OPINION OF ADVOCATE GENERAL ALBER

delivered on 23 January 2001 [1]

I — The subject-matter of the proceedings

1. In these proceedings against the Kingdom of Belgium for failure to fulfil an obligation, the Commission requests the Court of Justice of the European Communities to declare that, by levying personal contributions on Belgian pensions in respect of occupational disease payable to persons who do not reside in Belgium and do not receive any Belgian social security benefit other than the said pension or who are no longer subject to the Belgian social security scheme, the Kingdom of Belgium has failed to fulfil its obligations under Article 13(2)(f) of Regulation (EEC) No 1408/71 of the Council. [2]

2. The Commission states that, in the cases mentioned, the Kingdom of Belgium is not empowered to levy those contributions, since the persons concerned are exclusively subject to the legislation of the other Member State, that is to say, of the State of residence. Belgian rules — and, therefore, mandatory contributions — do not apply and cannot be applicable.

3. The Commission further contends that Article 46 of the Lois coordonnées relatives à la réparation des maladies professionnelles (Consolidated Laws on compensation for damage resulting from occupational diseases) of 3 June 1970 (or 'Article 46') [3] infringes Article 13(2)(f) of Regulation No 1408/71.

4. Article 46 reads as follows:

'A person who contracts an occupational disease and who is in receipt of a benefit or an allowance under these laws, shall still be required to pay the contributions payable under social security legislation.'

5. As may be seen from the letter of formal notice initiating the procedure for failure to

1 — Original language: German.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 (OJ 1991 L 206, p. 2), consolidated version of the Regulation published in OJ 1992 C 325, p. 1.

3 — *Moniteur belge*, 27 August 1970.

fulfil an obligation, the Commission is not objecting to the obligation to pay contributions as thus formulated, but only to the levying of social security contributions on certain pensions payable to persons who are residing in another Member State and are in receipt of a pension provided by that State.

II — Procedure

6. Following the initiation of the procedure for failure to fulfil obligations, by the letter of formal notice of 24 September 1996, the Kingdom of Belgium requested an extension of the period allowed it for replying to that letter. Its request was granted. Since the Commission's reminders with regard to a reply proved to be fruitless, on 6 November 1997 it issued a reasoned opinion in which, essentially, it objected to Belgium's levying personal contributions at a rate of 13.07% on Belgian occupational disease pensions whose recipients do not draw any social security benefits other than the pensions at issue and who reside outside Belgium. The Kingdom of Belgium replied to this by letter of 12 May 1998, in which it stated that the contested Article 46 did not infringe Regulation No 1408/71. The Commission thereupon initiated proceedings for failure to fulfil obligations by application, registered at the Court of Justice on 22 September, in which it claimed that the Court should:

1. declare that, by levying personal contributions of 13.07% on Belgian occupational disease pensions payable to persons who do not reside in Belgium and who are no longer subject to the Belgian social security system, the Kingdom of Belgium has failed to fulfil its obligations under Article 13(2)(f) of Regulation No 1408/71 of the Council;

2. order the Kingdom of Belgium to pay the costs.

7. The Kingdom of Belgium contends that the Court should dismiss the application as unfounded and make an appropriate order as to costs.

8. By order of 1 March 1999, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the defendant Member State.

9. There has been no hearing of oral argument in the proceedings.

III — The relevant provisions

A — *Community law*

(1) Regulation (EEC) No 1408/71

10. Article 13(1) and (2)(a) and (f) provides that:

'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.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State ...

(b) — (e)...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

11. Article 17 reads as follows:

'Two or more Member States, the competent authorities of these States or the bodies designated by these authorities may by common agreement provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain categories of persons or of certain persons.'

12. Article 27 provides:

'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that

of the Member State in whose territory he resides, and who is entitled to benefits under the legislation of the latter Member State,... shall, with the members of his family, receive such benefits from the institution of the place 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.'

13. Article 33 reads as follows:

'1. The 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 for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Article 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.

2. Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence, these contributions shall not be payable.'

14. Article 52 provides:

'An employed or self-employed person who sustains an accident at work or contracts an occupational disease, and who is residing in the territory of a Member State other than the competent State, shall receive in the State in which he is residing:

(a) benefits in kind, provided on behalf of the competent institution by the institutions of his place of residence in accordance with the provisions of the legislation which it administers as if he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, these benefits may be provided by the latter institution on behalf of the former in accordance with the legislation of the competent State.'

