not insured for the purposes of an old-age pension because he is insured for such purposes under the legislation of another Member State, even if he resided in the territory of the first-mentioned Member State and is there engaged in gainful employment concurrently with his activities in the territory of the other Member State. That answer is not affected by the fact that the employment in the State of residence is secondary to the main activity of the person concerned which is pursued in the other Member State.

In Case 276/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [court of last instance in social security matters], Utrecht, for a preliminary ruling in the proceedings pendings before that court between

BOARD OF THE SOCIALE VERZEKERINGSBANK [Social Insurance Bank]

and

HEIRS OR ASSIGNS OF G. T. KUIJPERS

on the interpretation of Article 13 (c) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers and of Article 14 (1) (c) (i) of Regulation 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,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

As is apparent from the order making the reference, the late Mr G. T. Kuijpers, born on 22 July 1911 and of Netherlands nationality, worked in the Netherlands and in Belgium. On and after 1 January 1957 (the date on which the Netherlands Algemene Ouderdomswet [Law on General Old-Age Insurance, hereinafter referred to as "the Old-Age Law"] entered into force) he worked in Belgium as a carter in a coal-mine until he became incapacitated for work about the end of 1972 or the beginning of 1973. In view of his incapacity for work he was awarded a Belgian invalidity pension. In addition to working in a Belgian coal-mine, after 1 January 1957 Mr Kuijpers also worked in the Netherlands from 1 June 1966 to 19 December 1972. He worked there for five days a week from 6 p.m. to 9 p.m. Mr Kuijpers became incapacitated for work in that occupation as well and in view of that incapacity he was granted a benefit as from 19 December 1972 under the Netherlands Ziektewet [Law on Sickness] and as from 19 December 1973 a benefit under the Netherlands Wet op de Arbeidsongeschiktheidsverzekering [Law on Insurance against Incapacity for Work], [hereinafter referred to as "the Incapacity Law"], calculated on the basis of a degree of incapacity for work of 80 to 100 %.

Mr Kuijper's wife, who was born on 28 July 1916 and is also of Netherlands nationality, has lived continuously in the Netherlands from 1 January 1957.

As from 1 July 1976 Mr Kuijpers (who attained the age of 65 on 22 July 1976) was granted an old-age pension under the Old-Age Law.

Under the scheme of the Old-Age Law, on attaining the age of 65 a (single) person in principle receives a full pension equal to the so-called social minimum (for single persons). That amount is reduced however by 2% (*inter alia*) for each calendar year in which the person entitled to the pension was not insured during the period between his 15th and 65th birthdays (Article 10 (1) (a) of the Old-Age Law). For that purpose the uninsured calendar years or parts thereof are added together and, pursuant to the Order of 17 June 1957 of the Minister of Social Affairs and Public Health issued pursuant to Article 10 (6) (now Article 10 (5)) of the Old-Age Law, any remaining part of a calendar year is disregarded for reduction purposes, to the advantage of the claimant.

If a married couple are concerned usually only the husband is entitled to an

old-age pension on attaining the age of 65 (Article 7 of the Old-Age Law). The pension is in principle equal to the social minimum for married persons. By virtue of Article 10 (2) (1) (a) and (b) of the Old-Age Law the reduction then amounts to 1% for each calendar year in which the husband was uninsured and 1% for each calendar year in which the wife was uninsured. Here again calendar years or parts thereof are added together and "rounded down" to the nearest year in the case of each spouse separately.

In addition the Old-Age Law refers to notional years of insurance with regard to the period before 1 January 1957, the date on which it entered into force. On certain conditions persons who were more than 15 but less than 65 years of age before 1 January 1957 are deemed, by virtue of Articles 43 and 44 of the Old-Age Law, to have been insured during the period between the date on which they attained the age of 15 and 1 January 1957. Both the husband and the wife concerned in the main action fulfil the conditions for the award (in full) of those notional years of insurance before 1 January 1957 and therefore it is only the period after 1 January 1957 which matters in this case.

What is at issue therefore is the question for which periods Mr Kuijpers and his wife were not insured after 1 January 1957 under the Old-Age Law.

According to Article 2 (1) (a) of the Royal Decree of 18 October 1968 laying down a general administrative measure within the meaning of Article 6 (2) and (3) of the Old-Age Law (extension and restriction of the number of persons insured), the following persons, amongst others, are not treated as insured persons for the purposes of the Old-Age Law;

"Residents who are employed outside the Netherlands and by virtue of that employment are insured under legislation on old-age and survivors' pensions and family allowances in force in the country in which they work".

