OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 12 September 1996 *

1. The questions on which the Court is to give a ruling in this case have been referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) ('Hoge Raad') in connection with an appeal on a point of law by Mr De Jaeck against a judgment of the Gerechtshof (Regional Court of Appeal), 's-Hertogenbosch ('Gerechtshof').

2. The dispute arises from an assessment by the Staatssecretaris van Financiën to national insurance contributions for 1984 in the sum of HFL 13 665, calculated on the basis of Mr De Jaeck's earned income in the Netherlands in that period, which totalled HFL 212 342. He objected to the assessment, which was confirmed by the Inspector. He then appealed against this decision to the Gerechtshof, which set it aside and reduced the amount to HFL 8 223.

3. It appears from the documents in the file that the applicant is a Belgian national who in 1984 was resident, together with his wife, in Belgium where he was self-employed. During the same period he was the director and sole shareholder of a limited liability company having its registered office in the Netherlands, where he performed his duties two days a week.

4. Before the Gerechtshof Mr De Jaeck claimed that he had no obligation to pay national insurance contributions because he was self-employed in both the Netherlands and Belgium. Therefore, pursuant to the first sentence of Article 14a(2) 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, in the consolidated version of Council Regulation (EEC) No 2001/83 of 2 June 1983 [1] ('Regulation No 1408/71'), only the Belgian legislation applied to him since he resided in Belgium.

* Original language: Spanish.

1 — Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating 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 and also amending and updating Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1983 L 230, p. 6).

In arguing that his activities in the Netherlands were those of a self-employed person, Mr De Jaeck relied on the case-law of the Centrale Raad van Beroep (Higher Social Security Court), Utrecht, concerning social security for employed persons, according to which, in a case such as this, where a director is at the same time the sole shareholder of a limited liability company, it cannot be said that the worker is subordinate to the employer.

In the alternative, he claimed that, since he had worked in the Netherlands only two days a week in that year, if he had to pay contributions, then he should pay two-sevenths of the maximum contribution.

5. The Inspector contested those arguments on the ground that Mr De Jaeck's work in the Netherlands had to be classified as employment and that, for that reason, Dutch law was applicable to him in respect of work in the Netherlands, pursuant to Article 14c(1)(b) of Regulation No 1408/71 in conjunction with paragraph 1 of Annex VII to the Regulation.

The Inspector reached this conclusion on the basis of the case-law of the Hoge Raad relating to wages tax and national insurance contributions, according to which the mere fact that a director of a limited liability company is also a majority shareholder in the company and can therefore exercise *de facto* power in the general meeting of shareholders does not prevent the relationship between the company and the director from being regarded as an employer-employee relationship.

6. In the judgment which is now the subject of an appeal on a point of law, the Gerechtshof followed the abovementioned case-law of the Hoge Raad and ruled that the relationship between the appellant and the limited company during 1984 was to be treated as an employer-employee relationship for the purposes of the Algemene Ouderdomswet (General Law on Old-Age Insurance) and the corresponding provisions of the other national insurance laws and that therefore Article 14c(1)(b) of Regulation No 1408/71, in conjunction with paragraph 1 of Annex VII to the Regulation, was applicable to the appellant. This meant that in 1984 he was subject to both the Belgian and the Dutch social security legislation.

With regard to the subsidiary issue, the Gerechtshof found that in 1984 the appellant was subject to wages tax since he had worked in the Netherlands on a regular basis during that period, and that he was compulsorily covered by national insurance and had to pay the appropriate contributions

throughout the year, and not only for the two days a week when he worked in the Netherlands.

7. The Hoge Raad adds that, to give judgment on the appeal, the question arises whether the Gerechtshof, like the parties, started from the correct premiss in finding that, for applying the rules of conflict in Title II of Regulation No 1408/71, the question whether the person concerned worked in a Member State on an employed or self-employed basis must be answered in accordance with the law of that State. A reply in the affirmative would mean that, with regard to the application of the Netherlands social security legislation, the court's answer would differ according to whether the dispute concerned national insurance or compulsory insurance for employees.

8. In the context of this dispute, the Hoge Raad has referred the following questions to the Court of Justice for a preliminary ruling:

'1. For the purposes of the application of Articles 14a and 14c of Regulation No 1408/71, is the expression "employed" to be interpreted as covering the employment relationship of a person managing, as an appointed remunerated director, a company with capital divided into shares, where that person is also a major shareholder of that company and can therefore exercise *de facto* power in the shareholder's meeting of the company?

2. If Question 1 is to be answered by reference to the national law of the Member State concerned, do the rules of Community law permit Article 14c of Regulation No 1408/71 to be applied — as would result in this case from the application of Netherlands law — in such a way that a person as referred to in Question 1 is insured only in respect of part of the risks covered by the social security scheme of the Member State concerned — in this case those covered by national insurance (volksverzekering) — and is not regarded as an insured person with regard to the other risks covered by that scheme — in this case, those covered by the employee insurance (werknemerverzekering) — and do they permit contributions to be levied on him accordingly?

3. If, as a result of the application of Article 14c(1)(b) of Regulation No 1408/71, the legislation of two Member States is applicable, do Community rules preclude national insurance contributions being levied by one Member State, under the legislation of that State, in connection with work performed —

not on every working day each week — in that State, without regard to the possibility that contributions may be levied under the legislation of the other Member state in connection with work performed in that other State during the other working days each week, and if so, to what extent is that the case?'

Community provisions

9. Article 1 of Regulation No 1408/71 provides as follows:

'[...]

(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;

[...].'

10. Title II of the Regulation contains a complete system of rules of conflict for

determining the law applicable to persons within its ambit. The general principle laid down in Article 13(1) is that a worker is subject to the legislation of a single Member State only. This provision reads as follows:

'1. Subject to Article 14c, 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.'

11. Article 14a of Regulation No 1408/71 lays down the special rules applying to persons, other than mariners, who are self-employed. It does not contain the term 'employed' which the national court requires to be interpreted. However, I presume that the provision of this article which is of interest for resolving the dispute is paragraph (2):

'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. ...'

12. Article 14c lays down the special rules applying to persons simultaneously employed in one Member State and self-employed in another. Pursuant to this provision, in the version in force at the material time: [2]

'1. A person who is employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

(a) to the legislation of the Member State in which he is engaged in paid employment, subject to subparagraph (b);

(b) in the instances referred to in Annex VII, to the legislation of each of these Member States, as regards the activity pursued in its territory.

2 — Council Regulation (EEC) No 3811/86 of 11 December 1986 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and also amending Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1986 L 355, p. 5), applying from 1 January 1987, amended this article so that it also covers two or more activities by way of employment and self-employment in two or more Member States.

2. The detailed rules for implementing subparagraph (b) of paragraph 1 shall be laid down in a Regulation to be adopted by the Council on a proposal from the Commission.'

13. Article 14d provides as follows:

'1. The person referred to in [...] Article 14c(1)(a) shall be treated, for the purposes of application of the legislation laid down in accordance with these provisions, as if he pursued all his professional activity or activities in the territory of the Member State concerned.'

14. Annex I to the Regulation, which gives definitions of self-employed persons, employed persons and members of their family for certain Member States, provides, so far as relevant here:

'I. The 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.'