15. Article 77 reads as follows:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age,

invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in provided that a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State, ... or

(ii) in other cases in accordance with the legislation of the Member State to which he has been subject for the longest period of time, provided that ... a right to one of the benefits referred to in paragraph 1 is acquired under such legislation; if no right to benefit is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States concerned shall be examined in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States.'

(2) Regulation (EEC) No 574/72 [4]

16. Article 10b of this regulation provides:

'The date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of the Regulation shall be determined in accordance with that legislation. The institution designated by the competent authority of the Member State whose legislation becomes applicable to this person shall apply to the institution designated by the competent authority of the former Member State with a request to specify this date.'

4 — Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159), as amended by Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 (OJ 1991 L 206, p. 2), consolidated version of the Regulation published in OJ 1992 C 325, p. 96.

B — *National law*

17. The contested Article 46 of the Consolidated Laws on compensation for damage resulting from occupational diseases has already been set out in paragraph 4 above.

IV — The arguments of the parties

(1) *The Commission*

18. The Commission charges Belgium with levying social security contributions on occupational disease pensions payable to persons who are residing in another Member State and are also in receipt of a pension provided by that State. That is contrary to Article 13(2)(f) of Regulation No 1408/71. That provision reflects the principle laid down in Article 13(1) of the Regulation, according to which the legislation of a single Member State must be applied. The provision was adopted after the judgment in *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging*,[5] in order to designate which State is to be competent when a person has ceased to work under the legislation of one Member State and resides in the territory of another Member State. According to the Commission, the effect of this is that, where the social security legislation of one Member State is no longer applicable, under Article 13(2)(f) of the regulation the legislation of the State of residence is to apply.

19. The Commission cites the judgments in *Perenboom* v *Inspecteur der directe belastingen of Nijmegen*,[6] *Commission* v *Belgium*[7] and *Kuusijärvi* v *Riksförsäkringsverket*,[8] concluding from them that persons who no longer work in Belgium and who have transferred their residence to another Member State are subject solely to the legislation of that Member State. The Belgian authorities are therefore no longer empowered to levy social security contributions on pensions paid in respect of occupational disease to persons in such a situation.

20. In response to the Belgian Government's objection that Article 13(2)(f) is not applicable to the situation described, since a person receiving a pension in respect of occupational disease remains subject to the Belgian social security system for the purposes both of family benefits and of costs associated with sickness, the Commission contends that, under Article 27 of the regulation, it is the State of residence which is competent in respect of costs associated with sickness. According to Article 33 of the regulation, only the State that bears those costs is empowered to levy contributions.[9] Under Chapter 8 of the regulation, the State of residence is also competent in the area of family benefits.

5 — Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821.

6 — Case 102/76 *Perenboom* v *Inspecteur der directe belastingen of Nijmegen* [1977] ECR 815.

7 — Case 275/83 *Commission* v *Belgium* [1985] ECR 1097.

8 — Case C-275/96 *Kuusijärvi* v *Riksförsäkringsverket* [1998] ECR I-3419.

9 — The Commission cites Case C-140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387, paragraph 14, in support of its argument.

21. In response to the Belgian Government's reference to Article 52 of the regulation, according to which a person who sustains an accident at work or contracts an occupational disease is to receive benefits in kind provided on behalf of the competent institution by the institutions of his place of residence and cash benefits provided by the competent institution, the Commission objects that that rule does not concern standard sickness-related costs, as referred to in Chapter 1 of the regulation, but specific benefits provided in respect of accidents at work or occupational diseases. Finally, the Commission rejects the Belgian Government's objection that the contributions are the consideration for membership of the Belgian social security scheme, stating that, under Article 13(2)(f) of the regulation, the Belgian State is no longer competent, and only the State of residence remains so.

(2) *The Belgian Government*

22. The Belgian Government contends, first, that Article 13(2)(f) of the regulation does not apply to the cases described by the Commission. In the alternative, it argues that, even if that provision does apply, levying the social security contributions at issue does not infringe it.

