1. A person must be considered to be covered by Regulation No 1408/71 if he meets the conditions laid down in Article 1(a) in conjunction with Article 2(1) of the regulation, irrespective of the amount of time which he devotes to his activities.

2. If the objective pursued by Article 13(2)(a) of Regulation No 1408/71 is not to be frustrated, that provision must be interpreted as meaning that a person covered by that regulation who is employed part-time in the territory of a Member State is subject to the legislation of that State both on the days on which he pursues that activity and on the days on which he does not.

3. Although Article 13(2)(a) of Regulation No 1408/71 is not intended to lay down the conditions for affiliation to the various national social security schemes, the effect of that provision, where applicable, is to replace, as a condition of affiliation, residence in the Member State concerned with employment in that Member State. Therefore, as a consequence of that article, a provision of the applicable national legislation under which membership of the insurance scheme established by that legislation is subject to the condition of residence in the Member State in whose territory the activity as an employed person is pursued may not be relied on against an employed person.

REPORT FOR THE HEARING
delivered in Case C-2/89 *

I — Facts and procedure

1. *Community legislation*

Title II of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended (Official Journal 1983, L 230, p. 8), is entitled 'Determination of the legislation applicable'. Article 13(1) and (2)(a) of the regulation provides that:

'1. Subject to Article 14c, persons to whom this regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to

* Language of the case: Dutch.

the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) . . .'

2. *National legislation*

The Algemene Kinderbijslagwet (General Law on child allowances, hereinafter referred to as 'the law') of 26 April 1962 (*Staatsblad* No 160) provides for a compulsory insurance scheme. Article 6(1) provides that for the purposes of the law an insured person is:

'a person who has reached the age of 15 and:

(a) is a resident; or

(b) is not a resident but is subject to income tax in respect of work performed as an employed person within the territory of the Kingdom'.

Article 11(1) of the law provides that:

'Only persons who are insured on the first day of a calendar quarter shall be entitled to child allowances for one or more children in respect of that calendar quarter'.

3. *The main proceedings and the questions referred for a preliminary ruling*

Mr Kits van Heijningen, who was born on 26 October 1925, worked full-time for Philips NV in Eindhoven. In addition he also worked as a part-time teacher at the Institut voor Hoger Beroepsonderwijs, also in Eindhoven, where he taught for two hours on Mondays and Saturdays. It is evident from the order for reference that Mr Kits van Heijningen has been living in Belgium for a long time. He commuted daily between his home and his place of work. The order does not state what his nationality is. His wife does not have an occupation.

On 1 November 1983 Mr Kits van Heijningen retired (early) from Philips and from that date received a pension under the company retirement scheme, which does not come within the material scope of Regulation No 1408/71. But even after 1 November 1983 the applicant continued his secondary occupation as a teacher.

Mr Kits van Heijningen claimed child allowances for the first quarter of 1984 from the Netherlands authorities in respect of his two children, who were studying. The competent Netherlands authority, which at the time was the Raad van Arbeid, Eindhoven, rejected the claim for child allowances because Mr Kits van Heijningen was not insured on the first day of the quarter in question, namely on 1 January 1984, since that day was not a working day for the applicant. The court of first instance, the Raad van Beroep, annulled that decision.

On appeal, the Centrale Raad van Beroep (Court of last instance in social security matters) wondered whether Mr Kits van Heijningen's additional employment could be taken into account for the purposes of applying the Community rules relating to the free movement of workers and, if so, to what extent. The Centrale Raad van Beroep was also of the view that the dispute raised difficulties concerning the interpretation of the judgment of 12 June 1986 in Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, and decided by a judgment of 28 December 1988 to stay the proceedings until the Court of Justice should have given a preliminary ruling on the following questions:

'(1) Can the activities as a part-time teacher (previously carried out as secondary activities), which a retired worker continues after the start of his retirement for two hours of teaching on each of two days per week, be regarded as effective and genuine activities for the application of the Community rules on the free movement of workers?

(2) If so, do those activities — like the earlier principal activities carried out in the territory of a Member State other than that in whose territory the retired worker lives and to which he returns after work on each working day — render the legislation of the former Member State applicable — having regard to Article 13(2)(a) of Regulation (EEC) No 1408/71 — only on the aforementioned days on which lessons are given or also on the intervening days when no work is performed at all?

