# OPINION OF ADVOCATE GENERAL
# POIARES MADURO
delivered on 16 February 2006 [1]

1. Where a pensioner is in receipt of pensions drawn not only from the Member State in which she resides but also from another Member State, is it incompatible with 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, [2] for the State of residence to include the pension paid by the second Member State in the basis for calculating the sickness insurance contributions payable in respect of the benefits which the Member State of residence itself provides? That, basically, is the question which has been raised in this case. I intend to answer it in the negative, but will make that answer subject to a proviso.

## I — The main proceedings

2. In 2000, Ms Nikula, a pensioner residing in Kemi (Finland), received retirement and supplementary pensions paid by a number of different Finnish and Swedish pension funds. When her tax liability for 2000 was assessed, the pensions she had received from the Swedish funds were included in her taxable income. It was on the basis of the whole of that income that the Finnish authorities determined how much Ms Nikula owed by way of sickness insurance contributions.

3. Ms Nikula applied to the Lapin verotuksen oikaisulautakunta (tax rectification board for Lapland) for annulment of that element of the contributions which had been calculated on the basis of her income from

1 — Original language: Portuguese.

2 — OJ 1983 L 230, p. 6, as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10, hereinafter 'the Regulation').

Sweden. Since her application was rejected, Ms Nikula appealed against that decision before the hallinto-oikeus (administrative court) (Finland). That court dismissed her appeal on the ground that the Finnish legislation on sickness insurance was applicable to her. Under that legislation, an insured person residing in Finland must pay a sickness insurance contribution calculated by reference to the basis for assessment of local tax, which takes into account pension income received from both Finnish and foreign pension funds.

4. That decision is currently the subject of an appeal by Ms Nikula before the national court. She cites, in particular, an action brought by the Commission of the European Communities against the Republic of Finland and seeking a declaration that, by taking into account in the calculation of sickness insurance contributions pensions paid under the law of a Member State other than the Republic of Finland, the latter has failed to fulfil its obligations under Article 33(1) of Regulation No 1408/71. [3]

5. Under Article 33(1), '[t]he institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions to cover sickness and maternity, shall be authorised to make such deductions, calculated in accordance with the legislation concerned, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State'.

6. The national court views the issue raised by this case in the light of the interpretation the Court gave in its judgment in *Rundgren*. [4] It points out, on the one hand, that in that judgment the Court held that 'Article 33(1) merely authorises, in the cases in which it applies, the relevant institution of a Member State to make deductions, in order to cover sickness benefits, from the pension payable by it, that is to say actually paid by it.' [5] But, on the other, the national court points out that the *Rundgren* case differs from that of Ms Nikula because Mr Rundgren, who resided in Finland, was in receipt of pensions from Sweden only, whereas Ms Nikula draws pensions from both Sweden and Finland.

3 — Case C-105/05 *Commission* v *Finland* (pending before the Court). A similar procedure in relation to the Kingdom of the Netherlands has also resulted in referral to the Court (Case C-66/05 *Commission* v *Netherlands*, pending before the Court).

4 — Case C-389/99 [2001] ECR I-3731.

5 — Paragraph 49, last sentence of the judgment in *Rundgren*, cited above.

7. Faced with a novel situation, the Korkein hallinto-oikeus decided to submit to the Court of Justice the following question for a preliminary ruling:

'Is Article 33(1) of [the] Regulation ... to be interpreted as meaning that in a situation where a pensioner is entitled, under Article 27 of the regulation, to claim sickness and maternity benefits only from the institution of the place of residence and at the expense of that institution, the assessment of sickness insurance contributions in such a way that in the pensioner's State of residence both the pensions received from that State and the pensions he receives from another State are taken into account as the basis for determining the amount of those contributions — provided that the sickness insurance contributions do not exceed the amount of pensions awarded by the State of residence — is incompatible with that provision?'

