OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 June 2000 *

1. In the present case, the Bundesgerichtshof (Federal Court of Justice) asks, essentially, whether a construction company which is registered in one Member State and maintains an office there, but carries out all its building works in a different Member State, may benefit from Article 14(1)(a) of Regulation (EEC) No 1408/71 [1] ('the posted workers rule'). The answer to that question is, as explained below, readily apparent from the Court's ruling in *Fitzwilliam* which was given after the reference in the present case was made. [2]

The Community provisions

2. Article 13(1) of Regulation No 1408/71 lays down the general rule that persons to whom that regulation applies are to be subject to the social security legislation of a single Member State only. The legislation applicable is determined according to Title II (Articles 13 to 17a) of the regulation.

3. The general rule provided in Regulation No 1408/71 concerning the determination of the social security legislation applicable to migrant workers is contained in Article 13(2)(a). Article 13(2) provides as follows:

'Subject to the provisions of Articles 14 to 17:

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

...'

4. Thus the legislation applicable is normally that of the State of employment. However, Article 14 establishes 'special rules applicable to persons, other than mariners, engaged in paid employment'.

* Original language: English.

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, in the version enacted by Council Regulation (EEC) No 2001/83, OJ 1983 L 230, p. 6, *Annex I*.

2 — Case C-202/97 *Fitzwilliam Executive Search* v *Bestuur van het Landelijk Instituut Sociale Verzekeringen*, judgment of 10 February 2000 ECR I-883.

Paragraph 1(a) of that Article, which is at issue in the present case, lays down rules for posted workers. It provides as follows:

'A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.'

The facts

5. Mr Josef Plum is the owner of two construction companies, Plum Bauträger- und Bauunternehmung GmbH and Plum Bauunternehmung GmbH. Those companies are incorporated under German law and have their headquarters in the German town of Geilenkirchen. In 1989 Mr Plum founded a third company, Aannemersbedrijf[3] B3 Senator BV (hereinafter 'Senator'). That company was incorporated under Netherlands law and had, until it stopped trading at the end of 1994, its headquarters in the town of Heerlen in the Netherlands.

3 — 'Firm of building contractors'.

6. According to the order for reference, Senator was founded to meet the increasing competition, on the German market, from construction companies based in the Netherlands where the cost of labour and social security contributions is lower than in Germany. Senator received all its orders from Mr Plum's two German companies and executed all its building projects in Germany, using for that purpose its own employees, some of whom were resident in the Netherlands and some in Germany. All of the building projects carried out by Senator were of less than 12 months' duration.

7. Senator's office in Heerlen was occupied by one person, a manager of the company who leased the business premises. He received phone calls and written correspondence which he dealt with himself or passed on to Mr Plum in Germany. Job interviews were also conducted at the office in Heerlen, and the books of the company were kept there.

8. From 1989 until February 1993 Senator paid social insurance contributions to the respondent in the main action, the Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln (hereinafter 'AOK'). However, after the Netherlands finance authorities had requested payment of social security contributions from Senator in February 1993, it ceased its payments to AOK.

9. In the main action, AOK seeks an order for payment against Mr Plum for outstanding social security contributions for the period from March 1993 until April 1994. The total claim is of DEM 100 430.32 plus interest. That claim is based on a personal guarantee, given by Mr Plum to AOK on 30 June 1989, in respect of all liabilities incurred by Senator.

10. The lower German courts found for AOK, and Mr Plum appealed to the Bundesgerichtshof contending that Senator was not liable towards AOK, because its activities were subject to Netherlands rather than German social insurance legislation under Article 14(1)(a) of Regulation No 1408/71. AOK contests that interpretation of the Regulation.

11. Faced with these arguments, the Bundesgerichtshof decided to stay the main proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a person who is employed by an undertaking (a company in the form of a Besloten Vennootschap (private limited company) incorporated under Netherlands law) which has its registered office in a Member State (the Netherlands) and maintains an office there but performs its activities primarily in the territory of another Member State and in the past has performed them exclusively in the latter Member State (in this case, the carrying out of building projects in Germany) a person employed in the territory of the first Member State (Article 13(2)(a) of Regulation No 1408/71 in the version of 2 June 1983, OJ 1983 L 230, p. 8 et seq.)?

(2) If Question 1 is to be answered in the affirmative, is there a "posting" within the meaning of Article 14(1)(a) of Regulation No 1408/71 where a building contractor with its registered office in a Member State employs its employees primarily on building projects in another Member State and has employed them exclusively there in the past over a number of years but the anticipated duration of each individual building project does not exceed 12 months?'

12. Written submissions have been submitted by AOK, the Belgian, French, German, Liechtenstein, Netherlands, and Portuguese Governments and by the Commission.

Analysis

13. In its first question, the referring court asks essentially whether an undertaking

which has its registered office in a Member State (the Netherlands) and maintains an office there, but performs its activities primarily in the territory of another Member State (Germany), using for that purpose its own employees, may benefit from the posted workers rule in Article 14(1)(a) of Regulation No 1408/71.

14. In answering that question, guidance may be sought in the judgment of the Court of Justice in *Fitzwilliam*. [4] In that case, the Court was called upon to decide whether, and in what circumstances, employment agencies which provide personnel in more than one Member State may benefit from Article 14(1)(a). The Court held that Article 14(1)(a) constitutes an exception to the general rule laid down in Article 13(2)(a) that a worker shall be subject to the legislation of the State of employment. [5] For undertakings to benefit from that exception, at least two conditions must be fulfilled. First, there must be a direct link between the undertaking and the posted worker. This means that the worker must be under the authority of that undertaking. [6] Secondly, the undertaking must normally carry on its activities within the State where it is registered. [7] This means that the undertaking must habitually carry on significant activities in that State. [8] As regards employment agencies, the Court laid down a list of criteria which must be taken into account when deciding whether an undertaking is carrying on habitual and significant activities in a Member State. [9]

15. It is common ground that the employees of Senator were under the authority of that undertaking while working in Germany. The first condition for the application of Article 14(1)(a) is therefore fulfilled.

16. It is however, in my view, clear that the second condition is not fulfilled. Senator maintained an office in the Netherlands, where correspondence was dealt with and interviews conducted by a single employee. As all of those who have submitted written observations point out, that does not amount to a significant activity in the State of establishment. Indeed, if the presence of an office, through which correspondence is processed and at which job interviews are conducted, were sufficient for the purpose of Article 14(1)(a), that provision would be open to serious abuse by undertakings seeking to evade the more onerous social insurance legislation of certain Member States.

17. It follows that those employees of Senator who worked on building projects in Germany are to be considered as subject

4 — Case C-202/97, cited in note 2.
5 — Paragraph 30 of the judgment.
6 — Paragraph 24.
7 — Paragraph 33.
8 — Paragraph 40.
9 — Paragraphs 43 and 44.

to German legislation under Article 13(2)(a) of Regulation No 1408/71.

18. In the light of the above, it is not necessary for me to express an opinion on what criteria might, in other circumstances, be relevant for deciding whether an undertaking which is not an employment agency is habitually carrying out a significant activity in a Member State. Nor is it necessary to examine the second question referred by the Bundesgerichtshof.

Conclusion

19. I accordingly conclude that the Court should answer the national court as follows:

A person who carries out work in a Member State (Germany) as employee of an undertaking which has its registered office in another Member State (the Netherlands) and maintains an office there but performs its activities primarily in the territory of the first Member State (Germany) and does not carry out significant activities in the second Member State (the Netherlands) is subject to the legislation of the first Member State (Germany) under Article 13(2)(a) of Regulation No 1408/71.