23. The Belgian Government bases its argument on the premiss that the rule *lex loci laboris* is enshrined in Article 13(2)(a) of the regulation, which means that in principle it is the legal system of the State of employment which is applicable, even when the worker resides in another Member State. Article 13(2)(f) provides for an exception, of a subsidiary nature, to that rule. It must therefore be interpreted restrictively, and only when the conditions laid down in that provision are satisfied is it possible for competence to be transferred from the State of employment to the State of residence. One of those conditions is that a person does not cease to be subject to the legislation of one Member State without the legislation of another Member State becoming applicable to him. It must therefore be ascertained in what circumstances legislation — in this case, the Belgian social insurance provisions — ceases to be applicable to persons in receipt of pensions in respect of occupational disease who reside in another Member State where, moreover, they are in receipt of another pension.

24. Title II [10] of the regulation does not replace the legal systems of the various Member States with Community law, but contains rules which, as is evident from the judgment in *Bestuur van de Sociale Verzekeringsbank* v *Kits van Heijningen*, [11] make it possible to specify which legal system applies, in order to avoid the concurrent competence of a number of Member States and to ensure that persons to whom the regulation applies are not left without social security cover because there is no legal system applicable to them.

10 — Title II concerns the 'Determination of the legislation applicable'.

11 — Case C-2/89 *Bestuur van de Sociale Verzekeringsbank* v *Kits van Heijningen* [1990] ECR I-1755.

25. In the present case, Belgian social security legislation remains applicable. This is evident, first, from the granting of benefits under the Belgian occupational diseases scheme and, second, from benefits available from other branches of social security, for example family benefits, payment of costs associated with sickness and, in calculating retirement pensions, the fact that periods involving more than 66% incapacity for work are taken into account. Those persons retain the status of insured persons under the social insurance scheme.

26. Furthermore, according to the Belgian Government, the question whether the legal system of a Member State ceases to be applicable depends, according to Article 10b of Regulation No 574/72, on the national provisions. Thus, Community law explicitly refers to national law. In regard to the competence of a Member State to establish the limits of applicability of its legal system, the Belgian Government refers to the judgments in *Coppola* v *Insurance Officer* [12] and *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging*. [13]

27. Furthermore, according to the Belgian Government, ceasing to apply the Belgian legislation and consequently no longer granting the benefits in question would be incompatible with the principle of acquired rights. Change of residence alone cannot have the effect of bringing a person under the social insurance scheme of the State of residence.

28. The compatibility with Community law of the continuing applicability of the Belgian provisions is also confirmed by Article 52 of the regulation, which mentions the 'competent institution' as providing both benefits in kind and cash benefits for persons residing in another Member State. In practice, a person receiving a pension in respect of occupational disease who resides in another Member State receives Form E 123 from the Fonds des Maladies professionnelles (Occupational Diseases Fund, 'FMP'). On that basis, the State of residence grants him sickness benefits, which are refunded by the FMP.

29. In the result, it must be assumed that Article 13(2)(f) of the regulation is not applicable and that Belgian law therefore remains applicable on the basis both of the competence transferred to Member States and of the fact that persons who contract occupational diseases remain subject to the Belgian social insurance scheme even when they are resident in another Member State and that, finally, there is consequently no conflict with Community law.

30. The Belgian Government then contends, but only in the alternative, that levying contributions is in any event in accordance with Community law. They are

12 — Case 150/82 *Coppola* v *Insurance Officer* [1983] ECR 43.
13 — Cited in footnote 5.

levied without discrimination, whether the beneficiary resides in Belgian territory or in that of another Member State. The beneficiaries retain total or partial status as insured persons, depending on whether or not their incapacity for work is at least 66%. The payment of contributions is the consideration for the benefits to which such beneficiaries are entitled.

31. Only in the event of the Court's nevertheless holding the application to be well founded, does the Belgian Government claim that any repayments of contributions should not be required for the period before Regulation No 2195/91 [14] entered into force, that is to say, before 29 July 1991.

(3) *The Netherlands Government*

32. The Netherlands Government, which has intervened in the proceedings in support of the Belgian Government, takes the view that the conflict rules contained in Regulation No 1408/71, and in Article 13(2)(f) thereof in particular, do not mean that a person who ceases to work in a Member State is no longer subject to that State's social insurance legislation if he lives in another Member State or has transferred his residence there. It is not contrary to Article 13(2)(f) for the legal provisions of the State where the person last worked to remain applicable in so far as they so provide.