15. In turn, Annex VII contains the following provision:

'Article 14c(1)(b) of the Regulation

Instances in which a person shall be simultaneously subject to the legislation of two Member States

1. Where he is self-employed in Belgium and gainfully employed in any other Member State except Luxembourg. ...'

16. Written observations on this preliminary reference have been submitted by the Netherlands Government and the Commission. The defendant authority, the Staatsecretaris van Financiën, informed the Court that it associated itself with the observations of the Netherlands Government. The latter, together with the Council and the Commission, replied to certain questions from the Court after the completion of the written procedure. The Netherlands Government,

the United Kingdom Government, the Council and the Commission appeared at the hearing.

Court to state whether, for the application of Title II of Regulation No 1408/71, the phrase 'under the direction of another person' requires a *de facto* relationship of subordination or whether it is sufficient for the relationship to be merely formal.

The first question

17. The Netherlands Government proposes an answer in the affirmative. It contends that the terms 'a person who is employed' and 'a person who is self-employed' in Articles 14a and 14c of Regulation No 1408/71 differ from the terms 'employed person' and 'self-employed person' which are defined in Article 1(a) and used in Article 2, which specifies the persons covered by the Regulation.

On this point the Netherlands Government asserts that the Treaty, Regulation No 1408/71 and national social security schemes give greater protection to employed persons than to self-employed persons. Therefore it proposes to ascertain, firstly, whether such protection can be obtained by applying a formal subordination criterion, and only if application of neither a formal criterion nor a practical criterion justify treating the person in question as an employed person will it be necessary to ascertain whether he is self-employed.

According to the Netherlands Government, the phrase 'a person who is employed' must be construed taking account of the definition by the Court of Justice of 'worker' for the purposes of Article 48 of the EC Treaty: 'The essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration', [3] and, in this connection, the Netherlands Government considers it essential for the

The Netherlands Government adds that in the present case Mr De Jaeck's relationship with the limited liability company fulfilled the essential requirements of an employment relationship: he worked for the company, he was subject to its authority and received remuneration for his services. This is sufficient to conclude that he was an employed person. Therefore his situation is not covered by Article 14a of the Regulation, but by Article 14c(1)(b) in conjunction with paragraph 1 of Annex VII to the Regulation.

3 — See the judgment in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17.

18. The Court asked the Netherlands Government to specify the contingencies covered by the social security scheme to which Mr De Jaeck should have contributed in 1984, and the conditions of membership. According to the information in the written reply, the contingencies covered are old age (Algemene Ouderdomswet), widowhood and orphanhood (Algemene Weduwen-en Wezenwet), invalidity (Algemene Arbeidsongeschiktheidswet), family allowances (Algemene Kinderbijslagwet) and special allowances for sickness (Algemene Wet Bijzondere Ziektekosten). The conditions of membership are practically the same for all these laws, viz. either residence in the Netherlands or, if resident in another Member State, liability to wages tax in respect of employment in the Netherlands, for which a merely formal relationship of subordination is sufficient.

19. In its written observations, the Commission observes that Title II of Regulation No 1408/71 contains a number of rules of conflict applying to persons who are employed and/or self-employed in two or more Member States simultaneously, and that Title II forms a complete, homogeneous system of rules of conflict based on the fundamental principle of Article 13(1) that such persons are subject to the social security legislation of a single Member State. The only exception to this, which did not appear in the Commission proposal submitted to the Council and which was the result of an amendment within the latter institution, is laid down by Article 14c(1)(b), which provides that in the cases listed in Annex VII both the legislation of the Member State where a person is employed and that of the Member State where he is self-employed are to apply concurrently.

To decide which legislation applies to Mr De Jaeck, we must start with the undisputed fact that in 1984 he was self-employed in a Member State or, to be specific, Belgium. However, the nature of his work in the Netherlands during the same period is not so clear.

20. This situation may be resolved by applying either Article 14a(2), if his activity in the Netherlands was on a self-employed basis, in which case he would remain subject to Belgian legislation because he resided in Belgium in 1984 and was also self-employed there, or Article 14c, if that activity was on an employed basis, in which case he would be subject to both Belgian and Dutch social security legislation simultaneously in relation to his activity in each of those States. Therefore, it is necessary to be able to decide whether Mr De Jaeck's activity in the Netherlands throughout that year constituted employment or self-employment, but these terms are not defined by the Regulation.

21. As the terms 'employment' and 'self-employment' are not defined in Regulation No 1408/71, the Commission proposes starting from the definitions of 'employed person' and 'self-employed person' in Article 1, so that those terms must be deemed to cover persons insured under a social security scheme provided for by the legislation of a Member State which applies to employed persons or self-employed persons respectively. Consequently, the nature of the activity in question would be of no significance for this purpose. In the Commission's opinion, the scope *ratione personae* of Regulation No 1408/71 is determined by reference to the social security scheme to which a person belongs, and not by reference to concepts which are more typical of employment law. As Community law stands at present, it is for the legislation of each Member State to determine the conditions for the right or the obligation to belong to a social security scheme or to a particular branch of such a scheme, and therefore it will be necessary to decide the question according to the provisions of national law applying to the particular case.

22. The Commission states that its position may appear to contradict the Court's case-law on the scope *ratione personae* of Article 48 of the Treaty and of Regulation (EEC) No 1612/68 [4] ('Regulation No 1612/68'), according to which the term 'worker' has a Community meaning and must be defined according to objective criteria which characterize the employment relationship, taking account of the rights and duties of the persons concerned.

The Commission adds that there is, however, no contradiction because Article 48 of the Treaty and Regulation No 1612/68 confer rights of Community origin on migrant workers, so that it is necessary to arrive at a Community definition which makes it possible to identify who has those rights, whereas Article 51 of the Treaty only provides for the coordination of national social security schemes. Therefore, in order to ascertain those who can avail themselves of the coordination provisions of Regulation No 1408/71, it will be necessary to see in each case who are the members of those schemes and, depending on whether the person concerned belongs to a social security scheme for employed persons or one for self-employed persons in a Member State, he will be within the scope *ratione personae* of Regulation No 1408/71.

23. In the Commission's opinion, the question whether an activity must be treated as employment or self-employment depends on whether the Member State where it takes place regards it as employment or self-employment for the purpose of membership of its social security schemes. In the present case, the Commission points out that the Netherlands does not have a social security scheme for self-employed persons as such and, if a person is not insured under the

4 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

scheme for employees but only under the national insurance scheme, it is more difficult than in other countries to identify the type of activity for the purpose of applying the Regulation.

To overcome this difficulty, the Commission recommends taking account of Article 1(a)(ii), which relates to social security schemes for all residents or for the whole working population, so that, when examining the manner in which such a scheme is administered or financed (first indent) or, failing such criteria, applying the rules set out in the second indent, which refer to the definition in Annex I to Regulation No 1408/71, it will be possible to determine whether the person concerned is insured as an employed or self-employed person. The reply proposed by the Commission to the first question is that, for the purposes of Articles 14a and 14c of Regulation No 1408/71, 'employed' and 'self-employed' activities must be those which are treated as such by the social security legislation of the Member State where they take place.