## II — Analysis of the question

8. Let me first draw attention to the legislative context of the provision forming the subject-matter of the question submitted. It is that context which explains the reference in Article 33(1) to the methods of calculation laid down by national legislation. However, that reference is the subject of an objection raised by the plaintiff in the main proceedings, the Commission and the Spanish and Portuguese Governments, as well as a limitation deriving from the principles of Community law.

### A — *The context*

9. Article 33 is located in Chapter 1 of Title III relating to sickness and maternity benefits, in the section concerning the situation of pensioners and members of their families. That section governs the allocation of responsibility for providing the sickness and maternity benefits to which pensioners are entitled as between Member States, as well as the levying of contributions payable by pensioners to cover those benefits.

10. In that connection, the regulation identifies three possibilities dependent on two criteria: the origin of the pensions payable and the existence of a right to benefits in the State of residence. Article 27 of the regulation establishes the rule whereby a pensioner who is entitled to draw pension under the legislation of two or more Member States and who is entitled to benefits under the legislation of the Member State in whose territory he resides is to receive such benefits from the institution of the State of residence and at the expense of that institution 'as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State'. But in a situation of that nature where, however, there is no pension entitlement in

the State of residence, Article 28 provides that where the pensioner is entitled to benefits under the legislation of the Member State competent in respect of pensions, that pensioner is to receive the benefits in kind from the institution of his place of residence 'as though the person concerned were a pensioner under the legislation of the State in whose territory he resides', the cost of those benefits being borne in accordance with the specific criteria laid down in Article 28(2). Finally, Article 28a introduces a special rule by way of derogation from Article 28. Where a pensioner is entitled to a pension in his State of residence although that State does not pay him a pension, the cost of the benefits in kind provided to him by the State of residence is to be borne by the Member State competent in respect of pensions, determined according to the rules laid down in Article 28(2).

11. These apparently complicated rules actually fulfil two basic principles. Firstly, it is necessary to try to ensure that, as far as possible, the persons concerned are subject to the social security scheme of a single Member State only, in order to prevent more than one national legislation from being applicable and the complications which may result from that situation. [6] Secondly, it is necessary, as far as possible, to ensure that it is the State in which the person concerned has engaged in the activity in respect of which he is entitled to a pension which bears the cost of the benefits provided.

6 — See, inter alia, Case 276/81 *Kuijpers* [1982] ECR 3027, paragraph 10.

*Mutatis mutandis*, moreover, those are the guiding principles underpinning the Community system for the coordination of the national social security schemes applicable to the situation of migrant workers, in accordance with the fundamental provisions of Article 13 of the Regulation.

12. Article 33 of the Regulation must be interpreted within that context and in the light of those principles. It regulates the question of liability for contributions deducted to cover sickness and maternity benefits provided to pensioners. Only the State which pays a pension and actually bears the cost of the benefits provided to the pensioner is authorised to deduct contributions from that pension.

B — *The reference*

13. In this case, Ms Nikula is in receipt of pensions under the legislation of two Member States, including that of her State of residence which also confers on her a pension entitlement. She is, therefore, in the situation defined in Article 27 of the Regulation. According to that provision, it is the institution of her place of residence which is competent to provide the benefits and which must bear the costs.

14. In cases to which Article 27 applies, it follows from Article 33(1) of the Regulation that the State of residence is authorised to make deductions in respect of contributions for which Ms Nikula is liable. Consequently, no other Member State is authorised to make such deductions.

15. Article 33(1) also provides that the deductions are to be calculated 'in accordance with the legislation' of the State of residence and are to be made from the pension payable by that State.