The royal decrees prior to the above-mentioned royal decree contain similar provisions.

Under the provisions just cited (and also Article 2 (1) (c) of the Royal Decree of 18 October 1968, which provides, in short, that a resident in receipt of a benefit for incapacity for work under foreign legislation is not also insured under the Old-Age Law) Mr Kuijpers is treated as being uninsured during the period from 1 January 1957 to 19 December 1973 for the purposes of the Old-Age Law in view of the fact that as from that last-mentioned date he is again treated as being insured under the Old-Age Law on account of the receipt by him of a benefit under the Law on Invalidity Insurance. Therefore, in Mr Kuijpers's case the number of uninsured years after 1 January 1957 is 16 (after rounding down to the nearest whole calendar year) which results in a 16% reduction of his pension.

Furthermore, under Article 2 (1) (i) of the said Royal Decree of 18 October 1968 "a married woman residing in the Kingdom of the Netherlands whose husband is not insured under subparagraphs (a), (b), (c), (d), (e), (f), (g), or (h) of this paragraph" is not regarded as insured under *(inter alia)* the Old-Age Law.

The earlier royal decrees contain corresponding provisions.

On the basis of the provisions cited above, for the period between 1 January 1957 and 19 December 1973 Mr Kuijpers's wife, too, was not insured under the Old-Age Law and

consequently there had to be a 16% reduction in her case as well. The total reduction of the old-age pension paid under the Old-Age Law is therefore 32%.

The court making the reference raises the question whether or not the reduction in Mr Kuijpers's case is compatible with Community law, in view of the fact that Mr Kuijpers worked in the Netherlands from 1 June 1966 to 19 December 1972 and that, on the basis of Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71, it might be maintained that Mr Kuijpers must be regarded as insured under the Old-Age Law during that last-mentioned period. That would mean that after 1 January 1957 Mr Kuijpers would have been uninsured for only 10 calendar years for the purposes of the Old-Age Law (after rounding down to the nearest whole year) and that therefore, since, by virtue of Article 2 (1) (i) of the Royal Decree of 18 October 1968 and the corresponding provisions contained in the earlier royal decrees, the pension under the Old-Age Law would be reduced not by 32% but by 20%.

In this context and having regard to the case-law of the Court of Justice which, in its judgment of 24 April 1980 in Case 110/79 *Coonan* [1980] ECR 1445, emphasized that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to social security schemes or to a particular branch under such a scheme, the Centrale Raad van Beroep, with a view to resolving the problem whether there is a conflict between national law and Community law, which in this respect have the same object, namely that of defining the scope of each national social security scheme in relation to the others, submitted the following question to the Court:

"Must Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71 be interpreted as meaning that a national provision of a Member State is incompatible with those two provisions if its effect is such that a worker residing in that Member State is not insured for the purposes of an old-age pension because he is insured for such purposes under the legislation of another Member State, even if he resides in the territory of the first-mentioned Member State and is employed in that State (albeit in what must be regarded as a secondary occupation) as well as working in the other Member State?"

The order making the reference was received at the Court Registry on 19 October 1981.

By order of 24 March 1982, the Court, after establishing that no Member State or institution, being a party to the proceedings, had requested that the case be decided in plenary session, assigned the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Sociale Verzekeringsbank, represented by its Director, and by the Commission of the European Communities, represented by Jean Amphoux, acting as Agent, assisted by Auke Haagsma.

On hearing the report of the Judge-Rapporteur and the views of the

Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

It nevertheless requested the Sociale Verzekeringsbank to inform it before 23 April 1982, orally in the event of its participation in the oral procedure, or otherwise in writing, whether or not Mr Kuijpers paid contributions under the Old-Age Law during the period from 1 June 1966 to 19 December 1972.

The Court also requested the Commission to reply in writing before 23 April 1982 to the question whether the application of the rule contained in Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71 may be influenced by the fact that the employment in the country of residence was only of a secondary nature and the full-time employment was carried on in another Member State.

The replies to these questions were furnished within the prescribed time-limit.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. Before broaching the question referred to the Court the *Sociale Verzekeringsbank* submits first of all some observations on the meaning and scope of the coordinating Community provisions concerning the designation of the legislation of a Member State as being the legislation applicable in the matter and a summary of the special features of Netherlands legislation concerning affiliation to the national scheme.

