OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 22 February 1990 *

Mr President,
Members of the Court,

1. The present reference for a preliminary ruling concerns the interpretation of Article 13(2)(a) and Article 73(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. [1]

2. The facts of the case can be summarized as follows:

Mr Kits van Heijningen, residing in Belgium, worked full-time for Philips NV in Eindhoven (Netherlands), and at the same time worked as a part-time teacher at an institute for vocational training, also in Eindhoven, where he taught for two hours per day on Mondays and Saturdays.

3. It is evident from the order for reference that Mr Kits van Heijningen returned to Belgium every working day and that his spouse did not exercise a professional activity.

4. Mr Kits van Heijningen was pensioned off by Philips on 1 November 1983 but continued to carry on his activity as a part-time teacher. He claimed child allowances for the first quarter of 1984 from the competent Netherlands authorities in respect of his two sons.

5. However, the Raad van Arbeid, Eindhoven, rejected the claim on the ground that Mr Kits van Heijningen was not insured on the first day of the quarter in question (namely 1 January 1984), as required under Article 11 of the Algemene Kinderbijslagwet (General Law on child allowances, hereinafter referred to as 'the law'), since that day was not a working day for him.

6. It should be pointed out in this regard that under Article 6 of the law an insured person is a person who is at least 15 years old and is resident (Article 6(a)) or, if not resident, is liable for income tax in respect of employment in the Netherlands (Article 6(b)).

7. The court of first instance annulled the abovementioned decision, but the Raad van Arbeid lodged an appeal.

The Centrale Raad van Beroep (Court of last instance in social security matters) took the view that an interpretation of Regulation No 1408/71 was necessary in order to settle the dispute and decided to stay the proceedings and refer five questions to the Court of Justice for a preliminary ruling.

* Original language: Italian.

1 — OJ, English Special Edition 1971 (II), p. 416; See the version codified in OJ 1983, L 230, p. 8.

8. With its first question the national court asks whether the activities as a part-time teacher, previously carried on as a secondary activity, which a retired worker continues after the start of his retirement for two hours of teaching per day on each of two days per week, are to be regarded as effective and genuine activities for the purposes of the Community rules on the free movement of workers.

9. As is evident from the outline of the dispute and from the wording of the other questions, the national court is essentially asking whether Mr Kits van Heijningen is a person covered by Regulation No 1408/71.

10. However, it is evident from the way in which the question is worded that the Centrale Raad van Beroep is working on a false premiss in so far as it appears to assume that the persons covered by Regulation No 1408/71 are the same as those covered by Article 48 *et seq.* of the EEC Treaty.

According to the case-law of the Court,[2]

the existence of effective and genuine activities is a condition for the applicability of the provisions of the Treaty on the free movement of workers.

11. However, there is nothing to suggest that such condition must also be met for the regulation at issue to be applicable.

On the contrary, the very title of the regulation, which refers 'to employed persons, to self-employed persons and to members of their families moving within the Community', is in itself an indication that its scope is not limited to the 'migrant workers' referred to in Article 51 of the EEC Treaty.

12. Moreover, Article 2(1) of the regulation, which defines the persons it covers, specifies that the regulation applies 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 a Member State.

13. Article 1(a) defines the concept of employed or self-employed persons in fairly wide terms stating in particular that, for the purposes of the regulation, it is to be understood as meaning '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'.

14. Article 1(a) is a codification of a principle laid down by the Court in relation to the earlier Regulation (EEC) No 3/58 on social security for migrant workers[3]

according to which, even in that earlier legislative context, the concept of 'wage-earner or assimilated worker' necessarily had a Community meaning, referring to all those who, as such and under whatever description, are covered by the different national systems of social security.[4]

15. In other words, the Community legislature has chosen to include among the

2 — See the judgments of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, and of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035

3 — JO 1958, 30, p. 561.

4 — See for example the judgment of 21 March 1964 in Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177.

persons covered by the regulation at issue all citizens of the Member States in any way insured under a national social security scheme and regardless of whether a minimum amount of professional activity is carried on. [5]

16. It follows that checking whether the professional activity is effective and genuine is of no assistance in determining the scope of Regulation No 1408/71. In short: if a person is insured under a social security scheme applicable to employed or self-employed persons, he is in any event considered to be an employed or self-employed person for the purposes of that regulation.

17. The national court's second question seeks to establish whether a professional activity carried out in the territory of a Member State other than the one in which the employed person resides and to which he returns each working day after work, gives rise, having regard to Article 13(2)(a) of Regulation No 1408/71, to the application of the legislation of the first Member State only in respect of working days or also in respect of intervening days on which no professional activity is carried out.

