OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 21 January 1987 *

Mr President,
Members of the Court,

1. Four references have been made to the Court under Article 177 of the EEC Treaty by the French Cour de cassation for a preliminary ruling as to the matters covered by Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. [1]

I — 2. The question has arisen in connection with the application of certain provisions relating to the Fonds national de solidarité [National Solidarity Fund] set up in France by Law No 56-639 of 30 June 1956 for the purpose of 'promoting a general welfare policy for old people by improving retirement and other pensions, allowances and old-age benefits' (present Article L 815-1 of the Code de la sécurité sociale [Social Security Code]). The Fonds national de solidarité pays supplementary allowances to the recipients of social benefits, contributory or otherwise, who fulfil certain conditions and whose income is considered insufficient in the light of the cost of living in France. The law provides in particular that the supplementary allowance will be paid to foreign nationals only if reciprocal international conventions exist with their country of origin (Article 815-11), that the beneficiaries must reside within French territory (Article 815-2), and that they forfeit entitlement to the allowance upon taking up residence abroad (Article 815-11).

II — 3. The circumstances which gave rise to the main proceedings are basically connected with the last-mentioned legal provisions.

4. Thus, in Case 379/85, the person concerned, Anna Giletti, an Italian national, is in receipt of a widow's pension by virtue of the fact that her husband, also an Italian citizen, worked as an employed person within French territory between 1930 and 1961, the year of his death. Since that time, the plaintiff has lived in Italy. On 9 June 1981, she applied to the Caisse régionale d'assurance maladie [Regional Sickness Insurance Fund] Rhône-Alpes for a supplementary allowance to be granted to her from the Fonds national de solidarité. Her application was rejected on the ground that she did not reside within French territory.

5. Cases 380 and 381/85 concern the position of two Italian workers who emigrated to France, have now retired and are in receipt of old-age pensions and supplementary allowances granted by the Fonds national de solidarité.

6. The first case arises from the fact that the pensioner, Domenico Giardini, gave notice to the Caisse régionale d'assurance maladie du Nord-Est in 1982 that he intended going to live in Italy permanently and was informed in reply that if he did so he would automatically lose his right to the supplementary allowance.

* Translated from the Portuguese.

1 — Official Journal, English Special Edition 1971 (II), p. 416.

7. In the second case, the pensioner, Feliciano Tampan, actually transferred his residence to Italy, and for that reason was deprived of his right to the supplementary allowance by the same Caisse régionale.

8. Finally, Case 93/86 relates also to an Italian worker, Severino Severini, who emigrated to France and from 1964 onwards received an invalidity pension and a supplementary allowance from the Fonds national de solidarité. When he moved to Italy in 1982, the paying authority, the Caisse primaire centrale d'assurance [Central Sickness Insurance Fund], Bouches-du-Rhône, withdrew his right to the supplementary allowance and at the same time required him to repay the benefits which, it said, he had received improperly.

9. All those decisions of the French social security authorities to which I have just referred were the subject of appeals and, in the proceedings at last instance, the Cour de cassation decided to seek a preliminary ruling from the Court of Justice, since questions had been raised as to the interpretation of Community provisions.

III — 10. In the main proceedings, the claimants relied upon Article 10 (1) of Regulation No 1408/71, which provides that 'invalidity, old age or survivors' cash benefits . . . and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal . . . by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated'.

11. For their part, the social security authorities involved in the main proceedings claim that the provision of Regulation No 1408/71 relied upon by the claimants does not apply to their cases, since the allowance from the Fonds national de solidarité displays the characteristics of social assistance, which is excluded from the matters covered by the regulation by virtue of Article 4 (4) thereof.

12. The Cour de cassation, which submitted identically worded questions in all the cases, asks the Court of Justice to give a ruling:

13. '(1) On the question whether or not an allowance such as the supplementary allowance under the Fonds national de solidarité provided for in Book IX of the Code de la sécurité sociale falls within the scope of Regulation No 1408/71 of 14 June 1971;

14. (2) On the meaning and scope of the word "acquired" in Article 10 (1) of that regulation.'

15. The Cour de cassation's questions were accompanied by a number of details intended to clarify their meaning.

16. It wishes to know, in the first place, 'whether a solidarity allowance which is financed out of taxation, intended to guarantee to recipients a general minimum means of subsistence, paid as a supplement to another benefit, contributory or not, and granted on the basis of the applicant's resources but without regard to his occupation and which may under certain circumstances be recovered from the recipient's estate falls within the scope of that regulation, as defined in Article 4'.