(a) It observes that the essential purpose of the Community rules is to prevent a worker from being uninsured in any Member State and to prevent such a worker from being subject to the legislation of more than one Member State at the same time, as is made clear in particular by the provisions of the first sentence of Article 13 (1) of Regulation No 1408/71 which were not contained in Regulation No 3.

According to the Sociale Verzekeringsbank the EEC Treaty is based on the principle, which is firmly anchored in the labour law in force in Western Europe, and according to which in each Member State the workers of other Member States must be subject to the same conditions regarding work as the workers of that Member State. That is why, according to the Sociale Verzekeringsbank, Title II of the regulations contain by implication the basic rule that the worker must be insured in the Member State in which he pursues the activities which constitute the source of the income necessary for the subsistence of the worker and his family. In this connection it must therefore be considered that the intention of Community law is to regulate full-time employment which is related to the requirements for subsistence.

Only if the criterion were liable to result in double insurance in the case of activities carried on in more than one Member State or if by reason of the nature of the activities carried on it would be unjust or impossible to give effect to it, is another criterion applied. In the latter case, according to the Sociale Verzekeringsbank, the relevant criterion is that of the place of the registered office of the undertaking or the place of establishment of the individual employing the worker and if that criterion cannot be applied the appropriate criterion is that related to the residence of the worker.

With regard to the scope of the designation of the legislation applicable the Sociale Verzekeringsbank maintains that such designation does not as such signify that the worker in question is

insured under the legislation declared applicable.

The Community regulations are in the nature of coordinating provisions which do not affect the national provisions determining the persons insured and the conditions for affiliation and the designation of national provisions cannot create a right to insurance. They merely lay down rules governing the case where the employment relationship comes within the jurisdiction of more than one Member State.

According to the Sociale Verzekeringsbank these considerations are of importance as regards the reply to the question whether the designation of legislation as applicable excludes affiliation to the insurance scheme of another Member State. It observes that if the answer is to that effect it is necessary to have regard to an actual affiliation to an insurance scheme of a Member State whose legislation is not designated, as well as to the payment of contributions to such a scheme. On the other hand if the answer is to the contrary, the question arises whether it is necessary to construe, and if so in what way, the provisions of national legislation which imply that (actual) insurance under the legislation of another Member State entails the exclusion of the group of insured persons under its own national legislation.

With regard to the Netherlands legislation the Sociale Verzekeringsbank states that affiliation is automatic provided that the legal conditions are fulfilled and the only persons who are registered are those who, although they have the status of residents, are excluded from the group of persons insured under the compulsory insurance covering the entire population and those who, although they do not have the status of resident, are included in the group of insured persons because they are liable to tax on their income from professional or trade activities pursued in the country.

It states that this system, in conjunction with the secondary nature of the activity pursued in the Netherlands and the fact of actually being affiliated to the scheme of another Member State, might lead to a situation in which the Sociale Verzekeringsbank was not informed of the activity pursued in the Netherlands since knowledge of that fact is generally more difficult to obtain in practice in the case of frontier workers whose activities in each of the States in question may remain unknown by employers and insurance institutions.

(b) With regard to the question referred to the Court by the Centrale Raad van Beroep the Sociale Verzekeringsbank observes that the result of the factual situation which existed in the case in point was that the contribution was paid under Belgian legislation and that rights were acquired under that legislation since the claimant in question pursued his main activities in that country as a person employed on a full-time basis.

According to the Sociale Verzekeringsbank the question is whether the insurance in the country in which the main activities were pursued may be called in question as a result of the pursuit of secondary and wholly marginal activities in the country of residence. According to it a literal application of Article 13 (c) of Regulation No 3 and of Article 14 (1) (c) (i) of Regulation No 1408/71, if the situation had been known in good time, could have led to designation the Netherlands legislation as that which should have been applicable.

According to the Sociale Verzekeringsbank such a situation could have

constituted a hindrance to the free movement of workers since it is entirely at variance with the coordination which arises in this case from the simultaneous application of Netherlands and Belgian legislation without the application of the regulations and which results in affiliation to the Belgian insurance scheme and exclusion from the Netherlands insurance scheme.

