OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 6 June 1996 *

1. The questions raised by the Landessozialgericht Nordrhein-Westfalen concern the scope *ratione personae* of Regulation No 1408/71 [1] (hereafter 'the Regulation'). More specifically the national court asks which of the various provisions in Article 1 of the Regulation should be applied to define a 'self-employed person' for the purpose of the grant by the German authorities of family allowances in respect of children resident abroad, pursuant to Article 73 of the Regulation.

2. Let us look at the facts of Case C-4/95. Mr Stöber, a German national, worked in Ireland from 1965 to 1969 and then returned to Germany. From then until 1977 he was employed and covered by the compulsory statutory sickness and old-age insurance scheme. From 1 February 1977 he was self-employed and began to pay *voluntary* contributions to the statutory pension scheme for salaried employees and became a *voluntary* member of a substitute statutory sickness insurance scheme.

3. In November 1988 Mr Stöber asked the German administrative authorities to take into account in calculating the family allowances due in respect of the two children of his second marriage — who lived in Germany — the daughter of his first marriage, who lived in Ireland with her mother, on the grounds that she spent her holidays with her father and was registered as a German resident.

4. By decisions of 22 December 1988 and 13 February 1989 the authorities refused that request. The allowances requested by Mr Stöber were refused pursuant to German law on the grounds that the daughter was neither domiciled nor habitually resident on German territory. However, the Sozialgericht (Social Court) Dortmund, in which Mr Stöber brought an action, annulled the authorities' decision and acknowledged his right pursuant to the relevant provisions of Community law to receive family allowances also in respect of his daughter who lived in Ireland. The authorities appealed against that decision on the grounds that those provisions were not applicable in this case because Mr Stöber could not be considered to be a 'self-employed person' within the meaning of the definitions contained in Article 1 of the Regulation.

5. The facts of Case C-5/95 are similar. Mr Piosa Pereira, a Spanish national, was employed in Germany until 9 September

* Original language: Italian.

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (consolidated version in OJ 1992 C 325, p. 1).

1988 and as such was liable to contribute to compulsory sickness and old-age insurance schemes. From 1 April 1989 he became self-employed and likewise made *voluntary* contributions to a recognized independent sickness insurance scheme.

6. On 31 October 1989 Mr Piosa Pereira applied for family allowances in respect of his three children (who lived in Spain with their mother, from whom he was separated *de facto* and who received no family allowances from the competent Spanish institution) and his illegitimate daughter, who was resident in Germany. The authorities took the view that Mr Piosa Pereira did not fall within the scope *ratione personae* of the Regulation and refused the application in respect of the three children living in Spain but acknowledged his right under national law to receive family allowances in respect of his illegitimate daughter resident in Germany. The Sozialgericht Dortmund granted the appeal brought by Mr Piosa Pereira and held that the Regulation did apply in his case. The defendant appealed against that ruling on the same grounds as in the previous case.

7. The national court, to which both cases were referred on appeal, held that the plaintiffs had no right to family allowances under German law on the ground that under the relevant legislation 'children who are neither habitually nor ordinarily resident in the Federal Republic of Germany are not covered by the federal law on family allowances.' [2] As the national court was uncertain, in the light of the Community rules, whether that right could be recognized under Article 73 of the Regulation, it decided to stay the proceedings and refer to the Court of Justice in both cases before it questions concerning the scope *ratione personae* of the provisions of the Regulation concerning family allowances.

8. The questions read as follows:

Case C-4/95

'For the purposes of the payment of family allowances in the Federal Republic of Germany, is a person who carries on an activity as a self-employed person in the Federal Republic of Germany and as such satisfies the definition of a "self-employed person" within the meaning of Article 1(a)(iv) but not the definition contained in the first subalternative of the second alternative in Article 1(a)(ii) in conjunction with Paragraph I. C.(b) of Annex I a "self-employed person" within the meaning of Article 73 of Regulation (EEC) No 1408/71.'

2 — Paragraph 2(5) of the Federal Law on Family Allowances [(Bundeskindergeldgesetz of 25 June 1969, published in BGBl. I, p. 168,) provides that 'children who are neither domiciled nor habitually resident in Germany are not taken into account' (for the calculation of family allowances)]. Free translation.

Case C-5/95

'For the purposes of the payment of family allowances in the Federal Republic of Germany, is a person who carries on an activity as a self-employed person in the Federal Republic of Germany and as such satisfies the definition of a "self-employed person" within the meaning of Article 1(a)(i) and (iv) but not the definition contained in the first sub-alternative of the second alternative in Article 1(a)(ii) in conjunction with Paragraph I. C.(b) of Annex I a "self-employed person" within the meaning of Article 73 of Regulation (EEC) No 1408/71.'