33. The Netherlands Government gives as its reason for intervening the attitude of the Commission towards the Netherlands compulsory insurance scheme. Under Netherlands law there is compulsory insurance for persons in receipt of long-term benefits as a result of incapacity for work, old age or death, even when they reside outside the Netherlands. As a consequence of that insurance coverage, old-age, death and family benefits and certain sickness-related costs are paid to insured persons. Such insured persons must, like those who reside in the Netherlands, pay contributions. The Commission requested information on the termination of compulsory insurance for persons receiving pensions who reside in another Member State. From this the Netherlands Government concluded that the Netherlands have competence to retain the compulsory insurance scheme for persons receiving long-term benefits who reside in another Member State. It thinks that, by bringing its action in this case, the Commission may have altered its position also on the Netherlands provisions.

14 — Council Regulation (EEC) No 2195/91 of 25 June 1991 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 Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1991 L 206, p. 2).

34. In order to bolster its contention that a Member State's legislation ceases to be

applicable within the meaning of Article 13(2)(f) of the Regulation only where the national legal system provides for this, the Netherlands Government has analysed the *Kuusijärvi* case and the origin of Regulation No 2195/91. The possibility of a Member State maintaining the applicability of its legislation — a possibility envisaged by Article 10b of Regulation No 574/72 — could result in the persons concerned preserving their rights to benefits and the State of residence not being exposed to disproportionate costs. In that regard, it makes little difference whether the continuing applicability of national provisions relates to all branches of social security or only some of them. Finally, in the context of the adoption of Regulation No 2195/91, Article 17 of Regulation No 1408/71 has also been adapted to the effect that derogating provisions can now be agreed for groups of persons who have not ceased work. The Netherlands Government considers that the conflict rules in Regulation No 1408/71 should be understood as follows:

— As long as a worker is working in the territory of a Member State, no residence requirement may be raised against his joining that State's social security scheme;

— As from the date on which a worker terminates his occupational activity without taking up another such activity residence clauses are lawful in a second Member State;

— If however, the first Member State does not subject membership of its social security scheme to a residence requirement, that scheme remains applicable even if the former worker resides in another Member State;

— If at a later date the worker no longer satisfies the conditions for membership of the first Member State's social security scheme, the legal system of the State of residence is then applicable with effect from that date;

— In the interest of persons concerned, the Member State in which a person last worked and the State of residence may agree exceptions.

35. The Netherlands Government makes a fuller analysis of the conflict rules applying to sickness benefits and family benefits and reaches the conclusion that — contrary to what the Commission maintains — the Member State's provisions are not bound to apply, but do so only when this follows from the relevant national provisions (see

Articles 27, 28 and 77 of Regulation No 1408/71). This will always depend on the circumstances of the case in point.

36. The applicability of the legislation of the Member State in which a person last worked entails competence to levy social security contributions. In this context, the Netherlands Government refers to the judgment in *Perenboom* v *Inspecteur der directe belastingen of Nijmegen*,[15] *De Jaeck* v *Staatssecretaris van Financiën*[16] and *Molenaar* v *Allgemeine Ortskrankenkasse Baden-Württemberg*.[17]

37. The Netherlands Government also expresses an opinion on a possible conflict between Articles 33 and 52 of Regulation No 1408/71. Following a detailed analysis of these provisions and of cases where they have been applied, it reaches the conclusion that Regulation No 1408/71 does not provide for one of those articles to take precedence over the other.

38. Finally, the Netherlands Government takes a position on the problem of the temporal effects of a judgment finding that Belgium has failed to fulfil its obligations. In that regard, it suggests limiting the judgment's possible effects to the period following its delivery.

39. In its observations on the application for leave to intervene, the Belgian Government explicitly associated itself with that request to impose a temporal limitation on the effects of the judgment.

