# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 11 June 1987 *

*Mr President,*
*Members of the Court,*

1. This Opinion is concerned with the first reference for a preliminary ruling submitted by a Spanish court. In proceedings between Fernando Roberto Giménez Zaera and the Instituto Nacional de la Seguridad Social y Tesorería General de la Seguridad Social (National Social Security Institute and General Social Security Fund), the Tribunal Central de Trabajo (Central Labour Court) asks the Court for an interpretation of Articles 2, 117 and 118 of the EEC Treaty. The court wishes to know essentially whether by virtue of those provisions the Member States must refrain from adopting rules which prohibit the overlapping of a retirement pension with the holding of a post in the public service.

The facts may be summarized as follows: Mr Giménez Zaera, who is employed in the public service, received with effect from 1 October 1983 a retirement pension provided for by the general social security scheme (Law of 21 April 1966, as amended on 30 May 1974) in respect of his previous employment in the private sector. However, Article 52 (1) of the Law of 28 December 1983 approving the State budget for the 1984 financial year applied to public servants a rule which already applied to employed or self-employed persons by virtue of Article 156 (2) of the said Law of 21 April 1966; Article 52 (1) provides that the receipt of such a pension was incompatible with the exercise of any remunerated function, profession or activity in any public administration or public institution. Pursuant to that rule, the competent Spanish institution suspended the payment of the pension which had until that time (2 February 1985) been paid to Mr Giménez Zaera.

Mr Giménez Zaera brought an action challenging that decision before the Magistratura de Trabajo (Labour Court), Saragossa, and when (on 6 September 1985) it dismissed his application, he brought an action in 'suplicación' before the Tribunal Central de Trabajo. By order of 21 March 1986, the Fourth Chamber of that court referred to the Court of Justice the following questions:

'(1) Is the general objective or the task of promoting an accelerated raising of the standard of living satisfied by national legislation which reduces or impairs the quantity and quality of protection hitherto achieved in a specific aspect of the public social security scheme?

(2) Is any contribution made towards fulfilment of the aim of improving living conditions by means of upward harmonization, when such legislation is retrograde, in relation to the amount of benefit previously payable, or when it makes more stringent the conditions governing access to social security benefits which previously depended on less exacting conditions?

* Translated from the Italian.

(3) Is the attempt to harmonize national law satisfactorily and adequately consummated with the proliferation or subsistence of such logistical solutions?

(4) Does it constitute action in favour of harmonization if a national legislative provision on social policy is systematically placed in the Budgets Law, as a device of economic policy designed to reduce public expenditure at the expense of those social security benefits whose acquisition is rendered more difficult or whose utility — quantitative or qualitative — is reduced?

(5) Is it appropriate to modify or suspend, in deference to the indeterminate concept of solidarity, the social functions which the Community legal order ascribes to the general principle of pursuing an accelerated raising of the standard of living, to the objective of improving living conditions by means of an upward harmonization and to the harmonization work undertaken by the public authorities, with the aim which those objectives share?'

In the proceedings before the Court, written observations were submitted by the appellant in the main proceedings, the Spanish and United Kingdom Governments and the Commission of the European Communities.

2. Primarily, the Spanish Government expressed doubts as to whether the Court has jurisdiction to give a ruling on the problems raised by the national court and suggested that the Court should therefore not give a ruling. According to its Agent, the interpretation which the Court is requested to give has no bearing on the solution of the dispute pending before the national court, because the administrative measure whose validity it is requested to decide precedes the date on which the Kingdom of Spain acceded to the Community. In other words, Community law is not applicable *ratione temporis* to the facts of the main action.

That argument is unfounded. According to a long line of decisions of the Court, it is for the national court to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment (most recently, judgment of 12 June 1986 in Joined Cases 98, 162 and 258/85 *Bertini, Bisignani and Others* v *Regione Lazio* [1986] ECR 1885, at p. 1893, at paragraph 8). It is therefore for that court, and for it alone, to determine whether the Court's assistance will help it to determine a dispute involving the applicability of a law which was adopted prior to the date on which the country concerned acceded to the Community but which is still in force. Furthermore, the Court has consistently replied to national courts which had, in similar circumstances, requested it for an interpretation of the Treaty or secondary Community legislation. Reference is made, *inter alia,* to the judgments of 4 February 1965 in Case 20/64 *Albatros* v *Sopéco* [1965] ECR 29; of 22 March 1972 in Case 80/71 *Merluzzi* v *Caisse de maladie, Paris* [1972] ECR 175; of 30 September 1975 in Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085; of 14 December 1979 in Case 34/79 *Regina* v *Darby* [1979] ECR 3795; of 12 February 1981 in Case 130/80 *Kelderman* [1981] ECR 527; of 14 July 1981 in Case 155/80 *Oebel* [1981] ECR 1993, and of 31 March 1982 in Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211.