(3) If the answer to Question 1 is no, does the legislation of the Member State in whose territory the former principal activities were last carried out continue to apply pursuant to Article 13(2)(a) even after the date of retirement?

(4) If the legislation of the Member State in whose territory the abovementioned activities were or are carried out is applicable even after the date of retirement — having regard to Article 13(2)(a) — can it be said exclusively on the basis of the determination of the applicable legislation pursuant to that provision that residence requirements such as that in the opening words and subparagraph (a) of Article 6(1) of the Algemene Kinderbijslagwet (General Law on child allowances) cannot be relied on against the retired worker concerned?

(5) If not, can it be said on the basis of Article 73(1) of Regulation No 1408/71 that residence requirements such as that in the opening words and subparagraph (a) of Article 6(1) of the Algemene Kinderbijslagwet cannot be relied on against the retired worker concerned?'

4. *Procedure before the Court*

The order of the Centrale Raad van Beroep, Utrecht, was lodged at the Court Registry on 5 January 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the

European Communities, written observations were submitted by the appellant in the main proceedings, the Managing Board of the Sociale Verzekeringsbank, represented by B. H. ter Kuile and E. H. Pijnacker Hordijk, of the Hague Bar and the Brussels Bar, by the Netherlands Government, represented by H. J. Heinemann, Secretary-General *ad interim* at the Ministry of Foreign Affairs and by the Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. On 18 October 1989 the Court assigned the case to the Sixth Chamber.

II — Written observations submitted to the Court

The first question

According to the appellant in the main proceedings, the concept of 'effective and genuine activity' as formulated by the Court in its judgments of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 and of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, seems to suggest that the extent of that activity has no bearing on the question whether the applicant is an 'employed person' within the meaning of Article 1(a) of Regulation No 1408/71. However, the appellant in the main proceedings asks whether it is compatible with the objective pursued by Regulation No 1408/71 for Mr Kits van Heijningen's very limited activities to come within the scope of the regulation. It also asks whether the fact that the activity may, or may not be permanent and that Mr Kits van Heijningen is retired can have any bearing on consideration of the question.

The Netherlands Government is of the view that whenever there is a question of a person being insured under a scheme for employed persons and self-employed persons, either compulsorily or on an optional continued basis, he is a worker within the meaning of Article 1(a) of Regulation No 1408/71. It follows that the question whether the activities are effective and genuine is irrelevant.

The Commission shares that view and also insists that the condition that the activity should be 'effective and genuine' is a condition for the application of the provisions relating to the free movement of workers but not for the applicability of Regulation No 1408/71 in general, and of Title II of that regulation in particular. The Commission also refers to Article 14(2)(b)(i) of Regulation No 1408/71, as amended by Council Regulation (EEC) No 2000/83 of 2 June 1983, and points out that no distinction is made between a 'principal activity' and an 'ancillary activity'. It concludes that the rules applicable to disputes contained in Title II of Regulation No 1408/71 apply to Mr Kits van Heijningen's case and that for the application of Article 13(2)(a) the fact that his activity is very limited in extent and ancillary in nature is irrelevant.

The second question

The appellant in the main proceedings concedes that the case-law of the Court does not provide any support for the view that a part-time worker may qualify as an employed person within the meaning of Regulation No 1408/71 only on those days on which he actually carries on his activity but not on the other days. Nor does the case-law of the Court lend support to the

view that a part-time worker comes within the scope of Article 13(2) of the regulation only on the days on which he is actually carrying out his activity. However, it insists that an interpretation of that kind is also in conflict with the objective of Article 13 of Regulation No 1408/71 which is to prevent the simultaneous or successive application of different sets of rules giving rise to unnecessary overlapping or compounding of charges.

The Netherlands Government is of the view that Article 13(1)(a) of Regulation No 1408/71 merely indicates which legislation is applicable and does not limit the power of Member States to lay down the conditions for insurance under the national scheme. It follows that the legislature of a Member State is competent to stipulate that a worker is insured only in so far as he is carrying out an effective activity and that, therefore, it is also competent to stipulate that that insurance is limited to the days on which those activities are carried on, to which may be added also public holidays and the usual days of leave. The condition is that there must be a permanent employment relationship within which the activities are carried on at least on a weekly basis.