24. In the light of this reply, the Commission states that it is already possible to apply Title II of the Regulation to Mr De Jaeck. There is no doubt that, in Belgium, the social security legislation treats him as having been self-employed. In the Netherlands, although the answer is not so simple, the Commission concludes that, with regard to social security legislation, he was employed, in which case his situation is covered by Article 14c(1)(b), which means that the legislation of Belgium and the legislation of the Netherlands apply to him simultaneously.

25. After the written procedure, the Commission was asked by the Court to answer certain questions. In particular, it was asked, firstly, whether the terms 'a person who is employed' and 'a person who is self-employed' in Title II of the Regulation must be interpreted in the same way as the terms 'employed person' ('werknemer') and 'self-employed person' ('zelfstandige') in Article 1(a). Secondly, the Commission was asked to give examples to illustrate its statement that, if employment law were used for defining 'employment' and 'self-employment' for the purpose of Title II of the Regulation, this would in certain cases render it impossible to apply the rules of conflict to persons falling within the scope *ratione personae* of the Regulation.

26. With regard to the first question, the Commission states that, to establish whether a person should be treated as employed or

self-employed or as belonging to neither category, it will be necessary to be guided by the reply to the following questions: firstly, whether he falls within the scope *ratione personae* of the Regulation (Title I); if so, which legislation is applicable to him (Title II), and this may differ from that which was used to classify him as employed or self-employed, [5] and, finally, whether pursuant to that legislation he is insured as an employed or self-employed person or is not insured. [6]

To sum up, at the time when Title II is applied it is not yet possible to know whether, for the purpose of applying the provisions of the Regulation, the person concerned is to be classified as employed or self-employed. Therefore, Title II is not based on these concepts, but refers to the nature of the activity in the expectation that the legislation applicable pursuant to Title II will provide a final answer in this respect. For example, a person may be self-employed in a Member State and, by virtue of the rules of conflict, be subject only to the social security legislation of another Member State where he is employed, in which case he cannot be treated as self-employed for the purpose of the other provisions of the Regulation.

27. In order to reply to the second question, the Commission offers the following examples:

(1) Under German social security legislation, students are affiliated to the social security scheme applicable to employed persons. For this reason, pursuant to Article 1(a) of the Regulation, they are deemed to be employed persons and fall within its scope *ratione personae*. If, in order to apply Title II, it were necessary to follow the specific criteria of labour law, it would be impossible to decide whether they were employed or self-employed since they do not pursue any economic activity or to determine which legislation was applicable to them for the purposes of Regulation No 1408/71 while they were staying in another Member State.

(2) If it were necessary to follow the Court's definition of 'worker' for the purposes of Article 48 of the Treaty, a person employed for a short period, such as two hours a day on two days per week, as in the case of

5 — This occurred in Case C-121/92 *Staatssecretaris van Financiën* v *Zinnecker* [1993] ECR I-5023. The person concerned, a German national resident in Germany who was self-employed for approximately one-half of the time in Germany and for the other half in the Netherlands, had to be treated, pursuant to the Dutch legislation, as within the scope *ratione personae* of the Regulation (Title I), but the legislation applying to him was that of the Member State where he resided (Article 14a of Title II).

6 — The conclusion in the *Zinnecker* judgment, cited in footnote 5 above, was that the person concerned was not insured in either State because the German legislation only provided for voluntary insurance for persons in that situation and Mr Zinnecker had not opted to take out such insurance.

Mr van Heijningen, could not be treated as either an employed person or a self-employed person. In that case, [7] however, the Court held that a person is covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1), irrespective of the time devoted to his occupational activity.

The Commission concludes by observing that it is preferable to follow the criterion laid down by social security law because it has been shown that, in each Member State, commentators and case-law find it very difficult to distinguish between employed and self-employed persons for the purpose of their own employment law.

28. I infer from the wording of the question from the national court that, as 'employment' is not defined in Regulation No 1408/71, the Court of Justice is being asked to remedy this deficiency by giving a Community definition of this term, as it has already done with terms such as 'worker' for the purpose of applying Article 48 of the Treaty, 'non-wage earner' for the purpose of Article 52, or 'wage-earner or assimilated worker' for the purpose of the Community rules on social security.

With regard to the first term, the Court has consistently held that 'the concept of worker has a specific Community meaning and must not be interpreted restrictively. Any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a worker. The essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.' [8]

Interpreting this definition by contrary inference, the Court ruled, in the recent *Asscher* judgment, [9] that the activity of the plaintiff in the main proceedings, who was the director of a company in the Netherlands of which he was the sole shareholder (a situation similar to that of Mr De Jaeck), was not carried out in the context of a relationship of subordination, and so he was not to be treated as a 'worker' within the meaning of Article 48 of

7 — See the judgment in Case C-2/89 *Bestuur der Sociale Verzekeringsbank* v *Kits van Heijningen* [1990] ECR I-1755.

8 — See the judgments in Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14, and Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 21.

9 — Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 26.

the Treaty, but as pursuing an activity as a 'self-employed person' *within the meaning of Article 52 of the Treaty.* [10]

This principle, which was developed by case-law, was incorporated in Regulation No 1408/71, in particular in Article 1(a).

With regard to the third term, in the *Unger* judgment [11] the Court ruled that the expression 'wage-earner or assimilated worker' in Regulation No 3 [12] ('Regulation No 3'):

29. I must admit, as I did in my Opinion in the *Hervein and Hervillier* case, [13] that, as many of the provisions forming the system of rules of conflict in Title II of Regulation No 1408/71 are intended to determine the legislation applying to 'employed persons' and 'self-employed persons', depending on whether the activities in question are pursued in one, or more than one, Member State, it would be easier to apply them in practice if there were a definition of both terms which could be applied uniformly throughout the Community.

'has a meaning only within the framework and the limits of the concept of "workers" provided for in the Treaty to the application of which this Regulation is limited. The said expression, which is intended to clarify the concept of workers for the purposes of Regulation No 3 has therefore, like that concept, a Community meaning. Even if, for the sake of argument, the expression "wage-earner or assimilated worker" appeared in the legislation of each of the Member States, it could not possibly have a comparable meaning and role in all of them, so that it is impossible to establish the meaning by reference to similar expressions which may appear in national legislation. The concept of "wage-earner or assimilated worker" has thus a Community meaning, referring to all those who, as such and under whatever description, are covered by the different national systems of social security.'

However, no definition has yet been provided by the legislature and, as I have indicated, there are none in the Community regulations concerning the social security of migrant workers. So far as case-law is concerned, although in the *Van Poucke* judgment [14] the Court ruled that employment as a civil servant of a person falling within the scope of Regulation No 1408/71 is an activity as a person 'employed' within the meaning of Article 14c, the Court did not define such activity in general terms. Neither did it

10 — Emphasis added.

11 — Case 75/63 *Unger* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 347, in particular p. 363.

12 — Council Regulation No 3 on the social security of migrant workers (JO 1958, 30, p. 561).

13 — Opinion delivered on 11 July 1996 in Case C-221/95 *Hervein*, pending before this Court.