The relevant legislation

9. Now that I have explained the questions raised, but before I begin to consider them, I should first outline the relevant legislation:

Article 1(a) of the Regulation:

'For the purpose of this Regulation:

(a) "employed person" and "self-employed person" mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

(...)

(iv) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:

— if such person carries out an activity as an employed or self-employed person, or

— if such person has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same Member State'.

(b) "self-employed person" means any person pursuing self-employment which is bound:

— to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons,

or

— to join a scheme within the framework of compulsory pension insurance.'

Annex I, paragraph I. C.

'If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the Regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

(...)

Article 73 of the Regulation

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

The substance

10. The questions before the Court arise because, in order to resolve the dispute, the national court has to choose between different definitions of self-employed person: those contained in Article 1(a)(i) and (iv) of the Regulation and the one specifically set out in the annex for the purpose of the payment of family allowances pursuant to Article 73 by the competent German institutions.

11. The national court suggests two possible applications of the definitions of self-employed person for the purpose of the application of the Regulation in these cases.

12. The first can be summarized as follows: the *optional* insurance schemes by which both Mr Stöber and Mr Piosa Pereira were covered when they were self-employed provide cover against sickness. Therefore, those schemes fall either within the category of insurance 'on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons' referred to in Article 1(a)(i) or, in the case of Mr Piosa Pereira, within that described in the second indent of subparagraph (iv) of that article because, as the national court informs us, he had previously been compulsorily insured for the same contingency (sickness) for which he is now covered on an optional basis 'under a scheme for employed persons'.

The national court argues further that, because the plaintiffs have made contributions to those schemes *on an optional basis*, they should fall within the scope *ratione personae* of the Regulation as self-employed persons, with the result that the rules laid down in respect of family allowances should be held to apply to them.

This interpretation is essentially supported by Spain in its observations.

13. The second interpretation — which, the national court informs us, is based on the writings of German academic lawyers and German case-law — refers to the provisions of the annex relating to the payment of family allowances by the authorities of that country. The German system of social security in respect of family allowances resembles those described in Article 1(a)(ii): it is a social security scheme for all residents. That interpretation, the national court adds, allows no distinction to be made between self-employed and employed persons as required by the first indent of subparagraph (ii); nor do Mr Stöber and Mr Piosa Pereira meet the conditions laid down in the first alternative of the second indent of subparagraph (ii): they are not insured for any contingency specified in Annex I under a scheme for self-employed persons. As those requirements are not met, recourse must be had to the definition laid down in the annex: the rules laid down by the combined provisions of the defining provisions constitute

special rules which prevail over the general rule laid down in Article 1(a) of the Regulation.

14. Having argued thus, the national court describes the implications of applying the latter defining provision to this case. The plaintiffs are not ***bound*** 'to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons,' nor 'to join a scheme within the framework of compulsory pension insurance,' but make their own contributions *on an optional basis*. Therefore, they do not fall within the definition of self-employed person as laid down in the annex and, as they are thus excluded from the scope of the Community legislation, they are entitled to family allowances only to the extent permitted by the German rules applicable to them.

This is the interpretation favoured by the German Government in its observations.

15. I shall begin my consideration of the substance by outlining the development of the relevant Community legislation. Originally applicable only to those in employment, the rules laid down in the Regulation were extended in two successive stages to the self-employed.

16. Having regard to the fact that 'freedom of movement for persons (...) is not confined to employed persons but also extends to self-employed persons in the framework of the freedom of establishment and the freedom to supply services,' Regulation (EEC) No 1390/81 extended the provisions of the Regulation relating to employed persons so as to cover the self-employed. [3] At that time, although clearly motivated by a manifestly 'expansionary' logic, the legislature nonetheless laid down a very precise exception in respect of family allowances. The rules, in fact, provided that the provisions of Article 73 should not apply to self-employed persons and thus ensured that family allowances could not be exported in their case.

17. Partly to fill that gap, Regulation (EEC) No 3427/89 [4] was adopted, amending Article 73 so as to extend to the self-employed the

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

4 — Council Regulation (EEC) No 3427/89 of 30 October 1989 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 1989 L 331, p. 1; see the second sentence of the fifth recital in the preamble).

rights contained therein. [5] In essence the 'territorial fiction' provided for in that legislation whereby children resident abroad were to be considered to be resident in the Member State was extended to the self-employed.

18. The objective of the Regulation was to coordinate the legislation in force in the various Member States, 'each of which determines the conditions for affiliation to the various social security schemes.' [6] Individual States do not have absolute discretion in this respect but must legislate within the confines of Community law. Thus, Community law coordinates, but does not directly harmonize, the various national rules. [7]

19. In accordance with the logic of the Regulation, the definition of the term 'worker' constitutes the 'doorway' to the rights provided for by the Community rules. [8] To that end the decisive criterion for the application of the Regulation is affiliation to a social security scheme. The various types of scheme are listed in Article 1(a): only workers affiliated to one of those types of schemes are entitled to have the provisions of the Regulation apply to them and to enjoy the rights for which it provides.

