1971 on the application of social security schemes to employed persons and their families moving within the Community for the competent institution of a Member State whose legislation is considered to be of the kind referred to in Article 37 (1) of the regulation to determine the theoretical amount of the invalidity benefit on the basis of the extent to which the period between the date on which the person concerned was first insured in any one Member State and the date on which the incapacity for work occurred comprises periods of insurance completed under the legislation of the Member States or by virtue of the above-mentioned regulation.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 23 September 1982.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 17 JUNE 1982 [1]

Mr President,
Members of the Court,

1. Introduction

In this case the Court must once again address itself to the extremely complex question of the coordination of national social security schemes under Community law, as provided for by Regulation (EEC) No 1408/71 of the Council of 14 June 1971 (Official Journal, English Special Edition 1971 (II), p. 416; codified version: Official Journal, 1983, C 138, p. 1). The case demonstrates that, in spite of the wealth of detailed rules contained in the regulation, the coordination of the various schemes is an

1 — Translated from the Dutch

operation which does not always run smoothly and may in practice lead to paradoxical results.

In order to prepare the ground for a brief synopsis and appraisal of the facts which led to this preliminary question I shall first describe the relevant national and Community legislation. I shall then address myself to answering the question which has been raised by the Raad van Beroep [Social Security Court], Amsterdam.

2. The relevant Netherlands legislation on incapacity for work

The Netherlands Law of 18 February 1966 (Staatsblad 84) on insurance against incapacity for work (Wet op de Arbeidsongeschiktheidsverzekering, hereinafter referred to as the "1966 Law") provides that workers are to become eligible for benefit if they are incapacitated for work for more than 52 weeks. The amount of this benefit is calculated on the basis of two factors: the degree of incapacity and the so-called "daily wage". The daily wage is governed by Article 14 of the 1966 Law, which reads as follows:

(1) For the purpose of calculating the benefit for incapacity for work to which a person is entitled under this law, the following shall be considered to constitute the daily wage under the general rules to be laid down by the Sociale Verzekeringsraad [Social Security Council], subject to the approval of the Minister:

The amount which the person concerned could have earned on average per day by pursuing his habitual occupation (or occupations) were he not incapacitated for work, based on the rate of pay on the day on which he became entitled to benefit in respect of incapacity for work, for a period of one year immediately following that day and with a working week of five days. The general rules shall be published in the Nederlandse Staatscourant [Netherlands Official Gazette].

(2) By way of exception to the provision in the preceding paragraph and the general rules referred to therein, the Social Security Council may adopt special rules for determining the daily wage, subject to the approval of the Minister. Such special rules shall likewise be published in the Nederlandse Staatscourant.

(3) By the general rules referred to in paragraph (1) the Social Security Council shall determine the amount of a minimum daily wage, taking into account any relevant rules laid down by the Minister. The special rules referred to in paragraph (2) shall not derogate from the provision contained in this paragraph.

The concept of a daily wage referred to in the first paragraph of that article is further defined in the Besluit Dagloonregelen WAO [Order on the rules for determining the daily wage, based on the 1966 Law] (Besluit No 61524 of the Social Security Council of 20 April 1967, Staatscourant 1967, p. 126).

Since the amount of benefit payable under the 1966 Law does *not* depend on the length of the periods of insurance the scheme in question may be described as a distributive scheme, of the type mentioned in Article 37 (1) of Regulation No 1408/71 (a type "A" scheme). This means that in order to be entitled to a benefit the person concerned must actually be insured at the moment at which the risk materializes. As I have stated, the amount of benefit is thus independent of the duration of the period of insurance. If the aforementioned condition of insurance is not satisfied there is no entitlement to benefit under the 1966 Law and therefore likewise no entitlement based on the

apportionment rules in Regulation No 1408/71 (Article 46). The result of the distributive scheme for workers moving out of the Netherlands is thus that in the event of invalidity in another Member State they are not entitled to an apportioned benefit under the Netherlands Law of 1966. If the other Member State also operates a distributive scheme then there should generally be no difficulty for the worker who has moved there. If, however, the scheme in the other Member State is a cumulative one, then as a general rule, and provided that the minimum period of insurance has been completed, the longer the person has worked in the Netherlands, the lower will be the benefit which will accrue to him under that scheme.

3. Article 45 (3) of Regulation No 1408/71

In order to avoid such undesirable consequences where the distributive system applies, a special provision was inserted in Article 45 (3) of Regulation No 1408/71, which reads as follows:

"Where the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materializes has no conditions as to the length of periods of insurance either for entitlement to or calculation of benefits, any worker who is no longer subject to that legislation shall for the purposes of implementing the provisions of this chapter, be deemed to be still so subject at the time when the risk materializes, if at that time he is subject to the legislation of another Member State or, failing this, can establish a claim to benefits under the legislation of another Member State. However, this latter condition shall be deemed to be satisfied in the case referred to in Article 48 (1)."

The aim of this provision is not to guarantee to migrant workers a benefit as great as that given to workers who fall squarely within the framework of the distributive system but merely to bring them within the terms of the first sentence of Article 46 (2) for an apportioned benefit. Where there is no entitlement to benefit under a distributive scheme, such entitlement is conferred by Article 45 (3).