14 — Case C-71/93 *Van Poucke* v *RSVZ* [1994] ECR I-1101. Mr Van Poucke pursued one professional activity as a military doctor in Belgium and another as a self-employed doctor in the Netherlands. He was compelled to pay contributions to the Belgian institution for the social insurance of self-employed persons. As he was simultaneously employed in Belgium and self-employed in the Netherlands, under Articles 14c(1)(a) and 14d(1) he was subject, as a result of the latter activity, to the appropriate Belgian legislation under the same conditions as if he was self-employed in Belgium.

do so in the *Van Roosmalen* judgment, [15] in which it ruled that the expression 'self-employed person' within the meaning of Article 1(a)(iv) of Regulation No 1408/71, which covers persons who are voluntarily insured, applies to persons who are pursuing or have pursued, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs, even if that income is supplied by third parties benefiting from the services of a missionary priest.

30. I agree with the Commission that the decisive factor as to whether a person is covered by the Regulation consists in being insured under a social security scheme of a Member State for employed or self-employed persons and that, for the purpose of the Regulation, when deciding whether a particular activity is to be treated as one of employment or self-employment, it is necessary in each case to determine how these activities are treated by the Member State in question when applying its social security legislation.

31. As the Court has consistently held, 'it is for the legislation 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, provided that in this connection there is no discrimination between nationals of the host State and nationals of other Member States.' [16]

32. Nevertheless, it must be remembered that, although the Member States are in principle competent to lay down the conditions for membership of their social security schemes, they are not authorized to determine the territorial scope of their own legislation, which is entirely a matter for Community law. In the *Ten Holder* judgment, [17] the Court observed that the provisions of Title II 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.

33. In the light of these considerations, I propose that the Court's reply to the first question be that the word 'employed' in Title II of Regulation No 1408/71 refers to activity which is treated as such, for the

15 — Case 300/84 *Van Roosmalen* v *Bestuur van de Bedrijfsvereniging* [1986] ECR 3097, which also concerned the application of Dutch legislation.

16 — See the judgment in Case 254/84 *De Jong* [1986] ECR 671, paragraph 13. See also the judgments in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, paragraph 6; Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraph 12; Case 275/81 *Koks* v *Raad van Arbeid* [1982] ECR 3013, paragraph 9; Case 276/81 *Bestuur der Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, paragraph 14; Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, paragraph 12; Case 368/87 *Troiani* v *Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333, paragraph 21; and Case C-297/92 *Baglieri* [1993] ECR I-5211, paragraph 13.

17 — Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, paragraph 21.

purpose of its social security system, by the legislation of the Member State in whose territory such activity is pursued.

34. On the basis of this reply the national court will have to determine, taking account of the first and second indents of Article 1(a)(ii) of Regulation No 1408/71, whether Mr De Jaeck ought to have been insured under and contributed to a scheme for employed or self-employed persons in the Netherlands. In the former case, his situation will be covered by Article 14a(2) and he will have been subject to only Belgian legislation, as if he had worked entirely in Belgium, whereas, in the latter case, Article 14c(1)(b) will apply and he will have been subject simultaneously to the social security legislation of both States in relation to his activity in each.

In determining whether Mr De Jaeck ought to have been insured under, and contributed to, a scheme for employed persons or for self-employed persons in the Netherlands, the national court will also have to take account of the judgment given by the Court of Justice in the *Asscher* case [18] which examines a factual situation very similar to that here. As appears from that judgment, Mr Asscher, a Dutch national, worked in the Netherlands as the director of a limited liability company of which he was the sole shareholder, and likewise worked in Belgium as the director of another company, for which his activity was confined to Belgium. He was insured under the Dutch national insurance scheme until he transferred his residence to Belgium in May 1986. Thereafter he was under no obligation to contribute to the Dutch national insurance, but was subject exclusively to the Belgian social security legislation and was, in particular, insured under the compulsory scheme for self-employed persons.

The second question

35. As I understand this question, the national court wishes to know, in the event that it is found that Dutch legislation applies pursuant to Article 14c of Regulation No 1408/71, what will happen if Mr De Jaeck's activity in the Netherlands is deemed to be employment for the purpose of that country's social security legislation, if Community law permits a person in that situation to be insured in relation to only some of the contingencies covered by the social security legislation of that Member State, i. e. those provided for by the national insurance scheme, but not all those forming part of the scheme for employees.

18 — Cited in footnote 9 above, paragraphs 2, 10, 11 and 17.

36. The Netherlands Government proposes a reply in the affirmative to this question. It observes that since 1985, as a result of a judgment of the Centrale Raad van Beroep, the social security cover of a company director who is at the same time the principal shareholder does not extend to certain contingencies for which there is provision for payment of benefits according to the remuneration previously received, i. e. sickness, invalidity and unemployment, and he is insured only in respect of the following risks: old age, widowerhood and orphanhood, invalidity (right to minimum benefits), sickness (special benefits) and family benefits.

The Government adds that, as the Court of Justice has repeatedly held, it is for the legislation of the Member States to determine the conditions of insurance under a compulsory or voluntary social security scheme, provided that the rules are applied without discrimination between nationals of the host State and nationals of other Member States, the only purpose of the rules of conflict in Title II being to determine the legislation applicable, and they cannot have the effect that a person is insured in relation to certain contingencies contrary to the provisions of such legislation.

37. The Commission points out that the objective of Regulation No 1408/71 is the coordination, not the harmonization, of the social security systems of the Member States, the latter remaining free to determine the conditions for being insured, subject to observance of the principle of non-discrimination. It follows that, if the legislation of a particular Member State is found to be applicable pursuant to Title II, the requirements it lays down for insurance under a scheme or a particular branch of such a scheme must be fulfilled.

The Commission also proposes a reply in the affirmative to the second question as follows: in cases where Article 14c(1)(b) of Regulation No 1408/71 is found to be applicable, the rules concerning the right or the obligation to be insured under a social security scheme or a particular branch thereof will be those laid down by the legislation of each of the Member States concerned, provided that no distinction is made between nationals of the host State and those of other Member States.

38. On this point I agree with the views of the Netherlands Government and the Commission and the arguments they put forward.

I believe that the reason why the national court has referred this question is that, if Mr De Jaeck's activity in the Netherlands is found to be that of employment, it seems strange that Community law permits a situation where there is no protection for unemployment, which is such a typical contingency provided for by social security schemes for employees.

However, as the Netherlands Government and the Commission correctly point out, it must be borne in mind that, firstly, the provisions of Title II of Regulation No 1408/71, of which Article 14c forms part, constitute a complete, uniform system of rules of conflict the purpose of which is to determine the national legislation applicable to persons covered by the Regulation, but not to lay down the conditions creating a right or obligation to be insured under a social security scheme or a particular branch of such a scheme and, secondly, as Community law stands at present, it is for the legislation of each Member State to create a right or obligation to be insured under its social security schemes and the conditions, provided that such rules apply without discriminating between its own nationals and those of other Member States.

39. From this I conclude that, if Article 14c(1) is found to apply to Mr De Jaeck, he will have been subject, in 1984, simultaneously to the social security legislation of two Member States, with the conditions of insurance and cover particular to each of them.

40. In the light of the foregoing arguments, I propose that the national court's second question be answered as follows: if the Netherlands legislation is applicable pursuant to Article 14c of Regulation No 1408/71, Community law does not preclude a person in Mr De Jaeck's situation from being insured in relation to only some of the contingencies covered by the Netherlands social security system, i. e. those provided for by the national insurance scheme, and not in relation to the other contingencies covered by that scheme, i. e. those provided for by the compulsory insurance scheme for employees.

