contract of employment is to be considered a self-employed person within the meaning of Article 1(a)(ii) of the regulation, that possession of the status of a self-employed person does not depend upon any residence condition in that Member State.

It follows that a German national who is resident in Germany and pursues an activity as a self-employed person as to approximately one half in that State and one half in the Netherlands must be deemed to be a self-employed person falling within the scope *ratione personae* of Regulation No 1408/71, notwithstanding the fact that he does not fulfil the residence condition laid down by the Netherlands legislation for affiliation to the Netherlands social security scheme.

2. Article 14a of Regulation No 1408/71 must be interpreted as meaning that the legislation applicable to a German national who is resident in Germany and who pursues an activity as a self-employed person as to one half in that State and one half in the Netherlands is that of Germany.

REPORT FOR THE HEARING
in Case C-121/92 *

I — Legal background

1. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 1390/81 of 12 May 1981, extending to self-employed persons and members of their families Regulation No 1408/71 (OJ 1981 L 143, p. 1) (hereinafter 'the Regulation'), defines its personal scope in Article 2 in the following terms:

'1. 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 ...'

2. In addition, Article 1 of the Regulation includes the following definitions:

'For the purpose of this regulation:

* Language of the case: Dutch.

(a) "employed person" and "self-employed person" mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

(iii) ...'

3. Annex I to the Regulation includes the following definitions:

'1. Employed persons and/or self-employed persons

(Article 1(a)(ii) and (iii) of the regulation)

A. ...

B. ...

C. GERMANY

If the competent institution for granting family benefits in accordance with Title III, Chapter 7, of the regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

(a) ...

(b) "self-employed person" means any person pursuing a self-employed activity who is bound:

— to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons,

or,

— to join a scheme within the framework of compulsory pension insurance.

D. ...

...

I. NETHERLANDS

Any person pursuing an activity or occupation without a contract of employment shall be considered a self-employed person within the meaning of Article 1(a)(ii) of the regulation.

...'

4. As regards the determination of the legislation applicable, Article 13 of the Regulation provides as follows:

'General rules

1. Subject to Article 14(c), persons to whom this regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) ...

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

(c) ...'

5. Article 14a, which provides for the special rules applicable to persons, other than mariners, who are self-employed, is worded as follows:

'Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

1. (a) ...

(b) ...

2. a person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State. If he does not pursue any activity in the territory of the Member State in which he resides, he shall be subject to the legislation of the Member State in whose territory he pursues his main activity. The criteria used to determine the principal activity are laid down in the regulation referred to in Article 98;

3. ...'

II — Facts and procedure before the national court

6. It appears from the judgment making the reference that Mr Zinnecker, who in 1982 resided in the Federal Republic of Germany, operated on a self-employed basis shops for the sale of foodstuffs both in Germany and, from 10 April to 24 October 1982, in the Netherlands. During that period Mr Zinnecker pursued his activities as to approximately one half in the Netherlands and one half in Germany.

7. In 1982 he was not covered in Germany by compulsory insurance for one or more of the contingencies covered by the branches of social security dealt with in the Regulation. Although he could have insured himself on a voluntary basis under the German system of pension insurance, he did not make the relevant declaration.

8. Mr Zinnecker was not insured in the Netherlands either, since he was not resident there.

9. For the year 1982 Mr Zinnecker received a demand for payment in the Netherlands concerning the collection of the contribution to the general social insurance scheme in the amount of HFL 8 335. Following a complaint against that assessment, the inspector of taxes eventually reduced the sum owed to HFL 3 407, calculated on an income for the purposes of contribution of HFL 16 391 and on the basis of 180 days insured.

10. Following an application by Mr Zinnecker, the Gerechtshof (Regional Court of Appeal), 's Hertogenbosch, annulled the inspector's decision and the demand.

11. The Staatssecretaris van Financiën (State Secretary for Finance) appealed in cassation to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The Hoge Raad explains the problem in the following terms:

'4.1. Assessed under the rules laid down for Germany under Article 1(a)(ii) of the regulation, in conjunction with Annex I C. Germany, the person concerned cannot be regarded as self-employed within the meaning of the regulation. Assessed under the rules laid down for the Netherlands under that provision, in conjunction with Annex I. I, Netherlands, the person concerned must, however, be deemed to be self-employed, whereby the fact that he is not a Netherlands resident is to be disregarded. In either case the question arises whether the abovementioned provisions must be interpreted as meaning that the person concerned fell within the personal scope of the regulation.