V — Assessment

40. In its application, the Commission is obviously starting from the premiss that the Belgian legislation is no longer applicable to a person in receipt of a pension in respect of an occupational disease once he has transferred his residence to another Member State after ceasing work in Belgium, for whatever reason. In the event that he was residing in another Member State during the period when he was working, as is the case for frontier workers for example, even the mere ceasing of work would of itself lead to the inapplicability of the Belgian legislation. Under Article 13(2)(f), the legislation of the State of residence would then be applicable. The inapplicability of the Belgian legislation means that it is unlawful to levy social security contributions on pensions in respect of occupational disease provided by Belgium.

41. In contrast, the Belgian Government starts from the basis that the Belgian legislation remains applicable, primarily in respect of pensions paid on account of occupational disease and, where appropriate, in respect of the granting of other social benefits such as covering sickness-related costs or payment of child benefits.

15 — Cited in footnote 6.

16 — Case C-340/94 *De Jaeck* v *Staatssecretaris van Financiën* [1997] ECR I-461.

17 — Case C-160/96 *Molenaar* v *Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] ECR I-843.

The levying of social security contributions is the corollary of retention of the status of member of the social insurance scheme, which, for example, also involves contribution periods being taken into account for the purposes of pensions insurance.

42. The question, therefore, is whether transfer of residence in the circumstances described results in the application of Article 13(2)(f) of Regulation No 1408/71 alone, which prescribes the legislation of the State of residence as the applicable law, or whether it is for the Member State in which the person last worked to determine whether, and if so on what conditions, its legislation is to continue to apply.

43. The answer to this question depends on the interpretation given to Article 13(2)(f) of Regulation No 1408/71 and in particular to the phrase 'a person to whom the legislation of a Member State ceases to be applicable'. As the Commission sees it, that provision applies directly in the event that competence under Article 13(2)(a) comes to an end, in other words in the event that the occupational activity constituting the connecting factor comes to an end. As the Belgian Government sees it, what is concerned here is a criterion that is not satisfied in the context of Regulation No 1408/71 alone, without examination of the national provisions.

44. Article 10b of Regulation No 574/72, which refers expressly to Article 13(2)(f) of Regulation No 1408/71, is significant in this regard. Those two provisions were later incorporated into Regulations No 1408/71 and No 574/72 by Regulation No 2195/91. Article 10b of Regulation No 574/72 refers expressly to the legislation of the Member States determining 'the date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of the Regulation'. Under that provision, therefore, the national legislation is conclusive in determining whether a person continues to be subject to it or not. On this point, the Belgian Government's argument that persons in receipt of pensions in respect of occupational disease remain subject to the Belgian social security scheme regardless of residence is entirely correct.

45. The context and the origin of the provisions show that Article 13(2)(f) of Regulation No 1408/71 is a residual clause for the purpose of allocating competence, which comes into operation only when it is impossible to infer another competence from national law or from the regulation itself. It was only through the judgment in *Ten Holder*[18] — to which the preamble to Regulation No 2195/91 explicitly refers, and following which Article 13(2)(f) of Regulation No 1408/71 and Article 10b of Regulation No 574/72 were adopted — that a 'gap'[19] in Title II of Regulation No 1408/71 was spotted, one which was filled by the provisions just mentioned.

18 — Cited in footnote 5.

19 — See *Kuusijärvi*, paragraph 46.

46. Article 13(2)(f) of Regulation No 1408/71 thus does not involve allocating original competence but creating a 'substitute competence' in cases where no other competence is provided for in Title II of that regulation and where a national legal system, which has previously been applicable under its own rules, *is no longer* applicable because of a change of circumstances brought about by the person concerned.

47. In that regard, in its judgment in *Kuusijärvi*, the Court held that:

'the provisions of Title II of Regulation No 1408/71, of which Article 13 forms part, constitute a complete and uniform system of conflict rules. Those provisions are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to *ensure* that persons covered by Regulation No 1408/71 *are not left without* social security cover because there is no legislation which is applicable to them'. [20]

48. One can therefore start from the premiss that, in determining whether Article 13(2)(f) of Regulation No 1408/71 is applicable, a preliminary issue, to be determined in accordance with national law, must be raised, namely whether or not a legal system that has been applicable continues to be so. The criterion 'a person to whom the legislation of a Member State ceases to be applicable' constitutes in this regard *one* material condition for application of the provision.