16. What then is the scope of that reference? It seems to me necessary to apply here the principle the Court established in its judgment in *Terhoeve*, [7] according to which 'in the absence of Community harmonisation of national laws, it is in principle for the Member States to specify the income to be taken into account when calculating social security contributions'. That applies more particularly since the Community rules include a specific reference to the legislation of the Member State which those rules designate as the State competent to make deductions in respect of sickness insurance contributions. [8] In those circumstances, it must be acknowledged that it is solely the legislation of that State which, in principle, determines the methods of calculating such contributions. Although nothing requires it to do so, [9] there is nothing to prevent that national legislation from determining the level of sickness insurance contributions on the basis of not only the income drawn from the State of residence but also the income drawn from other Member States. Advocate General Jacobs accepted that approach in his Opinion in *Movrin*, [10] in relation to a similar practice applied by the Kingdom of the Netherlands.

17. That approach has, however, elicited an objection from a number of parties to the case.

C — *The objection*

18. There is in fact a judgment which, at first sight, seems clearly to preclude that approach. In *Rundgren*, the Court held that 'it follows from the provisions of Article 33(1) of Regulation 1408/71 that, contrary to the Finnish Government's submission, the regulation does not authorise the Member State in whose territory the pensioner resides

7 — Case C-18/95 [1999] ECR I-345, paragraph 51.

8 — It is established *a contrario* that the terms of a provision of Community law *which makes no express reference to the law of the Member States* 'must normally be given an autonomous and uniform interpretation throughout the Community' (see, among others, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43).

9 — There are in fact cases in which the Regulation requires the national legislation to include income drawn in another Member State in the calculation of a social security contribution (Case C-249/04 *Allard* [2005] ECR I-4535).

10 — In point 20 of his Opinion in that case (Case C-73/99 [2000] ECR I-5625). I should make clear that, in its judgment, the Court was not required to give on a ruling on that issue.

to require that person to pay the contributions for sickness insurance prescribed by its domestic legislation, calculated by reference to his income from pensions paid by another Member State'.[11] The Court further states that 'Article 33(1) merely authorises, in cases in which it applies, the relevant institution of a Member State to make deductions, in order to cover *inter alia*, sickness benefits, from the pension payable by it, that is to say actually paid by it'.

19. According to the Commission, the Court is expressing here a general position which prevents pensions or annuities paid by another Member State from being included in the income on which the calculation of sickness insurance contributions is based. The same view is taken by the Spanish and Portuguese Governments which have intervened before the Court. However, the Republic of Finland, supported by the Netherlands and Norwegian Governments, contends that this is a solution which applies to a particular case and can in no way be transposed to the case at issue. Furthermore, the Netherlands Government has cited to the Commission the text of one its proposals amending Article 33(1), according to which those contributions may be deducted on the basis of the total amount of pensions or annuities paid to pensioners.[12]

20. In my view, the objection raised by both the Commission and the Spanish and Portuguese Governments is based on a misapprehension. It is true that, in that judgment, the Court held that 'Article 33(1) merely authorises, in the cases in which it applies, the relevant institution of a Member State to make deductions, in order to cover sickness benefits from the pension payable by it, that is to say actually paid by it'. But by its finding, the Court is merely stating that the responsibility for making deductions from pensions lies with the State that actually disburses a pension. A State which merely offers the *possibility* of paying a pension but does not *actually* pay it, such as the Republic of Finland in the circumstances of the *Rundgren* case, cannot rely on the provisions of the Regulation to demand payment of social security contributions. In that case, Mr Rundgren was in the situation defined in Article 28a of the regulation. Residing in Finland, he was in receipt of a pension from the Kingdom of Sweden only and, on that basis, Sweden alone bore the cost of the benefits provided. Consequently, the principle whereby the State actually

11 — Paragraph 49 of the judgment in *Rundgren*, cited above.

12 — Proposal for a regulation of the European Parliament and the Council amending Regulation No 1408/71 and Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 [COM(2003) 468 final]. However, the Council of the European Union and the European Parliament decided not to adopt that amendment in Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), revoking Regulation No 1408/71. While accepting the principle of the 'need for a balance between contributions deducted and the cost of benefits paid', the Council took the view that the amendment in question should be included in the next implementing regulation [Common Position (EC) No 7/2005 adopted by the Council on 15 November 2004 (OJ 2005 C 38 E, p. 21, and p. 34 in particular)].

competent in respect of pensions must bear the cost of the benefits in kind provided to the pensioner resulted in the Republic of Finland, as the State of residence, being denied any competence in that regard. [13].