4.2. If that question is answered in the affirmative, under Article 13(1) the person concerned is to be subject to the legislation of a single Member State only, and it must be determined on the basis of the other provisions of Title II whether the legislation of Germany or that of the Netherlands is applicable to him.

In accordance with Article 13(2)(b) Mr Zinnecker was subject to Netherlands legislation since he was carrying on activities as a self-employed person in the territory of that State; since he was resident in Germany that provision is however, displaced by Article 14a(2) if he carried on a part of his activities in the latter State.

4.3. Since, with regard solely to the activities carried on in the Netherlands, the person concerned should fall within the personal scope of the regulation, the question arises whether for the purposes of the last mentioned two provisions account may be taken solely of those activities, with the result that in the application thereof the activities carried on by Mr Zinnecker in Germany, which are not relevant in classifying the person concerned as a self-employed person within the meaning of the regulation, are to be disregarded.

4.4. If the person concerned was subject to Netherlands legislation the question finally arises whether the judgment of the Court of Justice in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, must be interpreted as meaning that, also in the case of self-employed persons living and working in one Member State but also working in another Member State, the other Member State's legislation pursuant to which affiliation to the social security scheme as provided for by law is subject to the condition that the person concerned resides in the last mentioned Member State is to be held invalid.'

12. Considering that the decision on the case depended on the interpretation of the Regulation, the Hoge Raad, by judgment of 8 April 1992, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In the case of a person residing in the second half of 1982 in Germany and carrying on activities as a self-employed person, in more or less equal proportions both in Germany — where he was not compulsorily insured under a social security scheme because he was not an employee, and also did not belong to a category assimilated thereto, and was also not insured on a voluntary basis — and in the Netherlands, must the question whether he was self-employed within the meaning of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, be answered on the basis of the definition of the concept of a self-employed person applicable to the Netherlands or that applicable to Germany under Article 1(a)(ii) of the regulation in conjunction with the corresponding paragraph C (Germany) and I (Netherlands) of Annex I thereto?

2. If the reply to the first question must be that the definition applicable to Germany is not decisive on its own, but that the definition applicable to the Netherlands may also, or solely, be decisive, does the fact that under

Netherlands legislation a person as referred to in the first question is not covered by compulsory insurance because he is non-resident, render it impossible to deem Article 1(a)(ii), in conjunction with Annex I. I (Netherlands), applicable to him?

3. If the replies to Questions 1 and 2 are to the effect that the person referred to in the first question may be deemed to be self-employed solely on the basis of his activities in the Netherlands, is it then nevertheless necessary for the purposes of Article 14a(2) of the regulation also to take into consideration the activities carried on in Germany, which would result in the legislation of the latter State being applicable to the person concerned, or must solely the activities in the Netherlands be taken into consideration, which in accordance with Article 13(2)(b) would result in Netherlands legislation being applicable to him?

4. If a person as referred to in the previous questions is subject to Netherlands legislation, which for the present purposes provides for a system of national insurance to which solely residents are affiliated, does it follow from Article 13(2)(b) of the regulation that such a person, although non-resident, must be deemed to be an insured person for the purposes of that system?

5. If Question 4 is answered in the affirmative:

Is the person referred to insured in the Netherlands solely during the period in which he carries on activities on Netherlands territory?'

III — Procedure before the Court

13. The judgment making the reference was lodged at the Court Registry on 15 April 1992.

14. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Mr Zinnecker, represented by M. W. C. Feteris, tax consultant, the Netherlands Government, represented by B. R. Bot, Secretary General at the Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by D. Gouloussis, Legal Adviser, and B. Smulders, of its Legal Service, acting as Agents.

15. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber; however, it called on the Commission to produce all documents referring to the meeting of 23 February 1984 of the Administrative Commission on Social Security for Migrant Workers. That request was complied with on 18 February 1993.

IV — Summary of the written observations submitted to the Court

The first question

16. *Mr Zinnecker* stated that in his opinion the answer to the question whether or not a person can be regarded as self-employed within the meaning of Article 1(a)(ii) of the regulation depends on the definition of that term as given in Annex I to the Regulation. He points out that the first question referred to the Court for preliminary ruling seeks to ascertain the appropriate criteria for determining which of the definitions appearing in Annex I to the Regulation must be used where the person concerned has ties with more than one Member State.

