. Here is an important point for us: although the provisions of Article 48 of the Treaty (which appear in the chapter concerning workers) are not applicable to employment in the public service (Article 48 (4) and the provisions of the

chapter concerning the right of establishment do not apply to activities which in a State are connected, even occasionally, with the exercise of official authority (Article 55), the authors of the regulation regarded civil servants and persons who are treated as such as employed persons, at least to the extent to which they are or have been subject to the legislation of a Member State to which Regulation No 1408/71 applies. I welcome this abolition of social barriers and this assimilation, but I do not understand why the same does not apply to self-employed persons, or at least to those among them who have paid compulsory contributions as employed persons and who continue to do so as self-employed persons.

C — Thus, on the eve of the accession of the new States, the Community regulations and the British scheme — like the social security schemes in most of the Member States — had developed along similar and converging lines demonstrating the generalization of the trend towards protecting the whole of the population.

Mr Advocate-General Gand had already observed this in his opinion in the *De Cicco* case ([1968] ECR 484); he declared that your judgment in *Hoekstra,* (née *Unger)* shows that 'the sphere of application of the regulation is determined by a *criterion of social security* and not of labour legislation', which implies that the ambit of Article 51 of the Treaty is different from that of Articles 48 to 50 and overlaps the provisions concerning the right of establishment (Chapter 2 of Title III): to use the very terms of the *Unger* judgment ([1964] ECR 185), the concept of 'wage-earner or assimilated worker' refers to 'all those, who, as such and under whatever description, are covered by the different national systems of social security'. Furthermore, in the case of stateless persons and refugees and, as we have seen, certain civil servants, the ambit of Article 51 extends beyond the strict definition of 'workers', and persons other than persons who 'voluntarily' prolong their insurance or 'holiday-makers' may find themselves regarded as assimilated.

This is in no way surprising. The social-cum-occupational or functional criterion on the basis of which a distinction is made between employed persons, self-employed persons and mere residents is not to be understood only in a narrow sense; for example, those persons who are not able to work for reasons of unemployment or physical inability are nevertheless in social terms part of the group to which they were attached by their earlier occupation. Children, although they do not work, come within the class to which the person responsible for them belongs.

The attraction exercised by the schemes for employed persons, which tend to absorb social groups other than those for which they were organized, forms another limit to the partitioning between the various classes of persons. We are thus moving towards a situation in which there are only two types of compulsory social insurance: social insurance for employed persons and assimilated workers and general social insurance applying to the whole of the population. Furthermore, the possibility exists under various provisions for self-employed persons to insure themselves voluntarily with the scheme for employed persons and the legislature encourages as much as it can such extension of insurance. This corresponds to socio-economic reality: not only may a career be pursued successively or alternately in several countries, but also under different schemes.

In order to take account of the effect of Regulation No 1408/71, which became applicable in the United Kingdom as from 1 April 1973, and of the fitting together of the British scheme and the Community regulations, the Act concerning the Conditions of Accession

(JO L 73 of 27. 3. 1972, p. 113), as adapted by the decision of the Council of the European Communities of 1 January 1973 (OJ L 2 of 1. 1. 1973, p. 26), supplemented Annex V to Regulation No 1408/71 by a section concerning the United Kingdom which states at Point I that:

'all persons required to pay contributions as employed workers shall be regarded as workers for the purposes of Article 1(a)(ii) of the regulation.'

In a sense, as Mr Advocate-General Warner said in his opinion in Case 24/75 *(Petroni* v *ONPTS,* [1975] ECR 1163) as regards Regulation No 1408/71, the first question raised by the present action is to what extent the authors of the Act succeeded in that endeavour.

IV — The Insurance Officer follows the wording of the Annex and considers that the claimant who, from the point of view of labour law, was self-employed at the material time, was not 'required to pay contributions as an employed worker' and thus does not come within the scope of the definition in Article 1 (a) (ii).

A — At first sight there appears to be a discrepancy between your case-law, according to which the term 'worker' has a Community meaning, and Annex V, in particular its section dealing with the United Kingdom, which refers to national law for the purpose of defining this concept. As long as the Community concept of a worker also covered persons 'required to pay contributions as employed workers', no difficulty arose. But we have seen in your case-law the extent to which this concept departs from this criterion.

In fact, your case-law is influenced by two considerations:

In the first place, you consider that the regulation cannot be given an application which depends on a definition or a modification of national law.