The Sociale Verzekeringsbank thus raises the question whether such a reversal of the situation could have been intended, above all in cases which are to be considered as extreme, such as this case. The basic rule laid down in Article 12 (1) of Regulation No 3 and in Article 13 (2) (a) of Regulation No 1408/71 is applicable in view of the main employment and this entails the application of Belgian legislation. No provision of the regulation annuls the effect of the exclusion of the insurance scheme under Netherlands law.

According to the Sociale Verzekeringsbank, even if, on the basis of Article 13 (c) of Regulation No 3, Netherlands legislation is designated as the legislation applicable that does not necessarily exclude the simultaneous application of Belgian legislation, having regard to the fact that the former regulation does not contain any provision corresponding to the first sentence of Article 13 (1) of Regulation No 1408/71. It observes that since the claimant was in fact insured under the latter legislation he was excluded from the insurance scheme provided under Netherlands law because he worked in another country and was accordingly insured and that in that case, too, the provision of the regulation concerning the designation of the legislation applicable does not annul the effect of that national provision. From this point of view, too, for the period up to 1 October 1972, the claimant was insured exclusively under Belgian legislation and was not simultaneously insured under Netherlands legislation.

The Sociale Verzekeringsbank considers that if, notwithstanding the provision contained in the first sentence of Article 13 (1) of Regulation No 1408/71, actual affiliation to the Belgian insurance scheme must be considered as not being contrary to the said provision, it may be also be maintained with regard to the period beginning on 1 October 1972 that by virtue of Article 14 (1) (c) (i) of Regulation No 1408/71 Netherlands legislation is doubtless designated as applicable, but that nevertheless there is still no provision whatever of the regulation which annuls the effect of the exclusion provisions of the said legislation which apply by reason of the existence of the Belgian insurance.

According to the Sociale Verzekeringsbank only if it had to be found, on the basis of the first sentence of Article 13 (1) of Regulation No 1408/71, that afffiliation to the Belgian insurance scheme was wrongly effected and if, under Belgian law, the consequences of that affiliation must be annulled with retroactive effect, would it follow that a Netherlands pension under the Old-Age Law must be proportionately increased on the basis of the period from 1 October 1972 to 19 December 1973 inclusive. It would then in fact also be necessary to reduce the Belgian pension proportionately but it is probably no longer possible to do so. A unilateral increase in the Netherlands pension would then produce advantages, which are unjustified and not envisaged by the regulation, in favour of the person concerned and those entitled under him.

In conclusion the Sociale Verzekeringsbank thus considers that it is the Belgian legislation which is applicable since the person concerned worked full-time in

Belgium and his work in the Netherlands was only of a secondary nature.

2. The *Commission of the European Communities* rehearses the facts and the Netherlands legislation applicable in the field and observes that with regard to the present case the provisions of Articles 13 (2) (a) and 14 (1) (c) (i) of Regulation No 1408/71 are particularly important. It points out that Article 31 (2) (a) provides:

"Subject to the provisions of Articles 14 to 17:

(a) a worker 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 . . ."

and that Article 14 (1) provides:

"Article 13 (2) (a) shall apply subject to the following exceptions or circumstances:

. . .

(c) a worker, other than one employed in international transport, who normally pursues his activity in the territory of two or more Member States shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States".

It adds that Regulation No 3, which was replaced by Regulation No 1408/71, did not contain the general principle which is set out in Article 13 of the latter regulation and according to which the workers to which the regulation applies are subject to the legislation of a single Member State only, determined in accordance with the provisions of Title II of the same regulation, but that it nevertheless contained provisions similar to those cited above, namely Article 12 and Article 13 (c).

Finally the Commission recalls Council Directive No 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal, L 6 of 10 January 1979 p. 24) which, in accordance with Article 1 thereof, applies *inter alia* to the statutory schemes applicable in the fields of invalidity and old age.

The Commission points out that under Article 5 of that directive the Member States are required to adopt the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished and that, according to Article 4, that principle means that "there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status . . .", which applies in particular with regard to "the scope of the schemes and the conditions of access thereto".

The Commission considers that the Netherlands scheme under which, subject to certain exceptions, a married woman is not insured *inter alia* under the Old-Age Law unless her husband is himself insured under that Law, is incompatible with the provisions of that directive and must accordingly be amended during the period which expires on 22 December 1984.

More particularly, with regard to the question put to the Court concerning the national legislation applicable, the Commission considers that, in order to reply to it, it is necessary to draw a distinction between two situations:

1. The situation as it existed up to 1 June 1966, that is to say, up to the time when Mr Kuijpers obtained employment in the Netherlands in addition to his employment in Belgium; and

2. the situation after that date.