17. According to Mr Zinnecker the first question must be answered by stating that the concept of a self-employed person which applies in the Netherlands must be used as the criterion for activities pursued in the Netherlands and the concept which applies in Germany, for activities pursued in Germany.

18. Mr Zinnecker draws attention to the interpretation proposed by the Administrative Commission on Social Security for Migrant Workers at its meeting on 23 February 1984, according to which reference should be made to the definition of a self-employed person applicable for the country where the activities in question are pursued.

19. According to Mr Zinnecker, an advantage of that latter interpretation is that in that way there is, as far as possible, concordance between the personal scope of the Regulation and the provisions of Title II concerning the legislation applicable. In Mr Zinnecker's opinion, since Title II makes a distinction between employed and self-employed activities, a consistent interpretation requires that that distinction should correspond, as far as possible, with the one in Article 1(a) of the Regulation between employed and self-employed persons.

20. On the other hand, according to Mr Zinnecker, if account is taken of the structure, the wording and the scheme of Article 1(a) in conjunction with Annex I, it is possible to arrive at a textual and systematic interpretation by making use of the definition amongst those in Annex I which is applicable for the Member State in which the person concerned is compulsorily insured under a social security scheme applying to all resident persons or to the whole of the working population.

21. However, according to Mr Zinnecker, save for one objection of limited importance, by adopting that latter interpretation a highly significant objection is encountered, namely the risk of a failure to conform to the provisions of Title II of the Regulation (see also below observations on the third question). Consequently, he is of the opinion, even if somewhat hesitantly, that the interpretation suggested by the Administrative Commission must be preferred.

22. The *Netherlands Government*, referring to the last recital in the preamble to Regulation (EEC) No 1390/81 cited above, points out that the question whether the person concerned falls within the personal scope of the Regulation may be answered on the basis of the description, applying to the Member

States concerned, of the concept of a self-employed person in Article 1(a)(ii) thereof in conjunction with the various chapters of Annex I to the Regulation. To come within the personal scope of the Regulation it is sufficient for the person concerned to satisfy one of those descriptions.

23. The *Commission* observes at the outset that the question raised by the national court seeks to establish whether a person such as Mr Zinnecker falls within the personal scope of the Regulation and which rules of conflict of laws should be used to answer that question.

24. According to the Commission, it follows from Article 1(a) of the Regulation that the status of an employed or self-employed person does not depend on the categorization under the labour law applicable, but rather on the obligation to effect insurance under a social security scheme applicable to employed or self-employed persons. The restriction, resulting from the personal scope of the Regulation, to those persons only who are affiliated to a national social security scheme, is a consequence of the limited objective of the Regulation, which is simply to coordinate and not to harmonize the social security schemes of the Member States.

25. The Commission states that according to the case-law of the Court (Case 39/76 *Mouthaan* [1976] ECR 1901, paragraph 10), for a person to be considered an employed or self-employed person within the meaning of the Regulation, it is not necessary for him to be actually insured, but it is enough for the worker to comply with the substantive conditions objectively laid down by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed.

26. Since the substantive conditions for affiliation to a national social security scheme vary according to the Member State in question, the Commission points out that in the event of self-employed professional or trade activities being pursued in two Member States, the question arises as to which national scheme (possibly taking into consideration the definitions in that regard under Annex I) should be used to assess whether a person is employed or self-employed within the meaning of Article 1(a) and, accordingly, falls within the personal scope of the Regulation according to Article 2(1).

27. The Commission states that in its opinion, the categorization under Annex I C. (Germany) is significant only for the application of *Chapter 7* of the Regulation, which concerns family benefits and family allowances, since the German scheme of family allowances applies to all residents and it is not possible to class a person as self-employed by means of the manner in which such scheme is administered and financed. As regards all the other branches of social security, the answer to the question whether a person may be regarded in Germany as an employed or self-employed person within the meaning of the Regulation, may be obtained only by means of the rules laid down in Article 1(a), without reference to Annex I, C.

28. According to the Commission, there are two ways of answering the question whether a person is affiliated to a national social security scheme or, at least, whether he satisfies the substantive conditions for affiliation: either by relying on the national legislation which governs the scheme, including the rules on conflict thereunder, or by means of the national legislation applicable under the rules on conflict set out in Title II of the Regulation.

29. In the Commission's opinion, the argument in favour of the first solution lies in the fact that the rules on conflict in Title II of the Regulation concern, according to Article 13(1), only persons 'to whom this regulation applies'. According to the Commission, it may be concluded that it is only on the basis of Article 2 that it must be determined whether someone falls within the personal scope of the Regulation before the other provisions of the Regulation, and in particular the rules on conflict, may be applied.

