OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 12 October 1995 *

1. The issues raised by the questions submitted by the Cour du Travail (Labour Court), Liège, regarding the interpretation of Regulation (EEC) No 1408/71 (on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, hereinafter 'the Regulation') are twofold. [1] The first is whether the person concerned in this case falls within the category of workers who are 'employed' or within that of 'civil servants', referred to respectively in paragraphs (a) and (d) of Article 13(2); the second issue is clarification of the 'availability' requirements laid down by Article 71(1)(b)(i) for the purposes of applying the rules governing the payment of unemployment benefit which the competent State, under the Regulation, must pay to employees other than frontier workers.

I — The facts

2. The present proceedings, pending before the Cour du Travail, Liège, concern a dispute between Mrs Heidemarie Naruschawicus, a Belgian national living in Germany, and the Belgian Office National de l'Emploi (the competent institution for payment of unemployment benefits in Belgium — hereinafter 'the ONEM').

3. Mrs Naruschawicus was a member of the Belgian Armed Forces in Germany from 1 June 1981 to 20 April 1991. During that period, her professional status was that of employee of the Belgian Ministry of Defence, holding the rank of corporal. According to the national court, the Belgian administration paid the requisite social security contributions to the ONEM during her period of employment. Although living in Germany, Mrs Naruschawicus maintained her legal residence, as defined by Belgian legislation, in Blégny.

4. Mrs Naruschawicus's employment contract with the Belgian administration was terminated in April 1991. At that time, we are informed by the national court, her employment relationship was retroactively reclassified. To enable her to obtain the unemployment benefit available under Belgian legislation for workers in general, Mrs Naruschawicus received, by operation of law, a certificate indicating that she had carried out

* Original language: Italian.

1 — The version of Regulation No 1408/71 applicable to this case is the one appended to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). That version has been in force since 1 July 1982 (see Article 3 of Regulation No 2001/83).

'temporary services' in the employ of the Belgian Armed Forces in Germany. [2]

5. Subsequently, Mrs Naruschawicus continued living in Germany and submitted to the Liège regional office of the ONEM, the competent body by virtue of her legal residence, the requisite application for unemployment benefit. The application was granted: the ONEM commenced paying her unemployment benefit as from 22 April 1991. From then until 30 June 1991, Mrs Naruschawicus also underwent checks as to her status as an unemployed person, travelling for that purpose from Arnsberg (Germany), her place of residence, to Liège. As from 1 July 1991, she was again taken on by the Belgian armed forces in Germany, as a part-time worker under contract.

6. By decision of 21 November 1991, the ONEM regional unemployment inspector terminated Mrs Naruschawicus's entitlement to unemployment benefit as from 22 April 1991. At the same time, she was asked to repay the benefit received by her between that date and 30 June 1991. The reason given was that, since she was living abroad, she had failed to fulfil the precondition laid down by national law for payment of the unemployment benefit, namely being available for work on the Belgian labour market. [3]

7. The Tribunal du Travail, Liège, before which Mrs Naruschawicus brought proceedings, annulled the decision of the ONEM regional inspector on the ground that unemployment benefit was available to her, under Belgian law, even if she lived in Germany, pursuant to Article 71(1)(b)(i) of the Regulation.

8. The ONEM appealed against that judgment to the Cour du Travail. That court — whilst recognizing that the national legislation contained no express residence obligation, merely a general obligation for an