3. It must be concluded that the reference is admissible. However, I agree with the Commission that the questions put by the national court are inadequate (inasmuch as they do not expressly state the Community rules to be interpreted) and too wide. It is therefore appropriate to rearrange them into a single question, without departing from the considerations set out in the order for reference: 'Do Articles 2, 117 and 118 of the Treaty prevent the legislature of a Member State from introducing a provision prohibiting the overlapping of social security benefits with other sources of income, in particular a retirement pension with the remuneration paid to a person occupying a post in the public service, thereby reducing the level of social protection of the worker?'

It will be noted that this formulation does not take account of the fourth question, by which the national court asks whether it is compatible with Community law to insert a rule in the Budgets Law even when it concerns social policy. Such exclusion is justified. As the Commission has stated, in the present state of its development, Community law does not interfere 'in the structural organization of the national legal systems' and in particular does not require measures adopted by the national legislature to reflect their traditional subdivisions.

4. In the order for reference, the Tribunal Central de Trabajo advances an interpretation of Articles 2, 117 and 118 to the effect that the Member States cannot take action which adversely affects the level of social protection of workers. It states that those provisions set forth values, such as the accelerated raising of the standard of living and an improved standard of living for workers, so as to make possible their upward harmonization, which constitute principles of Community public policy and therefore cannot be derogated from. It follows that, by signing the Treaty, the Member States have undertaken not to withdraw rights guaranteed at a given moment under their social security systems and not to reduce the level of protection in quantitative or qualitative terms. In particular, the Member States are subject to: (a) a prohibition on the adoption of laws which reduce the level of social benefits existing when the Treaty entered into force in the State in question; (b) an obligation to accelerate the improvement in the standard of living for workers, in particular by harmonizing upwards the amounts of such benefits.

As has been pointed out by the Commission and the Spanish and United Kingdom Governments in their observations, this view, which has been adopted by Mr Giménez Zaera, finds no support in the provisions of the Treaty cited. On the contrary, the exegesis and systematic interpretation of those rules which also takes account of secondary Community legislation, enables that view to be rejected without hesitation.

But I propose to begin by examining the scope of Articles 2, 117 and 118. Article 2 provides that 'the Community shall have as its task, by establishing a common market and progressively approximating the economic policy of Member States, to promote . . . an accelerated raising of the standard of living'. It thus repeats the undertaking contained in the third recital in the preamble to the Treaty (in which the States affirm 'as the essential objective of their efforts the constant improvement of the living and working conditions of their

peoples') and reinforces it by upgrading the 'efforts' to be made to a 'task' and by stating the instruments by which that task is to be accomplished. However, it is impossible to say that such instruments are attributed any specific legal character, let alone binding force. As has been correctly stated, the rule 'contains expressions of intent, purpose and motive, rather than rules that are of direct operative effect' (Herzog: *The Law of the European Economic Community, a Commentary*, New York, 1976, I, p. 46 of the 1984 edition).

There is therefore no obligation on the States and, consequently, no right upon which individuals can rely against the States. The achievement of the aims laid down in Article 2 is instead entrusted to a process in which economics, science and technology manifestly take precedence over measures adopted by the public authorities. It has been stated that the establishment of the common market 'will require the expansion and rationalization of production by offering consumers a range of goods that is constantly increasing and becoming less expensive. Moreover, the improved distribution and utilization of the workforce will result in a higher average income. The consequence will precisely be the accelerated raising of the standard of living' (Monaco: 'Commento all'Articolo 2', in *Commentario CEE*, Milan, 1965, I, p. 38).

Let me now pass to Article 117, which introduces Chapter I of Title III of Part Three of the Treaty. The first paragraph of Article 117 provides that 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'. The second paragraph states that the States 'believe that such a development will ensue not only from the functioning of the common market... but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action'.

