OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 26 November 1998 *

1. May an opera singer or a conductor of an orchestra who normally pursues his occupation in a Member State under whose social security legislation his activity is regarded as being that of a self-employed person, and who moves to the territory of another Member State after having been engaged to appear for a few days in a theatrical production there, remain subject to the social security scheme of the first Member State, or must he rather become subject to the social security scheme of the second State, under whose legislation the same activity is regarded as that of an employed person?

It is in this way that the questions which the Tribunal du Travail (Labour Court), Brussels, has referred to the Court of Justice for a preliminary ruling can be summarised. In order to answer them, it will be necessary to interpret Articles 14a(1)(a) and 14c(a) of Regulation (EEC) No 1408/71 [1] (hereinafter 'Regulation No 1408/71').

I. The facts in the main proceedings

2. Mr Banks, nine other opera singers, and a conductor, as plaintiffs in the main proceedings, together with a further three performers, as joined parties, all of whom are British nationals residing in the United Kingdom, were engaged by the Théâtre Royal de la Monnaie, Brussels (hereinafter 'TRM'), as defendant, to perform in Belgium for relatively short periods between 1993 and 1995.

3. The activity of opera singer, of such long-standing tradition in the history of western culture [2] and such a difficult profession to pursue, [3] has not on this occasion

* Original language: Spanish.

1 — Regulation (EEC) No 1408/71 of the Council 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 and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), amended in turn by Council Regulation (EEC) No 3811/86 of 11 December 1986 (OJ 1986 L 355, p. 5).

2 — The earliest surviving opera is *Euridice*, composed by Jacopo Peri in the late 16th century, since all that remains of *Dàfne*, a dramatic fable by the same composer, is a few fragments of music, and *L'Amfiparnaso*, by Orazio Vecchi, which is regarded by some as the first example of lyrical opera, is simply a large-scale exercise in polyphony, consisting of short songs, pantomimes, madrigals and dialogues. *Euridice* was first performed on 6 October 1600 at the Palazzo Pitti in Florence for the marriage of Maria de' Medici to Henry IV of France.

3 — In *L'Arte del Canto* (Vergara, Buenos Aires, 1991, p. 116) (originally published by Rusconi Libri S.p.a., 1989), Giuseppe Di Stefano writes: 'Becoming an opera singer in the fullest sense of the term seemed unattainable. Singing an aria was easy, but walking on stage in costume, moving in the correct way, remembering the notes and their musical value, memorising all the words and injecting feeling into them, while at the same time constantly searching for the most beautiful sounds, purer even than those of the instruments themselves, and, finally, following the conductor without being seen to do so, seemed ... horrendous!'

had the impact it frequently has on the sensibilities of many people. [4]

4. The contracts signed by most of the above persons stated that rehearsals would be held from 4 to 22 January 1994 and that the performances would take place from 23 January to 5 February 1994, giving a total period of employment of 25 days. The conductor likewise worked from 21 to 23 December 1993. The three joined parties had also worked for TRM on previous occasions: Mr Appleton and Mr Davies had been engaged as performers for the periods 11 April to 30 June 1992 and 22 April to 30 June 1992 respectively; Mr Curtis was engaged from 15 January to 13 March 1993, from 10 to 21 November 1993 and from 25 October 1994 to 28 February 1995.

5. While the contracts were still in force, or once the litigation had commenced, the plaintiffs produced Form E 101 certificates, issued by the competent institution in the United Kingdom, in accordance with Article 11a of Regulation (EEC) No 574/72 [5] (hereinafter 'Regulation No 574/72'), which lays down the procedure for implementing Regulation No 1408/71. Those certificates covered the period during which the performers were under contract to TRM and stated that they were self-employed in the United Kingdom, that they would be self-employed for the period of their contracts in Belgium, and that throughout that period, they would remain subject to United Kingdom legislation in accordance with Article 14a(1)(a) of Regulation No 1408/71.

6. However, pursuant to Article 3(2) of the Royal Decree of 28 November 1969, which implements the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for persons subject to the scheme for employed persons, TRM, in its capacity as employer, deducted from the fees (*cachets*) owed to the plaintiffs an amount corresponding to the contributions payable under that scheme for the days they had worked in Belgium.

7. The plaintiffs in the main proceedings seek an order requiring TRM, an artistic institution of indisputable international prestige, [6] to reimburse them for the amounts deducted from their fees by way

4 — On pages 95 and 96 of his work (cited above), Di Stefano describes how, during his military service in Frugarolo, a province of Alessandria, on the eve of the Second World War, he was summoned by a medical officer who ordered him to sing. 'I don't think I have ever heeded a conductor's criticism quite so diligently as I did then. Standing all the while to attention, I sang in a single breath 'Che gelida mannina', the famous aria from Puccini's *La Bohème*. The fierce-looking officer began to smile and gave his verdict immediately: 'I'm taking you out of the mortar battalion and putting you to work here in the infirmary with me; that way, you'll be less exposed to the elements.'

5 — Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing 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, as amended and updated by Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86), amended in turn by Regulation No 3811/86, cited above.

6 — On 14 July 1959, Maria Callas gave a memorable concert at the Théâtre Royal de la Monnaie in which she sang two Verdi arias of profound musical and dramatic significance: 'Ernani involami' (from the opera *Ernani*) and 'Tu che la vanità' (from *Don Càrlo*). The prestigious Brussels theatre can pride itself on having played host to a singer described by the conductor and writer René Leibowitz, in an article which appeared in Jean-Paul Sartre's review 'Les Temps Modernes', as 'unique among sopranos, whose fame as a prodigious artist has transcended the boundaries that normally confine even the greatest and most prestigious stars' (Ardoin, J., *Callas: El arte y la vida*, Pomaire, Barcelona, 1979, p. 4).

of social security contributions, on the ground that they were deducted in error since the plaintiffs remained subject to United Kingdom social security legislation pursuant to Article 14a(1)(a) of Regulation No 1408/71.

II. The questions referred

8. In order to resolve this dispute, the Tribunal du Travail, Brussels, stayed the proceedings pending before it and referred the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Does the concept of "work" in Article 14a(1)(a) of Regulation (EEC) No 1408/71 refer to any work performed, whether as an employed or self-employed person, the duration of which does not exceed 12 months?

(b) If the concept of "work" within the meaning of Article 14a(1)(a) refers exclusively to work by a self-employed person, should this concept be defined by reference to the social security legislation of the Member State in which the person is normally self-employed or by reference to the social security legislation of the Member State in which the "work" is done?

2. What is the relevant unit of time which should be taken into account in defining the term "simultaneously" in Article 14c of Regulation (EEC) No 1408/71, or by what criteria can this term be defined?

3. (a) (i) Does Form E 101, the issue of which is provided for, in particular, by Articles 11a and 12a(7) of Regulation No 2001/83,[7] have binding force as regards the legal consequences attested to therein:

— with respect to the competent institution of the Member State in which the second activity is pursued?

— with respect to the person employing a worker pursuing an activity in two Member States?

(ii) If so, until when?

(b) Does Form E 101 have retroactive effect in so far as the periods to which it relates have already come

7 — Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating 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 1983 L 230, p. 6).

to an end at the time when the form is issued or produced?'

III. The Community legislation

9. The provisions of Regulation No 1408/71 which are relevant for the purposes of answering the questions referred by the national court are as follows:

Article 13

'General rules

1. Subject to Article 14(c), 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 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) a person who is self-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;

...'

Article 14

'Special rules applicable to persons, other than mariners, engaged in paid employment

Article 13(2)(a) shall apply to the following exceptions and circumstances:

1 (a) A person employed in the territory of a Member State by an under-

taking to which he is normally attached and 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.

...'

...'

Article 14a

'Special rules applicable to persons, other than mariners, who are self-employed

Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

1 (a) A person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months.

Article 14c

'Special rules applicable to persons employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State

1. A person who is employed simultaneously in the territory of one Member State and self-employed in the territory of another Member State shall be subject:

(a) to the legislation of the Member State in the territory of which he is engaged in paid employment, subject to subparagraph (b); ...'