21. It therefore appears that the '*Rundgren* principle' relates to the designation of the State authorised to deduct contributions but not to the methods of calculating those contributions. It therefore has no bearing on the solution to this case. Here, the parameters of the dispute are set not by Article 28a but by Article 27 of the Regulation. The Finnish State is in fact competent in respect of the payment of pensions. Consequently, it is common ground that Finland is authorised, under Article 33(1) of the Regulation, to make deductions in respect of contributions.

22. It seems to me that, by taking the extract from paragraph 49 of the abovementioned judgment in *Rundgren* out of the context in which the Court set out its view, those parties which have raised this objection are making an error of interpretation. They construe that extract from the judgment as if the pension paid by the competent State constituted the sole *basis* for calculating the deductions in respect of contributions. But in *Rundgren*, it is not the *methods* of calculation that are at issue. The pension paid is taken into consideration solely as a *condition* on which deductions to be made in respect of are authorised. Accordingly, since Article 33 (1) authorises *only* the institution of the State actually making the payment to make a deduction, it cannot be concluded that the deductions can be made *only* on the basis of the amount of the pension payable by that institution.

23. That interpretation seems to me to be confirmed by the context in which the provision at issue sits. The main purpose of the provisions of Chapter 1 of Title III of the Regulation, relating to the various categories of benefits, is to designate the State competent in respect of sickness and maternity benefits for certain categories of insured persons who are not covered by the provisions of Title II. In that context, the objective of Article 33(1) is simply to determine the State authorised to levy the contributions payable by recipients of pensions or annuities and not to determine the methods of calculating those contributions. Consequently, it is for that State to determine the methods of calculation, in accordance with the principles of Community law.

24. Moreover, that interpretation holds good, notwithstanding the fact that the Finnish legislation does not make entitlement to benefits dependent on the amount of the contributions levied. The Spanish and Portuguese Governments claim that, in those circumstances, the method of calculation adopted under the Finnish legislation is tantamount to demanding an increased contribution without that increase giving rise to additional social protection. Such a

13 — Paragraph 47 of the judgment in *Rundgren*, cited above.

requirement is incompatible with the rules of the EC Treaty on the free movement of persons.

25. That line of argument is misconceived. It relies on case-law relating to the situation of persons who pursue their activity in more than one Member State and belong to the social security scheme of the State in which they reside. It is indeed contrary to the Treaty if the legislation of a Member State other than the Member State of residence requires such persons to contribute to an additional social security scheme without offering them additional social protection. [14] But the Finnish legislation does not place insured persons who have pursued their activity in more than one Member State in that position. On the one hand, in the circumstances of this case, Finnish legislation is to apply as the legislation of the State of residence, to the exclusion of all other legislation. On the other, the scheme for which it provides is applicable to all insured persons resident in Finnish territory. In principle, that legislation does not, therefore, require additional contributions from persons who have exercised their right to move freely within the Community.

26. The rule, under Finnish legislation, that benefits are not dependent on the amount of the contributions paid is a rule governing the organisation of the national social security system, and it is settled case-law that the Member States have the power to organise their social security systems. [15] The fact that there is no exact correlation between the amount of the contributions and the quality or quantity of the benefits provided is an economic and social policy decision of the State concerned and is immaterial in terms of the rules of Community law. All that matters in that connection is that contributions are actually deducted by way of consideration for the benefits provided to the person concerned by the competent Member State.