2 — This retroactive classification, which may at first sight seem unusual, is a feature of Belgian social security legislation. The Law of 28 June 1960 (Articles 1 and 2) — which, *ex tunc*, makes military employees who 'return' to civilian life subject to the general rules on social security for workers — provides that, on leaving the army, they are to be provided with a severance certificate indicating that they have provided 'temporary services' in the Ministry of Defence. Thus, in the present case, Mrs Naruschawicus's certificate stated that she had carried out 'temporary services' in the army from 21 April 1981 to 20 April 1991. See the Law of 28 June 1960 on social security for persons who have carried out temporary services in the army, *Moniteur Belge*, 1960, p. 5413. For a better understanding of the present case and, in particular, the retroactive classification mechanism, the relevant articles are set out below:
'Article 1. The provisions of this chapter shall apply to military personnel who, without having made an application for that purpose, are returned to civilian life for any reason whatsoever ...;
Article 2. Military personnel to whom the provisions of this chapter apply shall be deemed, throughout the period of their military employment, to have been subject, without interruption, to the provisions of the Decree-Law of 28 December 1944 concerning social security for workers (unemployment benefit) ...;
Article 4(3). The Minister of Defence shall issue to the military personnel concerned, on the day on which they leave the Armed Forces, two copies of a severance certificate. The persons concerned ... will deliver the second copy to one of the payment bodies provided for by the legislation on unemployment'.

3 — The legislative measures on which the residence requirement for unemployed persons is based are: the Royal Decree on employment and unemployment, of 20 December 1963, *Moniteur Belge*, 1964, p. 506, Article 153 of which provides: 'To qualify for unemployment benefit, an unemployed person must regularly present himself for the checks applicable to unemployed persons and have his record card stamped'; the Ministerial Order on unemployment, of 4 June 1964, *Moniteur Belge*, 1964, p. 6340, Article 68 of which provides: 'Unemployed persons must undergo checks carried out by the municipal authorities where they habitually reside'.

unemployed person to 'make himself available' to the competent administrative authority — denied Mrs Naruschawicus the entitlement which she claimed under Belgian law on the ground that she did not fulfil the residence requirement. However, it was uncertain whether that right could be afforded to her under Community law.

II — The preliminary questions

9. In considering that point, the Cour du Travail considered that it required a preliminary ruling from the Court of Justice on the following three questions:

'(1) Where a worker is a civil servant in the employ of a Member State, in this case Belgium (the Ministry of Defence), but works in another Member State, in this case Germany, in whose territory he actually resides and at the time of the termination of the contract of employment he is retrospectively considered as having worked as an employed person, does the applicable legislation for the purposes of entitlement to unemployment benefit and cover by the legislation on sickness and invalidity insurance fall to be determined by Article 13(2)(a) or by 13(2)(b) of Regulation No 1408/71?

(2) Is Article 71(1)(b)(i) of the Regulation to be interpreted as meaning that a worker, other than a frontier worker, who is wholly unemployed may receive unemployment benefits payable by the competent State without regard to the requirement of residence provided that he registers as a person seeking work with the employment services of the competent institution even where, by virtue of distance, he is less available to respond to offers of employment proposed by the said services and cannot be the subject of a check by the competent services of that institution to verify whether he fulfils the requirements for the grant of benefits?

(3) May a Belgian worker who has been resident for more than ten years in Germany where he was employed by the Belgian State, the employer for whom he is to resume work after some months of being wholly unemployed, be assimilated to a worker of the category governed by Article 71(1)(b) in view of the special personal and business links formed with the competent State?'

III — Legislative background

10. To answer those questions, the following provisions must be taken into account.

As regards the persons covered by the Regulation:

'Persons covered ... this Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States ...' (Article 2(1)).

The Regulation also applies:

'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' (Article 2(3)).

However, as regards the matters covered, the Community rules do not apply to 'special schemes for civil servants and persons treated as such' (Article 4(4)).

11. In principle, the applicable national law is the *lex loci laboris*.

Article 13(2)(a) of the Regulation provides:

'a person employed in the territory of a Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State'. [4]

In the case of 'civil servants' and 'persons treated as such', the Regulation specifies that they

'shall be subject to the legislation of the Member State to which the administration employing them is subject' (Article 13(2)(d)).

4 — By virtue of the principle that the applicable law is the *lex loci laboris*, benefit will be payable by the 'competent institution' as defined by Article 1(o):

'(i) the institution with which the person concerned is insured at the time of the application for benefit; or

(ii) the institution from which the person concerned is entitled or would be entitled to benefit if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; or

(iii) the institution designated by the competent authority of the Member State concerned; or

(iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1), either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned'.