10. Article 11a(1) of Regulation No 574/72 [8] provides:

'1. The institution designated by the competent authority of the Member State

8 — This article actually comes from Regulation No 574/72, and not Regulation No 2001/83 as cited by the national court which has referred the questions. Regulation No 2001/83 consists of three articles the purpose of which, apart from laying down the date of its entry into force, is merely to provide that the title, index and provisions of Regulations No 1408/71 and No 574/72 are to be replaced by the texts in Annex I and Annex II to Regulation No 2001/83.

whose legislation is to remain applicable shall issue a certificate stating that the self-employed person shall remain subject to that legislation up to a specified date:

(a) at the request of the self-employed person in cases referred to in Articles 14a(1) and 14b(2) of Regulation [No 1408/71];

...'

11. To issue that certificate, the competent institution of the Member State to whose legislation the worker is subject uses Form E 101, in accordance with the model established by the Administrative Commission of the European Communities on Social Security for Migrant Workers [9] (hereinafter 'the Administrative Commission') in Decision No 130. [10]

IV. Preliminary considerations

12. Before examining the questions referred, I shall set out the doubts I have regarding this case, which have to do mainly with the procedure followed for obtaining a ruling from the Court on the refusal of the Belgian social security institution to recognise the effectiveness of a Form E 101 certificate issued by the institution of another Member State which certifies that the person concerned is normally self-employed in that State, that he intends to carry out work of a specified duration in another Member State, and that, for the duration of that work, he will continue to be subject to the social security legislation of the Member State whose institution has issued the form.

13. This is the fundamental issue of the case, since it is common ground between the parties to the main proceedings that the performers should not have paid contributions to the Belgian social security scheme for employed persons during the period in which they worked in Belgium as they remained subject to United Kingdom social security legislation. It is clear from the statement of the facts that what the plaintiffs in the main proceedings seek is an order requiring TRM to reimburse them for the amounts deducted in error from their fees by way of contributions to the social security scheme for employed persons, since they remained subject to the United Kingdom social security legislation for self-employed persons for the duration of their work in Belgium. In this respect, TRM, as defendant, states that, in its opinion, although the contract it signed with the performers was not a contract of employment, it none the less deducted social security contributions from the fees it paid to them because the Belgian legislation had extended the scheme for employed persons to stage performers, and because the Office National de Sécurité Sociale Belge (the

9 — The Administrative Commission was created by Article 80 of Regulation No 1408/71. It is attached to the Commission of the European Communities and is made up of a government representative of each of the Member States. Most of the tasks assigned to it are described in Article 81 of Regulation No 1408/71 and in Article 2 of Regulation No 574/72.

10 — Decision No 130 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 October 1985 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001; E 101-127; E 201-215; E 301-303; E 401-411) (OJ 1986 L 192, p. 1).

national social security institution) (hereinafter 'the ONSS'), in which the power of execution upon property is vested, refuses to recognise the validity of Form E 101 certificates.

14. The latter fact is confirmed by the Commission in its observations and is abundantly illustrated in the documents contained in the file submitted by the defendant. It is established, for example, that counsel for the performers sent a letter to the ONSS on 16 February 1994 requesting repayment of the contributions which TRM had deducted from his clients' fees and then deposited in the coffers of the ONSS; that the Director of TRM asked the Director-General of the ONSS, in a letter of 1 March 1994, whether it would accept the Form E 101 certificates issued by the United Kingdom social security institution; and that, on 2 September 1994, the ONSS gave its reply, which contained the following comments:

'With respect to "self-employed persons", which is what the singers engaged by TRM claim to be, the ONSS refuses to take into account the certificates issued. This position is based on the decision of the Director-General of Social Security at the Ministry of Social Welfare to the effect that the problem of "self-employed persons" must be resolved consistently throughout the EEC.'

15. Further support for the ONSS's position can be found in a letter, attached as an annex to its reply, which the ONSS sent to TRM in November 1995. Enclosed with that letter is an assessment of the contributions payable by two British performers (who are not parties to the main proceedings) cancelling a previous assessment in which the performers concerned had been found — erroneously, it is claimed — not to be liable for contributions in Belgium. The ONSS's position, the letter states, is based on a note of 21 May 1993 from the then Director-General of Social Security, Mrs G. Clotuche, the substance of which the ONSS considers it is bound to apply rigorously. The note is worded as follows:

'I have the honour to inform you that I have asked the International Affairs Department to find a solution to the problem of British self-employed persons within the EEC, since it affects other countries in addition to Belgium. Until such time as a solution has been found for the EEC as a whole, it is clear to me that temporary migration by self-employed persons cannot be permitted.'

16. The file also contains a letter of 15 February 1994 by which the plaintiffs in the main proceedings, before approaching the Belgian courts, lodged a complaint with the Commission on the same subject. In its observations, the Commission maintains that it sent a letter of formal notice to the Kingdom of Belgium on 7 February 1995 and, having failed to obtain a satisfactory reply, took the decision to deliver a reasoned opinion on 13 December 1995. The Commission goes on to explain, however, that the reasoned opinion was suspended because of the existence of the

present proceedings. I would point out, however, that the application for reimbursement of the contributions deducted in error was brought before the Tribunal du Travail, Brussels, on 18 September 1995, and the order by which that court referred questions for a preliminary ruling was received at the Court Registry on 7 May 1997.

17. It is not my intention in making these comments to criticise the Commission for having suspended the infringement procedure which it had initiated against Belgium. Nor do I seek to call into question its having exercised in this case the powers conferred on it by Articles 155 and 169 of the EC Treaty, since the Commission is at liberty to decide whether or not to initiate an infringement procedure and, having done so, whether or not to pursue it. The Court has held in this respect that, as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. [11]

18. It should none the less be recalled that the Court has also held that 'the Commission's function ... is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end ...'. [12]

19. In view of the position of the competent Belgian authorities with respect to social security, that is to say their refusal to recognise the intended effects of Form E 101, which was introduced by the Administrative Commission to make it easier for Member States to comply with the provisions of Regulations No 1408/71 and No 574/72, the question arises whether it would not have been more appropriate, in the interests of the effective and uniform application of Community law, for the Commission to continue with the infringement procedure it had already initiated, regardless of the existence of the dispute in the main proceedings before the Belgian courts, which is an indisputable fact, and the reference for a preliminary ruling to the Court of Justice by the national court required to give judgment in that dispute.

V. Examination of the questions referred

20. Written observations have been submitted in these proceedings, within the time-limit laid down by Article 20 of the EC Statute of the Court of Justice, by the plaintiffs and the defendant in the main proceedings, the French, German, Netherlands and United Kingdom Governments, and the Commission.

11 — Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22.

12 — Ibid., paragraph 21.

At the hearing, which was held on 22 October 1998, representatives for the plaintiffs and the defendant in the main proceedings, the German Government, the French Government, the Irish Government, the Netherlands Government, the United Kingdom Government and the Commission respectively, appeared to submit oral argument.

A. *The first question*

21. By the first question, paragraphs (1) and (2) of which should, in my opinion, be answered jointly, the national court seeks to ascertain whether the term 'work' in Article 14a(1)(a) of Regulation No 1408/71 refers to the pursuit of any economic activity, whether as an employed or self-employed person. In the event that the Court interprets that term as referring exclusively to work by self-employed persons, the court making the reference asks which legislation should be used to define that concept: the social security legislation of the Member State in which the person concerned is normally self-employed or that of the Member State to which he has moved in order to perform work.

22. The plaintiffs in the main proceedings maintain that the term at issue, which is not defined anywhere in Regulation No 1408/71, encompasses work by both employed and self-employed persons, and that, with a view to avoiding potential abuse, the Court might make it clear that, in order for a person to benefit from that provision, the work he intends to carry out in the second Member State must be linked to the occupation he pursues in the State where he is established. In the event of a finding by the Court to the effect that the term in question refers only to work by self-employed persons, they submit that the legislation applicable for the purpose of defining that concept should be that of the Member State in which the person is normally self-employed.