20. As the Court has pointed out, in order to satisfy the objectives of the legislation the definition of the term 'worker' must be interpreted broadly. [9] This rule of interpretation is based on the spirit of Regulation (EEC) No 1408/71 and on the objectives of the Treaty, and must be applied *vis-à-vis* employed and self-employed persons alike. [10] To define the term restrictively would undermine any attempt to coordinate the various systems and workers would be deprived of adequate protection. Their right to freedom of movement, the ultimate objective of the legislation, would be unjustifiably restricted. [11]

21. I, too, agree that the concept of 'self-employed person' should, in principle, be interpreted broadly, as described above. However, I take the view that the logic and the letter of the Community legislation

5 — This tortuous process gives a first clue to interpretation. It shows that the legislature came to extend to the self-employed the rights given to employed workers — and, of more specific interest to this case, the right to family allowances — in a gradual process. This should lead us to interpret the provisions on the basis of which those rights were extended in the clear knowledge that the legislature made specific use of its freedom in deliberately setting limits to the enjoyment of such rights.

6 — Case 266/78 *Brunori* [1979] ECR 2705. As to the need to ensure that such conditions are not discriminatory, see Case 110/79 *Coonan* [1980] ECR 1445.

7 — See Case 101/83 *Brusse* [1984] ECR 2223, paragraph 28.

8 — See, in a similar vein, the Opinion of Advocate General Reischl in Case 84/77 *Recq* [1978] ECR 19.

9 — The idea that the term 'worker' should have a Community meaning and cover all those who, under whatever description, are covered by the various national social security systems, is a recurrent theme in the case-law of the Court, which appears for the first time in the judgment in Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177.

10 — Case 300/84 *van Roosmalen* [1986] ECR 3097, paragraph 20 et seq.

11 — See the Opinion of Advocate General Mayras in Case 17/76 *Brack* [1976] ECR 1455, in particular, at 1463, where it is explained that it is not possible, given the very purpose of Article 51, to define the categories of workers (employed or self-employed) 'restrictively'.

which must be taken into account preclude the plaintiffs from claiming the rights in question as self-employed persons falling within the category of workers contemplated by the general provisions of the Regulation. I reach this conclusion on the basis of the following observations.

22. The cases before the Court are concerned with workers who are seeking payment of family allowances from the competent German institutions.

As the national court informs us, the rules governing such payments in German law are applicable to all those resident on German territory. It is thus the type of system described in Article 1(a)(ii). [12] In my view, the interpreting authority has to determine whether a given person has the status of a worker on the basis of the defining provisions contained therein.

23. It is necessary to consider the characteristics of those rules, as they have been described by the national court. First of all, they are applicable to all residents. The rules for administering the scheme do not enable a distinction to be drawn between employed and self-employed persons. On the other hand, workers are not insured compulsorily or on an optional basis for the purposes of the grant of family allowances. The definitions set out in Article 1(a)(ii) are therefore not applicable to them: nor is that set out in the first indent of the alternative, nor that in the first Glimb of the second indent of the alternative.

24. As these rules are inapplicable, recourse must be made to the residual definition contained in the second term of the alternative set out in the second indent. This refers to the annex, defining the concept of self-employed person for the purposes of the grant of family allowances by the German authorities by reference to *compulsory* cover by an insurance scheme. [13]

25. This reconstruction is the one that sits best with the logic of the Regulation. As Advocate General Gand pointed out, 'the sphere of application of the Regulation is determined by a criterion of social security and not of labour legislation; this reflects the ever growing independence given to the first of these concepts as against the second.' [14] If

12 — Other systems of this type are the social security schemes of the United Kingdom, Ireland and Denmark; old-age, widows' and orphans' pensions in the Netherlands; health care in Italy and the Netherlands; family allowances in Luxembourg, France and Greece.

13 — It should be pointed out that this is clearly a different definition, from the point of view of its objective, from that relating to the United Kingdom contained in Annex V to the Regulation, which was considered by the Court in Case 17/76 *Brack* [1976] ECR 1429. Its purpose was to secure 'broad application' of the definitions contained in Article 1(a)(ii) of the Regulation. Faced with legislation, like that of the United Kingdom, which required certain categories of persons 'who do not have [the status of employed persons] under the law of employment' to 'pay contributions as employed persons,' the rule in the annex — to the effect that all those who are bound to pay contributions as employed workers are to be regarded as 'workers' — set itself the clear aim of securing a broad application (paragraphs 10, 11 and 12).

14 — Opinion in Case 19/68 *Di Cicco* [1968] ECR 483, in particular at 484.

this criterion is adhered to, the definition of self-employed person for the purposes of the payment of family allowances cannot, in my view, leave the definitions contained in the annex out of account. It is those provisions, rather than any others, which enable a worker to enjoy his rights to such allowances under Community law.