49. In its application to the Court, the Commission based its case, at first by reference to the pre-litigation procedure, on persons in receipt of pensions in respect of occupational disease who '*no longer belong to the Belgian social security scheme*'. In so doing, it circumvents, in the abstract, the preliminary issue, to be determined in accordance with national law, whether a legal system that has previously been applied should continue to be applicable. In its reasoned opinion, it formulated the ground of complaint in such a way that it related to persons in receipt of such pensions *who do not receive any social security benefits other than the pensions in question.*

50. The wording of the application leaves in abeyance the question as to what are the criteria according to which the persons concerned no longer belong to the Belgian social security scheme. That circumstance having been assumed, the way is entirely open to the application of Article 13(2)(f) and hence to the applicability of the provisions of the State of residence. However, the Belgian Government has deprived that line of argument of its foundation by stating that persons in receipt of pensions in respect of occupational disease *still* belong to the Belgian social security scheme.

20 — *Kuusijärvi*, paragraph 28. Emphasis added.

51. In this context, the starting point chosen by the Commission in the pre-litigation procedure, taking as a criterion persons who, pursuant to the Belgian provisions, do not receive any benefits other than the pension to be granted in respect of occupational disease, is relevant.

52. The Belgian Government's argument that membership of the social security scheme depends solely on the granting of a pension in respect of occupational disease and that the Belgian legislation can be viewed as ceasing to be applicable only when pension payments have been suspended, is highly dubious, since the pension paid in respect of occupational disease is a benefit acquired by the payment of previous contributions and the residence clauses relating to it have been abolished in accordance with Article 10 of Regulation No 1408/71. Where a person entitled to a pension in respect of occupational disease transfers his residence to another Member State, this alone does not justify the Member State which granted the pension suspending the payment of it.

53. As the Belgian Government itself maintains, this would be contrary to the principle of acquired rights. Such a practice would also conflict with the principles of the Community provisions for coordinating social security, which under Article 42 EC guarantee to migrant workers:

'(a) aggregation, for the purpose of acquiring and *retaining the right to benefit* and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) *payment of benefits* to persons *resident in the territories of Member States*.' [21]

54. The Belgian Government's argument that the contributions constitute the consideration for the pension paid seems equally unconvincing as support for the continuing validity of the Belgian claim to contributions. Contributions intended to provide insurance against accidents at work and occupational diseases are as a rule paid during the period when the contributor is working, either by the employer alone or by the employer and the employee. In contrast, when the event insured against materialises, it is the solidarity of all insured persons in common that comes into operation.

55. However, the Belgian Government has referred to other social security benefits granted to persons entitled to a pension in

21 — Emphasis added.

the event of occupational disease. In this regard, it has explicitly mentioned sickness-related costs and family benefits. It has also referred to the fact that the status of member of the social insurance scheme is, as such, maintained, with the result that periods during which pensions in respect of occupational disease were granted may be counted for the purposes of the old-age pension scheme. It is above all this last aspect which is, like the right to sickness benefits, characteristic of membership of a social security scheme. The Belgian Government has, it is true, mentioned a distinction as to the level of social insurance protection according to whether the rate of incapacity for work of a person in receipt of a pension in respect of occupational disease is above or below 66%. However, it cannot be inferred with certainty from the information provided by the Belgian Government whether, and in what way, persons in receipt of pensions in respect of occupational disease whose rate of incapacity for work is below 66% are members of the Belgian social security scheme.

56. For its part, the Commission has failed to establish the circumstances in which the Belgian legislation ceases to apply to a person who is in receipt of a pension in respect of an occupational disease and who resides in another Member State. In particular, it has not attempted to refute the Belgian Government's assertion that the whole body of legislation on social security continues to apply to those persons.

57. In starting from the premiss that the circumstances in which a person is no longer subject to the legislation of a Member State constitute a material condition for applying Article 13(2)(f) of Regulation No 1408/71, the Commission's arguments in support of its application are not conclusive or are rebutted by the arguments in defence raised against them by the Belgian Government.

58. Furthermore, the Commission's assumption that, in the event of a person covered by Regulation No 1408/71 transferring his residence to another Member State, the legislation of the State of residence becomes applicable by virtue of Community law in the form of Article 13(2)(f) of that regulation does not seem to follow necessarily either from Article 13(2)(f) or from the case-law of the Court of Justice. It is notable that the parties to the proceedings cite the same judgments in support of different arguments. However, Article 13(2)(f) expressly states that 'a person... shall be subject to the legislation of the Member State in whose territory he resides *in accordance with the provisions of that legislation alone*', [22] that is to say, in accordance with the provisions of the State of residence.