The Commission observes that the first situation concerns the period during which Mr Kuijpers was employed only in Belgium. According to the provisions of Article 12 of Regulation No 3 the worker must in such circumstances be subject to the legislation of the State on whose territory he was employed that is, to Belgian legislation.

The Commission recalls that Regulation No 3 did not contain any provision expressly laying down the principle that workers to whom the regulation applied must be subject to the legislation of a single Member State only and that in its judgment of 9 June 1964 in Case 92/63 *Nonnenmacher* [1964] ECR 281 the Court furthermore stated that Article 12 of Regulation No 3 included no provision prohibiting the simultaneous application of several systems of legislation but on the other hand that that article prohibited "the application of the legislation of a Member State other than that in which the person concerned works . . . . to the extent that it requires that person to contribute to the financing of a social security institution which is unable to provide him with additional advantages in respect of the same risk and of the same period".

According to the Commission it may thus be concluded with regard to the period before 1 June 1966 that the competent Netherlands institution was entitled to declare the Netherlands social security legislation inapplicable to Mr Kuijpers and that, even if such legislation were to be considered applicable, on the basis of the case-law of the Court it could only have producted its effects within the limits mentioned above.

On the other hand the Commission considers that the same does not hold true with regard to the situation which existed in the course of the period during which Mr Kuijpers worked both in Belgium and the Netherlands. It emphasizes that during that period he was in fact subject to the application of the provisions of Article 13 (c) of Regulation No 3. By virtue of those provisions he was thus subject, as a worker ordinarily employed on the territory of more than one Member State, to the legislation of the State on the territory of which he was resident, that is to say, the Netherlands.

With regard to that period the competent Netherlands institution could not exclude Mr Kuijpers from the benefit of the application of the Netherlands social security legislation.

In this connection the Commission notes that if a number of uncertainties continue to exist, this is because of the judgment in the *Coonan* case in which the Court interpreted Articles 1 (a) and 3 of Regulation No 1408/71 as meaning that "it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme provided always that in this connection there is no discrimination between nationals of the host State and nationals of the other Member States".

According to the Commission it may be deduced from the foregoing that under Netherlands legislation it is permissible to exclude from the Netherlands social security scheme persons who do not fulfil certain conditions, and in particular persons who are already insured outside the Netherlands. It emphasizes that the Centrale Raad, however, wonders whether the situation is different in this case since such a provision of national law has the same objective as the provisions of Community law, namely the delimination of the effects of the various national social security schemes, and whether the rule of Community law must not then take priority over the rule of national law.

It observes that, in this perspective, the essential point in this case is therefore to reply to the question whether the legislation of a Member State, which may in principle fix the conditions for affiliation to the social security scheme, may exclude from that scheme a worker to whom the regulation applies because he is already insured in another Member State.

Before replying to that question the Commission remarks that it is important to emphasize that the situation to which that question relates will only arise exceptionally and that this applies even more in the case of Regulation No 1408/71 than in that of Regulation No 3. It emphasizes that, apart from the voluntary insurance or optional continued insurance dealt with in Article 15, Regulation No 1408/71 lays down the principle, set out in Article 13 (1), that the worker must be subject to the legislation of a single Member State only.

The Commission repeats in this connection that the scheme set up under Regulation No 3 is slightly different in that it may permit in certain clearly-defined cases the simultaneous application to the same worker of the legislation of more than one Member State. Nevertheless in this case too the word "simultaneous" used expressly by the Court in the *Nonnenmacher* case might exclude the application of a provision such as the Netherlands provision in question concerning overlapping.

Be that as it may, with regard to the actual question put to the Court the Commission is of the view that the regulations in question must be considered as embodying detailed rules, which in its opinion are exhaustive, governing the problem of the legislation applicable. It observes that the basic principle is that in all cases it is necessary to apply at least, and generally no more than, one social security scheme and that in principle the legislation of a Member State applicable by virtue of those rules may fix the conditions governing the right and duty of affiliation.

Nevertheless, a Member State is not entirely free to fix these conditions and it must not exceed the limits laid down by the regulation. Thus it is, maintains the Commission, that the provisions on the national legislation applicable contained in the regulation and mentioned above must be complied with. According to the Commission this would not be the case if national legislation which the regulation declares to be applicable — by exclusion or otherwise — contained provisions indicating the application not of that legislation but of the legislation of another Member State.

