OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 19 February 2009 [1]

1. As the EC Treaty makes provision only for national social security legislation to be coordinated rather than for its full harmonisation, disparities may remain between them. Thus, the use made by the worker of his or her right to freedom of movement can sometimes be to his or her disadvantage, without involving any infringement of the Treaty. But, on the other hand, the aims of the Treaty would not be achieved if the exercise of the right to freedom of movement were to lead to the loss of social security advantages guaranteed to workers by the legislation of a Member State. The present case represents a good example of this tension.

I — Factual background to the main proceedings

2. The reference for a preliminary ruling was sent to the Court in the context of proceedings between Ms Leyman and the Belgian social security office, known as the Institut national d'assurance-maladie ('the INAMI'). Ms Leyman, a Belgian national, worked in Belgium as an employee between 1971 and 2003. In August 2003, she moved to Luxembourg and, since then, she has been subject to the Luxembourg social security scheme. On 8 July 2005, the Luxembourg authorities found her to be incapable of work for the period from 8 July 2005 until 29 February 2012, when she is due to retire. Therefore, the Luxembourg authorities awarded her an invalidity pension with immediate effect and calculated in accordance with the ratio of the length of the periods of insurance completed under the legislation administered by them. The monthly amount of the pension adds up to EUR 322.83.

3. In accordance with Council Regulation (EEC) No 1408/71, [2] Ms Leyman submitted an application to the INAMI for invalidity benefits for the ratio of insurance periods completed in Belgium. On 23 July 2006, the INAMI granted her such benefits for a monthly amount of EUR 737.10. However, the pension was to be paid only as from 8 July 2006, in accordance with Article 93 of the Belgian Law of 14 July 1994 on compulsory medical care and sickness benefit insurance, under which the right to invalidity allowance is acquired only after a year of incapacity for work, this prior period entitling the bene-

1 — Original language: English.

2 — Regulation 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 (consolidated version — OJ 1997 L 28, p. 1).

ficiary to the award of an allowance called 'indemnité d'incapacité primaire'.

4. It follows that, for the first year of incapacity, the applicant received from the Grand Duchy of Luxembourg an invalidity pension calculated on the basis of insurance periods completed within its territory, but received no payments from the Belgian social security institutions.

5. Ms Leyman brought an appeal against the decision of the INAMI before the Tribunal du travail de Nivelles (Nivelles Labour Court), arguing that the fixing of the starting point for payment of the invalidity pension at 8 July 2006 is incompatible with the freedom of movement and, thus, claiming that it should be paid as from 8 July 2005. Considering that the dispute raised several questions of Community law, the referring court decided to stay the proceedings and to ask for a preliminary ruling.

II — Legal background and questions referred to the Court

6. In order fully to understand the reasoning underlying the current order for reference and what is at stake in the questions referred, the following provisions shall be recalled.

7. Annex IV to Regulation No 1408/71 classifies the Member States in two categories, according to the type of social legislation they apply. In a so-called type A scheme, the amount of the benefit is paid at a fixed rate, regardless of the duration of the affiliation to the insurance scheme; in a so-called type B scheme, the amount of the pension depends on the number of insurance periods completed under this legislation.

8. When, as in this case, a worker is successively the subject of type A legislation, which is the case in Belgium, and of type B legislation, which is the case in Luxembourg, Article 40(1) of Regulation No 1408/71 addresses this situation by referring to the rules established in Chapter 3 of the regulation, that is to say to Articles 44 to 51a. It follows that a worker can be entitled to an invalidity pension in several Member States, such a right being acquired in accordance with the conditions laid down by each national legislation, as provided for by Article 44(2).