59. That wording therefore refers to the provisions of the State of residence which is competent by virtue of Article 13(2)(f), when the conditions of that provision have also been satisfied. However, that reference still does not serve to determine for which

22 — Emphasis added.

branches of social security competence is conferred. This depends more on how the legislation of the Member States is framed. The Belgian Government's submission that change of residence alone cannot result in membership of a social security scheme should to that extent be upheld. The same conclusion is also indicated by the efforts, mentioned by the Netherlands Government, by the Community legislature at the time of adopting Regulation No 2195/91 to avoid burdening the State of residence which becomes competent under Article 13(2)(f) of Regulation No 1408/71 with disproportionate costs.

60. It now remains to examine the extent to which the relevant provisions of Title III of Regulation No 1408/71 — which sets out the 'special provisions relating to the various categories of benefits' — are consistent with the interpretation of Article 13(2)(f) of that regulation outlined above or whether it can be inferred from them that the Belgian legislation ceases to apply.

61. Article 27 of Regulation No 1408/71, in Section 5 'Pensioners and members of their families' of Chapter 1 'Sickness and maternity', governs competence in matters of 'sickness and maternity benefits' for pensioners who are entitled to draw pensions under the legislation of two or more Member States. When a person is entitled to a pension under the provisions of the Member State in whose territory he resides, *and* at the same time is entitled under the legislation of the latter Member State to benefits of the types mentioned, then, according to this provision, he is to receive such benefits from the institution of the place of residence and at the expense of that institution. If he is not entitled to such benefits in the State of residence, Article 28 of Regulation No 1408/71 becomes operative. The specific case of a right to receive benefits in kind without having any entitlement to receive a pension in the State of residence is governed by Article 28a of Regulation No 1408/71. In such cases, the national provisions under which a right to benefits must exist *in principle* are once again determinative. Only then are the costs apportioned as provided by Community law in accordance with Articles 27, 28 and 28a of the regulation.

62. Those provisions in no way preclude the theoretical possibility of the social security provisions of a Member State which grants a pension continuing to be applicable. On the contrary, the institution of the State providing the pension is and remains potentially required to pay benefits. This is why Article 28 mentions in several places 'the competent institution' and in Article 28a mention is made of 'the institution of one of the Member States competent in respect of pensions'.

63. Article 33 of Regulation No 1408/71 is no more than a consequence of the preceding apportionment of burdens. It governs the right to levy or deduct contributions in order to finance sickness benefits. Under this provision, the 'competent institution' is

empowered — as it were in consideration of its obligation to pay benefits, which goes beyond granting a pension in respect of occupational disease — to deduct contributions in so far as it is allowed to do so by the legislation applicable to it. Thus, it is not by chance that the Belgian Government cites Article 33 in order to justify levying social security contributions on pensions in respect of occupational disease paid to pensioners who reside in another Member State. In that connection, it has not failed to point out that in these cases the cost of providing sickness benefits is as a rule borne by the Belgian institution. Levying contributions is in any event in accordance with Article 33(1). Nor does Article 33(2) of Regulation No 1408/71 preclude it. That provision concerns special cases, regulated in Article 28a of that regulation, where a right to receive benefits in kind exists in that State of residence without that State having any responsibility to pay a pension. It is only where the pensioner is subject, in the circumstances described, to contributions or to deductions of the same value that under Article 33(2) those contributions are not payable to the State granting the pension. In the result, although it has not intervened in the way in which the actual obligation to pay contributions arises, the Community legislature has decreed that the right to levy contributions is ultimately to be correlative to the obligation to pay benefits. That reading of the situation has, moreover, been confirmed by the Court in its judgment in *Noij* v *Staatssecretaris van Financiën*.[23]

64. In contrast, Article 52 of Regulation No 1408/71 contains special rules for persons receiving benefits in respect of accidents at work or occupational disease. In accordance with Article 52(a), that category of persons is to receive benefits in kind in the State of residence but 'on behalf of the competent institution'. The institution of the State of residence may even under certain circumstances grant pecuniary benefits pursuant to Article 52(b) of the regulation, but again on behalf of the competent institution. It is true that Chapter 4 'Accidents at work and occupational diseases' contains no autonomous rules on the obligation to pay contributions, but that is in conformity with the general principle that the obligation to contribute for insurance against accidents at work and occupational diseases generally exists *before* the event insured against arises.