27. The indisputable outcome is that the method of calculation adopted by the Republic of Finland may prove to be less favourable to Ms Nikula than the method applied by the other Member State from which she draws a part of her pension. But that circumstance cannot be held to constitute, as the Spanish Government claims, a clear restriction on the free movement of workers. It should, in fact, be pointed out that the Treaty did not provide for the harmonisation of the social security legislation of the Member States. It merely sets in place a system for coordinating that legislation, while respecting the special characteristics of the national legislations. [16] In those circumstances, Community law cannot guarantee to an insured person that moving to another Member State will be neutral as regards social security. [17] Given the dispar-

14 — Case C-53/95 *Kemmler* [1996] ECR I-703 and Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829.

15 — See, inter alia, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 44).

16 — As pointed out in the fourth recital in the preamble to Regulation No 1408/71.

17 — See, by analogy, Joined Cases C-393/99 and C-394/99, cited in footnote 14 above, paragraphs 50 and 51.

ities between the social security legislation of the Member States, moving from one State to another may, depending on the case, be more or less advantageous for the insured person in terms of contributions. [18] It follows that Ms Nikula cannot infer from Community law the right to receive identical treatment in all of the Member States from which she draws a pension and in whose territory she may come to reside, that treatment being determined, moreover, on the basis of the legislation which is most favourable to her.

28. An interpretation to the contrary would have the effect of reserving more favourable treatment exclusively to insured persons who had moved within the Community. That is neither the aim nor the object of the Community system coordinating the national social security schemes. The sole object is '... to guarantee within the Community equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors'. [19]

29. Moreover, it is hard to see how the application of the Finnish rules could be the source of what the Portuguese Government describes as a 'quasi-harmonisation of legislations'. It is true that the pensions paid by the Swedish pension funds are taken into account in the basis for calculating the contributions which are deducted. But they are taken into account on the basis of the income received by Ms Nikula, who is resident and insured in Finland. Those rules have absolutely no impact on the Swedish system of pensions and contributions.

30. In the absence of harmonisation, the Member States therefore remain, in principle, free to determine the methods of calculating contributions from insured persons to cover the sickness benefits provided to pensioners. That freedom is not, however, unlimited.

D — *The limitation*

31. It is settled case-law that, when exercising their power in the field of social security, the Member States must comply with Community law and, in particular, the Regulation and the Treaty provisions on freedom of movement for workers. [20]

32. Moreover, those provisions complement each other. In its judgment in *Noij*, [21] the Court did indeed rule that Article 33 of the Regulation pursues the objective of the

18 — See, by analogy, Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45.

19 — As provided by the fifth recital in the preamble to Regulation No 1408/71.

20 — See, inter alia, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33.

21 — Case C-140/88 [1991] ECR I-387, paragraph 13.

Regulation itself which is to contribute to the establishment of the fullest possible freedom of movement for workers within the Community. In *Noij*, the Court held that 'the rules laid down by ... Article 33 ... constitute the application of a general principle according to which a pensioner cannot be required, because he resides in the territory of a Member State, to pay compulsory insurance contributions to cover benefits payable by an institution of another Member State'. [22] The aim is to prevent the person concerned being liable for contributions levied by a State which does not bear the costs of the benefits in kind which he receives. That judgment confirms the link which must exist between the obligation to provide the benefits and the competence to deduct contributions.

33. It is, however, true that this link could be broken in a case in which, as in the present case, a pensioner has had to pay sickness insurance contributions during the course of his working life in a State other than his State of residence. It appears, in fact, that the Kingdom of Sweden applies a system in which the contributions to cover the sickness benefits provided to pensioners are levied on those pensioners during their working years. In that case, the implementation of the authority conferred on the Republic of Finland freely to determine the methods for calculating contributions risks the result that *contributions are paid twice*. By transferring his place of residence from a Member State in which he has already paid contributions to another Member State which is authorised to deduct contributions on the whole amount of the pensions payable to him, a citizen who has pursued his activity in more than one Member State could find himself taxed twice for the same benefits.