Secondly, although you have sometimes held that the regulation could not be regarded as a measure to harmonize or approximate the laws of the Member States, but merely to coordinate them, you have done so solely in order to maintain or strengthen the rights which workers enjoy under the laws of the Member States: it is for this reason that you have ruled that in no case could the regulation be interpreted or applied as reducing these rights. You confirmed this principle again after the accession of the new Member States in Case 24/75 (Judgment of 21 October 1975, *Petroni* v *Office National des Pensions pour Travailleurs Salariés,* [1975] ECR 1149).

Giving more direct consideration to the first question which is referred to you, I must therefore reply that the term 'worker' is defined exhaustively in Articles 1 and 2 of the regulation, in the sense in which they must, according to your case-law, be interpreted. The sole aim of Annex V is, in accordance with Article 89 of the regulation, to determine the special procedures for implementing the legislation of certain Member States on the basis of this definition and not to determine the procedures for implementing the regulation on the basis of the variations between national legislations.

I will go further: to the extent to which the 'restrictions' (Article 1 (a) (i)) or contingency 'specified' (Article 1 (a) (ii), second indent) contained in this Annex exclude or seek to exclude from the application of the regulation certain persons who are workers within the meaning of Article 51, as this article has been interpreted by you, this Annex is unlawful. The fact that the section concerning the United Kingdom, in the wording existing at the material time, was drawn up by agreement among the Member States makes no difference. If the definition laid down in Annex V in relation to the United Kingdom had contained a new aspect, then, in accordance with Article 30 of the Act

concerning the conditions of accession and the adjustments to the Treaties, the whole of Regulation No 49/71, including its preamble, should have been amended to take account of this aspect. This section forms part of a regulation which you have supreme power to interpret and declare valid in the light of the whole of the Treaty and of your own case-law.

However, I do not think that it is necessary to take this heroic step: the phrase 'required to pay contributions as employed workers' is not incompatible with a wider interpretation based on your earlier case-law.

In case of an amendment of national law, the Annex expressly although not exhaustively states what is contained by implication in the regulation, as it must be interpreted and applied in the light of this case-law. It has been amended and supplemented on various occasions by means of the procedures referred to in Article 95 of the regulation.

Thus, Article 1 (5) of Regulation No 1392/74 of the Council of 4 June 1974 (OJ L 152 of 8. 6. 1974, p. 1) added six new paragraphs concerning the United Kingdom with retroactive effect to 1 April 1973.

Changes were also made by Regulation No 1209/76 of the Council of 30 April 1976 (OJ L 138 of 26. 5. 1976, p. 1) which, 'having regard to the changes that have been made in United Kingdom legislation' amended, in particular by Article 1 (4) (b), the Annex concerning that country and added thereto, with retroactive effect to 1 April 1973, a paragraph 16 according to which: 'For the purposes of Article 10 (1) of the Regulation' (which deals with the 'waiving of residence clauses') 'any beneficiary under United Kingdom legislation who is staying in the territory of another Member State, shall, during that stay, *be considered as if* he resided in the territory of that other Member State'. Consequently, invalidity, old-age or survivors' pensions cannot be subject to any reduction, modification, suspension or withdrawal 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.

This regulation also added, with effect to 6 April 1975, a paragraph 17 which provides that ... 'for each week of insurance, employment or residence as a worker, the person concerned shall be *deemed* to have paid contributions as an employed earner on the basis of earnings equivalent to two-thirds of that year's upper earnings limit'.

I consider this interpretation to be compatible with the nature of the Annex which, as I have said, is merely declaratory and which, formally at least, does not even require bringing up to date. Although it is good legislative practice for Community texts to be adjusted in good time in order to guide the competent authorities responsible for applying the Community regulations and the national texts, the fact that they have not been amended to take account of the case-law of the Court and the development of British legislation cannot be set up against the insured persons concerned.

B — Having demonstrated that Point I of the provisions of Annex V concerning the United Kingdom cannot *a priori* prevent the claimant falling within the ambit of the persons covered by regulation, I would now like to try to give the reasons why I consider that a person such as the claimant ought normally to fall within Article 1 (a) (ii) of Regulation No 1408/71.

It is in my opinion clear from the combined provisions of that article and of Annex V that the term 'worker' refers to any person who, having been liable as an employed person to insure himself, under a special security scheme applying *inter alia* to employed persons, against a

contingency provided for in Regulation No 1408/71, must — whatever the nature of his occupational activity — continue to contribute to a general scheme organized *inter alia* for employed persons and whose employed person's contributions must be taken into account in order that he may qualify for the full rate of the benefit prescribed for a contingency against which employed workers are protected in an identical manner, even though such contingency is not expressly mentioned in Annex V.