30. However, according to the Commission, that solution has disagreeable consequences for certain categories of migrant workers who, because of the social security scheme adopted (applying exclusively to residents or else solely to workers), would receive no protection in the event of sickness, invalidity and the like. Furthermore, according to the Commission it follows from the case-law of the Court (Case 60/85 *Luijten* [1986] ECR 2365; Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755; Case C-196/90 *De Paep* [1991] ECR I-4815), that that result would prevent realization of the objective of the Regulation, namely to avoid both 'positive' and 'negative' conflicts of law, because the workers concerned do not come within the personal scope of the Regulation since the criteria under Article 1(a) are not satisfied and they cannot therefore rely upon the provisions of Title II.

31. The only satisfactory solution, in the Commission's opinion, consists in taking into consideration, in applying Articles 2(1) and 1(a), the rules on conflict laid down in Title II of the Regulation — and their *exclusive* and *overriding* effect confirmed by the Court in Case 302/84 *Ten Holder* [1986] ECR 1821 and in Case 2/89, cited above. That amounts to saying that the question whether a person has the status of an employed or self-employed person within the meaning of the aforementioned provisions, can be resolved only by means exclusively of the legislation of the Member State which applies to him, in accordance with the provisions of Title II of the Regulation. According to the Commission, that opinion is partly substantiated by paragraph 6 of the judgment in Case 39/76 *Mouthaan*, cited above.

32. More particularly on the first question, the Commission points out that in accordance with Article 14a(2) of the Regulation, it is the German legislation which applies in this instance. As a result, in the Commission's opinion, it is only in the light of the provisions of German law alone that it is appropriate to consider whether Mr Zinnecker is a self-employed person within the meaning of Article 1(a) of the Regulation and whether, in that capacity, he comes within its personal scope.

33. In the Commission's opinion, since Mr Zinnecker is in fact neither compulsorily insured (because there is no compulsory insurance in Germany for activities other than as an employed person) nor voluntarily insured, he does not meet the criteria of Article 1(a), and cannot therefore be considered a self-employed person within the meaning of the Regulation and does not fall within the personal scope thereof.

34. The result would have been different, the Commission thinks, if, when he resided in Germany, Mr Zinnecker had carried out his activities exclusively in the Netherlands. In that case, in accordance with Article 13(2)(b) of the Regulation, it would have been the Netherlands legislation which would have applied to him. On the basis of that provision, he would have been a self-employed person within the meaning of the Regulation. Thus, in the Commission's opinion, the fact that the Regulation does not apply means that the question whether Mr Zinnecker is compulsorily insured under the Netherlands workers' insurance scheme can only be resolved only on the basis of Netherlands legislation alone and the rules on conflict which it provides for. Any residence requirements laid down by that legislation therefore continue to apply, with the possible result that Mr Zinnecker is not compulsorily insured in the Netherlands.

35. In order to avoid any ambiguity, the Commission states that the fact that Mr Zinnecker is insured neither in Germany nor in the Netherlands does not result from a 'negative' conflict of laws, because under the German legislation applying to him, Mr Zinnecker *could* have *voluntarily* insured himself. In that case he would have fallen within the personal scope of the Regulation in his capacity as a self-employed person within the meaning of Article 1(a)(iv).

36. In the light of its observations on the first question, the Commission considers that the other questions raised by the court of reference have become nugatory.

The second question

37. In *Mr Zinnecker's* opinion, it is clearly apparent from the structure of Article 1(a) of the Regulation that a person, in his capacity as an employed or self-employed person, falls within the personal scope of the Regulation only where he is insured under a social security scheme of one or more Member States. It follows that Mr Zinnecker does not fulfil the conditions of Article 1(a) of the Regulation. The contrary view, taken by the Staatssecretaris van Financiën, would give rise to a strange situation, because in Mr Zinnecker's opinion, it is tantamount to saying that a person could acquire, by the application of the Regulation, the status of an insured person and thus of an employed or self-employed person, required in order that the Regulation might apply.

38. Mr Zinnecker suggests that that interpretation should be taken in conjunction with the judgment of the Court in Case 2/89 *Kits van Heijningen*, cited above. That case concerned a person who, owing to his professional or trade activities, already fell within the scope of a national social security scheme and the argument concerned only the

question whether that insurance also covered the days on which he did not work.