26. I am aware that the point of view I am putting forward here may be controversial. The question whether the definitions contained in Article 1 of the Regulation were alternatives has been explicitly put to the Court on at least one occasion but was neither tackled nor resolved. I refer to the *Warmerdam Steggerda* case. [15] In the course of those proceedings, the competent institution in the Netherlands and the Commission argued that the definitions were alternatives. More specifically, the Commission argued — in the light of the provisions of Annex I. C to Regulation No 1408/71, as amended by Regulation No 1390/81 — that it had to be determined in respect of each contingency whether or not a person was a worker within the meaning of the Regulation. [16] In support of its arguments the Commission referred to the judgment in the *Brack* case, in which the Court adopted a defining criterion based on the factor 'risk'. [17]

27. As I was saying, the Commission did not tackle the question I have raised, which thus remains open. I cannot hope to consider it exhaustively here. I am merely concerned to highlight the reasons why I take the view that, in this case, the rules which determine cover by this particular type of social security scheme and thus entitlement to the benefits for which it provides, must necessarily be linked to those defining the concept of worker. What is important for present purposes is that the legislature chose to lay down a specific definition of self-employed person covers precisely cases where family allowances are to be paid by German institutions. Both the derogation granted for the German authorities and the content of the definition laid down in the annex, therefore, call for discussion on two fronts.

15 — Case 388/87 *Warmerdam - Steggerda* [1989] ECR 1203. In that case the right of Mrs Warmerdam, a Dutch citizen, to receive unemployment benefit from the competent institution in the Netherlands was under discussion. After initially receiving unemployment benefit in the Netherlands, the plaintiff found work in Scotland. Under the United Kingdom system she was insured only against the risk of industrial accident and paid contributions for that purpose. When she returned to her country of origin she applied to be registered as unemployed in the Netherlands. The Dutch administrative authorities refused her application on the ground that, during her period of employment in the United Kingdom, she had not been insured against the consequences of unemployment and therefore could not be considered an employed person within the meaning of Regulation No 1408/71 for the purposes of the payment of unemployment benefit. The problem was not tackled by the judgment (the national court's first question, specifically concerning the relationship between the various definitions, was subsumed into the reply given to the second question).

16 — See the Commission's arguments in the report for the hearing in *Warmerdam - Steggerda* [1989] ECR 1204, II, section 4.

17 — Case 17/76 *Brack*, cited in footnote 13. In that case it fell to be decided whether a British accountant, afflicted as a self-employed person to the British social security system, having previously paid contributions as an employed person, could be considered a worker within the meaning of Regulation No 1408/71 for the purposes of the application of Article 22(1), which lays down rules concerning the reimbursement of expenses relating to medical treatment received in another Member State. The Court decided that the claimant had the status of a worker solely on the basis of his insurance against the contingency of sickness on which the case turned. On the basis of that decision the Commission argued for the need for a selective approach to the application of the Regulation based on the specific contingencies insured against.

28. First, the fact that the special rules of definition — for cases where the institutions competent to grant benefits are German — was laid down solely in relation to Article 1(a)(ii) shows that, according to the logic of the Regulation, those are the rules which, to the exclusion of any other, governs a worker's right to family benefits, where, as in this case, the national rules contain no criteria for distinguishing between the various categories of worker. The combined effect of the rules set out in the Regulation and those contained in the annex, in my view, brings out the fact that there is a very precise, consequential connection between the type of social security benefit sought by the worker (in this case, family allowances) and the criteria which that worker must satisfy in order to be recognized as being entitled to the benefit.

Secondly, this is also evidenced by the express wording of the last recital in the preamble to Regulation No 1390/81. It states that, in Annex I, the legislature felt it 'necessary to stipulate (...) what the terms "employed person" and "self-employed person", introduced in Regulation (...) No 1408/71, mean when the person concerned is insured under a social security scheme which applies to all residents'.

29. This conclusion is confirmed by a second sort of consideration, if it is considered what criteria were used to define a self-employed person in the annex. It is useful to note in this connection that a 'person ... bound to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons' (definition contained in the annex) must be considered to be capable of being equated with a 'person who is insured compulsorily (...) for one or more of the contingencies covered by the branches of a social security scheme for (...) self-employed persons' [definition contained in Article 1(a)(i)].

30. As the German Government rightly points out, this means that, through the provisions set out in the annex, the legislature intended to lay down — exclusively and exhaustively — the definition of self-employed person for the purposes of obtaining family allowances from the German administrative authorities. If this is the case, I do not see how it is possible to go along with the proposition put forward by Spain to the effect that, in the light of the objectives of the Regulation, it is possible to read the defining provisions together.