23. TRM contends that the term 'work' covers the pursuit of any economic activity irrespective of its classification in employment law or social security law, provided that its duration does not exceed 12 months and that the person who has procured the service remains the same throughout that period. Like the plaintiffs, it proposes that, in the event of a different interpretation by the Court, the nature of the work should be determined by reference to the legislation of the Member State in which the person is normally self-employed.

24. The French Government submits that, even though Article 14a(1)(a) does not expressly say so, the term 'work' must be interpreted as referring exclusively to work by self-employed persons and that it is for the social security legislation of the Member State in which that work is performed to determine whether it is paid employment or self-employment.

25. The German Government and the Netherlands Government agree that the term 'work' refers only to the activities of

self-employed persons and that, in order to determine whether particular work forms part of an activity as an employed or self-employed person, regard must be had to the legislation of the Member State in which the work is carried out on a temporary basis. That interpretation is justified by the fact that Article 14a(1)(a) establishes an exception to the general principle that workers are subject to the legislation of the place of employment; workers posted to another Member State qualify for that exception provided that the following conditions are met: the work in the second State must be temporary; its duration must not exceed 12 months; and during the period in which the work in the other Member State is carried out, the worker must maintain a direct relationship with the Member State of origin.

Both Governments express concern at the practice of labour being exported from the United Kingdom. The legislation of that State classifies such workers as self-employed persons and its social security institution issues them with Form E 101 certificates certifying that United Kingdom legislation continues to be applicable under Article 14a(1)(a) of Regulation No 1408/71. Under cover of that form, those workers move to Germany (where they are said to number 60 000) and to the Netherlands, where they are employed in the building industry. The Governments in question consider that a ruling by the Court to the effect that the term 'work' also covers an activity as an employed person would have serious consequences in so far as the social security contributions payable by such workers would be significantly less, if they continued to be subject to the United Kingdom social security legislation, than those payable by employed persons in both Germany and the Netherlands. This, in so far as it would reduce the cost of their labour, would enable them to engage in unfair competition.

26. The United Kingdom Government, on the other hand, considers that the term at issue encompasses work by both employed and self-employed persons the duration of which does not exceed 12 months. In the event of the Court's not sharing that view, the nature of the work should be determined by applying the legislation of the Member State in which the person is normally self-employed.

27. The Commission points out first of all that Regulation (EEC) No 1390/81 [13] (hereinafter 'Regulation No 1390/81'), which entered into force on 1 July 1982, and which extended to self-employed persons the application of Regulation No 1408/71, was adopted by the Council in order to ensure the same protection for the self-employed as was enjoyed by employed persons.

It then explains that, in the first proposal it submitted to the Council in 1977, [14] the provision at issue governed the situation of a worker who normally pursues his 'professional or trade activity' in the territory of a Member State and who 'engages in the provision of services' in the territory of

13 — Council Regulation (EEC) No 1390 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) 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).

14 — OJ 1978 C 14, p. 9.

another Member State. In the second proposal, submitted in 1978,[15] the wording was as follows: 'A person who is normally "self-employed" in the territory of a Member State and who "provides services" in the territory of another Member State ...'. As far as the Commission was concerned, it was clear that the scope of the provision at issue was to be confined to activities pursued in another Member State as a self-employed person. The Council, however, decided to use the term 'work' without specifying, as it did in the case of employed persons temporarily posted to another Member State and of mariners, whether the work had to be performed for an undertaking or on a self-employed basis. In the light of the final text adopted by the Council, the Commission is of the opinion that 'work' includes both forms of employment.

By way of a solution to the problem of potential abuse alleged by the German and Netherlands Governments, the Commission proposes that the Member State to whose legislation a worker is subject should require, as a condition for issuing a Form E 101 certificate, that that person has normally been self-employed in its territory and has been lawfully insured under the social security scheme for self-employed persons.

In the event that the Court takes the view that the term 'work' is to remain confined to self-employment, it considers that the nature of the economic activity must be determined in accordance with the legislation of the State in whose territory it is pursued on a temporary basis.

28. At the end of the written procedure, the Court decided to put four questions to the Commission and gave it until 31 July 1998 to reply. It was asked to state, first of all, whether the expressions 'provision of services'/'provides services' in the texts of its proposals corresponded to the concept of provision of services within the meaning of Articles 59 and 60 of the Treaty; secondly, whether, in its opinion, the plaintiffs in the main proceedings had 'engaged in the provision of services'/'provided services' within the meaning ascribed to those expressions in its proposals; thirdly, whether the expression 'work on his own account' in Article 14(b)(2) of Regulation No 1408/71 corresponded to the concept of provision of services within the meaning of Articles 59 and 60 of the Treaty; and, finally, which legislative system or systems is or are applicable to a person employed by an undertaking established in one Member State who uses a period of leave to move to another Member State in order to carry out temporary work on a self-employed basis.

29. In its reply, the Commission states that, when it used the expressions 'provision of services'/'provides services' in its proposals, it was referring to the pursuit of an activity regarded as self-employment by the social security legislation of the Member State in

15 — OJ 1978 C 246, p. 2.

whose territory that activity is pursued, and not to the concept of provision of services within the meaning of Articles 59 and 60 of the Treaty. Accordingly, the plaintiffs in the main proceedings are to be deemed to have 'engaged in the provision of services'/'provided services' in Belgium within the meaning that must be ascribed to those expressions as used in the aforementioned proposals only if the Belgian legislation concerned regards the activity which they pursued in Belgium as self-employment. For the same reason, the expression 'work on his own account' in Article 14b(2) of Regulation No 1408/71 must be construed as referring to activities regarded as such by the social security legislation of the Member State whose flag the ship flies. With regard to the person normally employed in one Member State who uses a period of leave to move to another Member State in order to work on a self-employed basis there, the Commission takes the view that this amounts to the simultaneous pursuit of activities in the territory of two Member States. Consequently, if the second activity is regarded by the social security legislation of the Member State in which it is pursued as employment, he will be subject to Article 14(2) of Regulation No 1408/71 and, if, on the other hand, that activity is regarded by the legislation of that State as self-employment, his situation will be governed by Article 14(c).

30. As the Commission very rightly points out in its written observations, Article 14a(1)(a) of Regulation No 1408/71 has not yet been interpreted by the Court. [16] In order to determine its meaning, therefore, it will be necessary to have regard both to its wording, taking into account the context in which it arises, and to the objective it pursues. It is settled case-law of the Court that 'as regards the interpretation of the material provisions of Regulation [No 1408/71] ... , it is necessary to consider not only its wording but also its context and the aims pursued by the legislation of which it forms part'. [17]

31. Through the coordination of the various national social security schemes, effected by Regulation No 1408/71, the Council considered it had discharged the obligation imposed on it by Article 51 of the EC Treaty for the purpose of establishing the free movement of workers. At the time of the facts in the main proceedings, no less than ten articles in Title II of Regulation No 1408/71, Articles 13 to 17a, most of them comprising several paragraphs, were concerned with determination of the legislation applicable to migrant workers. All those provisions seek, by a technique of highly detailed lists, to prevent any possible conflict of rules, whether positive, by ensuring that workers are not simultaneously subject to several legislative systems, or negative, by ensuring that workers are not deprived of social

16 — The judgment of the Court of Justice is, however, pending in Case C-3/98 *Openbaar Ministerie* v *Schacht*, in which the Hop van Beroep (Court of Appeal), Ghent (Belgium), has requested an interpretation of the same provision. The question referred for a preliminary ruling was published in OJ 1998 C 72, p. 9.