The Commission accordingly considers in conclusion that the following reply should be given to the question submitted by the Centrale Raad van Beroep:

Article 13 (1) (c) of Regulation No 3 concerning social security for migrant workers and Article 14 (1) (c) (i) of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community must be interpreted as meaning that a provision of a Member State which is intended to exclude a worker from the benefit of legislation which is declared applicable to him in accordance with the regulation on the ground that he is insured at the same time in another Member State is incompatible with those articles.

III — Answers to the questions put by the Court

1. The *Sociale Verzekeringsbank* gave the following reply to the question which was put to it by the Court:

"For the purposes of limited registration under the Old-Age Law and Algemene Weduwen- en Wezenwet [Law on General Insurance for Widows and Orphans, herein after referred to as "the Law on Widows and Orphans], which is available *inter alia* to persons who, although resident, are not insured under the Old-Age Law and the Law on Widows and Orphans, the inspector of taxes in Eindhoven (since, in relation to national social insurance, it is in fact the tax authorities which are by law entrusted with the collection and recovery of contributions), under whose jurisdiction Mr Kuijpers fell during the period from 1966 to 1972 inclusive, informed the Sociale Verzekeringsbank that Mr G. T Kuijpers was not insured under the Old-Age Law or the Law on Widows and Orphans during the following periods: from 1 January 1966 to 30 May 1966 inclusive, throughout the whole of 1967, 1968, 1969, 1970, 1971 and 1972.

The necessary declarations are made to the Sociale Verzekeringsbank by the tax authorities *inter alia* where they consider that a person has not been insured under the Old-Age Law and the Law on Widows and Orphans for a certain period, for example as a result of his having been insured in another country for purposes of old age, death, prolonged incapacity for work and also family allowances by reason of his employment there.

Where the tax authorities send to the Sociale Verzekeringsbank a report stating that a resident has not been insured during a certain period, it is likely that no contribution has been paid during that period or that any contribution (deducted at source) which may have been wrongly paid has been refunded to the person concerned. However, in 1978 and 1979 the Sociale Verzekeringsbank entered into correspondence with the employer of Mr Kuijpers at that time and with the trade association to which he then belonged, over the question *inter alia* whether the contributions under the Old-Age Law were at that time being deducted from his salary at source.

A copy of that correspondence is also attached hereto.

From that correspondence it appears that contributions under the Old-Age Law were deducted at source from G. T. Kuijpers's pay from his employment in the Netherlands.

It is not known whether those contributions, which were deducted at source, were paid to the tax authorities or whether they were later refunded.

An investigation conducted into the matter by the tax authorities produced no information.

With reference to the question put by the Court it is considered necessary to emphasize once again that this aspect of the case (that is to say, whether or not contributions were paid under the Old-Age Law and if they were, whether they were later refunded) was deliberately not raised by the Soziale Verzekeringsbank in this case.

The Centrale Raad van Beroep, Utrecht, in fact considers that, in answering the question whether the person must be considered to be insured, it is irrelevant whether or not contributions have been paid.

It is true that if it appears that a contribution was wrongly paid, the Soziale Verzekeringsbank offers in suitable cases to the person concerned the opportunity either of having the contribution deemed to be a voluntary payment, obviously with a corresponding effect on the pension to which he is entitled, or of receiving an amount corresponding to the contribution which has been wrongly paid (at least if the amount of the contribution paid can still be determined).

2. In answer to the question which was put to it by the Court, the *Commission* submitted the following reply:

(a) First, in relation to more general considerations, it must be emphasized that the aim of the provisions referred to in the question is to establish more clearly the social security legislation to which a worker covered by the regulation (or a member of his family) is subject if he pursues his activities in the territory of two or more Member States. In that regard, it is necessary to prevent him from being subject to no social legislation or from being subject to the legislation of two or more Member States (on this point see Article 13 (1) of Regulation No 1408/71).

This aim may be achieved only if clear and unequivocal criteria make it possible to determine the applicable legislation. In the Commission's opinion, a distinction between "main activities and secondary activities" cannot be considered to be such a criterion. Such a distinction is neither clear nor unequivocal, since in many cases it is extremely difficult to determine which activities may be considered to be main activities. This is particularly true in the case of commercial travellers.