If that interpretation is not upheld and if the law must be interpreted as meaning that a worker becomes eligible for full insurance however long he worked in the Netherlands, the consequence is that those concerned qualify for insurance which is the same as that accorded to residents of the Netherlands; that insurance is not in proportion to the activities carried on in the Netherlands upon which the insurance is based. The Netherlands Government is of the opinion that full insurance of that kind, which is based on the Netherlands authorities' care for their nationals, should not be extended to any person carrying on a professional activity in the Netherlands regardless of its duration since that would go beyond the bounds of what is reasonable and would also entail an excessive burden on the financial resources available. It may be that in cases such as the one at issue, the balance between the contributions to be paid and the rights of the worker leans too far in favour of the worker. For example, one day's work per year in the Netherlands would be sufficient to qualify for all Netherlands social security benefits during that year; it would therefore become particularly attractive to misuse the Netherlands social security. In the Netherlands Government's opinion, it is therefore not possible to agree with the view that the person concerned is insured not only for the days on which he is carrying on a professional activity in the Netherlands, but also for the days on which he is not carrying on such an activity.

However, the Commission observes that the Court of Justice has consistently held that the provisions of Title II of Regulation No 1408/71 constitute a complete and uniform system which seeks to prevent conflicts of laws. In that regard, it refers to the judgments of 9 June 1964 in Case 92/63 *Nonnenmacher* v *Sociale Verzekeringsbank* [1964] ECR 281, of 19 February 1981 in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503 and of 12 January 1983 in Case 150/82 *Coppola* v *Insurance Officer* [1983] ECR 43. The consequences of movements between Member States must not be that no legislation is applicable or that several legislative systems are applicable at the same time. That is why Article 13(1) of Regulation No 1408/71 expressly states that 'persons to whom this regulation applies shall be subject to the legislation of a single Member State only'. Even when a person carries on an activity in two or more Member States, it is clear from Article

14(2)(b)(i) that the legislative systems of those Member States do not apply to that person in proportion to the activity that he carries on there, but that a single legislative system is applicable to him to the exclusion of the others. That enables overlapping and wasteful administrative complications to be avoided. In the Commission's view, it must therefore be concluded that the Netherlands legislation is wholly applicable to the case of Mr Kits van Heijningen and that the fact that he worked only part-time makes no difference.

The third question

The appellant in the main proceedings considers that the rules on the applicability of Article 13 *et seq.* of Regulation No 1408/71 are not applicable to former employed persons. It considers that an analysis of the scope and the wording of the provisions of Title II of the regulation shows clearly that they apply only to persons who carry on activities as employed or self-employed persons.

The application of the principle that a worker is subject to the legislation of the place where he is employed can also be explained by the fact that the social security schemes of the Member States generally link insurance under the social security scheme to employment in the Member State in question. Entitlement to benefits and the obligation to pay contributions are usually related to occupational earnings. If the principle that a worker is subject to the legislation of his place of employment is not applied as a rule to settle disputes, a frontier worker runs the risk of being excluded from social security both in the State in which he resides and in the State in which he works.

As regards the consequences for the present case of the judgment of the Court in Case 302/84 *Ten Holder*, cited above, the appellant in the main proceedings recognizes that the judgment in *Ten Holder* effectively filled in a gap in Title II of Regulation No 1408/71 with regard to the situation of former workers, but is of the opinion that the judgment is formulated in terms which exceed the scope of the category of cases which was submitted to it. The application of that judgment in the present case would give rise to unacceptable results: the principle of the free movement of workers would be undermined and the consequences for the Member States would be unfair.

The appellant in the main proceedings therefore proposes that the third question referred for a preliminary ruling be answered in the negative.

The Netherlands Government considers that in view of the answer proposed to the first question, the third question need not be answered. However, if the Court replies to the first question in terms different from those proposed by the Netherlands Government, the latter is of the view that those entitled to long-term invalidity or old-age benefits should be regarded as not being subject to the rules for determining the legislation applicable, as contained in Title II of the regulation, since they cannot be considered to be workers for the purposes of the social security scheme.