12. As regards payment of unemployment benefit, Article 71(1)(b)(i) provides:

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

IV — Answers to be given to the preliminary questions

13. In the first place, it follows from the legislation outlined above that the conditions for the application of the Regulation to this case are fulfilled. The person concerned is not subject to any 'special scheme' which might, under Article 4(4), exclude the application of the Regulation to this case. Pursuant to the national legislation referred to earlier (paragraph 4, footnote 2), Mrs Naruschawicus, as an employee of the Belgian Ministry of Defence, is 'covered' by the unemployment insurance scheme applicable under Belgian law to employees in general. [5] That provides a sufficient basis for concluding, following the course taken in *Van Poucke*, [6] that this case falls, in every respect, within the scope of Regulation No 1408/71. On that occasion, the Court held that 'a professional soldier ... is a person covered by Regulation No 1408/71 if, under national law, he is subject to the medical care provisions of the general sickness and invalidity insurance scheme for employed persons' (operative part, paragraph 1).

(1) *The first question*

14. That said, let us now consider the substance of the problem. In its first question, the national court seeks a ruling on two different readings of the provisions of the Regulation which might — either of them, in its opinion — be applied in the main proceedings. The first alternative put forward is as follows: the employment relationship between Mrs Naruschawicus and the Belgian administration must, by virtue of the reclassification referred to earlier, be regarded as an ordinary employment relationship; if that is so, the present case falls within the scope of Article 13(2)(a) of the Regulation, so that, in accordance with the principle *lex loci laboris* contained therein, the applicable legislation as regards unemployment benefits is German legislation. The second solution mentioned by the national court is, on the other hand, based on the view that, despite the reclassification, the employment relationship remains within the civil service. As a result, pursuant to Article 13(2)(d), Belgian

5 — Reference should be made on this point to Article 2 of the abovementioned Belgian Law of 28 June 1960 which is extremely clear in that respect (see footnote 2).

6 — Case C-71/93 [1994] ECR I-1101.

law would, for the present purposes, be recognized as applicable since a civil servant is employed by the Belgian administration.

15. Mrs Naruschawicus, for her part, requests that the question be reformulated. In her opinion, the issue here is not whether this case falls within either of the provisions of Article 13 referred to by the national court. The two alternative solutions to be considered are, she suggests, offered on the one hand by Article 13 and the set of rules for which it provides and, on the other, Article 71(1)(b)(i). In her view, it is the latter provision which directly and exclusively covers the present case in so far as it creates an autonomous, special set of rules for the payment of unemployment benefit to previously unemployed persons other than frontier workers. Mrs Naruschawicus — classified as an employed person within the meaning of Article 71 — therefore claims the right to choose the administration which is competent to pay her unemployment benefit, a choice expressly reserved by that provision to unemployed workers other than frontier workers.

16. It should first of all be noted that the inquiry addressed to the Court would not be correctly expressed if reformulated in the terms suggested by Mrs Naruschawicus. The proposed reformulation is based on the assumption that the provisions on unemployment — those contained in Chapter 6 of Regulation No 1408/71 — are intended to operate independently from the other provisions of the Regulation, to such an extent as to escape the general criteria laid down in Title II, which indicate the national law to be applied by reference to the category of workers into which the person concerned falls. However, that is not the case. Article 71 is not intended to resolve the problem of identifying the applicable law. That is a matter for Article 13(2). Article 71 presupposes that the applicability of national law and the competence of the corresponding social security institution have been determined on the basis of those other provisions of the Regulation, and it merely lays down the specific conditions which must exist for the competent State to be able to pay unemployment benefit to the person concerned. That conclusion is expressly confirmed by case-law of the Court of Justice. In *Cochet*, in a dispute as to which State was competent to pay an unemployment benefit to a frontier worker, the Court stated — adopting a clear position, which in my view is also applicable to this case — that:

'the term "competent State" must be defined in conformity with the general rules set out in Article 13 of Regulation No 1408/71, which is part of Title II thereof headed "Determination of the legislation applicable"'. [7]

17. Let us now consider more closely how the first preliminary question fits into the order for reference. The national court puts