I condider that it is quite possible for the case-law which you developed in relation to Regulation No 3 to be transposed to the context of Regulation No 1408/71. Assuming that the expression 'workers' used by this latter regulation refers principally to employed persons, it covers, according to the express terms of Article 2 (1), not only workers who, as employed persons, are at present subject to the legislation of one or more Member States, but also to those who 'have been' so subject. This is shown by ground 12 of your judgment in the *Janssen* case, given on 27 October 1971. In particular, this expression refers to any person who is insured compulsorily on a continuing basis, under a scheme for employed workers, for one or more of the contingencies covered by the branches of social security to which the regulation applies. There is still room in Regulation No 1408/71 for the concept of assimilation, although the Community legislature made every effort to banish this expression and it is wrong to say, at least in the categorical form used by the Danish Government, that 'It must therefore be excluded from the outset that independent persons for example are covered by the regulation although the regulation states that it also covers persons who have been workers'.

The exact extent of that assimilation can only be determined by reference to the terms of the national legislation and it will therefore be necessary to refer to the law governing the claimant. However, in this respect you have established an important criterion: according to your case-law 'Such an assimilation takes place on every occasion on which, as the result of the effect of a national legislation, the provisions of a general scheme of social security are extended to a category of persons other than the wage-earners referred to by [Regulation No 3], whatever may be the forms or methods employed by the national legislature' (ground of judgment in Case 23/71; *Janssen*). Similarly, it will be for the national court to determine whether the extension of the provisions of the general scheme to those persons who are in the position of the claimant entitles them to a degree of protection against the risk in question comparable to that granted in respect of the same risk under the general scheme (ground 9 of judgment in the same case).

Like the British Government I have no doubts as to the complete nature of this assimilation. In fact, the file sent by the National Insurance Commissioner shows that the claimant had been an employed person and, as such, had been liable to pay contributions; although, strictly speaking, he was no longer liable to pay contributions in order to qualify for sickness benefit in cash as an insured person, this is because in normal circumstances he would have been entitled to a retirement pension which would have taken the place of such benefits. As he had temporarily refrained from drawing his retirement pension and was continuing to work on a self-employed basis, *he was therefore liable* to pay contributions in order to qualify for the cash sickness benefit payable to the self-employed. Furthermore, he could not have claimed the reimbursement of his contributions since he had not ceased to be subject to compulsory insurance (Article 10 (1) and (2) of Regulation No 1408/71). Since, according to the Commission's own findings, during his temporary stay in the territory of another Member State his

condition required the immediate payment of benefits, he must be treated as if he was residing in the territory of that State and the benefit due under British legislation cannot be subject to any 'reduction, modification, suspension, withdrawal or confiscation' as a result of that residence (Article 10 (1)).

Furthermore, Annex V lists several cases in which a condition of residence in the national territory cannot be set up against a claimant.

Thus, under paragraph (4), any insured person who wishes to claim unemployment benefit in the United Kingdom is *deemed* to have been permanently resident in the United Kingdom in any period prior to the date of his application for benefit during which he was resident, insured or employed in the territory of another Member State.

Again, under paragraph (7) (which no doubt refers to seamen) in the event of a *worker* subject to United Kingdom legislation being the victim of an accident after leaving the territory of one Member State while travelling, in the course of his employment, to the territory of another Member State, but before arriving there, his absence from the territory of the United Kingdom must be disregarded for the purposes of determining whether, by virtue of his employment, he was insured under British legislation.

Finally, we must bear in mind paragraph (16) which was added by Regulation No 1209/76.

Consequently, the residence clause must be waived in the case of a person such as the claimant and it would be a good thing if Annex V were amended appropriately.

C — In the second question the National Insurance Commissioner asks whether, in contrast to an employed worker, a self-employed person insured under a scheme such as the British scheme is, either generally or in relation to the contingencies insured against, a 'worker' within the meaning of Article 1 (a) (i). For the purposes of the outcome of this action it would be unhelpful and premature to reply in the affirmative and to conclude that, as regards social security, the Community regulations consider that self-employed persons are, for all purposes and in all cases, in the same position as employed workers where they are subject to the same risks and the same contingencies and that they are covered by a compulsory insurance scheme applying to employed persons.

It is sufficient to state, although it will be for the national court to say whether this is in fact the case and to give a final ruling on the exact status of the claimant, that in the United Kingdom the cooordination established by the legislature between the schemes covering employed and self-employed persons is such as to imply that a person such as the claimant, who was formerly employed and is now self-employed, is treated as an employed person.

A further point arises from this question: does the assimilation of a class of persons for all aspects of a particular risk, for example, sickness, entail assimilation — and thus the application of Regulation No 1408/71 — as regards protection against all the other risks or contingencies from which all employed persons benefit?