34. That would apply in particular if, by failing to take account of the special situation of pensioners who had changed their place of residence during their working life, national legislation required them to pay sickness insurance contributions by including in the basis for calculation of contributions the pensions paid by another Member State, in which the deductions had already been made to cover such sickness insurance benefits.

35. Such an outcome, which disadvantages citizens of the Member States who have pursued their activity in more than one Member State, as compared with citizens who have always resided in the State concerned, is incompatible with both Article 33 of the Regulation and the Treaty provisions on free movement of persons.

36. Consequently, I consider that Community law requires the authorities of the Member State which is competent in respect of benefits and which opts to calculate the deduction of contributions on the basis of

22 — Case C-140/88, cited in footnote 21, paragraph 14.

the whole of the pensioner's income to take into account, when making that calculation, the contributions which the person concerned has already paid in another Member State. [23]

37. In that event, it is for the insured person to provide the authorities of his State of residence with proof that he has actually paid contributions in the other Member State.

38. There is no doubt that the obligation to take into account contributions paid previously in accordance with the specific procedures of another Member State may result in certain practical and administrative difficulties in the State of residence. However, it is, in principle, settled case-law that considerations of a practical and administrative nature cannot justify a Member State derogating from the rules of Community law. [24] It follows that even if Article 33 of the Regulation respects in principle the autonomy of the Member States which have the power to determine the methods of calculating contributions, it is, in this case, permissible to require the Member State concerned to introduce an equitable system which takes account of contributions that have already been paid in another Member State. It is, above all, necessary to ensure that this system does not undermine the rights conferred on citizens of the Member States who have exercised their freedom to move within the Community, by making it impossible or extremely difficult to take such contributions into account.

39. The last point I have to make concerns a limitation set by the Republic of Finland and specifically cited in the question which the national court has submitted. The Republic of Finland takes the view that the possibility of including, in the calculation of the contributions for which an insured person is liable, the pensions that person receives from another Member State, remains subject to the condition that the contributions which are levied do not exceed the amount of the pension it pays.

40. That limitation seems to be derived from the actual wording of the Regulation. Article 33 thereof provides that the deductions are to be made from *the pension payable* by the State competent to provide the benefits. Consequently, it seems difficult to accept that the deductions made can exceed the amount of the pension paid. While it may be well-founded, the drawback of that interpretation is that it results in the risk of creating an imbalance to the detriment of the State competent to provide the benefits. That State may, in effect, find itself compelled by the Regulation to provide benefits in kind as though the person concerned were entitled to a pension under the legislation of that Member State exclusively, but would not be able to deduct contributions on the basis of that person's whole income in circumstances in which, as a result of the method of calculation adopted, those contributions exceed the amount of the pension paid. In some cases, that obligation could lead to situations in which insured persons who receive only a minimal portion of their pension from the competent Member State enjoy unfair advantages. [25]

23 — See, by analogy, Case C-302/98 *Scherer* [2000] ECR I-4585.

24 — Case C-18/95, cited in footnote 7, paragraph 45.

25 — In its written observations, the Netherlands Government cites the example of a situation in which, in the context of the system analysed in this case, the Finnish pension accounted for only 5% of the pensioner's total pension income, whereas 95% of that income was drawn from another Member State.

41. A situation of that nature is certainly regrettable. But given that the wording of Article 33 is clear to that effect, it is for the Community legislature alone to consider whether it needs to be remedied.

## III — Conclusion

42. In the light of all of the foregoing, I propose that the Court give the following answer to the national court's question:

'Article 33(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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EC) No 3096/95 of 22 December 1995, does not preclude a Member State which is responsible for the provision of benefits under Article 27 of the Regulation from including in the basis for the calculation of sickness insurance contributions for which a pensioner entitled to a pension payable by that State is liable, the pensions paid by another Member State, always provided the former State takes into account, in its calculation, that contributions may already have been deducted for that purpose in that other Member State.'