OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 March 2003 [1]

I — Introduction

1. This reference for a preliminary ruling from the Arbeidsrechtbank van het Arrondissement Tongeren (Tongeren District Labour Court) concerns the relationship between the provisions laid down in the Belgian national system of unemployment insurance and the rules concerning unemployment benefits for officials of the institutions of the European Communities. The national court would like to know whether any unemployment benefits which the institutions may award can be taken into consideration within the framework of the national rules against overlapping of benefits. In addition, the national court would like to know how the social-security status of post-doctoral assistants fits into that structure.

1 — Original language: German.

II — Rules applicable

A — *Community law*

2. Article 39(1) and (2) of the Treaty reads as follows:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

3. Article 7 of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [2] reads as follows:

2 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 475).

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

4. Article 28a(1) and (2) of the Conditions of Employment of Other Servants of the European Communities [3] reads as follows:

'1. A former member of the temporary staff who is unemployed when his service with an institution of the European Communities has been terminated:

...

— who has completed a minimum of six months' service,

— and who is resident in a Member State of the Communities,

shall be eligible for a monthly unemployment allowance under the conditions laid down below.

3 — See Regulation (EEC, Euratom, ECSC) No 259/68, as amended by Regulation No 2799/85 of 27 September 1985 (OJ 1985 L 265, p. 1); hereinafter also 'the Conditions of Employment'.

Where he is entitled to unemployment benefits under a national scheme, he shall be obliged to declare this to the institution to which he belonged, which shall immediately inform the Commission thereof. In such cases, the amount of those benefits will be deducted from the allowance paid under paragraph 3.

2. To be eligible for this unemployment allowance, a former member of the temporary staff shall:

(a) be registered, at his own request, as seeking employment with the employment authorities of the Member State in which he establishes his residence;

(b) fulfil the obligations laid down by the law of that Member State for persons in receipt of unemployment benefits under that law;

(c) forward every month to the institution to which he belonged, which shall immediately forward it to the Commission, a certificate issued by the competent national employment authority stating whether or not he has fulfilled the obligations and conditions referred to in (a) and (b).'

5. Article 67 of 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 [4] reads as follows:

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they

4 — As amended by Regulation (EC) No 118/97 (OJ 1997 L 28, p. 1).

were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

— in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.'

B — *National rules*

6. Article 30 of the Royal Decree of 25 November 1991 [5] provides in essence as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a waiting period comprising the following number of working days:

...

2. 468 during the 27 months preceding the claim, if the worker is more than 36 and less than 50 years of age.

The reference period referred to in the first paragraph is extended by the number of days included in the period [of]:

...

5 — *Belgische Staatsblad* of 31 December 1991.

3. at least six months in which the person concerned carries on an occupation in the course of which the person concerned does not come under the social security system in respect of unemployment; the extension may not be for more than nine years.'

Article 37(1) of the Royal Decree provides in essence as follows:

'In the application of this section, periods of employment are to be taken into account in an occupation or undertaking subject to social security in respect of unemployment, and for which simultaneously:

1. payment of at least the minimum wage has been made

...

2. deductions for social security, including those in respect of unemployment, have been made.'

Article 46 provides in essence as follows:

'The following in particular are regarded as remuneration within the meaning of Article 44:

...

5. payment to which the employee is entitled on termination of his employment, with the exception of compensation for non-material damage and payment which is awarded in addition to unemployment benefit;

...

For the purposes of the first subparagraph of Article 46(1)(5), payment awarded in addition to unemployment benefit is deemed to be the remuneration or part of the remuneration which a person who is involuntarily unemployed receives as a consequence of the termination of an employment relationship, if the following conditions are fulfilled:

...

— the payment or part of the payment must not have been paid in substitution for the benefits normally awarded under arrangements relating to the termination of employment, in so far as such benefits have in fact been paid.'

Article 14 of the Ministerial Decree of 26 November 1991 [6] provides in essence as follows:

'When calculating the necessary days of work, services are not to be taken into account which have been performed in an occupation or in an undertaking not subject to social security in respect of unemployment, even if deductions were made.'

III — Facts and procedure

7. The applicant in the main proceedings (hereinafter 'the applicant') is a Norwegian national. She was born in 1961, finished her studies in 1988 and took up employment in Norway which was subject to social security, working there from 1 July 1988 to 31 October 1994.