31. The coherence of the legislation must be respected. It cannot reasonably be considered that the intention was to define the scope *ratione personae* of the Regulation as regards family allowances granted by the competent German authorities and, at the same time, to allow access to that entitlement by another route. That is not all. A different reading of the Regulation would divest national systems of the autonomy allowed to them in determining the 'conditions for affiliation to national systems.'

32. My conclusion is not affected by the Court's judgment in the *Kits van Heijningen*

case cited by the national court. [18] I do not believe that that judgment can be applied to the present case. Leaving aside the major differences between that case and the cases under consideration, I take the view that, when the Court stated that the expression 'employed persons' within the meaning of the Regulation meant any person who was insured under one of the social security schemes referred to in Article 1(a), it was not adopting a position on the question under consideration here. The Court confined itself to establishing the scope of the rule contained in Article 2 of the Regulation but did not set out to resolve the problems posed by the defining provisions contained in Article 1(a) in order to say who should be considered to be an employed person within the meaning of that provision. The ultimate meaning of the Court's position, if it were sought to be applied to the present cases, would in my view be that Mr Piosa Pereira and Mr Stöber fall within the definition of self-employed person within the meaning of the Regulation only in respect of the benefits for which they are insured on an optional basis; conversely, they cannot be considered to be self-employed persons, having regard to the *lex specialis* set out in the annex, for the purposes of the grant of family allowances. [19]

33. I have a few remarks to add on two further aspects of the cases before the Court. The first is that the provisions contained in the annex define, for the purposes of obtaining family allowances, both the concept of employed person and that of self-employed person. What the above definitions have in common is the reference to cover by a compulsory social security scheme (against unemployment in the case of employed persons and old-age insurance or compulsory pension insurance in the case of the self-employed). I consider — in common with the Commission and the German Government — that this does not constitute discriminatory treatment of the self-employed. For both categories the right to benefits is dependent on the payment of contributions. The underlying assumption in both cases is that the right to export family allowances is granted solely where the worker belongs to the solidarity-based community of the German social security scheme.

18 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755. In that case (in particular, with regard to the first question put by the referring court) the Court had to assess whether a Dutch citizen living in Belgium who worked part-time (teaching twice a week at an educational establishment in Eindhoven) should be considered an employed person within the meaning of Regulation No 1408/71 and receive family allowances in respect of student children. The answer to the question was found in the fact that the plaintiff was affiliated to a compulsory insurance scheme, which meant that it was irrelevant, for the purpose of determining the scope of the Regulation, whether he was actually and effectively working. It was, therefore, on those bases and for those purposes that the Court, in paragraph 9 of its judgment, made it clear that any person insured under one of the social security schemes referred to in Article 1(a) must be considered to be a self-employed person within the meaning of the Regulation. Nor can we ignore the fact that the Court's view was reached on the basis of a case which did not raise the question of the 'parallelism' between the insurance scheme to which the plaintiff was affiliated (governed by the Dutch legislation on family allowances) and the benefit (family allowances) which the plaintiff was seeking.

19 — The same sort of considerations lead me to consider irrelevant the amendment to the German version of the Regulation pointed to by the referring court, which argues that it endorses the application on an alternative basis of the various definitions of self-employed person contained in Article 1(a). That observation does not offer any useful insight into the definitions contained in the annex or, more generally, into their position within the internal logic of the Regulation.

34. The interpretation I espouse is endorsed by the relevant national legislation from another point of view, too. The German Social Security Code (Sixth Volume) makes express provision for a worker to belong to the *compulsory* scheme on an *optional basis*. [20] The exercise of that right would have had the effect, as the German Government acknowledges in its observations, of bringing Mr Stöber and Mr Piosa Pereira within the scope *ratione personae* of the provisions of the Regulation and thereby of granting them rights under Article 73 in respect of children non-resident in Germany. I take the view that this option — of which the two plaintiffs did not avail themselves as they could have done within the adequate time limits — objectively serves to eliminate the discrepancies there may be in the German national system between the treatment of self-employed and employed persons.

35. An initial conclusion can be reached on the basis of the various factors considered: neither the provisions of the legislation nor its overall aims enable the plaintiffs to be regarded as being 'self-employed persons' within the meaning of the Regulation for the purposes of the grant of family allowances by the competent German institutions under Article 73. Having reached that conclusion, however, we come up against an inescapable problem: under the German legislation Mr Stöber and Mr Piosa Pereira have been granted the right to family allowances in respect of their children resident in Germany but not in respect of those resident in other Member States. It must be asked whether such different treatment is contrary to Community law.

36. Under the German legislation on this subject, the *Bundeskindergeldgesetz*, the payment of family allowances is not dependent on the payment of contributions but derives automatically from a person's *status* as a resident and as a parent *irrespective of the occupational status of the worker*. As the German Government itself points out in its observations, under the legislation 'the right to family allowances does not depend on the existence of compulsory or optional insurance'.