17 — Case C-131/95 *Huijbrechts* v *Commissie voor de Behandeling van Administratieve Geschillen* [1997] ECR I-1409, paragraph 16. Similarly, Case C-136/91 *Findling Wälzlager* v *Hauptzollamt* [1993] ECR I-1793, paragraph 11, and Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 21.

security protection owing to the absence of applicable legislation. The Court has consistently held that 'the provisions of Title II of the regulation constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complication which may arise from that situation'. [18]

32. The principle that a migrant worker is subject to the legislation of a single Member State is contained in Article 13 of Regulation No 1408/71. The Court has held that that principle excludes the possibility of the overlapping of several national legislative systems in respect of one and the same period. [19]

The only exception to that principle is provided for in Article 14c(b), applicable to persons employed in the territory of one Member State and simultaneously self-employed in the territory of another Member State who are in one of the situations provided for in Annex VII; such persons are to be subject to the legislation of each of the States. [20]

33. The Court has made it clear that the compulsory nature of the application of the conflict rules in Title II means that individuals cannot choose the legislation which is to be applied to them [21] and that Member States cannot determine the extent to which their own legislation or that of another Member State is applicable. [22]

34. The other major principle governing Title II of Regulation No 1408/71 is that a migrant worker must be subject to the legislation of the Member State in which he pursues his economic activity *(lex loci laboris)*. In accordance with Article 13(2), a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in another Member State or if the undertaking employing him has its registered

18 — Judgment in *Huijbrechts*, cited in footnote 17 above, paragraph 17. Similarly, Case C-71/93 *Van Poucke* [1994] ECR I-1101, paragraph 22, Case C-425/93 *Calle Grenzshop Andresen* [1995] ECR I-269, paragraph 9, and Case C-275/96 *Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-3419, paragraph 28.

19 — Case 102/76 *Perenboom v Inspecteur der directe belastingen of Nijmegen* [1977] ECR 815, paragraph 11.

20 — In my Opinions in Case C-340/94 *De Jaeck v Staatssecretaris van Financen* [1997] ECR I-461, and in Case C-221/95 *Inasti v Hervein and Hervillier* [1997] ECR I-609, in particular I-494 and I-634 respectively, in addition to proposing answers to the questions which the national courts had referred for a preliminary ruling, I suggested that the Court declare Article 14c(b) and Annex VII to Regulation No 1408/71 invalid in so far as they provide that a person who is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State is to be subject to the legislation of each of those Member States.

21 — Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraphs 18 to 20.

22 — Case 60/85 *Luijten v Raad van Arbeid* [1986] ECR 2365, paragraph 14, Case 2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, Case C-196/90 *De Paep* [1991] ECR I-4815, paragraph 18, and the judgment in *Kuusijärvi*, cited in footnote 18 above, paragraph 30.

office in another Member State. The same applies to a self-employed person who is subject to the legislation of the State in which he works, even if he resides in the territory of another Member State. The legislation applicable to mariners must be that of the State whose flag is flown by the vessel on which they pursue their occupational activity.

35. That principle is inevitably subject to certain exceptions, the rules governing which are laid down in Article 14 in the case of employed persons, Article 14a in the case of self-employed persons, and Article 14b in the case of mariners. I shall now examine those three exceptions.

36. The application of Article 14 is confined to employed persons. Paragraph 1(a) thereof determines the legislation applicable to a person employed in a Member State by an undertaking to which he is normally attached who is posted to another Member State to perform work there for that undertaking for a limited period. Provided that the anticipated duration of that work does not exceed 12 months, a period which under certain circumstances may be extended by a further 12 months, the person in question continues to be subject to the legislation of the first Member State. Paragraph 1(b), the provisions of which I do not intend to examine in detail as this is unnecessary for the purposes of this case, determines the legislation applicable to a person normally employed in the territory of two or more Member States.

37. In interpreting the provision in Regulation No 3, [23] the predecessor to Regulation No 1408/71, corresponding to the present Article 14(1), the Court of Justice held that 'the exception ... provided ... aims at overcoming the obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organisations. But for this exception, an undertaking established in the territory of a Member State would be required to register its workers, normally subject to the social security legislation of that State, with the social security system of other Member States where they were sent to perform work of short duration. Moreover, the work would suffer more often than not because national legislative systems generally exclude short periods from certain social benefits'. [24]

38. Articles 14a and 14c were added to Regulation No 1408/71 by Regulation No 1390/81, which extended the coordination of Member States' social security schemes to self-employed persons moving within the Community.

23 — Regulation No 3 of the Council of 25 September 1958 on social security for migrant workers (OJ 1958, 30, p. 561/58).

24 — Case 35/70 *Manpower* v *Caisse d'Assurance* [1970] ECR 1251, paragraphs 10 to 12. Similarly, Case 19/67 *Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 445, in particular 457.

39. Article 14a(1) is devoted to determining the legislation applicable to a person normally self-employed in the territory of a Member State who moves to another Member State in order to perform work there for a limited period. Provided that the anticipated duration of that work does not exceed 12 months, a period which under certain circumstances may be extended by a further 12 months, the person in question continues to be subject to the legislation of the first Member State. This, precisely, is the provision at issue here, which, in the absence of clarification by the legislature, has given rise to differences of opinion among those who have submitted observations as to whether it applies exclusively to work by self-employed persons or whether it may also include work by employed persons.

Paragraph (2), the provisions of which again I do not intend to examine in detail as this is unnecessary for the purposes of this case, determines the legislation applicable to a person normally self-employed in the territory of two or more Member States.

40. The final exception to the general principle of the application to migrant workers of the *lex loci laboris* is contained in Article 14b, which deals with mariners. Here, the legislature returns to the usual terminology employed throughout Title II and requires that, in order for a person to continue to be subject to the legislation of the Member State in which he is employed, when posted by the undertaking to which he is normally attached in order to perform work on board a vessel flying the flag of another Member State, he must perform the work for that undertaking. At the same time, paragraph (2) requires that, in order for a person to continue to be subject to the legislation of the Member State in which he is normally self-employed, when performing temporary work on board a vessel flying the flag of another Member State, he must perform that work on his own account.

41. There is indisputably a symmetry between Article 14(1), which applies to a person employed by an undertaking in a Member State who is posted to another Member State in order to perform work for that undertaking, and Article 14b(1), which applies to a person employed by an undertaking to which he is normally attached on board a vessel flying the flag of a Member State who is posted to perform work for that undertaking on board a vessel flying the flag of another Member State. In both cases, in order for the person concerned to be able to remain subject to the social security legislation of the first State, the anticipated duration of the work must not exceed 12 months, which period may under certain circumstances be extended by a further 12 months, and the work in the second Member State must continue to be performed for the same undertaking.

42. That symmetry is reflected in Decisions No 128[25] and No 162[26] of the Administrative Commission concerning the application of Article 14(1) and Article 14b(1). The first of those decisions points out that one of the decisive criteria for the application of both provisions is the existence of a direct relationship between the undertaking and the worker it engages, and in particular the payment of a wage and the maintenance of the worker's relationship to the undertaking as an employee.

The second lays down that the work is to be regarded as being performed for the undertaking of the sending State if it has been established that this work is being performed for that undertaking and that there continues to exist a direct relationship between the worker and the undertaking that posted him. In order to establish whether such a direct relationship continues to exist, and to determine whether the worker remains in the employ of the undertaking which posted him, a number of factors have to be taken into account, including responsibility in the matter of recruitment, employment contract, dismissal and determination of the nature of the work. That decision likewise requires that the competent institution of the Member State to whose legislation the person concerned remains subject inform both the employer and the worker concerned of the conditions under which the posted worker may continue to be subject to its legislation, and inform the employer of the possibility of checks being made throughout the period of posting so as to ensure that this period has not come to an end. Such checks may relate, in particular, to the payment of contributions and the maintenance of the direct relationship.

43. However, in order for a person normally self-employed in the territory of a Member State who moves to another Member State in order to perform temporary work there to be able to remain subject to the legislation of the first State, the legislature not only did not provide that that work be performed on a self-employed basis, it did not give any indication in the text of the regulation which would support an interpretation either way.

44. Because Article 14a was added when the Council adapted Regulation No 1408/71 so as to extend its application to self-employed persons, there is a temptation, to which the Commission appears to have succumbed in its successive proposals, to have recourse to the concepts of the right of establishment in Article 52 of the Treaty and the freedom to provide services in Articles 59 and 60 of the Treaty.