8. From 1 November 1994 to 31 October 1996 she worked for the Institute for Reference Materials and Measurements (hereinafter 'the IRMM') in Geel, Belgium, under an 'Individual Fellowship Contract' with the Commission. That post-doctoral scholarship was not subject to social security. Under the contract, the applicant was required to take part in a research training project, which was described in an annex to the contract. In accordance with that annex, the primary objective of such a contract was to enhance the professional qualifications of young workers through the acquisition of further knowledge and greater skill in their scientific field and at the same time to increase the scientific potential of the Community.

9. The contract provided for a monthly remuneration of ECU 3 500. In accordance with the general requirements applicable to such contracts, the remuneration was intended to finance scholars' subsistence, travel costs, publication of their studies and participation in conferences. Social security contributions and taxes were also to be covered by that amount, that is to say they had to be paid by the scholars themselves.

10. After that two-year contract expired, the applicant was unemployed for one month.

11. From 1 December 1996 to 30 November 1999 the applicant worked

6 — *Belgische Staatsblad* of 25 January 1992.

as a temporary official with the Commission, where she was subject to the Community social security scheme. After the temporary contract with the Commission expired, she applied to the Belgian Rijksdienst voor Arbeidsvoorziening (National Employment Office, hereinafter 'the RVA') for unemployment benefit. The application was rejected on the ground that the applicant did not meet the requirements laid down by Belgian legislation with regard to unemployment benefit, that is to say, in her case 468 working days in the 27 months preceding her application.

12. Under Article 30(3) of the Royal Decree of 25 November 1991, the reference period may be extended. The Belgian institution recognised the period of employment as a temporary official with the Commission as being capable of extending the reference period. However, it did not give similar consideration to the period spent as a scholar at the IRMM. The Belgian institution regarded that as a period of training. Accordingly, it was not possible to add that period to the period of time spent in employment in Norway which was subject to social security.

13. The applicant instituted legal proceedings against that decision. She asked the Commission for assistance under Article 24 of the Staff Regulations. This was given to her for the purposes of the proceedings before the national court.

14. Before it rules on the dispute, the national court considers the answer to the following two questions to be material to the decision:

(1) In respect of members of the temporary staff of the EC who, after the end of their period of service with the EC, reside in Belgium, and in respect of whom no contributions were deducted in favour of the social security system, and who are entitled to unemployment benefits paid by the EC, do the provisions of Regulation (EEC) No 1408/71 preclude national legislation from being fully applied to them, including the national rule against the overlapping of benefits under which, in accordance with the conditions governing the award of unemployment benefit, the employee must be out of work and not in receipt of remuneration, the latter term being defined to include in particular: payment in lieu of notice or any compensation payable to the employee in respect of termination of his contract of employment, with the exception of compensation for non-material damage?

(2) Does it run counter to Regulation (EEC) No 1612/68 of the Council (Article 7(4) of Title II), which provides that uniformity in social security matters must be pursued and that there may be no discrimination, that (in the applicant's view) there is inequality in the social security status of postgraduate students within the EEA, in that in various Member States of the EEA a postgraduate student is deemed to

carry on an occupational activity, albeit not subject to social security, and in Belgium a postgraduate student (in the applicant's view unjustly) is deemed to be a trainee fellowship student, who must arrange for his own social security cover under the Belgian national system although that is not possible on a voluntary basis (at any rate in regard to unemployment insurance)?

15. The Commission alone took part in the proceedings before the Court of Justice.

IV — Arguments of the parties

16. The arguments of the parties in the main proceedings can be inferred only from the order for reference. The *applicant's* submission therein is summarised as follows. The specific position of a post-doctoral assistant with the EU must be regarded as an occupation which is not subject to social security and which falls under Article 30(3)(3) of the Royal Decree of 25 November 1991. There is inequality with regard to the social security status of post-doctoral assistants within the EEA. In various Member States of the EEA a post-doctoral assistant is 'deemed to carry on an occupational activity, albeit not subject to social security'. In Belgium, a post-doctoral assistant is regarded, wrongly according to the applicant, as a trainee fellowship student. A post-doctoral fellow must arrange for his own insurance under the Belgian national security system, although that is not possible on a voluntary basis. The applicant claims that this runs counter to Regulation No 1612/68, in particular Article 7(4) therein, under which uniformity in social-security matters must be pursued and there may be no discrimination.

17. The *Commission* considers that the applicant may assert in Belgium the Community rules on freedom of movement for workers by means of the provisions of the EEA Agreement. The Commission's view on the specific questions submitted by the national court is that the Conditions of Employment of Other Servants of the European Communities which apply to workers appointed by the Community do not come under the definition of 'legislation' within the meaning of Article 1(j) of Regulation No 1408/71 and consequently that regulation is not applicable to the present case.