37. The fact is that the German legislation confers the right to family allowances only on children resident in Germany. The right to allowances is purely and simply based on the criterion of residence. We might ask whether this constitutes a disincentive to free movement of workers.

20 — The relevant legislation at the material time was Paragraph 2(1)(11) of the *Angestelltenversicherungsgesetz* and Paragraph 1227(1)(9) of the *Reichsversicherungsordnung*. The legislation currently in force is Paragraph 4(2) of the *Sozialgesetzbuch, Sechstes Buch*. It reads as follows: 'Persons who are not merely temporarily self-employed may, on request, be covered by compulsory insurance if they apply for such cover within five years of commencing self-employment or of ceasing to be covered under the compulsory scheme by reason of such employment' (free translation). For present purposes it is useful to note that the difference between the two pieces of legislation lies in the fact that the deadline for self-employed persons voluntarily to join the compulsory scheme was two years, rather than five, before the amendment made by the legislation cited.

38. The Court has held that, although in the absence of specific Community rules it is for the Member State to enact the legislation applicable to the workers within its jurisdiction, national legislation must not impose even indirect obstacles to the exercise of the freedom of movement of persons: [21] that is to say it must not obstruct workers seeking to make use of that freedom in order to carry out or extend their activities in another Member State. [22]

39. On the basis of these legislative guidelines the Court has held to be incompatible with the fundamental principles of Community law national legislation which had the effect of imposing financial burdens on migrant workers in addition to those they already bear in their respective States of origin in order to obtain the same social security benefits. In the *Stanton* and *Wolf* cases, as in the *Kemmler* case, the cases before the Court concerned self-employed workers and events prior to the entry into force of Regulation No 1390/81. [23] That regulation, as we have seen, extended the provisions of Regulation No 1408/71 to cover self-employed persons. In the absence of specific provisions of Community law, the Court, making direct recourse to the relevant provisions of the Treaty, held that a double financial burden was essentially unlawful. The same interpretation should, therefore, hold good for the present cases. As we have seen, they cannot be brought within the scope of the specific Community legislation either.

40. Having established that the provisions of the Treaty apply to the present cases, let us try to define in what terms it should be analysed. There are two aspects to consider. In the first place, the rules in question have to be assessed from the point of view of their compatibility with the principle of non-discrimination enshrined in Article 6 of the Treaty. In our case, that article must be read in conjunction with the provisions of Article 52 of the Treaty relating to freedom of establishment. As the persons concerned are self-employed, it is reference to that article which will prove useful in resolving the dispute. [24] Secondly, it should not be forgotten that freedom of movement is also a right of citizens of the Union as a result of Article 8a, which was introduced into the Community legal order by the Maastricht Treaty. Admittedly, this is a legislative development which occurred after the events of the main proceedings and we can only take account of it only incidentally in gauging what limits will be imposed on the criterion of residence as a result of this important development of the right to freedom of movement within the territory of the Union.

41. The question — in the terms in which I am putting it and considering it — has not been directly raised by the national court. I am, however, encouraged to tackle it here by the settled case-law of the Court. I refer to the judgments confirming that although it does not have jurisdiction to rule on the

21 — Case 16/78 *Choquet* [1978] ECR 2293.

22 — Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19.

23 — Case 143/87 *Stanton* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *Wolf* [1988] ECR 3897; Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 9.

24 — *Kemmler*, cited in the preceding footnote, paragraph 8.

compatibility of a national measure with Community law, [25] the Court is competent to provide the national court with all material relating to the interpretation of Community law which may enable it to determine the issue of compatibility for the dispute in the case before it. [26]

42. There are just a few points still to be made in order to indicate to the national court what material relating to the interpretation of Community law is relevant for the purposes of the assessment of the German legislation in this case.

43. I shall begin with the provisions of Article 52 of the Treaty. According to the second paragraph of that article: 'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons (...) under the conditions laid down for its own nationals by the law of the country where such establishment is effected (...).'

The Court has consistently held that this provision is a directly applicable rule of Community law, which Member States are bound to observe. [27] It must be viewed in the more general context of the provisions of the Treaty relating to the free movement of persons, whose aim is to make it easier for Community citizens to carry out work of any nature throughout the territory of the Community. [28] From this perspective, as the Court has held, an interpretation is required which gives the rule in question its wide significance. Indeed, freedom of establishment includes 'the right not only to take up activities as a self-employed person but also *to pursue them in the broad sense of the term*'. [29]

44. It must first be stressed that a 'geographical constraint' for the purposes of obtaining family allowances of the sort embodied in the German legislation is in itself likely to have a greater impact on a migrant worker than on a national worker. [30] This must hold good even where, as in these cases, on a formal level the same conditions apply to foreign workers as to national workers under the national legislation. In this connection the principle which has consistently informed the decisions of the Court is that of 'substantial' equal treatment of workers. [31] On the basis of that criterion, the prohibition must extend to 'not only overt discrimination based on nationality, but all

25 — Case C-188/91 *Deutsche Shell* [1993] ECR I-363, paragraph 27.