(b) It should also be emphasized that it may be disadvantageous for the persons concerned to be subject to the legislation of a State other than the State in whose territory they are established. In order to determine the legislation applicable in the case of a worker who partly does not pursue his activities in the territory of the Member State in which he resides, the interest of the person concerned (for whom, as has been stated, it is in general advantageous to be insured in the Member State in which he resides) must always be balanced against that of the Member State or Member States concerned (for whom it is advantageous to levy contributions to the social security scheme).

In the case of a worker who pursues all his activities in the territory of one Member State, more emphasis is put on the interest of that Member State, even if the worker resides in the territory of another Member State (see, for example, Article 13 (2) of Regulation No 1408/71). On the other hand, if he pursues his activities both in the territory of his own Member State and in that of another Member State, priority is given to the interest of the worker concerned. In that case, several Member States might claim payment of contributions and it is the interest of the person concerned which is decisive in the choice between those different interests.

(c) From a more legal or more literal viewpoint, it must be noted that the concept of "main activities or secondary activities" is not to be found either in Article 13 of Regulation No 3 or in Article 14 of Regulation No 1408/71. On the other hand, the concept of "main activity" does appear in Article 14 (a) (2) (incorporated in Regulation No 1408/71 by Council Regulation No 1390/81 of 12 May 1981, Official Journal 1981, L 143, p. 1).

Article 14 (a) (2) lays down the following principle:

"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."

In essence, that rule is identical to the rule laid down in Article 14 (1) (c) (i). However, Article 14 (a) further provides:

"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."

From that sentence it may be inferred that conversely, if the person concerned in fact pursues part of his activity in the territory of the Member State in which he resides, the criterion of "main activities" is not relevant.

(d) In short, the Commission therefore considers that the fact that only secondary activities are pursued in the country of residence whereas the main activities are pursued in another Member State has no influence on the application of the rules laid down in Article 13 (c) of Regulation No 3 and of Article 14 (1) (c) (i) of Regulation No 1408/71.

(e) Nevertheless that does not prevent the question from being asked whether it is not necessary for activities to be actually pursued in the territory of two or more Member States. The view might be taken that that is not the case if the activity pursued by the person concerned in the Member State in which he resides is only of a *marginal* nature. Thus it might be possible to apply a rule similar to the rule formulated in the judgment of the Court of Justice of 23 March 1982 in Case 53/81, *Levin* v *Staatssecretaris van Justitie*, that is to say that the activity in question must be effective and genuine and that it must not be purely marginal.

Whatever may be the position of the Court of Justice in relation to the applicability of that rule to the provisions referred to in the questions which it has put, the Commission takes the view that in this case, Mr Kuijpers's activity in the Netherlands may not be regarded as marginal, since he spent three hours on it on five evenings in every week.

(f) On the basis of the above-mentioned considerations, the Commission wishes to state, in reply to the questions put to it by the Court, that the fact that only secondary activities are pursued in the country of residence has no effect on the application of the rule laid down in Article 13 (c) of Regulation No 3 and in Article 14 (1) (c) (i) of Regulation No 1408/71, but that those provisions may presuppose that an effective and genuine activity is pursued in two or more Member States, so that a person who pursues an activity which is only marginal is not to be considered as pursuing an activity within the meaning of the provisions cited.

IV — Oral procedure

At the sitting on 6 May 1982, oral argument was presented by A. Haagsma for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 17 June 1982.

Decision

1 By order of 29 September 1981, received at the Court on 19 October 1981, the Centrale Raad van Beroep [court of last instance in social security matters] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question relating to the interpretation of Article 13 (c) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561) and Article 14 (1) (c) (i) of Regulation 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 Communities (Official Journal, English Special Edition 1971 (II), p. 416), in order to determine the compatibility with Community law of certain provisions of the Netherlands legislation on pensions.

2 The question was submitted in the context of proceedings between the Soziale Verzekeringsbank [Social Insurance Bank], a Netherlands social security institution, and the heirs or assigns of G.T. Kuijpers, whose pension was reduced in application of the Netherlands legislation.

3 Mr Kuijpers, a married Netherlands worker, resided in the Netherlands from 1 January 1957 until the end of 1972 and worked in Belgium while at the same time holding employment regarded as secondary in the Netherlands from 1 June 1966 to 19 December 1972.

4 According to the provisions of Article 13 (c) of Regulation No 3 of the Council and Article 14 (1) (c) (i) of Regulation No 1408/71 of the Council, Mr Kuijpers could be considered to be affiliated to the Netherlands general

old-age insurance scheme set up by the Algemene Ouderdomswet [Law on General Old-Age Insurance, hereinafter referred to as the Old-Age Law], which entered into force on 1 January 1957.