The concern of the Insurance Officer and of the National Insurance Commissioner, which I share, is to establish definite criteria which may be applied in cases other than the present. For my part, I would tend to accept the same solution for all the contingencies to which the regulation applies. This must be the case where assimilation extends to all the contingencies covered by the general scheme and where the effect of it

has not been to create a separate scheme limited to that class of persons. Here again, however, it will be for the National Insurance Commissioner to rule whether this is in fact the case and the general reply which he is hoping to receive does not appear to me to be necessary in order to settle the particular case which is before him.

D — In order to reply to the third question referred by the National Insurance Commissioner, it is necessary to consider whether, under the terms of the first indent to Article 1 (a) (ii) the claimant 'can be identified as an employed person by virtue of the manner in which [the British] scheme is administered or financed', by reason of the fact that his title to benefit is constituted 'to a material extent' by his having paid, or been credited with, contributions as an employed person.

In the light of the reply which I have suggested it is no longer necessary for me to consider further the methods of administering and financing the scheme to which I have already referred.

I consider that the criterion which takes account of the extent of the contributions paid as an employed person in relation to those paid as a self-employed person is too vague and imprecise. The pragmatic solution which consists in permitting the court to decide, in each individual case, on the basis of the extent of the contributions paid as an employed worker, must be dismissed on the ground that it creates legal uncertainty in an area in which the specific aim is to guarantee social security. For my part, I am inclined to think that once an insured person is entitled, under the British scheme, to a benefit made up, if only to a small extent, of the contributions which he has paid or with which he was credited as an employed person, he must be identified as a 'worker' for the purposes of the regulation.

E — It is necessary to consider the fourth question referred to you by the National Insurance Commissioner only on the hypothesis either that the claimant voluntarily continued to pay contributions to the sickness insurance scheme during his short stay in France, although he would no longer have been liable to do so in the United Kingdom had that contingency occurred in that country, or that his decision not to retire may be treated as an extension of his insurance on a voluntary basis.

If a person who, in accordance with the desire of the British legislature, continues to pay contributions on a voluntary basis in order to insure himself against one or more of the contingencies covered by the branches dealt with in the regulation under a national social security scheme for the benefit of all residents, is a worker within the meaning of the regulation (Article 1 (a) (iii)), the same ought to apply *a fortiori* to a person who, having formerly been compulsorily insured against a contingency under a scheme for employed persons, *is obliged* to continue to insure himself against that same contingency. It is, however, unprofitable to continue an examination of this point since, as I have said, I consider that a worker such as the claimant must normally fall within the category referred to in Article 1 (a) (iii).

V — Finally, I should like to reply to certain objections put forward by the Danish Government. It fears that 'The consequence of conceding that a person retains his status as a worker in every respect would ... be that virtually the entire adult population of the Communities would have to be regarded as workers within the meaning of the regulation'. It adds that 'Such an outcome would further entail a discrimination between independent persons who temporarily reside in another Member State, depending on whether they come from a Member country with general schemes or a Member country which draws a distinction in its social security

schemes between workers and self-employed persons'.

Apart from their relevance to the present case, these observations show the real nature of the problem of extending social protection, in particular that afforded by social security, to classes of persons who are not covered or are insufficiently protected by the existing schemes, and of coordinating schemes for self-employed persons with schemes covering employed workers. The reply which you will give will in no way reduce the need to establish a real Community system for the application of social security schemes to workers — whether employed or self-employed — and their families moving with the Community. So that European integration may actually be seen as a reality by all workers and so that freedom of movement does not constitute an economic device enabling 'labour' to move more easily, it is necessary to bring about a situation in which movement from one country of the Community to another, for whatever reason, does not entail a change in the 'social welfare status' which is connected to the pursuit of an occupation.

However, since at present the Community regulations represent merely a means of multilateral coordination, the inclusion of self-employed persons within the ambit of Regulation No 1408/71 still depends on national legislation. The lacunae which may result from differences in the scope of national laws on this subject should be filled by the introduction of the general scheme of coordination which the Commission states is in the process of being developed (Reply given on 10 May 1976 to written question No 79/76 from Mr Spicer).

I am therefore of the opinion that you should rule that:

Where the legislation of a Member State which compulsorily covers self-employed workers against the risk of sickness provides that contributions which have been compulsorily paid by the insured persons concerned or with which they have been credited as employed workers in order to qualify under that legislation for the same protection against the same risk must be taken into consideration for the acquisition of a right to the normal benefits payable in respect of that risk, for the purposes of the application of Article 22 (1) (a) of Regulation No 1408/71 such persons must be regarded as 'workers' within the meaning of that provision. The fact that the insured persons concerned were temporarily resident in another Member State at the time of the materialization of the risk cannot be relied upon in order to refuse them those benefits.