26 — See, for example, Case C-438/92 *Rustica Semences* [1994] ECR I-3519 and Case C-131/91 *K Line Air Service Europe* [1992] ECR I-4513.

27 — Judgments cited in footnote 23: *Stanton*, *Wolf* and *Kemmler*.

28 — See, to this effect, the second recital in the preamble to Regulation (EEC) No 1390/81: 'freedom of movement for persons, which is one of the cornerstones of the Community, is not confined to employed persons but also extends to self-employed persons in the framework of the freedom of establishment and the freedom to supply services.'

29 — Case 197/84 *Steinhauser* [1985] ECR 1819, paragraph 16 (my emphasis).

30 — As evidence of that different impact it is useful to look at statistics on family allowances broken down according to whether the children are resident in the Federal Republic of Germany or abroad, even though they predate the events in issue (1984). These show that more than 17% of children of citizens of other Member States living in Germany and entitled to German family allowances lived abroad, whereas German citizens whose children lived abroad represented 0.03% of those entitled. These statistics are reproduced in the report for the hearing in Case C-228/88 *Bronzino* [1990] ECR 531, in particular at 536.

31 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11.

covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.' [32] This is the golden thread running through the case-law up to the judgment in *Schumacker* and *Imbernon Martínez*. [33] The Court has recognized that the problem of members of the family living outside the Member State of employment essentially concerns migrant workers. [34] The reasons for this are quite obvious. As Advocate General Mancini pointed out 'the operation of the "residence" parameter differs according to the worker's nationality. In other words, the family of a person working in his country of origin is generally united whereas the migrant worker's family is generally separated. The fact that some members of his family should live in countries other than the one in which he is employed is in fact a normal effect of a worker's moving within the Community.' [35] This state of affairs makes it impossible, in situations like that in this case, for a migrant worker to receive family allowances and, therefore, in the final analysis, to take up work under substantially the same conditions as are laid down by the legislation of his country of establishment for its own citizens. The upshot is that the full, free exercise of freedom of movement is impaired.

45. On the basis of this reasoning, the Court has brought within the category of covert discrimination disparities in the grant of benefits or in obtaining rights based on the place of residence of the children of a migrant worker. [36] Accordingly, it has held that rules giving rise to such disparities were not compatible with the principle of the free movement of workers. This is so whether it is a case of discrimination directly caused by rules at Community level, as in the *Pinna* case, or a case of indirect discrimination, as in the *Schumacker* and *Imbernon Martínez* cases, which concerned national legislation which denied tax benefits to a migrant worker on the basis of his — or members of his family's — failure to satisfy the criterion of residence in the territory of the Member State in question.

46. In my view, the German legislation — in providing for different treatment between a worker whose children are resident in Germany and one whose children are resident in other Member States — constitutes covert discrimination within the meaning of the aforementioned case-law: that legislation — to use the terminology employed by the Court in its decision in the *Stanton* case — places Community nationals at a disadvantage in their exercise of their right to freedom of movement. The discriminatory effect cannot be denied.

32 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 23.

33 — Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-321/93 *Imbernon Martínez* [1995] ECR I-2821; see also Case C-228/88 *Bronzino* [1990] ECR I-531, paragraph 12.

34 — Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 14.

35 — Opinion in *Pinna*, cited in footnote 32, section 6 B.

36 — *Pinna*, cited above, paragraph 2 of the operative part; *Bronzino*, cited in footnote 34; Case C-12/89 *Gatto* [1990] ECR I-557.

47. Nor can it be argued that this discrimination is reasonable or otherwise justified. The practical function of the family allowance, its *raison d'être* we might say, is to provide financial support to a worker for the expenses which he incurs in maintaining his own children. This aim is therefore not, as such, logically connected in any way with the place of residence of those children, as it might be in the case of social security benefits granted in the territory or serving some other purpose, for which that factor might justifiably be taken into account. [37] On the contrary, on proper reflection, it is when a member of a worker's family is no longer living in the same country as he that the expenses he must incur to maintain them is, presumably, greater. However, it is in precisely that situation that the benefit due to the whole family is unjustifiably limited by the German legislation. The wording of Article 73 of the Regulation, moreover, appears to be an indirect but definite confirmation of what I have just said. It expressly provides for the right of a self-employed migrant worker to receive family allowances in respect of children resident in another Member State. As I have already pointed out, that provision is not applicable in this case, but I mention it to illustrate that, under the principles laid down by the Treaty with regard to the free movement of persons, disparities in the treatment of national and migrant workers cannot be justified by a residence criterion. On the basis of the German legislation, Mr Stöber and Mr Piosa Pereira would have been entitled to the allowances in question if their children had continued to reside in Germany. That right was not fully recognized solely because the workers' families were not living in the State those workers chose to live in: hence the inequalities in the system adopted for family allowances are unjustified.