65. In any event, the assumption that the Belgian institution, as the entity responsible for paying a pension, is also in principle the 'competent institution' which is ultimately required to grant the benefits is not precluded by Article 52(b) of Regulation No 1408/71. No conflict between the provisions of Chapter 1 'Sickness and maternity' and the provisions of Chapter 4 is therefore discernible.

66. Finally, the Belgian Government cites Article 77 of Regulation No 1408/71 in order to substantiate its contention that the Belgian State is, in conformity with Community law, competent with respect to family benefits for persons in receipt of

23 — Cited in footnote 9.

pensions in respect of occupational disease. In so far as the Belgian State is the only Member State granting a pension, that competence follows from Article 77(2)(a) of Regulation No 1408/71. By contrast, the Commission bases its contention also on cases where the State of residence is also responsible for paying a pension, and therefore on circumstances in which Article 77(2)(b) of Regulation No 1408/71 applies. Under that provision, by virtue of point (i) thereof, a right exists to family benefits in the State of residence where there is entitlement to a benefit under the legislation of that State. Here, too, national law is conclusive. If the law of the State of residence does not provide for such an entitlement, then Article 77(2)(b)(ii) applies, which provides for an alternative competence vested in the Member States which grant a pension, dependent on the length of time for which the legal systems were applicable to the pensioner or on the requirements of the rules establishing entitlement in the particular Member State.

67. Therefore, even when that provision is applied, the Belgian State in any event remains in principle competent in the alternative for granting family benefits. That provision, too, is therefore such as to support the Belgian Government's contention.

68. Lastly, Article 17 of Regulation No 1408/71, which was amended when Regulation No 2195/91 amending that regulation was adopted, should be mentioned. The provision continued to authorise exceptions to Articles 13 to 16 for the benefit of persons engaged in an occupational activity. [24] This possibility was extended by the amending regulation to 'certain categories of persons or ... certain persons'. Article 17 is thus the expression of a relative flexibility, for the purpose of reacting in an appropriate manner, in the event of need, to certain situations. Thus, the derogating rule also relates to Article 13(2)(f) of Regulation No 1408/71, but does not thereby call it into question. The provision is therefore quite immaterial with regard to determining the scope of Article 13(2)(f).

69. In the result, it must be found that the Commission has failed to explain when and in what circumstances Belgian legislation ceases to be applicable to persons who are in receipt of pensions in respect of occupational disease under Belgian law. That situation is an indispensable prerequisite for the application of Article 13(2)(f) of Regulation No 1408/71, which the Commission claims to have been infringed. The application would be well founded only if persons entitled to an occupational invalidity pension under Belgian law had no right to another benefit under Belgian social security and moreover no longer had the status of an insured person for social security purposes under Belgian law, with the result that periods during which pensions in respect of occupational disease were granted would not be taken into account under the Belgian social security

24 — Certain categories of persons or certain persons who are employed or self-employed.

system. Only in those circumstances would it be proper to assume that the Belgian legislation had ceased to be applicable to persons in receipt of an occupational invalidity pension. For reasons of legal certainty, it is for the Member State to determine both the date and conditions on which its corresponding legislation ceases to be applicable to the persons in question in accordance with Article 10b of Regulation No 574/72. The Commission has not shown that the Belgian authorities still levied social security contributions on the occupational invalidity pensions in question after a date as so determined. The application must therefore be dismissed.

VI — Costs

70. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must pay the costs. According to Article 69(4) of the Rules of Procedure, Member States which have made representations in the proceedings are to bear their own costs. The Kingdom of the Netherlands must therefore bear its own costs.

VII — Conclusion

71. In the light of the foregoing considerations, I propose that the Court give judgment as follows:

(1) The application is dismissed;

(2) The Commission shall bear its own costs and pay those of the Kingdom of Belgium;

(3) The Kingdom of the Netherlands shall bear its own costs.