17. In the event of an affirmative answer, the French Cour de cassation asks the Court

to state whether such a benefit constitutes a 'benefit acquired' within the meaning of Article 10 of Regulation No 1408/71, where the applicant, to whom it has not yet been granted, resides in another Member State.

IV — 18. Let us review the main written observations submitted by the various parties to this Court.

19. The French social security authorities which are parties to the main proceedings maintain, as does the French Government, that a social benefit whose purpose is to respond to cases of need, is financed out of taxation and is granted according to the income of the recipients, cannot be assimilated to a social security benefit, but must be regarded as social assistance. In any event, the supplementary allowance could not be regarded as a 'benefit acquired' within the meaning of Article 10 (1) of Regulation No 1408/71, since entitlement to that allowance is unrelated to the occupation of the recipient and it can at any time be suspended or adjusted as a result of changes in the recipients' income.

20. The other parties — the recipients, the Italian Government, the United Kingdom and the Commission — maintain, relying upon previous decisions of the Court of Justice, that an allowance of the type at issue falls, in principle, within the sphere of social security as provided for in Article 51 of the EEC Treaty. It will thus come within the scope of Regulation No 1408/71, as defined in Article 4 (4) thereof, since, on the one hand, it confers on recipients a legally defined position, without any individual and discretionary assessment of their personal needs and, on the other hand, the purpose of the allowance is to provide additional income for persons in receipt of social security benefits listed in Article 4 (1) of Regulation No 1408/71. That being so, the supplementary allowance must be assimilated to a social security benefit, and therefore residence clauses must be waived in the manner provided for in Article 10 (1).

V — 21. As was pointed out by some of the parties during the proceedings, in particular the Commission, previous decisions of the Court provide a sufficient basis for a clear answer to the questions submitted by the Cour de cassation.

22. Following the judgment in *Frilli*,[2] there have been a number of decisions of this Court on the nature of 'hybrid non-contributory benefits' under Community law, which enable the problem referred to us by the Cour de cassation to be resolved.

23. Moreover, one case specifically concerned the application of the French legislation concerning supplementary allowances from the Fonds national de solidarité, with reference to the predecessor of Regulation No 1408/71, Regulation No 3 of the Council.[3]

24. In its written observations, the Commission makes a detailed analysis of all those cases, so I shall merely mention the

2 — Judgment of 22 June 1972 in Case 1/72 *Frilli* v *Belgian State* [1972] ECR 457.

3 — Judgment of 9 October 1974 in Case 24/74 *Caisse regionale d'assurance de maladie de Paris* v *Biason* [1974] ECR 999.

essential points, relating them to the question at issue here.

25. In defining the scope of the social benefits falling within the scope of Regulation No 1408/71 what is important is, essentially, to determine 'the factors relating to each benefit, in particular its purpose and the conditions for its grant'.[4]

26. This is a problem of Community law to be resolved in accordance with the requirements of Community law, regardless of how the allowance is described under national law and the nature of the legislation which provides for it.[5]

27. However, it is not always easy to distinguish clearly, even in the context of Community law, between schemes which constitute social security and those which constitute assistance: 'Certain laws, because of the classes of persons to which they apply, their objectives, and the detailed rules for their application, may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification'.[6]

28. It may happen that social welfare legislation assumes a hybrid character where, 'taking into account the wide definition of the range of recipients, such legislation in fact fulfils a double function; it consists on the one hand in guaranteeing a subsistence level to persons wholly outside the social security system, and on the other hand in providing an income supplement for persons in receipt of inadequate social security benefits'.

29. A scheme of that kind is assimilated to *social assistance* by virtue of certain of its characteristics — in particular where need is specified as the essential criterion for its availability and it is freed from specific requirements concerning periods of employment, membership or subscription; however, it approximates to *social security* 'because it does not prescribe consideration of each individual case, which is a characteristic of assistance, and confers on recipients a legally defined position', giving them the right to a given benefit.[7]

30. It was precisely that fact that the Court considered to be decisive; as was made very clear in the judgment in *Fossi*,[8] 'legislation which confers on the beneficiaries a legally defined position which involves no individual and discretionary assessment of needs or personal circumstances comes in principle within the field of social security within the meaning of Article 51 of the Treaty and Regulations Nos 3 and 1408/71'.[9]

31. Even so, for the legislation in question to be able to be regarded as coming within the field of social security covered by Regulation No 1408/71, it is a requirement that, as was implied in a number of previous judgments but was stated explicitly by the Court in the *Hoeckx* and *Scrivner* cases, it must satisfy, in particular, 'the condition of covering one of the risks specified in Article 4 (1) of the regulation'. That list 'is

4 — Judgment of 6 July 1978 in Case 9/78 *Gillard* [1978] ECR 1661, at p. 1668; Judgment of 5 May 1983 in Case 139/82 *Piscitello* [1983] ECR 1427, at p. 1439.