18. Nevertheless, the Commission considers it necessary to provide further information so that the first question referred may be answered. It states that the Conditions of Employment were adopted by means of a Council regulation. By virtue of the second paragraph of Article 249 EC, a regulation is binding in its entirety and

directly applicable in [all] Member States. It follows that, in addition to having effects within the Community administration, the rules are also binding on Member States in so far as their cooperation is necessary in order to give effect to those measures. [7]

19. According to the Commission, the second paragraph of Article 28a(1) of the Conditions of Employment establishes the supplementary effect of the Community scheme for unemployment benefits. This cannot be disregarded by Member States. [8] The nature of the Community scheme likewise obliges the applicant to claim unemployment benefits from the Belgian institution.

20. With regard to the answer to the second question, the Commission points out first of all that the national court is wrong to assume that Article 7(4) of Regulation No 1612/68 seeks to secure uniformity in social-security matters. However, it does not share the assessment of the Belgian institution that the applicant must be deemed to be a 'trainee fellowship student' and therefore not an employee. Relying on the case-law of the Court, the Commission takes the view that the applicant may be deemed to be an employee within the meaning of Regulation No 1612/68. However, that assessment still does not make her eligible for unemployment benefits under the Belgian scheme. Finally, the Commission points out that it is for the Member States to determine the conditions for affiliation to a social security scheme and that the Belgian rules do not discriminate against the applicant.

V — Assessment

A — *The first question*

21. Although the national court has not stated so expressly, it appears that the first question is seeking to establish to what extent unemployment benefits awarded under the Community social security scheme may be taken into consideration within the framework of the national rules against overlapping. The issue is which legal provisions are applicable and how they relate to one another.

22. It should first of all be pointed out that the Community provisions relating to the EEA Agreement are applicable to a Norwegian national. [9]

7 — Case 186/85 *Commission* v *Belgium* [1987] ECR 2029, paragraph 21.

8 — *Commission* v *Belgium* (cited in footnote 7), paragraph 23.

9 — Agreement on the European Economic Area (OJ 1994 L 1, p. 3 et seq.).

23. In the view of the national court, the answer to the first question can be deduced from Regulation No 1408/71 because of the way in which that question is worded. In Chapter VI entitled 'Unemployment', that regulation determines which institution must pay benefits if the employee has completed periods of employment subject to social security under the legal system of more than one Member State. The regulation also governs how the competent institution must take into account periods of employment and/or insurance completed under the legal system of another Member State.

24. For the situation which is considered to be the norm, where an employed person also resides in the Member State in which he is employed,[10] Article 67(2) of Regulation No 1408/71 governs the competence of an institution of a Member State under whose legislation periods of insurance and/or employment were most recently completed.

25. There appears to be no doubt as to the competence of the Belgian institution in the present case and consequently there is really no need to invoke Regulation No 1408/71 in that regard. Nevertheless, there is uncertainty as to how any benefits awarded by the Belgian institution relate to those awarded by the Community. In so far as the applicant has more recently completed periods of employment and insurance with the institutions of the European Communities, if the rules laid down in Article 67(3) of Regulation No 1408/71 are applied, the Community scheme could be deemed to take precedence. By extension, if the opposite were the case and periods of employment and/or insurance had been most recently completed under the Belgian scheme, it could likewise mean that periods completed under the Community scheme would have to be taken into account, within the meaning of Article 67(1) and (2), for the purposes of entitlement to benefits.

26. However, the above considerations are of interest only if Regulation No 1408/71 is applicable to the present case in the first place. The Commission has stated categorically that it is not. I cannot be as categorical myself. In any event, since the adoption of Regulation (EC) No 1606/98 amending Regulation No 1408/71 with a view to extending it to cover special schemes for civil servants,[11] I do not consider EC officials to be precluded in principle from the scope of Regulation No 1408/71.

27. The expression 'special scheme for civil servants' is defined in Article 1(ja) as follows:

10 — See Article 71 of Regulation No 1408/71 for cases where the state of residence and the state of employment are not the same.

11 — Council Regulation (EC) No 1606/98 of 29 June 1998 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 with a view to extending them to cover special schemes for civil servants (OJ 1998 L 209, p. 1).

'any social security scheme which is different from the general social security scheme applicable to employed persons in the Member States concerned and to which all, or certain categories of, civil servants or persons treated as such are directly subject'.

'legislation' means 'in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2)(a)'.