That provision has an important consequence as regards benefits paid under a distributive scheme. According to the last sentence of Article 46 (2) (a) the amount of benefit payable under legislation based on the distributive system is to be taken as the 'theoretical amount' referred to in that subparagraph. If, therefore, Article 45 (3) applies and there is entitlement to an apportioned benefit under a distributive scheme, any gaps in the insurance record will, in contrast to the case where an apportioned benefit is payable under a cumulative scheme, cease to have any effect. Application of Article 45 (3) may thus lead to the paradoxical result that, the greater the gaps in the insurance record under the distributive system, the higher the apportioned benefits payable under that system. The result may be illustrated by the following examples: If a worker has been insured in the Netherlands for five years under the 1966 Law and subsequently for 25 years in another Member State under a cumulative scheme, his apportioned benefit in the Netherlands will amount, after application of Article 45 (3) in conjunction with Article 46 (2) of Regulation No 1408/71, to 5/30, or 1/6, of the

theoretical amount. If there is an uninsured period in the Netherlands of, say, 24 years, followed by a five-year period of insurance completed under the 1966 Law and one year of insurance completed under a cumulative scheme in another Member State, then the apportioned benefit payable in the Netherlands will amount to 1/6 of the theoretical amount.

These examples serve to emphasize the fact that, if a distributive scheme is treated as a cumulative scheme by maintaining a right to benefits under Article 45 (3), this has results which are impossible under a cumulative scheme alone since under that scheme the greater the gaps in the insurance record the lower the theoretical amount.

4. The Bijzonder Dagloonbesluit WAO [Order laying down special rules for determining the daily wage, based on the 1966 Law]

In order to avoid the paradoxical result just described, whereby gaps in the insurance record do not have the effect of reducing the benefit, there are in principle two possibilities which may be considered. The first is to amend Regulation No 1408/71, which according to the file on the case and the submission of Counsel for the Nieuwe Algemene Bedrijfsvereniging [New General Trade Association] has been the aim of various efforts made by the Netherlands, but without success. The second possibility is to fix the theoretical amount under Article 46 (2) (a) in such a way that gaps in the insurance record may be taken into account. As the Commission itself stated, in that way the theoretical amount is, as it were, "adjusted". As was stated on behalf of the Bedrijfsvereniging, that was the solution adopted in the Bijzonder Dagloonbesluit WAO (No 78/2154 of the Social Security Council, approved by Order No 51832 of 8 June 1978, Staatscourant 1978, p. 128). Under Article 8 (1) of the Bijzonder Dagloonbesluit the daily wage, as a basis for calculating the benefit payable under the 1966 Law and thus for calculating the theoretical amount under Article 46 (2), is to be reduced in proportion to the gaps in the insurance record. The provision reads as follows:

"The daily wage calculated in accordance with the preceding articles shall be proportionately reduced if there are one or more uninsured periods in the period between the date on which the person entitled was first insured under legislation on invalidity benefit or is to be considered as having been insured by virtue of the regulation, in any country which was a Member State on the day on which he became entitled to benefit for incapacity for work and the date on which he became incapacitated for work."

According to the reply of the Bedrijfsvereniging to a question put by this Court, the Bijzonder Dagloonbesluit was clearly intended to convert the distributive scheme set up by the 1966 Law, into a cumulative scheme for the purposes of Article 45 (3) of the regulation with the attendant consequences for the apportioned benefits to be determined under Article 46 (2). The representative of the Bedrijfsvereniging added that the Bijzonder Dagloonbesluit was intended to rectify what was described as the "aberrant" effect of Regulation No 1408/71 in order to enable the regulation to be applied *within the framework of the national scheme.*

5. The facts and the question submitted for a preliminary ruling

Mr Besem's working life covered the period from 1934 to 1978, the year in which, after working in the Federal Republic of Germany for almost 13 years, he was declared unfit for work in that State. He was unemployed in the Netherlands from 1948 to 1953. Owing to that interruption, he completed only 38.83 out of a possible total of 43.92 years of insurance. Under Article 45 (3) of Regulation No 1408/71 he was entitled to an apportioned benefit on the basis of the 1966 Law. However, the competent authority in the Netherlands, the Nieuwe Algemene Bedrijfsvereniging, calculated the benefit by applying to the daily wage the adjustment provided for in Article 8 (1) of the Bijzonder Dagloonbesluit. The daily wage, which amounted in Mr Besem's case to HFL 101.60, was thus reduced to HFL 89.64 by multiplying it by the fraction 38.83/43.92. The appeal brought by Mr Besem against that decision resulted in the following question's being referred to this Court for a preliminary ruling by the Raad van Beroep, Amsterdam:

"Is it compatible with the method of calculating benefits provided for by Article 46 (2) of Regulation No 1408/71 for the amount of the benefit from a Member State, whose competent institution must apply Article 45 (3) of the regulation in order to grant entitlement to the benefit and whose legislation is considered to be of the kind mentioned in Article 37 (1) of the regulation, to be determined by the extent to which the period between the date on which the person concerned was first insured in any one Member State and the date on which the incapacity for work occurred is completed by periods of insurance in accordance with the legislation of the Member States or by virtue of the regulation, with the result that the rights only of those workers who have moved to another Member State are restricted?"