45. However, taking into account the context in which the provision was adopted, is

25 — Decision No 128 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 October 1985 concerning the application of Articles 14(1)(a) and 14b(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers (OJ 1986 C 141, p. 6).

26 — Decision No 162 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 31 May 1996 concerning the interpretation of Articles 14(1) and 14b(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers (OJ 1996 L 241, p. 28).

it conceivable that, by electing to use the term 'work', the Council sought to indicate that that concept referred only to activity as a self-employed person?

46. In my view, this is not the proper interpretation of that term, for a number of reasons:

— First, because the Council disregarded the Commission's proposals. I think, therefore, that it knowingly used a much more general term than those which had been suggested to it.

— Secondly, because Article 14b, which was adopted at the same time as Article 14a in order to determine the legislation applicable to mariners in similar situations, states in paragraph (2) that work on board a vessel flying the flag of another Member State must be performed on a self-employed basis.

— Thirdly, because there is no need to have reference to the Treaty provisions on the free movement of persons and services in order to interpret Regulation No 1408/71. This was stated by the Court in its judgment in *De Jaeck*,[27] from which it is clear that the terms 'employed person' and 'self-employed person' in the regulation refer to the definitions given them by Member States' social security legislation, regardless of the nature of the activity for the purposes of employment law. Furthermore, in the judgment in *Martínez Sala*,[28] the Court held that, in the context of Article 48 of the Treaty and Regulation (EEC) No 1612/68,[29] a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker, whereas a person has the status of employed person within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship.

47. The fact that, in laying down rules governing the situation of a person normally self-employed in a Member State who moves to another Member State in order to perform work for a specified period, the Council did not make the right

27 — Cited in footnote 20 above, paragraph 19.

28 — Case C-85/96 *Martínez Sala* v *Freistaat Bayern* [1998] ECR I-2691, paragraphs 32 and 36.

29 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

of that person to remain subject to the legislation of the first State for the period of his move conditional on his performing the activity in the second State on a self-employed basis, shows that it intended the term 'work' to include any economic activity, whatever its classification in the employment and social security law of the second State.

48. In *De Jaeck*,[30] the Court reached certain conclusions which are relevant to this case in so far as it held that, although it is true that the provisions of Title II of Regulation No 1408/71 refer expressly to persons who are employed or who are self-employed rather than to employed or self-employed workers, a logical and consistent interpretation of the scope *ratione personae* of the regulation and of the system of conflicts-of-laws rules which it establishes requires the terms in question to be interpreted in the light of the definitions of Article 1(a) of that regulation. Accordingly, just as categorisation as an 'employed person' or 'self-employed person' for the purposes of Articles 1(a) and 2(1) of the regulation depends on the national social security scheme under which the person is insured, 'a person who is employed' and 'a person who is self-employed' for the purposes of Title II of the regulation should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued.

49. In accordance with that doctrine, and to return to the interpretation of Article 14a(1)(a), it is the social security legislation of the Member State in which the economic activity is normally pursued that must classify it as self-employed. Once it is so classified in the social security legislation of the Member State where it is pursued, the person performing it may be regarded as a self-employed person.

50. The facts of this case illustrate perfectly the practical application of the Court's logical and consistent interpretation of the scope *rationae personae* of the regulation and of its system of conflict-of-laws rules. The plaintiffs in the main proceedings normally pursue an economic activity in the United Kingdom. Pursuant to the general principle, they should be subject to the law of the place of work, which, in their case, is that of the United Kingdom. United Kingdom social security legislation regards that activity as 'self-employment' and the plaintiffs are accordingly 'self-employed persons' for the purposes of Regulation No 1408/71. Had the plaintiffs stopped performing that economic activity in the United Kingdom and moved to Belgium to perform it, because Belgian social security legislation regards the activity of opera singer as paid employment, they would have become employed persons for the purposes of the regulation. In both cases, the concepts are totally independent from the classification of those activities under the employment law of each Member State.

30 — Cited in footnote 20 above, paragraphs 22 and 23.

This example shows how easy it is for the same activity to be treated differently by the social security legislation of two Member States. Hence the need for coordination to ensure that migrant workers, whatever their situation, are subject to a single legislative system which must be determinable in an unequivocal and uniform manner throughout the Community.

51. As I explained earlier, there are certain exceptions to the general principle that a worker is subject to the law of the place of employment which allow him to remain subject, for a certain period of time, to the legislation of the Member State where he normally works. The first condition applicable to the recognition of that right is that the duration of the work on account of which he is moving to the other Member State must not exceed 12 months, which period may in certain circumstances be extended by a further 12 months. That condition applies to all workers without distinction.

For employed persons, including mariners, the second condition is that any work in which they engage during the posting should be performed for their employer. I should like to point out that, in my view, this condition requires not so much that the work in the second State be paid employment in the strict sense of the term, as that workers remain attached to the undertaking for which they normally work, so that a posted worker is not affected by the classification which the social security legislation of the second State reserves for the particular activity which he performs in its territory, since that is not the legislation applicable.

The second condition imposed on mariners who are normally self-employed requires any work in which they engage on board a vessel flying the flag of another Member State to be performed on their own account for the full duration of the posting.

52. However, in the case of workers normally self-employed in a Member State who perform work in the territory of another Member State, Regulation No 1408/71 does not appear to make their right to remain subject to the social security legislation of the first State subject to any condition other than that concerning the duration of the work.

53. Does this mean that any person is entitled, for example, to join the social security scheme for self-employed persons in one Member State and then to move to another Member State in order to work in the construction industry for a year, on the ground that the social security legislation of the second State is not applicable to him because he remains subject to the legislation of the first State?

54. I consider that Article 14a(1)(a) should not be used as a shield for misusing the law in this way, and that there is scope for abuse only to the extent that inadequate regard is had to the preconditions for the applicability of the provision.

55. It is true that, in accordance with Article 13(2)(b) of Regulation No 1408/71, a person who is self-employed in the territory of a Member State is subject to the legislation of that State and that, once the legislation applicable has been determined, it alone will apply to that person until such time as his situation changes.

However, in order to work in another Member State and in so doing enjoy the advantages described, as provided for in Article 14a(1)(a), the person concerned is also required to be 'normally' self-employed in one of the Member States. It seems clear to me that that condition is not fulfilled by a person who joins the social security scheme for self-employed persons one day and then on the following day applies for a Form E 101 certificate in order to go and work in another country under cover thereof.

56. The Court has consistently held that it is for the legislation of each Member State to lay down the conditions governing the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, provided always that in this connection there is no discrimination between nationals of the host State and nationals of other Member States. [31]

Community law does not have any bearing on the conditions which each Member State lays down in respect of the affiliation to a particular social security scheme of persons performing economic activities in its territory. However, where the competent institution of a Member State applies a provision of Regulation No 1408/71, such as Article 14a(1)(a), it is exercising a power vested in it under Community law in so far as it is acting in its capacity as an institution capable of recognising the person concerned as holding a right under the regulation. It therefore has an obligation to verify that the conditions laid down by that provision are met before recognising his right to remain subject to its legislation for the duration of the work he intends to perform in another Member State.

57. When should the conditions for the applicability of Article 14a(1)(a) be regar-

31 — Case 29/88 *Schmitt* v *Bundesversicherungsanstalt für Angestellte* [1989] ECR 581, and Case C-297/92 *INPS* v *Baglieri* [1993] ECR I-5211, paragraph 13.

ded as having been met? In my opinion, there are several such conditions:

— The first is that the activity as a self-employed person which gives rise to affiliation to the relevant social security scheme must be the activity which that person 'normally' pursues; this should automatically preclude affiliations of convenience.

— The second is that the person concerned must move to the territory of another Member State in order to 'perform [a unit of] work'. [Translator's note: Unlike the Spanish text of the provision, which has '... realiza un trabajo ...' (emphasis added), the English merely has '... performs work ...', thus not conveying, as the indefinite article 'un' in the Spanish does, the idea of a 'unit' of work. It is on this idea that the Advocate General bases his argument here. The words in square brackets in English have been inserted to make this clear]. The provision does not speak of going 'to work' or 'pursing an economic activity'; nor does it use any of the other expressions that might be conceivable. Performing [a unit of] work means carrying out a particular, specified job the content of which is defined in advance and evidence of which can be provided, as it was by the plaintiffs in the main proceedings, in the form of the relevant contracts.