9. Nevertheless, Article 45(1) specifies that, for the acquisition of the right to benefits, account must be taken, if necessary, of all periods completed within other Member States. This principle of the aggregation of periods of insurance is also reflected in

Article 40(3) as regards the type of situation which arises in the present case:

‘(a) For the purpose of determining the right to benefits under the legislation of a Member State, listed in Annex IV, part A, which makes the granting of invalidity benefits conditional upon the person concerned having received cash sickness benefits or having been incapable of work during a specified period, where an employed person or a self-employed person who has been subject to that legislation suffers incapacity for work leading to invalidity while subject to the legislation of another Member State, account shall be taken of the following, without prejudice to Article 37(1):

(i) any period during which, in respect of that incapacity for work, he has, under the legislation of the second Member State, received cash sickness benefits, or, in lieu thereof, continued to receive a wage or salary;

(ii) any period during which, in respect of the invalidity which followed that incapacity for work, he has received benefits within the meaning of this Chapter 2 and of Chapter 3 that follows, of the Regulation granted in respect of invalidity under the legislation of the second Member State,

as if it were a period during which cash sickness benefits were paid to him under the legislation of the first Member State or during which he was incapable or working within the meaning of that legislation.’

10. As regards the starting point of the right to invalidity allowance in the particular case covered by Article 40(3)(a), Article 40(3)(b) states:

‘(b) The right to invalidity benefits under the legislation of the first Member State shall be acquired either upon expiry of the preliminary period of compensation for sickness, as required by that legislation, or upon expiry of the preliminary period of incapacity of work as required by that legislation, but not before:

(i) the date of acquisition of the right to invalidity benefits referred to in subparagraph (a)(ii) under the legislation of the second Member State

or

(ii) the day following the last day on which the person concerned is entitled to cash sickness benefits under the legislation of the second Member State.'

11. Finally, under Article 46 of Regulation No 1408/71, the amount of the invalidity pension is to be calculated in accordance with the ratio of the duration of insurance or residence periods completed under the Member State's legislation which applies to the total duration of the periods of insurance and of residence completed under the legislation of all the Member States concerned.

12. In the present case, the difficulty arises because of the difference between the Belgian and the Luxembourg legislation, concerning the date as from which the invalidity pension has to be paid. Whereas, under Luxembourg law, the entitlement arises as from the first day of incapacity for work, that is to say as from 8 July 2005 in the present case, it is granted in Belgian law as from the end of a one-year period following the beginning of the incapacity for work, that is to say as from 8 July 2006 in the present case.

13. It follows that, for her first year of incapacity, the claimant only received the Luxembourg invalidity pension calculated solely in accordance with the ratio of the duration of the periods of insurance completed in Luxembourg, that is to say an amount lower than the one of the indemnité d'incapacité primaire she would have received if she had stayed in Belgium. At the same time, the INAMI also refused to grant her, for the first year of incapacity, an invalidity pension established according to the ratio of the duration of her periods of insurance completed in Belgium on the basis that, by virtue of Belgian law, invalidity is preceded by a preliminary period of incapacity for work, called a period of 'incapacité primaire', and that, in this case, Article 40(3)(b) provides that entitlement to invalidity allowance comes into being, as regards the legislation of the first Member State,'upon expiry of the preliminary period of incapacity for work'.

14. Ms Leyman sees in those rules a breach of the Community principle of freedom of movement. Hence, the referring court, with its two questions, in substance asks the Court as to the compatibility of Article 40(3)(b) of Regulation No 1408/71 and of Article 93 of the Belgian Law of 14 July 1994 with the right to move and reside granted to Union citizens by Article 18 EC, as far as those two provisions may give rise to a discrimination against citizens who have made use of their right to freedom of movement.

III — Legal assessment

15. It must be noted at the outset that, although the questions relate to Article 18 EC, the situation at issue falls within the scope of Article 39 EC, the claimant having established her residence in Luxembourg in order to work there as an employee. Thus, it is not necessary to rule on the interpretation of Article 18 EC, inasmuch as the right of every citizen of the Union to move and reside freely within the territory of the Member States finds specific expression in Article 39 EC in relation to the freedom of movement for workers. [3]

16. The doubts put forward by the referring court concerning the validity of Article 40(3)(b) of Regulation No 1408/71 and of Article 93 of the Belgian Law of 14 July 1994 shall accordingly be assessed in relation to Article 39 EC. In the view of the national court, by allowing a waiting period of one year before the coming into effect of the invalidity pension, the disputed provision prevents Ms Leyman from benefiting, during the first year of her incapacity, from the rights acquired during her professional career in Belgium. Hence, it places her at a disadvantage on the sole ground that she made use of her right to freedom of movement.