The third question

41. It seems to me that, with this question, the national court is asking whether, if Article 14c(1)(b) of Regulation No 1408/71 is applicable, Community law precludes one of the Member States in question from levying contributions from an insured person who works in its territory for only a few days per week, without taking into account the contributions by the same person in another Member State in connection with his work there on the other days, i. e. whether the fact that, through the application of Regulation No 1408/71, a person is subject simultaneously to the legislation of two Member States has any effect on the calculation of the contributions which he has to pay in both States.

42. The Netherlands Government proposes that this question be answered in the negative. It observes that a person in

Mr De Jaeck's position is not subject alternatively to the social security legislation of two Member States, but simultaneously. Herein lies the difference from the situation examined in the *Perenboom* judgment, [19] in which the Court ruled that, in the case of a worker who was subject for part of the year to German legislation, and for the remainder of the year to Netherlands legislation, a Member State could not require contributions for the salary received in the other Member State during the period when the legislation of the other State was applicable.

On the contrary, pursuant to Article 14c(1)(b) of Regulation No 1408/71, the Member State whose legislation applies to paid employment charges contributions, under the conditions laid down by that State, on the remuneration received, but under no circumstances can it require contributions on the income received during the same period from self-employment in another Member State.

Finally, the Netherlands Government states that Mr De Jaeck is subject to Netherlands legislation during the entire week and that social security contributions must be charged on his total income from his work in the Netherlands, and that they may be calculated as if his work had been full-time work and not part-time work.

43. The Commission also proposes a reply in the negative. It observes, firstly, that in cases where Article 14c(1)(b) of Regulation No 1408/71 applies, contributions can be levied only on the income received in the Member State in question and under no circumstances on income in another State, and that this principle appears acceptable in the light of the provisions which normally appear in conventions for preventing double taxation.

Secondly, the Commission examines Mr De Jaeck's alternative submission that in his case the maximum national insurance contribution in the Netherlands (which at that time was HFL 62 850) should be reduced according to the number of working days and that, since he worked only two days a week, the maximum should be reduced to two-sevenths of that amount. The Commission rejects this argument on the ground that there is no provision in Regulation No 1408/71 which requires the authorities of a Member State to apply special rules for calculating contributions where the person concerned simultaneously pays contributions in

19 — Case 102/76 *Perenboom* [1977] ECR 815.

another Member State and that, in the absence of Community provisions in the matter, the national legislation on the calculation of contributions for work in its territory applies without reservation.

44. I concur with the submissions of the Netherlands Government and the Commission with regard to the reply to this question. I think there is no doubt that, if Article 14c(1)(b) of Regulation No 1408/71 is found to apply, the worker is subject simultaneously, not successively, to the legislation of both States in relation to the activities in each and that, as there is no Community law rule which would require the authorities of a Member State to apply special rules for calculating contributions where the person concerned has to pay contributions simultaneously in another Member State, the respective national legislation must be applied without reservation.

45. Consequently, I propose that the answer to be given to the third question is that, for the purposes of applying Article 14c(1)(b) of Regulation No 1408/71, Community law does not require the Member States to take account, in calculating the contributions payable by the person concerned in the State where he is employed, of the fact that he is also obliged to pay contributions in respect of self-employment in another Member State, but that Community law prevents the first State from charging contributions in respect of his income earned in the second, and vice versa.

46. Having thus given a complete reply to the three questions from the national court, I must say that I am perplexed, as in my Opinion in the *Hervein* case, [20] by the prospect of Article 14c(1)(b) of Regulation No 1408/71 being applied in conjunction with Annex VII to the Regulation.

47. In the first place, when the Community rules applying to migrant workers were contained in Regulation No 3, the Court of Justice ruled, in the *Nonnenmacher* judgment, [21] when deciding whether the compulsory application of the legislation of the State where the worker is employed excludes the application of that of any other Member State, that Article 12 of Regulation No 3, forming part of Title II (which, like Title II of Regulation No 1408/71, set out the rules of conflict for the purpose of determining the legislation applicable to persons within

20 — Cited in footnote 13. In that case, the application of Article 14c(1)(b) affected a French national who had worked for several years in a very similar capacity in France and Belgium. To be precise, he was the chairman and managing director of a number of public companies. In France, he was covered by the social security scheme for employees, while the respective Belgian institution also claimed that he should pay contributions to the scheme for self-employed persons.

21 — Case 92/63 *Nonnenmacher* v *Bestuur der Sociale Verzekeringsbank* [1964] ECR 281, in particular 288.

its ambit), did not prohibit application of the legislation of a Member State other than that where the worker was employed, except in so far as he was required to pay compulsory contributions to a social security institution which would not accord him supplementary protection in respect of the same risk and of the same period. Likewise in the *Van der Vecht* judgment [22] the Court held in effect that the purpose of Article 12 of Regulation No 3 was to avoid any simultaneous application of national laws which could increase unnecessarily the social security charges of the employee and the employer, and that Article 12 prohibits Member States other than the State of employment from applying their own social security legislation to the worker if such application entailed an increase in social security charges for employees or employers, with a corresponding increase in social security protection.

48. Secondly, as long as Regulation No 1408/71 applied only to employed persons and members of their family, the situation where a person was subject to the social security legislation of two Member States did not arise. The provision to this effect was introduced by Regulation (EEC) No 1390/81, [23] which extended Regulation No 1408/71 to self-employed persons and members of their families and which came into force on 1 July 1982 ('Regulation No 1390/81'). It did not even appear in the proposal presented to the Council by the Commission. The detailed rules for implementing Article 14c(1)(b), as announced by Article 14c(2), were to have been laid down in a regulation to be adopted by the Council on a proposal from the Commission, and this was done by Regulation No 3811/86, [24] which came into force on 1 January 1987.

49. I am uncertain as to how far this regulation can be considered compatible with the principles of the free movement of workers and the right of establishment proclaimed in Articles 48 and 52 of the Treaty, as construed by the Court of Justice, which on many occasions has had to rule on the application of the regulation to factual situations very similar to those of the present case, but with the difference that, at the time of the facts of those cases, Regulation No 1390/81 had not come into force.

50. In the *Stanton* case, [25] the plaintiff, a British national who was employed in the United Kingdom and in that capacity paid contributions to the British social security scheme for employees, was at the same time a director of a Belgian insurance company, a subsidiary of the British company by which he was employed. As a consequence of that activity, the Belgian authorities on their own initiative insured him under their own social security scheme for self-employed persons.

22 — Case 19/67 *Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 345, in particular at p. 354.

23 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation No 1408/71 on the application of social security schemes to employed persons and to members of their families moving within the Community (OJ 1981 L 143, p. 1).

24 — Cited in footnote 2. When it came into force, Article 14c was reworded and paragraph 2 was deleted.

25 — See the judgment in Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877.

The Institut National d'Assurances Sociales pour Travailleurs Indépendants ('INASTI') claimed the respective contributions from Mr Stanton and, as being jointly and severally liable, the insurance company.