— The third, which is linked to the second, is that the anticipated duration of the work must not exceed 12 months, which period may be extended by no more than a further 12 months if unforeseeable circumstances cause the work to overrun. The duration of the work must therefore have been calculated beforehand and must appear on the certificate.

— The fourth is that it must indeed be [a unit of] work; this precludes the performance of several jobs in succession, whether for the same beneficiary or for several; this, in my opinion, would require the issue of separate certificates.

— The fifth is implicit in the provision and requires the person concerned to maintain the infrastructure necessary for him to perform his activity, however minimal, while working in the other State; this will enable him, on his return, to carry on his activity normally.

58. On comparing the requirements applicable to the various types of worker, I note that, although Article 14(1)(a) of Regulation No 1408/71 makes recognition of the right of an employed person posted to another Member State to remain subject to the social security legislation of the first State conditional on the work which he intends to perform being for the undertaking which employs him, it does not require him to have been normally employed in the first State before being sent to the second. Workers engaged in the Member State in which the undertaking has its registered office or a branch with a view to being sent to another Member State fall into this category. [32] What matters most in the case of employed persons is that they

32 — This situation was clarified by the Court of Justice in the judgments in *Van der Vecht* and *Manpower*, cited in footnote 24 above.

should be posted by the undertaking to which they are normally attached, that is to say that there should be a direct relationship between the worker and the undertaking which orders the posting.

59. On the other hand, a person who is self-employed in one Member State and who moves to another Member State in order to perform work there is required by Article 14a(1)(a) to be *normally* self-employed in the first State in order to be able to remain subject to its social security legislation. What matters most in the case of persons who are self-employed is that they should be normally self-employed in a Member State. I wish to emphasise that compliance with that requirement and the fact that the posting is for the purpose of performing a particular [unit of] work of predetermined duration mean that, during that period, the worker must maintain the organisational infrastructure necessary for him to pursue his activity in his country of origin, as it would otherwise be difficult for him, on completion of the work in the other Member State, to return to being normally self-employed.

By organisational infrastructure I have in mind, for example, without intending this to be an exhaustive list, offices, payment of social security contributions, payment of taxes, both direct and in respect of professional or trade activities, possession of a business card and VAT number, as well as registration with chambers of commerce and trade organisations and payment of the corresponding membership fees, all this being, of course, open to scrutiny as necessary by the competent institution of the Member State to whose legislation the person concerned remains subject, either on its own initiative or at the request of the competent institution of the Member State in which he performs the work.

60. On the basis of the above reasoning, I suggest that the Court's answer to the national court should be that the term 'work' in Article 14a(1)(a) of Regulation No 1408/71 refers to the pursuit of any economic activity, and the fact that the social security legislation of the Member State in which the work is performed regards it as employment or self-employment has no bearing on the application of that provision.

B. *The second question*

61. By its second question, the national court essentially seeks to ascertain how it must be determined whether a person is employed in one Member State and simultaneously self-employed in another Member State, as provided for in Article 14c of Regulation No 1408/71.

62. The plaintiffs maintain that, in order for Article 14c to be applicable, a person must be continuously and simultaneously engaged in activities in two Member States

for a period which, although unspecified, is in any event longer than the period they spent in Belgium in order to perform an opera, and that activities engaged in by way of both self-employment and paid employment are more permanent than temporary and must be pursued in the context of a degree of stable and continuous integration into the economy of both States.

63. TRM considers that Article 14c governs situations characterised by a degree of permanence, while Article 14a applies to situations of a limited duration. It therefore suggests that the 'simultaneous' employment and self-employment governed by Article 14c should be construed as meaning that the person concerned is subject to social security legislation in respect of the activity as an employed person which he pursues in the territory of one or more Member States for a period the anticipated duration of which exceeds 12 months, and is at the same time subject to social security legislation in respect of the activity as a self-employed person which he pursues in the territory of one or more Member States during the same period.

64. The French Government takes the view that a person is simultaneously employed and self-employed in two or more Member States where, by reason of his pursuit of such employment, he is at the same time subject to the social security legislation of two or more Member States, applicable to employed persons and self-employed persons.

65. The German Government submits that a person can be said to be 'simultaneously' employed in one Member State and self-employed in another if he works with a degree of regularity in each of those States alternately, but not if, as is the case of the performers in the main proceedings, his employment is confined to one or two engagements in another Member State.

66. The Netherlands Government is of the opinion that, in order to determine whether a person is 'simultaneously' employed and self-employed within the meaning of Article 14c in a number of Member States, various factors must be taken into account in each particular case: whether the pursuit of activities in two or more countries is part of a person's normal work pattern; whether those activities are pursued on a regular basis; and whether they are genuine activities. Applying those criteria, it reaches the conclusion that Article 14c of Regulation No 1408/71 cannot be applied to the plaintiffs in the main proceedings since they worked exclusively in Belgium for the duration of the production in which they performed and returned to their country of origin once the run had finished.

67. The United Kingdom Government maintains that Article 14c applies to a person who carries out a combination of work on a self-employed basis in one Member State and work on an employed basis in another Member State on an ongoing and permanent basis.

68. The Commission considers that the essential criterion in determining whether a person is simultaneously employed and self-employed within the meaning of Article 14c is that the activities in question should be pursued on a regular and foreseeable basis in two or more Member States for a specified period, which may be one month or several years. In this respect, the duration of the period of parallel or regularly alternating employment and self-employment is immaterial, and the pursuit of such activities on both an employed and self-employed basis does not have to be limited in time at all.

69. I consider that, in order to interpret Article 14c of Regulation No 1408/71, and, more specifically, in order to determine when a person is simultaneously employed in one Member State and self-employed in another Member State, reference must again be had to the wording of the provision, taking into account the context in which it occurs.

70. Having regard to its wording, I would observe that the provision requires that work on an employed basis in one Member State and work on a self-employed basis in another be simultaneous. It is, moreover, the only requirement.

That situation, in so far as it determines the legislation applicable to a person who pursues economic activities in two or more Member States, is comparable to those governed by Article 14(2), concerning persons normally employed in the territory of two or more Member States, and Article 14a(2), concerning persons normally self-employed in the territory of two or more Member States.

71. There is, however, a fundamental difference between Article 14c on the one hand and Articles 14 and 14a on the other. The former requires only that the activities in question should be pursued simultaneously, but not that any of them should be carried on normally in one or more of the Member States, while the other two require the activities to be carried on normally in both States.

72. In practice, the application of Article 14c will be subject, first, to the person's not moving within the framework of Article 14(1)(a) or under Article 14a(1)(a), since, in both those cases, he remains subject to the legislation of the Member State in which he was engaged, if he is in paid employment, or to the legislation of the Member State in which he is normally self-employed, and the legislation of the Member State in which the temporary work is performed can have no bearing on the classification of the nature of the work.

73. Secondly, in the light of the decision in *De Jaeck*, [33] the scope of Article 14c will extend to cover a person who carries on an economic activity in a Member State under whose social security legislation that activity is regarded as that of a self-employed person for the purposes of affiliation to the appropriate social security scheme, and who at the same time carries on an economic activity in another Member State under whose social security legislation that activity is regarded as that of an employed person for the purposes of affiliation to the appropriate social security scheme.

The example of Mr Hervein, a French national residing in France who had carried out the duties of Chairman/Director-General and Director or Assistant Director of various companies established in France and in Belgium, and was regarded as an employee under French social security legislation, but as a self-employed person under Belgian social security legislation, provides a good illustration of the situations to which Article 14c applies. [34]

74. In such circumstances, I take the view, like the Commission, that the duration of the period of parallel or regularly alternating employment and self -employment is immaterial, and that the pursuit of such activities on both an employed and a self-employed basis does not have to be limited in time at all.