The first paragraph therefore reaffirms the principle already laid down in the preamble to the Treaty and in Article 2; moreover, it expressly reproduces a provision of the ECSC Treaty (Article 3 (e)) and states that the attainment of that aim, namely to improve working and living conditions, cannot be dissociated from 'their harmonization while the improvement is being maintained'. The Court has confirmed in its judgments (see judgments of 15 June 1978 in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, at paragraphs 19 and 31, and of 13 May 1986 in Case 170/84 *Bilka* v *Weber von Harz* [1986] ECR 1607, at p. 1620) that the twofold objective fixed by the rule nevertheless remains purely in the nature of a programme.

Conclusive evidence that that is so may be found in the very wording by which the objectives are introduced ('Member States agree upon the need') and, as is clear from the second paragraph, the fact that they are to be achieved, first, by applying other provisions of the Treaty and, secondly, by approximating the national legal systems.

But that is not all. Recourse to the latter method involves the adoption of legal measures which fall within the jurisdiction of the Council. In the field of social security (Article 51), the measures which the Council is required to adopt are nevertheless confined to the coordination of the different schemes, since no provision of the Treaty confers on the Community the power to determine the scope of those schemes or the level at which benefits must be guaranteed.

Lastly, Article 118. Since that article is at issue in the cases pending on the migratory policies of the Member States (Cases 281, 283 to 285 and 287/85), it is well known to the Court. It is therefore unnecessary for me to reproduce its lengthy provisions and, as regards its scope, I would refer to the Opinion which I delivered on 31 March of this year ([1987] ECR 3219). For present purposes I would merely repeat that although Article 118 does indeed impose an obligation on the Member States, it is an obligation not to detract from the efforts of the Commission and *a fortiori* not to frustrate them. It is therefore situated in the framework of the cooperation for which the article provides between the States and the executive. And that is sufficient to prevent there from being corresponding rights upon which individuals may rely.

5. In short, Articles 2, 117 and 118 do not lay down the prohibitions and obligations referred to by the Tribunal Central de Trabajo. According to the Commission and the Spanish Government, this conclusion is confirmed by at least four provisions of secondary Community legislation.

Thus paragraphs (2) and (3) of Article 12 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to migrant workers (codified version in Official Journal 1980, C 138) provide that provision for reduction, suspension or withdrawal of benefit laid down in the legislation of some Member States may be applied to persons entitled to the benefit in two cases: in the case of overlapping with other social security benefits or other income, and in the case of overlapping of invalidity or old-age benefits with income arising from a professional activity. If the Community legislature accepts the legality of the prohibition of overlapping in the case of migrant workers, who are entitled to an especially effective protection, it is clear that a similar prohibition with regard to workers residing in the State of which they are nationals cannot be considered incompatible with Community law.

Furthermore, Article 3 of Council Directive 75/129 of 17 February 1975 on collective redundancies (Official Journal 1975, L 48, p. 29) and Article 7 of Council Directive 77/187/EEC of 14 February 1977 on the rights of workers on the transfer of undertakings (Official Journal 1977, L 61, p. 26) authorize the Member States to apply more favourable measures to workers than those provided for by the two sources of law. Assuming that the remuneration which applied previously was in fact more favourable, a State which, on implementing the directive, does not intend to use the power provided for may therefore legitimately reduce the level of protection guaranteed to workers at a certain time.

It can therefore be concluded that Community law does not oblige Member

States to maintain in full the level of social security benefits which existed at the time when the Treaty entered into force or to accelerate the raising of the standard of living for workers by harmonizing upwards the amount of such benefits.

6. On the basis of all the considerations set out above, I propose that the Court should answer the questions referred to it for a preliminary ruling by the Tribunal Central de Trabajo by order of 21 March 1986 in the case pending before that court between Fernando Roberto Giménez Zaera and the Instituto Nacional de la Seguridad Social y Tesorería General de la Seguridad Social as follows:

'Articles 2, 117 and 118 of the EEC Treaty do not prevent the legislature of a Member State from introducing a rule prohibiting the overlapping of social security benefits with other sources of income and in particular the overlapping of a retirement pension with remuneration received in respect of employment in the public service, thus reducing the level of social protection of the worker.'