17. At first sight, the Treaty does not forbid the difference allowed by the Community legislation and observed between the Belgian and the Luxembourg legislation, concerning the starting point of the payment of the invalidity pension. Indeed, the Treaty did not provide for the harmonisation of the social security legislation of the Member States but only, in its Article 42 EC (formerly Article 51 of the EC Treaty), for the coordination of such legislation. Accordingly, it does not detract from the power of the Member States to organise their social security systems. [4] In particular, it is for the legislation of each Member State to lay down the conditions under which social security benefits are granted. [5] As a result of that competence retained by the Member States, differences between the national social security schemes in the procedures applicable and in the rights of persons working in the Member States may remain. [6]

18. Member States have, indeed, chosen different solutions in matters of sickness and invalidity benefits. The Community legislature has taken note of this, limiting itself, by means of Regulation No 1408/71 adopted on the basis of Article 42 EC, to the putting in place of a system of coordination concerning inter alia the determination of the legislation applicable to employed and self-employed workers who make use, in various circum-

3 — To that effect, see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26; Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 66; Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 61.

4 — Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 32; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100; Case C-103/06 *Derouin* [2008] ECR I-1853, paragraph 23.

5 — Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36; Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 22; *Müller-Fauré and van Riet*, cited in footnote 4, paragraph 100; Case C-507/06 *Klöppel* [2008] ECR I-943, paragraph 16.

6 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 20; Case 141/88 *Jordan* [1989] ECR 2387, paragraph 13; Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 50.

stances, of their right to freedom of movement.[7] In so doing, the Community legislature cannot define the content of national social security legislation; it is for the national authorities to ensure the consistency with the Treaty of such legislation,[8] subject to the control of the Community judicature.

19. Thus, Article 40 of Regulation No 1408/71 provides for a mechanism of coordination of national legislation, in the event that a worker leaves a Member State endowed with legislation of type A in order to join another Member State applying type B legislation. In this case, as already mentioned, each Member State, in which the insured person has been employed, ought to give an invalidity allowance in accordance with the ratio of the time he worked within its territory, as far as the worker fulfils the granting conditions laid down by the national legislation in the relevant territory. In this respect, Article 40(3)(b) of the regulation explicitly recognises that Member States of type A legislation have sometimes made the award of an invalidity pension conditional upon the expiry of a preliminary period of sickness or of incapacity for work.

20. It therefore seems doubtful that the applicant is entitled to receive an invalidity pension in Belgium as from the first day of her incapacity for work. That would be to impose the immediate payment of a benefit which, in Belgian law, is granted only after a waiting period of one year. That would amount to forced harmonisation, while Community law only puts in place a coordination of national laws.

21. Does this condition of grant imposed by Belgian social law and authorised by Article 40(3)(b) of Regulation No 1408/71 infringe Article 39 EC, as such? My conclusion is that it does not. This condition neither constitutes discrimination between workers based on nationality nor does it discriminate against workers who make use of their right to freedom of movement. It also applies to workers who have spent their entire professional career in Belgium and the possible negative impact on workers having exercised the freedom of movement is a simple consequence of the conflicting legislative choices made by Belgium and Luxembourg with respect to the conditions regulating the award of an invalidity pension.

22. At the same time, it must be recognised that the Belgian legislation would put workers having made use of their right to freedom of movement at a disadvantage, in comparison to those who remained within Belgian territory, if they are not allowed to claim an indemnité d'incapacité primaire. The question, therefore, remains as to whether the claimant could not apply, on the basis of Community law, for the indemnité d'incapacité primaire provided for by Belgian law. Of course, it appears from the order for reference

7 — *Hervein and Others*, cited in footnote 6, paragraph 52; *Derouin*, cited in footnote 4, paragraph 20.