39. According to the *Netherlands Government*, the fact that, in accordance with the Netherlands national legislation, a person as referred to in the first question is not compulsorily insured, since he does not have the status of resident, in no way prevents Article 1(a)(ii), in conjunction with Annex I, Chapter I. I (Netherlands) of the Regulation from being deemed to apply to him. It follows from the wording of Article 1(a)(ii) of the Regulation in conjunction with the definition in Annex I, Chapter I. I (Netherlands), that Mr Zinnecker must be regarded, for the purpose of the activities which he pursues in the Netherlands, as a self-employed person within the meaning of the Regulation.

The third question

40. According to *Mr Zinnecker*, a systematic interpretation of the Regulation implies that the activities pursued by persons regarded as self-employed ('zelfstandige' — literally 'independent') within the meaning of Article 1(a) of the Regulation, are regarded as self-employed activities ('werkzaamheden anders dan in loondienst') within the meaning of Article 14a thereof. A more restrictive interpretation of the concept of self-employed activities would mean that the Regulation did not indicate the legislation applicable to certain self-employed persons ('zelfstandige') falling within the personal scope of the Regulation, which, in Mr Zinnecker's opinion, conflicts with the objective of Title II thereof. Mr Zinnecker adds that with such an interpretation of the Regulation, the third question submitted for a preliminary ruling is very similar to the first.

41. If, in order to answer the first question the opinion of the Administrative Commission is adopted, it would be appropriate, according to Mr Zinnecker, to utilize the definition of the concept of a self-employed person applicable in Germany for activities pursued in Germany. According to that view, the activities in question do not amount to self-employed activities ('werkzaamheden als zelfstandige'), nor could they be regarded as activities of self-employed persons ('werkzaamheden anders dan in loondienst') within the meaning of Article 14a of the Regulation. For the determination of the legislation applicable, the activities pursued in Germany must thus be disregarded so that consequently the Netherlands legislation alone would be applicable.

42. According to Mr Zinnecker, if on the other hand Article 1(a) of the Regulation is interpreted systematically and textually in order to answer the first question, the person concerned should be regarded for the whole of his activities as a self-employed person within the meaning of that provision, since, by virtue of the performance of all those activities, including those pursued in Germany, he has the status of an insured person for the purposes of Article 1(a) of the Regulation.

43. In Mr Zinnecker's opinion, that interpretation would result in the exclusive application of the German legislation which is

however unable to offer the person concerned anything in the way of social security. That complication arises, according to Mr Zinnecker, since in the context of a social insurance scheme, the status of an insured person, within the meaning of Article 1(a) of the Regulation, does not follow from his professional or trade activities but rather from his status as a resident. Mr Zinnecker prefers the interpretation of Article 1(a) put forward by the Administrative Commission (see above point 18).

44. The *Netherlands Government* observes at the outset that it does not agree with the interpretation to the effect that Mr Zinnecker does not come within the personal scope of the Regulation as regards the activities which he pursued in the Netherlands, because that would mean that a self-employed person who pursues his professional or trade activities exclusively in the Netherlands, but is resident in another Member State, cannot be insured in the Netherlands and cannot, accordingly, fall within the personal scope of the Regulation, whereas Regulation No 1390/81 amending the Regulation was precisely intended to bring self-employed persons within the scope of the latter so as to abolish as far as possible the obstacles to free movement which the social security schemes might involve.

45. As regards the question for a preliminary ruling raised by the court of reference, the Netherlands Government points out that it has reached the conclusion that in accordance with the opening words of Article 14a and paragraph 2 thereof, only the German legislation applies in a situation such as this. According to the Netherlands Government, the provisions of the opening words of Article 14a and paragraph 4 thereof do not apply where the person concerned has or had the possibility of effecting optional insurance with the German 'Rentenversicherung'. That conclusion is not, according to the Netherlands Government, in any way undermined by the fact that Mr Zinnecker did not actually effect optional insurance in Germany.

46. The Netherlands Government also adds that it is impossible to uphold the interpretation which seeks to exclude the application of the opening words of Article 14a and paragraph 2 thereof on the ground that Mr Zinnecker was not insured for the activities which he pursued in Germany. Such an interpretation would deprive Article 14a(4) of the Regulation of any meaning, since that paragraph concerns precisely the situation in which a person is not insured in his State of residence (in this instance, Germany).