The Commission also refers to the reply it gave to the first question. The Commission's view is that the Netherlands legislation remained applicable to Mr Kits van Heijningen even after his retirement.

The fourth question

According to the appellant in the main proceedings, the mere fact of holding Netherlands legislation applicable to a non-resident cannot mean that the conditions for insurance laid down in Article 6(1)(b) of the law may no longer be applied to the non-resident in question. On the contrary, Article 6(1)(a) of the law is not applicable to a non-resident.

In view of the reply given to the second question, the Netherlands Government is of the view that this question need not be answered. However, if the Court considers that, in spite of the fact that as a worker Mr Kits van Heijningen can be considered to be insured under the Netherlands social security scheme by virtue of Article 6(1)(b) of the law, he must nevertheless be considered as being insured under Article 6(1)(a) of the law, the Netherlands Government's view is that the residence conditions referred to in Article 6(1)(a) of the law cannot be applied to Mr Kits van Heijningen.

It is not Mr Kits van Heijningen's status as a resident but rather his status as a worker which brings him within the ambit of the Netherlands legislation under Article 13(1)(a) of Regulation No 1408/71. The Netherlands Government considers, therefore, that it is reasonable to lift the residence conditions in respect of Mr Kits van Heijningen only for the days on which he is working in the Netherlands and that he can be regarded as being insured only on those days. As was mentioned in the context of the second question, the insurance may, under certain conditions, be extended to public holidays and the usual days of leave. The Netherlands Government concludes therefore that the residence conditions referred to in Article 6(1)(a) of the law may not be applied to a worker for the days when he is actually working in the Netherlands.

The Commission's view is that the Member States may not lay down territorial conditions in their national legislative systems and make entitlement to a social security benefit dependent on those conditions because that would have the effect, in particular, of narrowing the scope of the national legislative schemes in relation to persons, thus rendering meaningless the rules for settling disputes in Title II of the regulation. To support its argument, the Commission refers in particular to the judgments of 23 September 1982 in Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027 and Case 275/81 *Koks* v *Raad van Arbeit* [1982] ECR 3013, of 12 June 1986 in Case 302/84 *Ten Holder*, cited above, and of 10 July 1986 in Case 60/85 *Luijten* v *Raad van Arbeid* [1986] ECR 2365.

Nevertheless, Member States are permitted to subject a worker's entitlement to insurance benefit to conditions other than territorial conditions, such as a minimum age or a minimum income; however, those conditions are independent of the question of the legislation applicable. The Commission is also of the view that a Member State may impose a residence condition, when that condition is the sole condition for obtaining a particular benefit within a branch of social security.

The fifth question

The appellant in the main proceedings considers that the only objective of Article 73(1) of Regulation No 1408/71 is to prevent a migrant worker losing his right to child allowances on the grounds that his

children are not resident in the Member State to whose legislation the worker is subject. That article is of no relevance in the present case: for that reason, the fifth question must be answered in the negative.

According to the Netherlands Government, from the principle that in order to receive social security benefits it is necessary to be insured under a social security scheme, it follows that if there is no insurance there is no entitlement to benefits. Consequently, if the residence conditions referred to in Article 6(1)(a) of the law can be applied to a worker, which would mean that he is not insured, there would be no insurance under the Netherlands scheme, with the result that no entitlement to family allowances could be derived from Article 73(1) of Regulation No 1408/71. The Netherlands Government does not understand why residence conditions, which can be applied by virtue of Article 6(1)(a) of the law, cannot also be applied by virtue of Article 73(1) of Regulation No 1408/71.

The Commission observes that the way in which the competent Netherlands institution applied Article 11(1) of the law infringes Article 73(1) of Regulation No 1408/71.

The Commission proposes that the Court should answer the questions referred for a preliminary ruling as follows:

'Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a worker who is resident in one Member State and who carries on an activity as an employed person only in the territory of another Member State is subject wholly and exclusively to the legislation of the latter Member State, even if his activity is only limited in extent and is carried on on only some days of the week. That legislation cannot exclude the worker from insurance cover merely because he is not resident in the territory of the Member State.'

T. F. O'Higgins
Judge-Rapporteur