48. Allow me, finally, a brief observation on Mr Stöber's position. It cannot be objected that he does not fall within the scope of Article 52 of the Treaty because he is a German citizen. Although it is true that the provisions of the Treaty relating to establishment cannot be applied to situations which are purely internal to a Member State, 'the position nevertheless remains,' as the Court has made clear, 'that the reference in Article 52 to "nationals of a Member State" who wish to establish themselves "in the territory of another Member State" cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State, (...) are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.' [38] Moreover, in general terms, the Court held in *Scholz* that 'any Community national who,

37 — In the case-law of the Court a distinction has been made between family allowances according to the extent to which the geographical element is relevant to their function: see Case 313/86 *Lenoir* [1988] ECR 5391, paragraphs 11 and 16. In that case, the Court held as follows (paragraph 16): 'If the legislation of the Member State by which the pension is payable grants periodical cash benefits to the recipient's family exclusively by reference to the number and, where appropriate, the age of the members of the family, the grant of such benefits continues to be justified wherever the recipient and his family reside. By contrast, benefits of another kind or subject to other conditions, as in the case, for example, of a benefit intended to cover certain costs incurred at the beginning of the school year, are in most cases closely linked with the social environment and therefore with the place where the persons concerned reside.'

38 — Case 115/78 *Knoors* [1979] ECR 399, paragraph 24, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 15.

irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of the (...) provisions [relating to freedom of movement of workers].' [39] This applies in the present case too. A German worker returned to his country of origin after exercising his right to freedom of movement by moving to Ireland to work. He thus falls into the category of migrant workers and the rights which the Treaty confers on him in that capacity cannot be cast into doubt by his return to his country of origin. [40]

49. It follows from the foregoing considerations that the provisions of Articles 52 and 6 of the Treaty are incompatible with national legislation which makes the grant of family allowances exclusively conditional on the criterion of residence in the Member State on the part of the worker's family or the beneficiary of the allowance. [41] As we have seen, such legislation is objectively likely to have a more significant impact on a Community worker than on a national worker and cannot be justified objectively.

50. For the reasons I have outlined above it is worth considering the compatibility of the national legislation with the provisions contained in Articles 8 to 8e of the EC Treaty ('Citizenship of the Union') even if they do not apply *ratione temporis* to the cases now before the Court. Those provisions, on which the Court has not yet had occasion to rule, represent, as Advocate General Léger noted in his recent opinion in *Boukhalfa*, progress of major significance in the construction of Europe. [42] Their ultimate purpose is, after all, to bring about increasing equality between citizens of the Union, irrespective of their nationality.

51. Of relevance in this case are the provisions of Article 8a, which entitle every citizen to move and reside freely within the territory of the Member States. It is my view that the criterion adopted by the German legislation directly conflicts with that right, as regards both the worker and members of his family, since the latter are unduly restricted in their ability fully to exercise the right they enjoy as citizens of the Union within the meaning of Article 8a. The exercise of that right, — enshrined with the status of a right of citizenship — would directly impose economic damage on the family of the person no longer entitled to family allowances.

39 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9.

40 — Most recently, the Opinion of Advocate General Léger of 15 February 1996 in Case C-107/94 *Asscher* [1996] ECR I-3089 is on the same lines, recognizing as it does the applicability of the provisions of the Treaty relating to freedom of movement and, in particular, the provisions of Article 52, to the case of a Dutch national who had moved to Belgium for reasons of work but at the same time had retained a link for the purposes of work with his State of origin which gave rise to the dispute in connection with which the Court has been asked to give a ruling on Community law (see section 36 of the Opinion).

41 — *Bronzino* (cited in footnote 33) and *Gatto* (cited in footnote 36).

42 — Opinion in Case C-214/94 *Boukhalfa* [1996] ECR I-2253, section 63.

52. The above observations are obviously without prejudice to the aspect of the methods of payment, by the competent institution of the State in which the member of the family resides, of any benefit having an equivalent aim to the family allowance in question. In such case, in order to prevent unwarranted overlapping of benefits of the same nature — which would conflict with the principles underlying Article 51 of the Treaty — the benefit must be proportionately reduced or, where appropriate, cancelled. It is a matter for the national court to determine whether this applies and for the competent national institutions, which are called upon to cooperate in good faith in order to deal with the case accordingly. [43]

53. I therefore propose that the Court should reply to the questions put by the Landessozialgericht Nordrhein-Westfalen as follows:

Articles 6 and 52 of the Treaty must be interpreted as precluding national legislation under which the grant of family allowances to a self-employed resident is conditional on the members of his family actually residing in the territory of the competent Member State.

43 — Case C-251/89 *Athanasopoulos* [1991] ECR I-2797, paragraph 57.