28. There is no doubt that, purely from the point of view of the above definition, the Staff Regulations of Officials of the European Communities are a special scheme for civil servants. In the Conditions of Employment of Other Servants of the European Communities, certain groups of persons are treated as a 'categor[y] of [] civil servants'.

31. On the one hand, neither the Staff Regulations nor the Conditions of Employment are the legislation of a 'Member State'. On the other, rules adopted by means of a regulation must be deemed to be the measures 'of each Member State'.

29. With regard to 'Unemployment', which is the area covered by Chapter 6 of Regulation No 1408/71, Regulation No 1606/98 amending that regulation expressly provides in Article 71a(1):

'The provisions of Sections 1 and 2 shall apply by analogy to persons covered by a special unemployment scheme for civil servants.'

32. So far, the Court does not yet appear to have given judgment on the relationship between the Conditions of Employment of Other Servants of the European Communities and Regulation No 1408/71 particularly since the adoption of Regulation No 1606/98. Since the first question submitted by the national court on the relationship between any benefits awarded under both social security schemes (national and Community) can be answered without a definitive finding as to the applicability of Regulation No 1408/71, the above issue must remain open.

30. However, they may not in practice be capable of application to a specific case because Article 67 expressly refers to the legislation of a Member State and, in Article 1(j) of Regulation No 1408/71,

33. In principle, it is for Member States to organise their social security systems and to determine the conditions for entitlement

to benefits. [12] However, the national authorities must comply with Community law when applying national law to circumstances falling within a Community context. [13]

34. As already mentioned above, the Conditions of Employment of Other Servants of the European Communities were adopted by means of a regulation. By virtue of the second sentence of Article 249 EC, regulations have general application. They are binding in their entirety and directly applicable in all Member States. The Commission has correctly pointed out that the Court has already recognised the binding nature of the Staff Regulations and the Conditions of Employment in its judgment of 5 July 1987 in Case 186/85. [14] Article 28a(2) of the Conditions of Employment clearly establishes the duty on the part of a former member of the temporary staff to register as seeking employment with the employment authorities of the Member State in which he resides. Article 28a(1) provides that the Community unemployment allowance does not take precedence. Entitlement to unemployment benefits under a national scheme must be declared to the relevant institution, which forwards the information to the Commission. That provision also provides: '[i]n such cases, the amount of those benefits will be deducted from the allowance paid under paragraph 3.'

35. Article 28a of the Conditions of Employment contains a special rule against overlapping for circumstances involving both national and Community unemployment benefits. National schemes must take into consideration the subsidiarity of Community benefits. Thus, given that unemployment benefits may be awarded under Article 28a(3) of the Conditions of Employment, national rules against the overlapping of benefits may not be applied first. Only where it is clear that there is no entitlement to unemployment benefits under the national scheme is the unemployment allowance under Article 28a(3) of the Conditions of Employment awarded in full.

36. In its judgment in Case 186/85, [15] the Court considered a similar mechanism in the field of family benefits to be the correct procedure to follow.

37. Thus, the answer to the first question should be as follows:

National legislation is applicable to members of the temporary staff of the EC who reside in Belgium after the end of their period of service with the EC, it being understood that, where national rules against the overlapping of benefits are concerned, regard must be had to the fact

12 — See Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Case C-70/97 *Sodemare and Others* [1997] ECR I-3395, paragraph 27; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17, and Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraph 44.

13 — *Kohll* (cited in footnote 12), paragraph 19, and *Geraets-Smits and Peerbooms* (cited in footnote 12), paragraph 46.

14 — See paragraph 23 of that judgment (cited in footnote 7).

15 — Cited in footnote 7.

that Article 28a(1) of the Conditions of Employment contains a special rule against the overlapping of benefits which establishes that the Community unemployment allowance is subsidiary to unemployment benefits awarded by a Member State.

B — *The second question*

38. In order to answer the second question, it must be pointed out first of all that it is in any event based in part on a false premiss. The national court's assumption that Article 7(4) of Regulation No 1612/68 provides that 'uniformity in social security matters must be pursued' is not correct. As the Court has consistently held, it is for Member States to organise their social security systems [16] and to determine the conditions for affiliation to each system and for entitlement to benefits. [17] However, Member States must comply with Community law when exercising those powers. [18] In that regard, they must comply with the equal treatment requirement also mentioned in the second question, for example. Where freedom of movement for workers is concerned, that fundamental Community principle is already enshrined in Article 39 EC and finds expression in Article 7 of Regulation No 1612/68. In its original form it requires Member States to treat nationals of other Member States and their own nationals as equals. Article 7 of Regulation No 1612/68 is also to be seen in that light.