The *Wolf* case [26] concerned a German chemical engineer who was simultaneously employed in the Federal Republic of Germany and held a position as a director of a company with its registered office in Belgium. INASTI claimed from him and from the Belgian company contributions to the social security scheme for self-employed persons in respect of his directorship.

51. Mr Wolf and the company requested exemption from the payment of such contributions pursuant to Article 12, paragraph 2, of Royal Decree No 38 establishing the social security scheme for self-employed persons, under which a self-employed person is not liable to pay contributions if his income in that capacity does not reach a certain threshold and if, in addition to that capacity, he habitually pursues another principal occupation. This was refused by INASTI on the ground that the 'other occupational activity' mentioned in Article 12, paragraph 2, related solely to employment covered by a Belgian social security scheme.

52. In these two judgments the Court observed that 'the first paragraph of Article 52 of the Treaty requires the abolition of all restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. It is settled law that that is a directly applicable rule of Community law'; that 'freedom of establishment within the Community is not confined to the right to create a single establishment within the Community, but entails the right to set up and maintain, subject to observance of the relevant professional rules of conduct, more than one place of work within the Community', and that 'that is equally true in respect of a person who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity.' [27]

In both judgments the Court also observed that 'the provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and precludes national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State'. The Court added that 'the legislation of a Member State which exempts persons whose principal occupation is employment in that Member State from the obligation to pay contributions to the scheme for self-employed persons but withholds such exemption from persons whose principal occupation is employment in another Member State has the effect of placing at a disadvantage the pursuit of occupational activities

26 — See the judgment in Joined Cases 154/87 and 155/87 *Wolf and Another* [1988] ECR 3897.

27 — Ibid., paragraphs 10 to 12.

outside the territory of that Member State. Articles 48 and 52 of the Treaty therefore preclude such legislation'. Bearing in mind that the national provision in question affords no additional social security cover to the persons concerned, who are insured under the social security scheme of the Member State in which they pursue their principal employment, the Court concluded that 'the impediment to the pursuit of occupational activities in more than one Member State may not in any event be justified on that basis'. [28]

53. In a more recent judgment in the *Kemmler* case, [29] the Court replied to a question referred by a Belgian court. In that case INASTI claimed that Mr Kemmler should pay contributions to the social security scheme for self-employed persons for 1981 and the first half of 1982. As in the *Stanton* and *Wolf* cases, the contributions were for periods prior to the entry into force of Regulation No 1390/81. Mr Kemmler practised as a lawyer in Frankfurt and Brussels and refused to pay the contributions on the ground that he was already insured under the German social security scheme for self-employed persons and that he would not obtain additional social security cover from the Belgian scheme. He was domiciled in Germany and had resided in Belgium for part of the period in respect of which contributions were claimed.

54. As Regulation No 1390/81 was not applicable, the question had to be answered by applying Article 52 of the Treaty alone, which relates to the right of establishment, as Mr Kemmler had a fixed, permanent establishment in both Member States.

55. Following the same reasoning as in the *Stanton* and *Wolf* cases, the Court arrived at the same conclusion in the *Kemmler* case:

'Legislation of a Member State which requires contributions to be made to the scheme for self-employed persons by persons already working as self-employed persons in another Member State, where they have their habitual residence and are affiliated to a social security scheme, inhibits the pursuit of occupational activities outside the territory of that Member State. Article 52 of the Treaty therefore precludes legislation of that kind unless it is duly justified.'

In this respect the legislation in question, which compelled Mr Kemmler to be insured under and to pay contributions to the Belgian self-employed scheme, afforded no additional social security cover, just as in the *Stanton* and *Wolf* cases. Consequently, added the Court, 'the impediment to the pursuit of occupational activities in more than one Member State may not in any event be justified on that basis' and its reply to the national court was as follows:

'Article 52 of the Treaty precludes a Member State from requiring contributions to be made to the social security scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social

28 — Ibid., paragraphs 13 to 15.

29 — Case C-53/95 *Kemmler* [1996] ECR I-703.

security scheme, that obligation affording them no additional social security cover.' [30]

56. In the present case, both the Council and the Commission were requested to submit observations on the compatibility of Article 14c(1)(b) of Regulation No 1408/71 with Articles 48 to 52 of the Treaty in the light of the Court's case-law, particularly the *Kemmler* judgment. [31]

57. The Council points out, firstly, that it has a broad discretion which corresponds to the political responsibilities given to it by Article 51 of the Treaty and by virtue of which the Court's power to review political decisions of the Council, within the limits of its own responsibility, must be limited to a general review in relation to the objective [32] and, secondly, that in the *Triches* judgment [33] the Court found that:

'none of the provisions of the Treaty restricts the freedom conferred on the Council by Article 51 to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reason of disparities between the national schemes in question.'

The Council adds that an exception such as that in Article 14c(1)(b) of Regulation No 1408/71 to the principle laid down in Article 13 that persons to whom the Regulation applies are to be subject to the legislation of a single Member State only cannot conflict with Articles 48 to 52. For this to happen, the application of that provision would have to produce undesired secondary effects or practical problems to the disadvantage of migrant workers in relation to their competitors who are nationals of the host State, and it did not appear that the application of the provision had caused problems in the Administrative Commission on Social Security for Migrant Workers.

The Council goes on to observe that, in the *Kemmler* judgment, [34] the Court allowed exceptions to the free movement of workers if they are 'duly justified' or if they afford 'additional social security cover'. With regard to justification, the Council claims that the purpose of Article 14c(1)(b) of Regulation No 1408/71 is to prevent persons who are simultaneously employed and self-employed in two Member States from having to pay smaller contributions than persons who are both employed and self-employed in one Member State. If that were possible, the consequence would be not only that they had an unjustified advantage in relation to their competitors whose activities are not divided between two Member States, but also that obtaining employment, whether fraudulently or legally, outside the Member State concerned would give rise to an undesired principle of indirect harmonization of

30 — Ibid., paragraphs 12 to 14.

31 — Cited in footnote 29.

32 — In this connection the Council cites the judgment in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 89 to 91, concerning the Common Agricultural Policy.

33 — Case 19/76 *Triches* v *Caisse Liégeoise pour Allocations Familiales* [1976] ECR 1243, paragraph 18.

34 — Cited in footnote 29.

the social security systems of the Member States mentioned in Annex VII to the Regulation, which would be contrary to the Treaty and which, in the long term, could prejudice the social security schemes of those States by aggravating their deficit situation. So far as additional social security cover is concerned, the Council observes that in certain cases double contribution, which is calculated on the income in the Member State concerned, may mean additional cover in relation to pension rights or family benefits.

58. In its reply to this question from the Court, the Commission confirms that Article 14c(1)(b) of Regulation No 1408/71 did not appear in the Council's original proposal (being the result of an amendment which arose in the Council itself) and points out that it was adopted in order to prevent persons who are employed in one Member State (e. g. France) and self-employed in one of the other Member States listed in Annex VII (e. g. Belgium) from avoiding payment of the social security contributions which they would have to pay in the State where they are self-employed if they were both employed and self-employed in that State, which would place them in a better position than that of their competitors who are in fact employed and self-employed in that State. The Commission leaves it to the Court to decide whether the exception, laid down by the said provision, to the principle of being subject to the legislation of only one Member State is compatible with Articles 48 to 52 of the Treaty.