5 — Judgments in *Gillard* and *Piscitello*, *supra*; judgments of 27 March 1985 in Case 249/83 *Vera Hoeckx* [1985] ECR 973, paragraph 11, and Case 122/84 *Scrivner* [1985] ECR 1027, paragraph 18.

6 — *Frilli*, *supra*, at p. 466, paragraph 13.

7 — *Frilli*, *supra*, paragraph 14; *Biason*, paragraphs 15 and 16; *Piscitello*, paragraphs 11 and 13.

8 — Judgment of 31 March 1977 in Case 79/76 *Fossi* v *Bundesknappschaft* [1977] ECR 667, at p. 678, paragraph 6.

9 — To the same effect, *Biason*, *supra*, paragraph 10.

exhaustive and . . . as a result a branch of social security not mentioned in the list does not fall within that category even if it confers upon individuals a legally defined position entitling them to benefits'. [10]

VI — 32. The characteristics of the social benefit provided by the Fonds national de solidarité are, in principle, such as to satisfy the requirements laid down by the previous decisions of the Court for inclusion within the scope of Regulation No 1408/71.

33. (a) The French Code de securité social confers upon the persons entitled to that benefit 'a legally defined position', in so far as the competent social security authorities enjoy no discretionary power to assess personal needs or situations in deciding whether or not to grant it. Their involvement is confined to the exercise of non-discretionary powers, which relate merely to the checking of objective matters such as age, resources, social security position, incapacity and other factors laid down by law for the grant of the benefit; once it has been established that those conditions are satisfied, the person concerned is entitled to receive the supplementary allowance from the Fonds national de solidarité, and may have recourse to the social security appeals boards in order to enforce that right.

34. (b) The legislation on the Fonds national de solidarité is of a mixed nature, capable of fulfilling the 'double function' referred to in the *Frilli* and *Piscitello* judgments.

35. The Fonds national de solidarité supplementary allowance may in certain circumstances be granted to persons outside the social security system (according to the Commission, that is the case where it is granted to recipients of the special old-age allowance, which, it appears, falls within the category of social assistance) and it is designed essentially to provide additional income for the recipients of inadequate social security benefits.

36. In any event, as stated in the *Biason* judgment, [11] 'the fact that the same law also provides beneficiaries with advantages that come close to the concept of assistance cannot alter, for the purposes of the Community regulations, the intrinsic social security character of a benefit linked to an invalidity pension of which it is an automatic appendage'.

37. Since all of the four cases now before the Court relate to Fonds national de solidarité benefits which are automatic supplements to a social security benefit, this problem does not have to be analysed in depth.

38. The Cour de cassation states that the allowance is 'intended to provide a general guarantee of the minimum means necessary for subsistence, is paid to supplement another benefit, whether contributory or non-contributory, [and] is accorded on the basis of the applicant's resources but without regard to his occupation'.

39. The features mentioned do no more than emphasize the mixed nature of this legislation (and of other legislation to which the Court has referred), which, by conferring upon the person concerned a

10 — *Hoeckx*, *supra*, paragraph 12 and *Scrivner*, paragraph 19. See also the Opinion of Mr Advocate General Darmon in the same cases.

11 — Paragraph 12.

legally defined position, is such as to fall within the scope of Regulation No 1408/71, which expressly includes non-contributory benefits, of which some of the characteristics mentioned are typical (the state of need and the lack of conditions concerning specific periods of employment, membership or the payment of subscriptions).

40. (c) The scheme introduced by the Fonds national de solidarité legislation covers a number of the risks enumerated in Article 4 (1) of Regulation No 1408/71.

41. First, the beneficiaries of the supplementary allowance must fulfil certain conditions concerning age or incapacity for work.

42. Secondly, the main benefits to which it relates are connected with the risks enumerated in Article 4 (1) — they are old-age, survival and invalidity benefits (subparagraphs (b), (c) and (d) of Article 4 (1) of the regulation).