75. For the reasons I have just given, I propose that the answer to be given by the Court to the national court should be that a person is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State, within the meaning of Article 14c of Regulation No 1408/71, where, provided that he is not in any of the situations governed by Article 14(1) and Article 14a(1), he carries on an economic activity in a Member State under whose social security legislation that activity is classified as that of an employed person for the purposes of affiliation to the appropriate social security scheme, and, at the same time, carries on an economic activity in another Member State under whose social security legislation that activity is regarded as that of a self-employed person for the purposes of affiliation to the appropriate social security scheme.

C. *The third question*

76. By the third question, which I think should be answered as a whole, the national court wishes to ascertain what the legal effects are of the form the issue of which is provided for, in particular, by Articles 11a and 12a(7) of Regulation No 574/72, and more specifically whether that form creates or is merely declaratory of rights and whether it must be recognised as having retroactive effect.

33 — Cited in footnote 20 above.

34 — See the judgment in Case C-221/95 *Inasti* v *Hervein and Hervillier* [1997] ECR I-609, cited in footnote 20 above, and the Opinion in that case which I delivered on 11 June 1996 ([1997] ECR I-611 et seq.).

77. The plaintiffs in the main proceedings maintain that the form issued by the competent institution appears at first sight to be binding on the social security institution of another Member State and on the person who has procured the services of the person concerned, since it defines the legislation applicable and the period during which the person concerned remains subject to that legislation. If the institution of the second Member State has doubts as to the validity or content of the form, it must, if it wishes to disregard it, contact the issuing institution in order to clarify both matters. If the two institutions fail to reach agreement, the institution of the second State must refer the matter to the Administrative Commission. Until such time as the Administrative Commission invalidates the form's binding force, it will continue to be effective vis-à-vis the social security institution of the second Member State.

78. TRM contends that it cannot be required to accept the form since it was addressed to the Belgian social security institution, which refuses to accept such forms. In its submission, it is binding only on the social security institution of the Member State in which the work is performed, since it classifies such work as that of a self-employed person and specifies the legislation applicable. The form is binding in this way until it is withdrawn or amended by the social security institution which issued it or until it is cancelled or amended by decision of a court. If Form E 101 is issued or produced after the work in another Member State has started, it is not binding and does not have retroactive effect.

79. The French Government contends that the social security institution of the Member State in which the work is carried out must regard as valid the information contained in a Form E 101 certificate issued by the institution of the Member State in which the person concerned is established, and that that form is capable of having retroactive effect.

80. The German Government contends that the contested form, since it certifies that the person concerned remains subject to the legislation of the Member State whose social security institution issued it, creates obligations only on the part of that institution and not on the part of the institution of the Member State in which the work is carried out, which was not involved in its issue. Under those conditions, Form E 101 is capable of being effective in respect of a period prior to its issue or production.

81. The Netherlands Government contends that Form E 101 is not binding either on the institution of the Member State in whose territory the activity is pursued or on the person who engages the worker to provide particular services, but rather creates a presumption that the situation in question is one of those provided for in Title II of Regulation No 1408/71. However, the institution of the place where the work is carried out may prove that the person to whom the form was issued is

performing work which is not consistent with the information given on the form. In so far as the *de facto* situation corresponds to the information on the form, the form may be deemed to have retroactive effect.

82. The opinion of the United Kingdom Government differs from that of all those who have submitted observations in these proceedings since it proposes that the Court's answer should be that Form E 101 is binding with respect to the social security institution of the Member State in which the work is performed and also with respect to the person who procures services in the second Member State, unless it is withdrawn by the issuing institution. It also suggests that Form E 101 has retroactive effect where the periods certified have already expired at the time when it is issued or produced.

83. The Commission, for its part, contends that the contested form does not constitute irrebuttable proof *vis-à-vis* the institution of another Member State or *vis-à-vis* the person who has procured the worker's services. It also maintains that, although the fact that the form is issued after the work in the other Member State has started, or even after it has finished, may give rise to reasonable doubts on the part of both the institution of that State and the person employing the worker, and will undoubtedly create administrative problems, there is nothing to preclude its having retroactive effect.

84. Articles 11a and 12a(7) of Regulation No 574/72 provide that the institution designated by the competent authority of the Member State whose legislation is applicable is to issue a certificate stating, *inter alia*, that the worker remains subject to that legislation. In performance of one of the tasks with which it is charged by Article 2 of Regulation No 574/72, the Administrative Commission has produced many model forms intended to facilitate the application of Regulations No 1408/71 and No 574/72. The certificate concerning the legislation applicable is model Form E 101, which, together with several others, was approved by the Administrative Commission in Decision No 130. [35]

85. In its judgment in *Knoeller*, [36] the Court held that Articles 33 and 34 of Regulation No 4, [37] the predecessor to Regulation No 574/72, as well as the rules adopted by the Administrative Commission as regards Form E 26 (which was intended to certify completed insurance periods, and corresponds to the present Form E 205), [38] must be interpreted in the light of Articles 48 to 51 of the Treaty, which constitute, for the regulations in the field of social security, their basis, their framework and their bounds. Those provisions, the Court continues, are aimed at securing freedom of movement for workers within the common

35 — Cited in footnote 10 above.

36 — Case 93/81 *INAMI* v *Knoeller* [1982] ECR 951, paragraph 9.

37 — Regulation No 4 of the Council of 3 December 1958 laying down implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers (OJ 1958 No 30, p. 597).

38 — The model now in force was approved by Decision No 158 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 27 November 1995 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 201 to E 215) (OJ 1996 L 336, p. 1).

market by enabling them *inter alia* to avail themselves of rights arising out of periods of employment completed in different Member States. The legal significance of Form E 26 must therefore be appraised in such a way as not to jeopardise the effectiveness of those articles and those regulations concerning the rights of migrant workers in the field of social security.

86. As I have already said, the purpose of Form E 101 is to certify which legislation is applicable and, for the purposes of this case, that form applies to the situations provided for in Articles 14(1)(a), 14a(1)(a) and 14c(1)(a). It consists of two pages, one to be completed by the competent institution of the Member State to whose legislation the worker is subject, and the other, on the back of the first, containing instructions. The information certified, to use the terminology employed in the English version of the model, is as follows:

— the worker's status — whether he is employed or self-employed;

— the worker's personal details — his permanent address and insurance number;

— details of the employer's address or of the place where the worker is self-employed;

— the approximate duration, expressed as start and end dates, of the period in which the worker will be posted or carry out an activity as a self-employed person;

— the name and address of the undertaking for which he will be working; and

— the country to whose legislation the worker will remain subject, the number of the article in Regulation No 1408/71 which is applicable to the posting, the date on which it starts and the date on which it is expected to finish.

The final section concerns the institution issuing the certificate and provides spaces for its name, its address, the date on which it issued the document, the authorised person's signature and the institution's stamp.

87. On the back are instructions for both the worker and the competent institution of the place of stay. With regard to the institution of the State to whose legislation the worker is subject, it says only that it must fill in the form at the request of the worker or of his employer and return it to the person requesting it. It also states that the institution should send a copy of the

form to the ONSS in Brussels if the worker is posted to Belgium.

88. I see from the Form E 101 certificates included in the documents before the Court, which cover the move to Belgium by the plaintiffs in the main proceedings in order to take part in the performance of an opera in Brussels, that they were issued and stamped by the Department of Social Security, Overseas Branch, in Newcastle upon Tyne, which, at the material time, was the institution designated by the United Kingdom competent authority, in accordance with the amendment to section L(i) of Annex 10 to Regulation No 574/72 introduced by Regulation (EEC) No 2195/91.[39] Those forms specifically state that United Kingdom legislation will be applicable during the work in Belgium, the duration of which is also confirmed by the information contained in the plaintiffs' contracts.

On the face of it, therefore, the conditions laid down in Article 14a(1)(a), which I set out in my examination of the first question, appear to be fulfilled in this case inasmuch as it concerns persons normally self-employed in the United Kingdom who move to another Member State in order to perform a particular unit of work the details of which are set out in a contract, and the duration of which, from start date to finish date, is known in advance.