7 — Case 145/84 *Cochet* [1985] ECR 801, paragraph 11; see also, most recently, Case C-454/93 *Van Gestel* [1995] ECR I-1707, in particular paragraphs 13 and 14.

forward, as regards determination of the applicable legislation, the two interpretations set out earlier (see paragraph 14). One or other of those possibilities must apply, it says, depending on the value that it is seen fit to attribute to the retroactive classification of the relationship between Mrs Naruschawicus and the Belgian administration and, therefore, depending on whether she is to be regarded as an ordinary employee or as a civil servant. It seems to me, however, that for the purposes of this case no account should be taken of the reclassification of the relationship or of the purpose thereof under Belgian national law. What is important here is the question of the criteria according to which the Regulation intended classifying those who, by virtue of their work, come within its scope. The national court approached the question in the way it did because, as is apparent on close examination, it considers that the category of employee, according to the Community law definition thereof, is to be understood in what might be called a merely 'nominalistic' sense and, precisely for that reason, it is to be separated conceptually for all purposes from the notion of civil servant. It is a view which I do not share. The distinction between the two categories does not, for the purposes that are important here, have the significance attributed to it in the order for reference. That is the approach that is apparent in the case-law of this Court. The judgment in *Van Poucke*, in stating that under the system of the Treaty civil servants fall within the category of employees, clearly defined the two categories as general and particular, so that the category of employees includes, *inter alia*, civil servants. [8]

18. In any case, on the basis of that clarification it may be concluded that the second category is special, as compared with the first, and that its special nature resides in the fact that a civil servant works on a continuous basis in return for pay in the service of the State or another public entity and not for an employer in the private sector. It is not therefore the objective and substantive nature of the work performed but merely the way in which it is subjectively described by the entity for whom the employee works which indicates, in this case as in others, that the special category of civil servants forms part of the wider category of employees.

19. The relationship between the categories having been thus defined, the objective characteristics of Mrs Naruschawicus's employment relationship show that it falls within the category of civil service employment. And indeed the national court itself has provided us with the information on which to base such a conclusion. It appears from the order for reference that Mrs Naruschawicus's employer was the Belgian Ministry of Defence and that she held a junior post in the administration with the rank of corporal; that, between 1981 and 1991, she worked uninterruptedly and received a salary in return; and that during that period the administration paid social security contributions to the ONEM for her.

20. Whether Mrs Naruschawicus is regarded as an employee of the Belgian armed forces, as she was before her employment relationship with the administration was retroactively reclassified, or as an employee who

8 — Cited in footnote 6; second paragraph of the operative part.

worked temporarily in the Belgian armed forces, as she was regarded after that reclassification, the substance of her employment relationship with the Belgian administration remains unchanged. That relationship has the characteristics objectively apparent from the order for reference, and no others. The category within which she falls, within the meaning of the Regulation, is always that of a civil servant and therefore of an employee in the permanent employ of the State. Such a solution is fully in conformity with the case-law of this Court, which, as regards freedom of movement for workers and social security, has held that the substantive elements characterizing the employment relationship must take precedence over the formal description of it. [9] A further comment on this point is called for. In making it clear that the applicable national legislation, within the meaning of the Regulation, must be determined by reference to the criteria which are to be inferred from the provisions of Community law, the Court reached the conclusion that the classification of an employment relationship is a matter of public policy and, therefore, is not a matter for the parties. A reclassification, of the kind involved here, based on the legislation of a Member State, cannot therefore have the effect of changing the decision as to which national law is applicable, as determined by the Community Regulation. As the Court has held, 'the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable'. [10]

21. That approach is also supported by the judgment of this Court in *De Wit*. [11] In that case, concerning a civil servant in the Netherlands administration who had worked with the Netherlands armed forces in Germany, the Court, acting on the suggestion of Advocate General Jacobs, expressly focused its attention on the requirement of not straying from the purpose pursued by the legislation. Recourse to that canon of interpretation prompted the Court on that occasion to conclude that:

'A person who has been employed by a legal person governed by Netherlands public law and who, although residing outside the Netherlands was, in that capacity, subject to the Netherlands social security legislation, is linked to the Netherlands as closely as a person who resided in the Netherlands' (paragraph 21).