43. To that extent, the allowance at issue is also included within the scope of Article 1 (t) of Regulation No 1408/71, which expressly covers 'supplementary allowances', not being comparable with the 'social benefit of a general nature' represented by the Belgian 'minimex', to which the *Hoeckx* and *Scrivner* judgments relate.

VII — 44. The foregoing conclusion is not affected by certain aspects of the legal provisions governing the Fonds national de solidarité mentioned by the Cour de cassation in the observations accompanying the questions which it submitted to the Court.

45. The first aspect is the method by which they are financed.

46. The Fund was initially financed exclusively by tax revenue generated specifically for the purpose.

47. Between 1959 and 1979, financing was provided by the resources of the general social security system, with a grant from the State which only partially covered the amounts payable by way of supplementary allowances.

48. At the present time, it appears that the State reimburses the general scheme in full for the expenditure incurred in respect of the Fonds national de solidarité.

49. In any event, the allowances at issue would not cease to come within the scope of Regulation No 1408/71 by virtue of Article 1 (t) ('including all elements thereof payable out of public funds') or of Article 4 (2) ('this regulation shall apply to . . . social security schemes, whether contributory or non-contributory').

50. This consideration is equally valid with respect to those benefits to which the allowance paid by the Fonds national de solidarité is a supplement, in those cases where they are non-contributory.

51. It should however be stated that all four cases under analysis here relate to situations in which the Fonds national de solidarité allowance is paid or applied for to supplement a main benefit payable by a contributory social security scheme.

52. In the second place, the supplementary allowance is liable to be recovered, in certain circumstances, by deduction from the assets of the estate of the beneficiary. This likewise does not change the nature of the allowance as regards its classification under Community law: the allowance was paid to the recipient as an allowance to which he was entitled, and it is of no importance in that connection that third parties (heirs) might be obliged to repay it after the death of the recipient from the assets of the estate. What is at issue is the

legal position of the beneficiary and Regulation No 1408/71, as the Commission emphasizes, does not exclude from its scope non-contributory allowances of which the burden does not, with absolute certainty, have to be borne by the authority by which they are paid. Moreover, if the estate is insolvent or comprises insufficient assets, there will be no reimbursement.

53. Let me say in that connection that it also seems to me that an allowance such as that granted by the Fonds national de solidarité does not appear to fall outside the scope of the Community regulation by virtue of the fact that it can be suspended, reviewed or withdrawn in the event of a change in the income of the recipient. What is at issue is not the right exercised by the recipient upon applying for and being granted the allowance but rather the initial or continuing satisfaction of the objective requirements upon which the grant of the allowance is conditional (as applies for example in the case of unemployment or sickness benefits which are payable for so long as the situation which gave rise to them endures).

54. Finally, it is to be emphasized that Article 5 of Regulation No 1408/71 requires the Member States to provide a list of the legislation and schemes referred to in Article 4, and the French Republic did not include in its list the Fonds national de solidarité supplementary allowance.

55. That fact must be regarded as irrelevant. What counts, as we have seen, is the intrinsic nature of the allowance. Moreover, the national provisions covered are not recorded in any annex to the regulation and, in those circumstances, the Court has already made it clear that the application of a Community regulation to any legislation cannot be conditional upon notification thereof by the Member State, otherwise the application of Community law would be conditional upon a unilateral national measure, with the result that Member States would be able arbitrarily to determine the scope of Community law. [12]

VIII — 56. It having been established that legislation such as that governing the Fonds national de solidarité falls within the scope of Regulation No 1408/71, the question to be considered is whether Article 10 of that regulation is applicable and, in particular, whether the allowance in question must be regarded as 'acquired' so that it will continue to be payable in the event of a change of residence to the territory of another Member State.

57. It has been emphasized on other occasions [13] that, as Community law stands at present, the 'exportability' of an allowance of that type may give rise to serious practical difficulties, relating for example to the identification and calculation of resources or reimbursements to be recovered from estates.

58. It may also give rise to objections on the grounds of reasonableness, having regard to the differences in the cost of living in the various Member States and therefore the real value of the benefits payable.

59. Such difficulties and objections are certainly not unconnected with the

12 — See Judgment of 15 July 1964 in Case 100/63 *Van der Veen* [1964] ECR 565, at p. 573; judgment of 2 December 1964 [1964] ECR 647, at p. 653; see also the Opinion of Mr Advocate General Reischl in Case 187/73 *Callemeyn* [1974] ECR 566.