It is apparent from the accompanying explanation that the point at issue is whether Article 8 (1) of the Bijzonder Dagloonbesluit is compatible with Community law.

6. Implications in the sphere of Community law

Both the wording of the Bijzonder Dagloonbesluit and the remarks which I have made as to its purpose indicate that it alters the way in which the 1966 Law affects persons entitled to benefits under Article 45 (3) of Regulation No 1408/71. In order to do so, it draws a distinction between persons who when the risk materialized were insured under the 1966 Law and those who are entitled to benefits solely by virtue of Article 45 (3) of the regulation. The distinction, which in practice coincides as often as not with that between residents and non-residents, was, moreover, clearly recognized by the second Counsel for the Bedrijfsvereniging in reply to questions put by the Judge-Rapporteur. A practical illustration of it may also be found by making a comparison with the situation if Mr Besem had spent his whole working life in the Netherlands. Had that been the case, any gaps in his insurance record would have had no influence on the determination of the daily wage. The comparison also goes to

show that the distinction operates to the disadvantage of the migrant worker as compared with his non-migrant colleagues. No further explanation is needed, I think, to show that this kind of distinction between workers covered by Regulation No 1408/71 and those not so covered is incompatible with the principle of equal treatment in Article 3 of the regulation. The distinction must also be considered to be contrary to the principle which has been expressed by this Court in many judgments concerning questions of social security and underlies Article 51 of the Treaty, namely that migrant workers must not be accorded less favourable treatment than non-migrant worker.

None the less, in view of the paradoxical effects of the application of Regulation No 1408/81 to which I have alluded, one might wonder whether a measure such as the Bijzonder Dagloonbesluit might not be justified in view of the fact that it is apparent from the explanation supplied earlier by the Bedrijfsvereniging that it was clearly intended to remedy a defect in Regulation No 1408/71. Counsel for the Bedrijfsvereniging have described the aim and purpose of the Bijzonder Dagloonbesluit in terms which leave virtually no room for doubt on the matter. As I stated earlier, it was explained that the combined effect of Articles 45 (3) and 46 (2) of Regulation No 1408/71 on distributive schemes might be avoided only by either amending the regulation or adopting a national rule governing the calculation of the theoretical amount. When the proposal for an amendment to the regulation produced no result, the Bijzonder Dagloonbesluit was adopted, thus making superfluous, according to Counsel for the Bedrijfsvereniging, further endeavours by the Netherlands to have the regulation amended. At the same time, however, it is acknowledged that that result has been achieved by means of a national rule which, as long as Regulation No 1408/71 is not amended, must be considered to be in conflict with the Community regulation. In the course of oral procedure the Commission stated in answer to a question from the Court that it would not hesitate in such cases to initiate the procedure under Article 169 of the Treaty against Member States using the distributive system which adopted such regulations. At the time of the oral procedure it did not know whether, and if so how, other Member States using the distributive system had resolved the problem. The other argument put forward by the Bedrijfsvereniging, namely that Article 46 (2) (a) of Regulation No 1408/71 imposes no further requirements as regards calculation of the theoretical amount, is beside the point in this case. Although in principle the suggestion cannot be repudiated on the basis of the wording of the provision, there is certainly no reason to assume that in calculating the amount the provision in Article 3 (1) of the regulation regarding equal treatment may be ignored. Moreover, the opening words of Article 3 (1), "subject to the special provisions of this regulation . . .", do not support the argument because there are no such provisions in this instance, and the aims and the general scheme of Regulation No 1408/71 in conjunction with Article 51 of the Treaty militate against such an interpretation of Article 45 (3) and Article 46 (2).

7. Conclusion

Any provision such as the Bijzonder Dagloonbesluit must therefore be regarded as incompatible with Regulation No 1408/71 and in particular Article 3 (1) thereof. Nevertheless, I would suggest that this case illustrates clearly the desirability of amending Regulation No 1408/71 as regards the payment of apportioned benefits under distributive schemes. Without such an amendment it may well be that the continued existence, or even the introduction, of such schemes, which in themselves are socially desirable in the case of Member States with many migrant workers, may be threatened.

I propose that the Court reply to the Raad van Beroep, Amsterdam, as follows:

"It is not compatible with Regulation No 1408/71, in particular Article 3 (1) thereof, for the amount of the benefit from a Member State, whose competent institution must apply Article 45 (3) of the regulation in order to grant entitlement to the benefit and whose legislation is considered to be of the kind mentioned in Article 37 (1) of the regulation, to be determined by the extent to which the period between the date on which the person concerned was first insured in any one Member State and the date on which the incapacity for work occurred is completed by periods of insurance in accordance with the legislation of the Member States or by virtue of the regulation, with the result that the rights only of those workers who have moved to another Member State are restricted."