47. Having regard to everything which it has stated concerning the first three questions, the Netherlands Government does not see any reason to deal with the fourth and fifth questions referred to the Court.

The fourth question

48. According to *Mr Zinnecker*, the grounds of the judgment in Case 2/89 *Kits van Heijningen* cited above, lead to the conclu-

sion that the fourth question must be answered in the affirmative. Those grounds have, in Mr Zinnecker's opinion, such a general scope that there seems to be little room left for any distinction relating to self-employed persons.

49. Nevertheless, in Mr Zinnecker's opinion such a distinction may legitimately be upheld in the context of the Netherlands social security scheme, because that scheme applies in principle to persons residing abroad only if they pursue an employed activity in the Netherlands. In the case of non-residents, that scheme is designed as insurance exclusively relating to employed persons. It would, according to Mr Zinnecker, be a very far-reaching step if the Netherlands had to extend that scheme on the basis of the Regulation to other groups of the working population, such as self-employed persons. According to Mr Zinnecker, the Regulation certainly does not seem to be intended to achieve such a result.

The fifth question

50. *Mr Zinneker* points out that the fifth question arises only where the activities pursued in Germany by the person concerned are not taken into account for determining the legislation applicable and where, accordingly, he is exclusively subject to the Netherlands legislation.

51. In Mr Zinnecker's opinion, although it may be said that the person concerned pursues professional or trade activities on the days when he works in Germany, those days are not to be taken into account as regards the application of Article 13(2)(b) of the Regulation, just like the days on which he has not worked. According to Mr Zinnecker, it is apparent from Case 2/89, cited above, that a person who is employed for some days of the week only and exclusively in the Netherlands is, by virtue of such activity, subject to Netherlands legislation for all the days of the week. In his opinion, that also applies, *mutatis mutandis*, in a case such as this, which involves self-employed activities and is justified, at least for the period from 1 July 1982 to the end of October 1982, in which Mr Zinnecker regularly went to work in the Netherlands; although his situation altered as from the end of October 1982.

52. In those circumstances, Mr Zinnecker considers that the question arises whether a person in his situation, who from July to the end of October 1982, was permanently and exclusively subject to the Netherlands legislation, therefore continues at a later stage to fall under that legislation, although he has ceased all activity in the Netherlands and works exclusively in Germany, even if he does not come within the personal scope of the Regulation because of those activities pursued in Germany.

53. According to Mr Zinnecker, the judgment in Case 302/84 *Ten Holder*, cited above, in which the Court stated, in paragraphs 14 and 15, that a worker who ceases to carry on an activity in the territory of a Member State and who has not gone to work in the territory of another Member State continues to be subject to the legislation of the Member State in which he was last employed, also applies to self-employed persons.

54. However, according to Mr Zinnecker the question arises whether, because the person concerned pursues activities in another Member state, he ceases to be subject to the legislation of the State in which he was last employed, even if those new activities do not bring him within the personal scope of the Regulation. Mr Zinnecker considers that that result seems strange, because the legislation of the Member State in which he was last employed would cease to apply to the person concerned, without, in exchange, any other legislation becoming applicable to him under Title II of the Regulation.

55. According to Mr Zinnecker, account must be taken of in Case C-140/88 *Noij* [1991] ECR I-387 in which the Court qualified the ground of judgment in Case 302/84, cited above. He thinks that where a person pursues, exclusively in Germany, professional or trade activities which do not bring him within the personal scope of the Regulation, it cannot be said that he has ceased his professional or trade activity, or, *a fortiori*, that he has permanently ceased it. For that reason he considers that a person in his situation continues to be subject to the legislation of the country in which he was last employed, even after the provisional cessation of his activity in the 1982-83 winter season.

56. Nevertheless, Mr Zinnecker is uncertain where the line should be drawn and whether the Netherlands legislation still applies to his situation at the present time although he works solely in Germany, or whether that will still be the case in ten years' time. In such circumstances he would be perpetually insured in the Netherlands, where he could claim benefits, although he no longer received any income from a Netherlands source on which the Netherlands State could levy social security contributions.

57. Because of the very far-reaching consequences which might occur in many cases, Mr Zinnecker suggests that the Court should lay down a clear criterion making it possible to determine the length of time for which a worker continues to be subject to the legislation of the country in which he was last employed, once he has gone to pursue, in another Member State or outside the Community, activities which do not give him the status of an employed or self-employed person within the meaning of the Regulation.

C. N. Kakouris

Judge-Rapporteur