39. In my view, that does not lead to the conclusion that there is a requirement to treat post-doctoral assistants uniformly with regard to their social-security status within the EEA. Such a requirement would call for the adoption of a harmonisation measure. According to information given by the applicant herself in the course of the main proceedings, the attempt to adopt such a measure has been unsuccessful.

40. The question raised by the Commission as to whether a post-doctoral assistant has the status of worker within the meaning of Community law is indeed an interesting one. The status of worker, which is key inter alia to Articles 39 EC and 42 EC, as well as Regulation No 1612/68, is the starting point for free movement of persons as enshrined in Article 39 EC and any rights connected with such freedom. The Court has given a relatively broad definition in that regard and I do not doubt that a post-doctoral assistant in a position such as that of the applicant under a fellowship

16 — See *Duphar and Others* (cited in footnote 12), paragraph 16; *Sodemare and Others* (cited in footnote 12), paragraph 27; *Kohll* (cited in footnote 12), paragraph 17, and *Geraets-Smits and Peerbooms* (cited in footnote 12), paragraph 44.

17 — See *Kohll* (cited in footnote 12), paragraph 18, and *Geraets-Smits and Peerbooms* (cited in footnote 12), paragraph 45.

18 — See *Kohll* (cited in footnote 12), paragraph 19, and *Geraets-Smits and Peerbooms* (cited in footnote 12), paragraph 46.

contract with the Commission must be deemed to be a worker within the meaning of Article 39 EC. For example, the Court has recognised the status of worker in *Lawrie-Blum*, [19] *Lair*, [20] *Brown*, [21] and *Le Manoir*, [22] which all involved the carrying out of an occupation which was connected with training in one way or another.

41. However, the finding that the applicant must be deemed to be a worker for the period that she was a trainee fellowship student still has no direct effect on her situation as regards entitlement to social security benefits. Any entitlements could in the first place only arise from the prohibition on discrimination contained in Article 39(2) EC and its expression in Article 7 of Regulation No 1612/68. Regulation No 1408/71, however, relies on another definition of worker, which, pursuant to Article 1(a) of that regulation, is essentially defined as any person who is affiliated to a social security benefits scheme.

42. In my view, the order for reference in conjunction with the Commission's observations show that there is no discrimination on the part of the Belgian institution for the very reason that it classifies the applicant, in her capacity as a post-doctoral assistant, as a trainee fellowship student. Belgian nationals in the same situation would also be regarded as trainee fellowship students. Ultimately, however, this is a matter for the national court. It must examine whether there may be any discrimination in relation to nationals; if so, this would constitute an infringement of Community law.

43. On the other hand, the position of post-doctoral assistant under the Fellowship Contract with the Commission was characterised precisely by the fact that there was *no* affiliation to any social security scheme, including the Community scheme.

44. Even though voluntary affiliation to the Belgian scheme was not possible under the prevailing conditions, that is still one of the conditions [23] already referred to for access to a social security scheme which it is for the legislation of the Member States to determine.

45. Thus, the answer to the second question referred by the national court should be as follows:

It is for Member States to determine the conditions for access to national social security systems. However, in so doing they must comply with Community law

19 — Case 66/85 [1986] ECR 2121.
20 — Case 39/86 [1988] ECR 3161.
21 — Case 197/86 [1988] ECR 3205.
22 — Case C-27/91 [1991] ECR I-5531.

23 — See *Kohll* (cited in footnote 12), paragraph 17 et seq. and *Geraets-Smits and Peerbooms* (cited in footnote 12), paragraph 17 et seq.

and, in particular, with the prohibition of discrimination. If a national in the position of post-doctoral assistant is given access to unemployment insurance, such insurance must also be available to a national of a Member State of the EEA.

V — Conclusion

46. In conclusion, on the basis of the aforementioned considerations I suggest that the questions referred be answered as follows:

(1) National legislation is applicable to members of the temporary staff of the EC who reside in Belgium after the end of their period of service with the EC, it being understood that, where national rules against the overlapping of benefits are concerned, regard must be had to the fact that Article 28a(1) of the Conditions of Employment contains a special rule against the overlapping of benefits which establishes that the Community unemployment allowance is subsidiary to unemployment benefits awarded by a Member State.

(2) It is for Member States to determine the conditions for access to national social security systems. However, in so doing they must comply with Community law and, in particular, with the prohibition of discrimination. If a national in the position of post-doctoral assistant is given access to unemployment insurance, such insurance must also be available to a national of a Member State of the EEA.