59. I cannot accept the Council's arguments. According to the recitals of Regulation No 1390/81, particularly the second, 'freedom of movement for persons, which is one of the cornerstones of the Community, is not confined to employed persons but also extends to self-employed persons in the framework of the freedom of establishment and the freedom to supply services'; the third, 'the coordination of the social security schemes applicable to self-employed persons is necessary to attain one of the objectives of the Treaty'; and the fifth, 'in the sphere of social security, the application of national legislations only would not afford sufficient protection to self-employed persons moving within the Community; whereas, in order to make the freedom of establishment and the freedom to provide services fully effective, the social security schemes for self-employed persons should be coordinated.'

60. However, it is easy to show that, with the entry into force of the Community rules for coordinating the social security schemes of the Member States applying to self-employed persons, the situation of persons who are self-employed in Belgium and employed in another Member State, save in Luxembourg (to take one example of several which can be taken from Annex VII to Regulation No 1408/71), is worse than before, when only the Treaty provisions concerning the free movement of persons were applicable. Messrs Stanton, Wolf and Kemmler had to be insured under and pay contributions to only one social security

scheme, whereas, pursuant to Article 14c(1)(b) of Regulation No 1408/71, Mr De Jaeck may have to be insured under and pay contributions to the Dutch social security scheme and to the Belgian self-employed scheme in relation to his work in each country.

61. The difference between the situation of Messrs Stanton, Wolf and Kemmler on the one hand and that of Mr De Jaeck on the other is that, for the former, the obligation to be insured under a social security scheme in one Member State when they were already covered in another arose from the application of national, i. e. Belgian, legislation, whereas the same obligation would be imposed on Mr De Jaeck by the Community rules.

62. As the Court has ruled that Articles 48 and 52 of the Treaty preclude rules of a Member State requiring contributions to be paid to its self-employed scheme by persons who are already employed or self-employed in another Member State, where they are domiciled and insured under a national social security scheme, because such rules are prejudicial to the pursuit of occupational activities outside that Member State, I think the conclusion must, with all the more reason, be that Articles 48 and 52 preclude the same effects being produced by a Council Regulation.

63. In this connection it remains to add that in the *Stanton, Wolf* and *Kemmler* judgments the Court appears to contemplate the possibility that impeding the pursuit of occupational activities outside a single Member State could be justified if the national rules afforded some kind of additional social security cover. However, in accordance with the principle of the hierarchy of norms and in the light of Articles 48 and 52 of the Treaty, which have the object of facilitating the pursuit of occupational activities in all the Member States, there is no justification whatever for the Council, in exercising its legislative power, to place Community nationals in an unfavourable situation if they wish to extend their activities to the territory of certain other Member States.

64. I think this is the weightiest argument in judging the compatibility of the provision in question with Articles 48 and 52 of the Treaty. However, it is not the only argument. At the material time, Annex VII to Regulation No 1408/71 listed six States out of a Community of ten members. [35] In the cases of Belgium, Denmark (for residents), France, Greece and Italy, a person who was self-employed in one of them and employed in any other remained subject to the legislation of two Member States. For Germany, this arose only where a person was self-employed in farming in Germany. The Council states that the purpose of the rule is

35 — With the accession of Spain and Portugal both States were added to the list. The same occurred on the accession of Austria, Finland and Sweden.

to prevent persons who are simultaneously employed and self-employed in two Member States from paying smaller contributions than persons who are both employed and self-employed in one Member State only, which would give the former an unjustified advantage over their competitors whose activities are not divided between two Member States. I now wish to consider whether Article 14c(1)(b) has this object, taking Mr De Jaeck's case as an example.

65. As I mentioned at the beginning, in 1984 Mr De Jaeck worked two days a week as the director of a limited liability company in the Netherlands, of which he is also the sole shareholder, and for the rest of the week he was self-employed in Belgium. He falls within the ambit of Regulation No 1408/71 because it is clear that he is insured under the Belgian social security scheme for self-employed persons and contributions are being claimed from him for the Netherlands social security scheme in respect of the same period.

When applying Title II of the Regulation to determine the legislation to which he is subject, which is a matter for the national court, it is possible that his situation may be covered by Article 14c. Were it not for paragraph (1)(b) of the Article and the above-mentioned Annex VII, Mr De Jaeck would be subject to the social security legislation of only one of the two States, which would treat him as if he worked entirely in its territory. The situation would be the same if he were self-employed in Germany instead of Belgium, unless he were engaged in farming, or in Denmark, unless he was resident there, or in the United Kingdom or Ireland, to take a few more examples. On the other hand, his situation would be comparatively worse if he proposed to work on a self-employed basis in Belgium, as we have seen, or in Italy or Greece, as he would be subject simultaneously to the legislation of two Member States, which would entail a double obligation to be insured and pay contributions, although only for the activities carried on in each State.

66. The Council's argument that, were it not for the provision in question, persons in Mr De Jaeck's position would be in a more advantageous situation in relation to their competitors who do all their work in one Member State because their contributions would be smaller is untenable for various reasons. Firstly, I presume that it is precisely in order to avoid this result that Article 14d(1) provides that a person who is employed simultaneously in one Member State and self-employed in another, and who is subject to the legislation of the former, is treated as if he pursued all his professional activity or activities there. Secondly, the method of calculating contributions differs considerably as between Member States and therefore it is rather rash to state outright that belonging to the social security scheme of a single Member State would mean that

the amount of the contributions would be lower.

This argument of the Council seems to me even less persuasive in view of the amendments made to Regulation No 1408/71 by Regulation No 3811/86. From the date when the latter came into force on 1 January 1987, although a person who is employed simultaneously in one Member State and self-employed in one of the others listed in Annex VII continues to be subject to the legislation of both, it is not clear whether this is solely in relation to the work in each, because this point was deleted in the two indents of which Article 14c(b) consists. Furthermore, pursuant to the new paragraph (2) of Article 14d, a person in this situation is treated, for the purposes of determining the rates of contributions to be charged to self-employed workers under the legislation of the Member State in whose territory he is self-employed, as if he pursued his paid employment in the territory of the Member State concerned. A provision worded in this way may, when the national legislation is applied, have the effect of either reducing or increasing the rate of contribution.

67. The Council also states that the purpose is to prevent a situation in which, simply by crossing the frontier and seeking employment in another Member State, such persons can escape paying compulsory contributions to a social security scheme for the self-employed, like, for example, the Belgian scheme. I am inclined to think that this was in fact the reason why the Council amended the Commission's wording at the time but, as I have already shown, this provision has the effect of creating an obstacle to the pursuit of occupational activities outside the territory of a Member State.

I would add that a person residing in Belgium where he is both self-employed and employed would perhaps be in a similar situation if he remains in that State or, pursuant to Article 14c(1)(b), if he moves to France to take up employment whilst continuing to work on a self-employed basis in Belgium. However, this situation would be very different from that of a person resident and employed in, for example, Germany and who is at the same time self-employed in Denmark or in any of the other Member States not listed in Annex VII.