39 — Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and 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 1991 L 206, p. 2).

The fact that a Member State issues the form to a person insured under its social security scheme, and states that its legislation remains applicable for the duration of the work to be performed by the person concerned in another Member State, in practice means not only that the posted worker will be exempt from the duty to pay contributions in the second State, but also that the institution of the first State assumes responsibility for his social security cover.

89. Advocate General Lenz put forward a comprehensive and cogent argument concerning the intended legal effects of Form E 101 in his Opinion in the *Calle Grenzshop Andresen* case;[40] it is an argument which I fully endorse.

90. His reasoning in that case was based on the fact that the national court which had referred questions for a preliminary ruling assumed that the Form E 101 certificate, placed on the court file in the main proceedings, had been issued by a non-competent authority. The difference between that case and this one lies in the fact that it is now the Belgian social security institution which flatly refuses to accept the validity of Form E 101 certificates, not in a particular case because it has doubts about the veracity of the facts certified therein, but systematically in all cases where such forms have been issued by the competent

40 — Opinion delivered in *Calle Grenzshop Andresen*, cited in footnote 18 above ([1995] ECR I-271 et seq., in particular I-282 et seq.).

United Kingdom institution to persons who are self-employed there.

91. As Advocate General Lenz quite rightly states in the aforementioned Opinion, 'if the declaration of a competent authority of one Member State could easily be called into question by the competent authority of another Member State, there would be no point in having a formal system of proof based on a binding declaration as to the legislation applicable. Moreover, that would jeopardise one of the basic principles of Regulation No 1408/71, which is that *only one* Member State's legislation should be applicable.' [41]

92. Furthermore, in its judgment in *Romano*, [42] which concerned the validity of Decision No 101 of the Administrative Commission concerning the date to be taken into consideration for determining the rates of conversion to be applied when calculating certain benefits, the Court held that a body such as the Administrative Commission could not be empowered by the Council to adopt acts having the force of law, and that whilst a decision of the Administrative Commission might provide assistance to social security institutions responsible for applying Community law in this field, it was not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they came to apply those rules.

93. I consider, therefore, that a form which has all the characteristics described above and which has been adopted by the Administrative Commission in order to facilitate the application of Regulation No 1408/71 has only declaratory effect, but carries with it a presumption of validity *iuris tantum* with respect to the facts certified therein, and is binding on the competent institution of the Member State to which a worker moves in order to perform temporary work.

In my opinion, a certificate as to the legislation applicable issued by the competent institution of a Member State may be addressed only to the national authorities of another Member State understood in a broad sense and, more specifically, to the competent institution of that State. Accordingly, a person who has procured the services of a worker on a temporary basis may be bound — within the meaning I have defined — by Form E 101 only if the national social security legislation designates him as the competent institution for the purposes of that particular case. [43]

94. In *Knoch*, [44] the Court answered several questions referred for a preliminary

41 — Ibid., point 61.

42 — Case 98/80 *Romano* [1981] ECR 1241, paragraph 20.

43 — See, for example, Case C-45/90 *Paletta* [1992] ECR I-3423. Under the law of the Federal Republic of Germany, the employer is the competent institution for the payment of cash benefits to workers for the first six weeks of illness.

44 — Case C-102/91 *Knoch* v *Bundesanstalt für Arbeit* [1992] ECR I-4341, paragraphs 53 and 54.

ruling by the Bundessozialgericht (Federal Social Court), which wished to ascertain whether the certified statement referred to in Article 84(2) of Regulation No 574/72, applicable to employed persons who are unemployed and who, during their last employment, were residing in a Member State other than the competent State, is binding on the institution and the courts of another Member State. After pointing out that the certified statement is a standard form drawn up by the Administrative Commission, the acts adopted by which are incapable of having the force of law, the Court held that the competent institution of the Member State where the person concerned resides or, in legal proceedings, the national court, remains entirely free to verify the content of that statement and that, consequently, the certified statement issued in accordance with Article 84(2) of Regulation No 574/72 does not constitute irrebuttable proof *vis-à-vis* either the institution of another Member State which is competent in matters relating to unemployment or the courts of that State.

95. If it is shown in a particular case that an E 101 form contains material errors or has been issued by the competent institution of a Member State on the basis of facts inconsistent with the actual circumstances, the form must be cancelled and the legislation applicable to the person concerned during the period in question immediately reconsidered. There is of course nothing to prevent the institutions of the Member States from notifying each other of any doubts they may have as regards the applicability of a provision to a particular case or as regards the evidence furnished by the person concerned.

96. As regards the duration of the binding effects of Form E 101, neither the provisions of Regulations No 1408/71 and No 574/72 nor the decisions adopted thus far by the Administrative Commission impose any time-limit on the issue of certificates concerning the legislation applicable; nor do they indicate for how long the certificates are effective.

I note, however, that the certificate states that, for the period between two specific dates, the person concerned remains subject to the legislation of the Member State in which he is normally self-employed, and that it also contains the date on which it is issued. Since it is a declaration in respect of a specified period, I see no reason to regard its effects as being limited in time, in the sense that it ceases to be valid once that period has expired.

97. I consider that the same reasoning is applicable to any retroactive effect it might have, especially since Article 1 of Decision No 126[45] of the Administrative Commission provides that the institution referred to in Articles 11 and 11a of Regulation No 574/72 is to issue a certificate concerning the applicable legislation (Form E 101), even if the issue of such a certificate is requested after the commencement of the

45 — Decision No 126 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 October 1985 concerning the application of Articles 14(1)(a), 14a(1)(a), and 14(b)(1) and (2) of Regulation (EEC) No 1408/71 (OJ 1986 C 141, p. 3).

occupation pursued in the State other than the competent State by the worker referred to *inter alia* in Article 14a(1)(a) of Regulation No 1408/71.

In so far as that certificate is issued when the work has already commenced, or even after it has come to an end if it is of very short duration, it will be intended to have retroactive effect in respect of the period to which it relates.

98. I therefore propose that the Court's answer to the third question should be that Form E 101 has only declaratory effect but carries with it a presumption of validity *iurus tantum* with respect to the facts certified therein, and is binding on the competent institution of the Member State to which the worker moves in order to perform temporary work. The person who has procured the worker's services may be bound by that form only in so far as his national social security legislation designates him as the competent institution for the purposes of that particular case. As the provisions examined do not impose any time-limit on the issue of Form E 101, or indicate for how long it is to be effective, there is no reason to limit its period of validity or to deny it its retroactive effect.

Conclusion

99. In the light of the foregoing considerations, I suggest that the Court's answers to the questions referred by the Tribunal du Travail, Brussels, should be as follows:

(1) The term 'work' in Article 14a(1)(a) of Regulation (EEC) No 1408/71 of the Council 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 and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, in turn amended by Council Regulation (EEC) No 3811/86 of 11 December 1986, refers to the pursuit of any economic activity. The fact that the social security legislation of the

Member State in which the work is performed regards it as an activity pursued by an employed or self-employed person has no bearing on the application of that provision.

(2) A person is simultaneously employed in the territory of one Member State and self-employed in the territory of another Member State, within the meaning of Article 14c of Regulation No 1408/71, where, provided that he is not in any of the situations governed by Article 14(1) and 14a(1) thereof, he carries on an economic activity in a Member State under whose social security legislation that activity is classified as that of an employed person for the purposes of affiliation to the appropriate social security scheme, and at the same time carries on an economic activity in another Member State under whose social security legislation that activity is regarded as that of a self-employed person for the purposes of affiliation to the appropriate social security scheme.

(3) Form E 101 has only declaratory effect, but carries with it a presumption of validity *iuris tantum* with respect to the facts certified therein, and is binding on the competent institution of the Member State to which the worker moves in order to perform temporary work. The person who has procured the worker's services may be bound by that form only if his national social security legislation designates him as the competent institution for the purposes of that particular case. As the provisions examined do not impose any time-limit on the issue of Form E 101, or indicate for how long it is to be effective, there is no reason to limit its period of validity or to deny it its retroactive effect.