Now, besides being of interest because of its clear proximity to this case, that precedent is noteworthy from the point of view of the interpretative approach to be adopted. Considerations of the kind which guided the Court in dealing with that question suggest that it is appropriate to include the employees, as described in this case, within the

9 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; judgments of 17 September 1980 and of 26 May 1982 in Case 149/79 *Commission* v *Belgium* [1980] ECR 1845 and [1982] ECR 1845; See also, with regard to equal treatment, Case C-7/93 *Beune* [1994] ECR I-4471.

10 — Case 276/81 *Kuijpers* [1982] ECR 3027; Case 302/84 *Ten Holder* [1986] ECR 1821; and Case 60/85 *Luijten* [1986] ECR 2365.

11 — Case 282/91 [1993] ECR I-1221.

category of 'civil servants', which is to be understood in the sense most consonant with the aims of the Regulation. From what has been said so far, two results emerge, in any event, which are relevant to determination of the national law which is applicable and what solution is to be adopted by the competent State regarding the actual payment of the benefit in question.

22. As regards the first point, the outcome of the reasoning so far developed is that the case falls within the scope of Article 13(2)(d) of the Regulation, according to which civil servants and persons treated as such are to be subject to the legislation of the Member State to which the administration employing them is subject. The applicable national law is therefore Belgian law.

23. The second outcome — once the matter has been brought within Article 13(2)(d) — may be described as follows. The Regulation provides for the right of a migrant worker who has become unemployed to obtain unemployment benefit. The fact that a civil servant is involved here, rather than an ordinary employee, is without doubt of importance, but only in the sense that, as regards that person, competence attaches to the Member State to which the employing administration belongs and not to any other Member State. What is important is that the obligation to assist the unemployed person is upheld by the Regulation in general terms, in view of the inalienable social-security right enjoyed by any person who, having lost his job, is forced to look for another and finds himself in a situation of need deserving of protection, whatever the competent State. Belgian law, which in this case falls to govern payment of the benefit, must therefore, in dealing with the matter according to its discretion, safeguard the rights acquired by the worker, as recognized by the Community legal order. And this necessarily means that the retroactive classification of the employment relationship — a fictional classification, moreover, as the national court was careful to point out — cannot divest the person concerned of those rights, including entitlement to the benefits available to unemployed persons under the Regulation. However, it need hardly be added that in this case the preconditions for receiving such benefits must be satisfied. This touches upon the subject-matter of the other question submitted by the Cour du Travail, which I shall now consider.

2. *The second question*

24. The national court specifically asks this Court to determine whether, for the purposes of Article 71(1)(b)(i) of the Regulation, an employee other than a frontier worker may receive unemployment benefit from the

competent State, regardless of the residence requirement, provided that he is registered with the employment services.

25. Support for an affirmative answer to this question is to be found in the Opinion of Advocate General Slynn in *Aubin*, concerning the preconditions for application of Article 71(1)(b), in which he said: '"Availability to the employment services" seems to me to depend on the worker having indicated to the employment services with sufficient clarity and at the material time that he is available for work in the territory of the Member State where those employment services are established'. He added that '*The normal way of indicating availability is by registration*'. [12]

In this case, the national court has provided us with sufficient information to support the conclusion that the requirements laid down by the Community legislation have been met. Mrs Naruschawicus not only completed the formality of registration but also, according to the order for reference, fulfilled the obligation of going to Belgium periodically for checks as to her continuing availability to the employment services of her Member State. And the fact that the 'availability' of the unemployed person to her ex-employer in this case met the requirements of the Regulation is confirmed — indirectly, but in my opinion significantly — by the very fact that Mrs Naruschawicus was re-recruited by the selfsame Belgian Ministry of Defence.