68. Therefore, I must conclude that, apart from the fact that in some cases this provision may result in the person concerned being given additional cover with regard to pension rights, or retaining an entitlement to death benefit acquired under the legislation of each of the Member States, it creates obstacles to pursuing occupational activities in different Member States and also accentuates the disparities arising from the national laws themselves and requires nationals of the Member states to be treated differently depending on where they propose to work.

69. It is clear from all this that Article 14c(1)(b) and Annex VII to Regulation No 1408/71 must be ruled invalid in so far as they provide that a person who is simultaneously employed in one Member State and self-employed in one of the Member States listed in Annex VII is subject to the legislation of each of those States.

70. The fact that the national court has referred questions of interpretation in this case does not prevent the Court from examining the validity of a legislative provision. In this connection the principle laid down by the Court in the judgment in Case 16/65 [36] is very important. The Court observed that:

'The conclusion to be drawn from the formulation of the questions put by the [national court] is that the court is concerned less with the interpretation of the Treaty or of a measure adopted by a Community institution than with obtaining a preliminary ruling on the validity of such a measure which the Court is empowered to give by subparagraph (b) of the first paragraph of Article 177.'

In such cases:

'it is appropriate for the Court of Justice to inform the national court at once of its views without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure ... and would be contrary to [the] very nature [of Article 177]. Although [such] strict adherence to formal requirements may be defended in the case of litigation between two parties whose mutual rights must be subject to strict rules, it would be inappropriate to the special field of judicial cooperation under Article 177 which requires the national court and the Court of Justice ... to make direct and complementary contributions to the working-out of a decision.' [37]

71. Likewise Advocate General Darmon, in his Opinion in Case C-37/89, observed in this respect that 'it is for the Court to verify the validity of a legislative provision even though the question referred to it does not ask for this to be done, once the Court contemplates interpreting the provision in a way which may cause it to be rendered invalid.' [38]

72. And this is precisely what the Court has always done over the years. For example, in the *Strehl* case, [39] in which a Belgian court asked the Court of Justice to interpret Article 46(3) of Regulation No 1408/71 and Decision No 91 of the Administrative Commission on Social Security of Migrant Workers, the Court examined by way of preliminary ruling the legality of those provisions and found them incompatible with Article 51 of the EC Treaty. In the *Roquette Frères* case [40] the Court found that six of the questions referred by the national court for interpretation also asked indirectly for an assessment of the validity of certain legislative

36 — *Firma C. Schwarze* v *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877.

37 — See the Opinion of Advocate General Mancini in Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805, in particular pp. 2822 and 2826.

38 — Case C-37/89 *Weiser* [1990] ECR I-2395, in particular at p. I-2411.

39 — See the judgment in Case 62/76 *Strehl* [1977] ECR 211, paragraph 10.

40 — See the judgment in Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraph 6.

provisions which the Court went on to consider and were ruled invalid. In Case 20/85, [41] in which the national court referred three questions for a preliminary ruling on the interpretation of paragraph 15 of Section C of Annex VI to Regulation No 1408/71, the Court interpreted the provision first and went on to rule it invalid. Again in Case C-37/89, [42] in which a French court sought a preliminary ruling on the interpretation of Article 11(2) of Annex VII to the Staff Regulations of Officials of the European Communities, the Court of Justice delivered a judgment ruling it invalid.

The same occurred in Cases 313/86, [43] C-204/88 [44] and C-117/88, [45] in which the Court examined of its own motion the validity of the Community provisions which the national court had asked it to interpret, but found that there was nothing which would affect their validity.

73. With regard to the consequences of the invalidity of Article 14c(1)(b) and Annex VII to Regulation No 1408/71, the Court has ruled that 'where it is justified by overriding considerations Article 174(2) of the Treaty gives the Court discretion to decide, in each particular case, which specific effects of a regulation which has been declared void must be maintained.' [46]

In the present case, since the *Stanton*, *Wolf* and *Kemmler* judgments, [47] in which the Court gave the interpretation of Articles 48 and 52 of the EC Treaty which serves as the basis of this declaration of invalidity, were delivered in 1988 (the first two) and 1996 (the last one), and since the facts of the main proceedings go back in all three cases to a time before the entry into force of Regulation No 1390/81, which added Article 14c and Annex VII to Regulation No 1408/71, it must be borne in mind exceptionally, that the Member States which, after that Community provision came into force on 1 July 1982, compelled persons already in a scheme for employees in another Member State to be insured under their social security schemes for self-employed persons, could have been mistaken as to the exact extent of their obligations concerning the free movement of persons.

74. Under these circumstances, I propose that, as in the *Pinna* judgment, [48] the Court should rule that, owing to overriding considerations of legal certainty affecting all the interests at stake, both public and private,

41 — Cited in footnote 37.

42 — Cited in footnote 38.

43 — See the judgment in Case 313/86 *Lenoir* [1988] ECR 5391.

44 — See the judgment in Case C-204/88 *Ministère Public* v *Paris* [1989] ECR 4361.

45 — See the judgment in Case C-117/88 *Trend-Moden Textilhandel* [1990] ECR I-631.

46 — See the judgments in Case 112/83 *Société des Produits de Maïs* v *Administration des Douanes et Droits Indirects* [1985] ECR 719, paragraph 18, and Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 26.

47 — Cited in footnotes 25, 26 and 29 respectively.

48 — Cited in footnote 46.

affiliation to social security schemes and contributions payable pursuant to Article 14c(1)(b) of Regulation No 1408/71 in respect of periods prior to the delivery of the judgment declaring that article invalid cannot in principle be called into question, save in the case of workers or persons claiming under them who, before that date, brought legal proceedings or made an equivalent claim under the national law applicable.

Conclusion

75. In view of the foregoing, I propose that the Court reply as follows to the questions referred by the Hoge Raad der Nederlanden:

(1) The expression 'employed' in Title II 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, in the consolidated version of Council Regulation (EEC) No 2001/83 of 2 June 1983, refers to activity which is treated as such, for the purpose of its social security system, by the legislation of the Member State in whose territory such activity is pursued.

(2) If the Netherlands legislation is applicable pursuant to Article 14c of Regulation No 1408/71, Community law does not preclude a person in Mr De Jaeck's situation from being insured in relation to only some of the contingencies covered by the Netherlands social security system, i. e. those provided for by the national insurance scheme, and not in relation to the other contingencies covered by that scheme, i. e. those provided for by the compulsory insurance scheme for employees.

(3) For the purposes of applying Article 14c(1)(b) of Regulation No 1408/71, Community law does not require the Member States to take account, in calculating the contributions payable by the person concerned in the State where he is employed, of the fact that he is also obliged to pay contributions in respect of self-employment in another Member State, but Community law

prevents the first State from charging contributions in respect of his income earned in the second, and vice versa.

On the grounds set out above, I also propose that the Court give the following ruling:

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(1) Article 14c(1)(b) of and Annex VII to Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, must be declared invalid in so far as they provide that a person who is simultaneously employed in the territory of one Member State and self-employed in that of another is to be subject to the legislation of both States.

(2) Such invalidity cannot be relied upon in order to call into question affiliation to social security schemes and contributions payable pursuant to the provision which has been declared invalid, in respect of periods prior to the delivery of the judgment declaring it invalid, save in the case of workers or persons claiming under them who, before that date, brought legal proceedings or made an equivalent claim under the national law applicable.