13 — See Opinions of Mr Advocate General Reischl in *Biason* and of Mr Advocate General Mancini in *Piscitello*.

systematic reluctance of the French social security authorities to pay benefits or with the views reiterated by the French Government, notwithstanding the previous decisions of the Court and indeed those of the Cour de cassation itself and of other French courts.

60. The same difficulties and objections prompted the French Government to submit, and the Commission to formalize, a proposal for a review of Regulation No 1408/71.

61. However, the case-law of the Court [14] is clear, in the light of the law as at present in force: in the absence of special provisions regarding the Fonds national de solidarité allowance in Regulation No 1408/71, it must be conceded that it is covered by the waiver of residence clauses provided for in Article 10 (1) of that regulation.

62. A further difficulty arises, however, where a person entitled to an allowance such as the Fonds national de solidarité allowance no longer resides in the country responsible for payment (in this case, France) or has never resided there. This difficulty arises in Case 379/85 *Giletti.*

63. Nevertheless, it seems that the Court has already had an opportunity to deal specifically with this problem.

64. According to the Court, [15] the purpose of Article 10 of Regulation No 1408/71 is 'to promote the free movement of workers, by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another', thus contributing to the implementation of Article 51 of the Treaty. It follows, as stated in the *Caracciolo* and *Van Roosmalen* judgments, 'not only that the person concerned retains the right to receive pensions and benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that he may not be prevented from acquiring such a right merely because he does not reside in the territory of the State in which the institution responsible for payment is situated'.

65. It is true that the Court did not make those statements about an allowance of the type provided by the Fonds national de solidarité. However, it made them in general terms, for the purpose of interpreting a provision of a regulation (Article 10 of Regulation No 1408/71), and, as we have seen, the Fonds national de solidarité supplementary allowance is not excluded from its scope.

66. That view, which is based on the general principles of freedom of movement for workers, is also supported by the wording of Article 10, which mentions 'the fact that the recipient *resides* in the territory of a Member State other than that in which the institution responsible for payment is situated' and does not use the words '*takes up residence*' or '*has changed his residence to another Member State*'.

67. Moreover, discrimination against persons who acquire an entitlement to the allowance when residing in another Member State would not (in view of identical objective situations) be any more justified than discrimination against persons who, having been resident in France when the conditions for the acquisition of that entit-

14 — See *Biason* and *Piscitello* judgments.

15 — Judgment of 7 November 1973 in Case 51/73 *Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, at p. 1222; judgment of 10 June 1982 in Case 92/81 *Caracciolo née Camera* [1982] ECR 2213, at p. 2224; judgment of 23 October 1986 in Case 300/84 *Van Roosmalen* [1986] ECR 3097, paragraph 39.

lement were fulfilled, did not exercise it until after transferring their residence.

68. Since there is no reason to treat them differently from those who merely were more aware or better informed as to their rights, there is likewise no reason for treating the first category of persons in a discriminatory manner.

69. In the last analysis, since reference is made to benefits *acquired*, for the purposes of the waiving of residence clauses, the objective pursued by Article 10 is, by all appearances, to safeguard not only the payment of such benefits but also the acquisition of entitlement to them.

IX — 70. In conclusion, I propose that the Court should reply to the questions submitted by the Cour de cassation for a preliminary ruling as follows:

71. 1. A social benefit such as the supplementary allowance paid by the Fonds national de solidarité, which is financed wholly or partly from tax revenue, is intended to provide minimum means of subsistence for the recipients thereof, is independent of their occupation and may, in certain circumstances, be recovered out of the assets of the recipients' estate, falls within the scope of Regulation No 1408/71 in so far as it confers upon the recipients a legally defined position, not based on any discretionary assessment of their individual needs, and is intended to provide supplementary income for elderly or disabled people who are in receipt of any of the social security benefits referred to in Article 4 (1) of that regulation.

72. 2. The expression 'acquired' used in Article 10 (1) of Regulation No 1408/71 must be interpreted as not excluding from the scope of that article the acquisition or retention of entitlement to a benefit such as the supplementary allowance paid by the Fonds national de solidarité where the person concerned resides or takes up residence in a Member State other than that in which the institution responsible for payment is situated.

X — 73. The answers which I propose are in harmony with the previous decisions of the Court, and for that reason there is no need to consider the problem of retroactive or immediate effect mentioned by the French Government in its observations.