26. To clarify the criteria according to which the obligation to remain available to the competent administration is satisfied another, more general, consideration — providing further support for an affirmative answer to the question under review — may be taken into account. The Community provision to be interpreted provides for an exception to the general principle of the territoriality of unemployment benefits by allowing the worker to receive them whilst residing in another Member State. That exception, designed to widen the range of choices open to an unemployed worker and facilitate the search for new employment, is created only for those workers who, in the course of their last employment, lived in Member States other than the competent Member State. [13] I take the view that in interpreting a derogation from the general rule, due importance must be attached to the specific aim which inspired it. In that light, the requirement of availability cannot be construed in such a way as unduly to cut down, or negate, the right expressly conferred by the provision on an unemployed worker to continue to reside outside the State responsible for paying the benefit. By laying down the requirement of availability, the Community legislature certainly did not wish to remove the freedom granted to the worker of choosing where to live. Quite the contrary. The fundamental right of freedom of movement, as described earlier, also has an impact on the Community rules on unemployment. Under the

12 — Opinion of Advocate General Sir Gordon Slynn in Case 227/81 [1982] 1991, particularly at p. 2012 — emphasis added.

13 — Judgments in Case 39/76 *Mouthaan* [1976] ECR 1901 and Case 1/85 *Miethe* [1986] ECR 1837.

Regulation, therefore, it is not justifiable for an unemployed person to be hampered by a territorial tie, such as that of having to reside in the State responsible for paying social security benefits. The reading which I propose of Article 71(b)(i) conforms, I believe, more with the logic of the system of which that provision forms part than with its text. In any event, I must add that it is the literal wording of the provision which makes it clear that an unemployed person, who remains available to the employment services of the competent State, is entitled to the benefits in accordance with the legislation of that State 'as though he were residing in its territory'. The Regulation recognizes in terms that the requirement of availability may be fully satisfied even if the person concerned does not reside in the State. Availability is equivalent, therefore, to residence, by virtue of an express rule adopted by the Community legislature which must be applied here.

The conclusion which I have thus reached also follows from application of the interpretative rules expounded by the Court in the area under discussion. The national court, called on to determine in this specific case whether the way in which the unemployed worker makes herself available meets the requirements of the Regulation, must in any event be guided by the criterion laid down by the Court in *Van Munster*: the national legislation is to be interpreted so as to ensure that it does not 'discourage Community workers from exercising their right to freedom of movement'. [14] If that interpretative rule were applied, therefore, it would be impossible, even for someone who happened to overlook the context of the Community provisions to be applied, to treat the requirement of 'remaining available' in such a way as to infer from it an obligation to reside within the territory of the competent State.

3. *The third question*

27. As regards the third question submitted by the national court, I consider — and my view coincides with that of the Commission and of Mrs Naruschawicus — that it need not be examined. It seems to me that the treatment of Mrs Naruschawicus as if she were an employee of the kind referred to by Article 71(1)(b) is based not on the special personal and occupational links to the competent State which in *Miethe* [15] prompted the Court to adopt an extensive interpretation of that provision, so as to include therein the case of an 'atypical frontier worker' but rather, and more specifically, on the former employment relationship between Mrs Naruschawicus and the Belgian Ministry of Defence and, therefore, on the possibility of bringing the case within the scope of Article 13(2)(d). In my opinion, therefore, the answers given to the preceding questions must be regarded as disposing of the third question from the national court.

14 — Case C-165/91 *Van Munster* [1994] ECR I-4661.

15 — See footnote 13.

I therefore propose that the following answers be given to the questions submitted by the Cour du Travail, Liège:

(1) The legislation applicable to a person employed by the administration of a Member State who works and lives in the territory of another Member State and who, on termination of his employment relationship, is retroactively classified as an ordinary employee so as to enable him to be recognized as entitled to receive unemployment benefit and to allow him to benefit from the provisions on insurance against sickness and invalidity is to be determined on the basis of Article 13(2)(d) of Regulation No 1408/71.

(2) An employee residing in a State other than the competent State, who has registered with the employment services of the administration responsible for paying unemployment benefit and undergoes, albeit within the limits imposed by distance, checks as to his status as an unemployed person, meets the requirements of availability laid down in Article 71(1)(b)(i) for the purposes of obtaining unemployment benefit.