8 — *Hervein and Others*, cited in footnote 6, paragraph 53.

that Ms Leyman formally claims only the invalidity pension as from the first day of her incapacity for work. Nevertheless, the questions referred relate more generally to the consistency with Community law of the denial of payment, during the first year of incapacity for work, of an allowance, regardless of what kind, taking into account all the insurance periods completed in Belgium.

23. The issue here does not relate to the fact that, as a consequence of the transfer of her professional activity to Luxembourg, Ms Leyman is in receipt of an invalidity pension from the Luxembourg authorities, determined in accordance with the ratio of her short insurance period within the territory of the Grand Duchy, the amount of which is lower than the amount of the indemnité d'incapacité primaire which would have been paid to her for the first year of incapacity, if she had stayed in Belgium. As emphasised above, the Community legislature did not harmonise the amount of the social benefits. 'Accordingly, the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance.' [9] It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all of his or her activities in one Member State, resulting from the extension or transfer of his or her activities into or to one or more other Member States and from his or her being subject to additional social security legislation is not contrary to the provisions concerning freedom of movement for workers. [10]

24. It is necessary, however, to make a distinction between the possible disadvantages arising out of being subject to the legislation of different Member States and the disadvantageous treatment of cross-border situations by the legislation of a single Member State. Accordingly, the question is more exactly concerned with the compatibility with Community law of the inability of a Belgian worker who, having moved to the Grand Duchy of Luxembourg and, while working there, having become incapable of working, to obtain, during the first year of his or her incapacity, any allowance taking into account the contributions previously paid to the INAMI, whereas he or she would have been eligible to receive an indemnité d'incapacité primaire as from the first day of incapacity for work, if he or she had remained in Belgium.

25. The Commission argues that in order to answer this question, it is not so much Article

9 — *Hervein and Others*, cited in footnote 6, paragraph 51; *Piatkowski*, cited in footnote 4, paragraph 34.

10 — Ibid.

40(3)(b) of Regulation No 1408/71, which deals only with the issue of awarding the invalidity allowance, that constitutes the relevant provision as Article 40(3)(a) of the regulation. Of course, by its wording, the latter also relates only to invalidity benefits and merely imposes an obligation on Members States which, like Belgium, make the granting of those benefits subject to the end of a prior period of incapacity for work, that they take into account, in order to verify the fulfilment of this condition, any period during which the worker has, under the legislation of the second Member State, received sickness or invalidity benefits for a working incapacity. [11]

26. It must, however, be recalled that, in order to guarantee the effectiveness of freedom of movement for workers, Article 42 EC provides for the establisment of a system securing for migrant workers the 'agregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of several countries'. It is also settled case-law that all of the provisions of Regulation No 1408/71 are to be interpreted in the light of the objective of Article 42 EC, which is to contribute, by means, inter alia, of the aggregation of insurance, residence or employment periods, to the establishment of freedom of movement for workers. [12] Where that has not been capable of being achieved, the Court has not hesitated to annul a provision of Regulation No 1408/71 which excluded the possibility of taking into account the periods during which, for the purposes of the prolongation of the reference period under the legislation of a Member State, social benefits were paid under the legislation of another Member State. [13] If the Treaty leaves in place differences between the social security schemes of the Member States and, as a result, in the rights of persons working in the Member States, its aim would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them by the legislation of one Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [14] Thus, that objective entails that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement

11 — For some examples of application of this provision, see Case 41/77 *Warry* [1977] ECR 2085; Case 150/82 *Coppola* [1983] ECR 43; solutions sanctioned from now on in Article 40(3)(a) of the Regulation No 1408/71.