5 However, according to Article 2 (1) (a) of the Royal Decree of 18 October 1968 laying down a general administrative measure within the meaning of Article 6 (2) and (3) of the above-mentioned Netherlands Law, "residents who are employed outside the Netherlands and by virtue of that employment are insured under legislation on old-age and survivors' pensions and family allowances in force in the country in which they work" are not treated as insured persons for the purposes of that Law.

6 In addition, according to Article 2 (1) (i) of the said Royal Decree a married woman residing in the Kingdom whose husband is not insured under the provisions of that paragraph is not considered as insured under the Old-Age Law.

7 In addition to those provisions, and within the same legislative framework, there are others which provide that the amount of the pension to be awarded to the person concerned is to be reduced by 1% in respect of himself and 1% in respect of his spouse for every calendar year in which they were not insured under the Old-Age Law.

8 The amount of the pension awarded to Mr Kuijpers was consequently reduced by the competent Netherlands institution in application of the above-cited provisions of the Netherlands legislation, which are alleged by the defendants in the main action to be incompatible with the provisions of Community law.

9 This is the context in which the Centrale Raad van Beroep stayed the proceedings and referred to the Court the following question:

"Must Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71 be interpreted as meaning that a national provision of a Member State is incompatible with those two provisions if its effect is such that a worker residing in that Member State is not insured for the purposes of an old-age pension because he is insured for such purposes under the

legislation of another Member State, even if he resides in the territory of the first-mentioned Member State and is employed in that State (albeit in what must be regarded as a secondary occupation) as well as working in the other Member State?"

10 According to a consistent line of decisions of the Court, the aim of the provisions contained in Title II of Regulation No 3 and Regulation No 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislation from being applicable and the complications which may result from that situation.

11 This principle, which was applied by the Court in relation to Regulation No 3, is expressed in Article 13 (1) of Regulation No 1408/71 which provides that "A worker to whom this regulation applies shall be subject to the legislation of a single Member State only" and that that legislation "shall be determined in accordance with the provisions of this Title", that is to say Title II on the "determination of the legislation applicable".

12 According to Article 13 (2) (a) of Regulation No 1408/71, subject to the provisions of Article 14 to 17 a worker employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State.

13 Article 14 (1) (c) (i) creates one of the exceptions to the rule laid down by Article 13 (2) (a) by providing that "a worker, other than one employed in international transport, who normally pursues his activity 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 his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States".

14 It follows from the provisions cited above that the application of national legislation is determined by reference to criteria drawn from the rules of Community law. Although the Court stated in its judgment of 24 April 1980 in Case 110/79, *Coonan* v *Insurance Officer,* [1980] ECR 1445, that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, it must be emphasized that this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member Sate is applicable.

15 Furthermore, it should be noted that Article 14 (1) (c) (i) of Regulation No 1408/71 does not contain any distinction between a main occupation and a secondary occupation.

16 The question put to the Court by the Centrale Raad van Beroep is therefore to be answered as follows:

Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71 must be interpreted as meaning that a national provision of a Member State is incompatible with those provisions if its effect is such that a worker residing in that Member State is not insured for the purposes of an old-age pension because he is insured for such purposes under the legislation of another Member State, even if he resides in the territory of the first-mentioned Member State and is there engaged in gainful employment concurrently with his activities in the territory of the other Member State. That answer is not affected by the fact that the employment in the State of residence is secondary to the main activity of the person concerned which is pursued in the other Member State.

Costs

17 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Centrale Raad van Beroep, by order of 29 September 1981, hereby rules:

Article 13 (c) of Regulation No 3 and Article 14 (1) (c) (i) of Regulation No 1408/71 must be interpreted as meaning that a national provision of a Member State is incompatible with those two provisions if its effect is such that a worker residing within that Member State is not insured for the purposes of an old-age pension because he is insured for such purposes under the legislation of another Member State, even if he resides in the territory of the first-mentioned Member State and is there engaged in gainful employment concurrently with his activities in the territory of the other Member State. That answer is not affected by the fact that the employment in the State of residence is secondary to the main activity of the person concerned which is pursued in the other Member State.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 23 September 1982.

For the Registrar

H. A. Ruhl

Principal Administrator

O. Due

President of the Second Chamber