18. The answer to this question is, in my opinion, also quite straightforward.

Article 13(1) of Regulation No 1408/71 provides that persons to whom it applies are to be subject to the legislation of a single Member State only.

Article 13(2)(a) provides that a person employed in the territory of one Member State is subject to the legislation of that State even if he resides in the territory of another Member State.

19. It should be pointed out in this regard that the provisions of Title II of the regulation, including the abovementioned Article 13, seek to establish a comprehensive system of rules for settling conflicts intended to preclude the possibility that no legislation will be applicable in a specific case or, conversely, that more than one legislative system will apply simultaneously, thereby creating complex legal situations and needless administrative complications.

That is precisely the reason why Article 13(1) lays down the principle that persons to whom the regulation applies are to be subject to the legislation of *a single Member State only.*

20. However, as the Commission has rightly pointed out, when a person is employed in two or more Member States, Article 14(2)(b)(i) provides that the legislation of only one State is applicable, to the exclusion of the others, and not that the legislation of the various States is applicable in proportion to the activities carried on.

5 — Moreover the Court has stated that the status of worker within the meaning of Regulation No 1408/71 is acquired when the worker complies with the substantive conditions laid down objectively by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed (see the judgment of 15 December 1976 in Case 39/76 *Metaalmijverheid* v *Mouthaan* [1976] ECR 1901, paragraph 10).

Thus to accept that legislation to which the conflict rules refer is applicable only in part to a person pursuing an activity part-time, would mean disregarding the spirit and the letter of the rules in question, thereby creating an unjustifiable gap and also allowing the person concerned to remain unprotected, if no legislation were applicable to him.

21. The reply I gave to the first question also answers the third. [6]

I shall therefore consider the fourth question by which the Central Raad van Beroep asks whether, if the legislation of the Member State on whose territory the abovementioned activities were or are carried out is applicable after the date of retirement — having regard to Article 13(2)(a) of Regulation No 1408/71 — it can be said exclusively on the basis of the determination of the applicable legislation pursuant to that provision that residence requirements such as that in the opening words and subparagraph (a) of Article 6(1) of the law cannot be relied on against the retired worker concerned.

22. The preliminary remark should be made that although it is true that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, [7] it is equally true that Member States do not have an absolute discretion in that regard but are required to legislate within the limits laid down in the field by Community law. [8]

23. It is apparent from the case-law of the Court that the provisions of Title II of Regulation No 1408/71 'constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as *the persons* who are subject thereto and *the territory* within which the provisions of national law take effect are concerned' [9]

and that the Member States are not 'entitled to determine the extent to which their own legislation or that of another Member State is applicable', [10]

since they are 'under an obligation to comply with the provisions of Community law in force'. [11]

24. From that outline of the case-law of the Court it is in my view an obvious conclusion that when a national legislature lays down a territorial condition for entitlement to a social security benefit, it infringes the provisions of Community law in that sphere in so far as, by restricting the persons covered by the national legislation, it undermines the provisions of Title II of Regulation No 1408/71.

6 — The third question referred for a preliminary ruling was as follows: 'If the answer to Question 1 is no, does the legislation of the Member State on whose territory the former principal activities were last carried out continue to apply pursuant to Article 13(2)(a) even after the date of retirement?'

7 — See the judgments of 24 April 1980 in Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraph 12, and of 12 July 1979 in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rhein Provinz* [1979] ECR 2705, paragraph 6.

8 — See the judgment of 17 May 1984 in Case 101/83 *Raad van Arbeid* v *Brusse* [1984] ECR 2223, paragraph 28

9 — See the judgment of 18 July 1986 in Case 60/85 *Luijten* v *Raad van Arbeid* [1986] ECR 2365, paragraph 14

10 — See the judgment of 23 September 1982 in Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, paragraph 14

11 — See the judgment of 23 September 1982 in Case 275/81 *Koks* v *Raad van Arbeid* [1982] ECR 3013, paragraph 10

25. On the basis of the foregoing considerations with regard to the fourth question, I may conclude — without having to consider the national court's last question [12] — by proposing that the Court give the following reply to the questions referred by the Centrale Raad van Beroep:

'Article 13(2)(a) of Regulation (EEC) No 1408/71 must be interpreted as meaning that a worker who is resident in one Member State and is employed in the territory of another Member State is subject exclusively to the legislation of the latter State, even if he works part-time and only on some days of the week. That legislation cannot exclude the employed person in question from the benefits of a social security scheme merely because he is not resident in the territory of that State.'

12 — The fifth question was as follows: 'If not, can it be said on the basis of Article 73(1) of Regulation (EEC) No 1408/71 that residence requirements such as that in the opening words and subparagraph (a) of Article 6(1) of the Algemene Kinderbijslagwet cannot be relied on against the retired worker concerned?'