12 — To that effect, see Case C-244/97 *Lustig* [1998] ECR I-8701, paragraph 30; Case C-406/93 *Reichling* [1994] ECR I-4061, paragraph 21; Case C-481/93 *Moscato* [1995] ECR I-3525, paragraph 27; Case C-482/93 *Klaus* [1995] ECR I-3551, paragraph 21.

13 — See Case C-290/00 *Duchon* [2002] ECR I-3567. For an analysis, see Mavridis, P., *La sécurité sociale à l'épreuve de l'intégration européenne*, Bruylant, 2003, pp. 657 to 659.

14 — See Case C-165/91 *van Munster* [1994] ECR I-4661, paragraph 27; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22; Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 22; Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 43.

conferred on them by the Treaty [15] and that the rule on the aggregation of insurance, residence or employment periods is aimed at ensuring that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he or she had spent his or her working life in only one Member State. [16]

27. In this case, if Ms Leyman had always worked and completed all her insurance periods in Belgium or if she had become an invalid or incapable of working there, possibly after being employed in another Member State, she would have been entitled to an indemnité d'incapacité primaire for the period from 8 July 2005 to 7 July 2006.

28. Interpreted in the light of Article 42 EC, Article 40(3)(a) of Regulation No 1408/71 must therefore be understood as requiring from a Member State, such as Belgium, not only to take into account, for the purposes of the payment of an invalidity allowance, any period during which the person concerned received invalidity benefits under Luxembourg legislation but also to take into account for the purposes of the payment and the calculation of the indemnité d'incapacité primaire all the insurance periods completed under the Luxembourg legislation, as if they were periods completed under its own legislation.

29. It is therefore in the light of this interpretation of Article 40(3)(a) of Regulation No 1408/71 that the Belgian authorities have to read and apply Article 93 of the Law of 14 July 1994. As the Court has constantly stated, when exercising their power to organise and apply their social security scheme, the Member States must comply with Community law, in particular the provisions of the EC Treaty on freedom of movement for workers. [17] The power of the Member States is thus not unlimited. They are, in particular, required to respect the spirit and the principles of Regulation No 1408/71, including that which ensures that a person is not penalised for exercising his or her right to freedom of movement and to satisfy themselves that the system thus created does not deprive that person of social protection. [18] Furthermore, while, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his or her activities in one Member State, resulting from the extension or transfer of his or her activities into or to one or more other Member States and from his or her being subject to additional social security legislation is not contrary to Articles 39 EC and 43 EC, that legislation must not simply result in the payment of social security contributions on which there is no return. [19] As already mentioned, if Ms Leyman were to receive no payment from Belgian

15 — *Lustig*, cited in footnote 12, paragraph 31; *Reichling*, cited in footnote 12, paragraph 24.

16 — *Lustig*, cited in footnote 12, paragraph 31; *Moscato*, cited in footnote 12, paragraph 28.

17 — Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 34; *Decker*, cited in footnote 5, paragraph 23; *Piatkowski*, cited in footnote 4, paragraph 33; Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39; *Derouin*, cited in footnote 4, paragraph 25; *Klöppel*, cited in footnote 5, paragraph 16; *Petersen*, cited in footnote 14, paragraph 42.

18 — *Derouin*, cited in footnote 4, paragraph 25.

19 — *Hervein and Others*, cited in footnote 6, paragraph 51; *Piatkowski*, cited in footnote 4, paragraph 34.

social security institutions during the first year of her incapacity, there would be no return during that period on the contributions she paid in Belgium.

IV — Conclusion

30. For the reasons given above, I propose that the Court answers the questions referred by the Tribunal du travail de Nivelles as follows:

Article 40(3)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community is to be interpreted as requiring from a Member State of type A legislation, which makes the granting of invalidity benefits conditional upon the person concerned having been incapable of working during a specified period, where an employed person who has been subject to that legislation suffers incapacity for work leading to invalidity while subject to the legislation of another Member State, to take into account all periods completed under the legislation of the second Member State for the purpose of determining the right to, and calculating the amount of, any allowance its legislation provides for to be paid to the incapacitated person during the period concerned.