OPINION OF ADVOCATE GENERAL JACOBS

delivered on 28 January 1999 *

1. Under Regulation (EEC) No 1408/71, [1] the general rule is that a worker is subject to the social security system of the State in which he is employed (Article 13(2)(a)). If, however, the 'undertaking to which he is normally attached' sends him to work temporarily in another Member State, the worker remains subject to the social security system of the first State (Article 14(1)(a)). [2]

2. The present case concerns the interpretation of the latter rule ('the posted workers rule') which has given rise to concern that the system will be abused by employers providing services in one State but purporting to establish themselves in another where the social security costs are lower. The application of the posted workers rule is attested by a certificate issued by the Member State whose legislation is to remain applicable, pursuant to Article 11 of Regulation No 574/72 (an E 101 certificate). [3] Questions have also been posed concerning the extent to which such certificates bind other Member States.

The facts

3. Fitzwilliam Executive Search ('Fitzwilliam') is an employment agency which provides personnel in both Ireland and the Netherlands. The agency was established in Ireland in 1989. It is a company incorporated under Irish law. It began supplying workers in the Netherlands in 1991. From 1993 to 1996 its turnover relating to the Netherlands exceeded that relating to Ireland. It appears, however, that it posts only Irish workers resident in Ireland and that it does not purport to post residents of the Netherlands.

4. Fitzwilliam's office is in Dublin. It comprises a five-floor building of approximately 200m^2, with 20 employees.

* Original language: English.

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

2 — Provided that the anticipated duration of the work does not exceed 12 months and he is not sent to replace another person who has completed his term of posting.

3 — Regulation (EEC) No 574/72 of the Council 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, in the version enacted by Council Regulation (EEC) No 2001/83, cited in note 1, Annex II.

Although it also has two representatives in the Netherlands, Fitzwilliam maintains that they serve merely as a contact point and have no power to bind the company.

5. In the Netherlands Fitzwilliam supplies staff mainly to the agricultural and horticultural sectors. In Ireland it is active in other sectors. Fitzwilliam maintains that the work carried out in both States is similar since it requires little skill. It adds that the work carried out in the Netherlands does not appear to be popular with Netherlands nationals and that it is often performed by illegal labour from third countries. According to the Dutch social security institution which is the respondent in the main action, now called the Bestuur van het Landelijk instituut sociale verzekeringen ('LISV'), the personnel provided by Fitzwilliam in Ireland work primarily in the computer industry.

6. The Irish Department of Social Welfare [4] issued E 101 certificates stating that the workers sent by Fitzwilliam to the Netherlands remained subject to the Irish social security legislation. However, LISV disputed the validity of those certificates. In its view workers sent by Fitzwilliam do not fall within the posted workers rule. Without consulting the Irish Department of Social Welfare, it claimed social security contributions in relation to those workers. Fitzwilliam appealed against that decision and in the course of that appeal the Arrondissementsrechtbank (District Court), Amsterdam, referred the questions set out below to this Court.

7. Fitzwilliam maintains that it has been harassed by the number of visits and enquiries made by LISV and that unannounced visits made by LISV to its clients have caused the latter to question the legality of Fitzwilliam's manner of doing business. Fitzwilliam has complained to the Commission to that effect.

8. The questions referred by the Arrondissementsrechtbank are as follows:

'1. (a) May the words "undertaking to which he is normally attached" in Article 14(1)(a) of EC Regulation No 1408/71 be supplemented by other terms or conditions not expressly mentioned therein?

4 — Now called the Department of Social, Community and Family Affairs.

(b) If so,

(i) Can such terms or conditions be formulated independently by the authorities of a Member State?

(ii) May quantitative conditions — whether or not based on Decision No 128 — relating to the activities pursued in the different Member States, turnover and number of employees be imposed with regard to the words "undertaking to which he is normally attached" in Article 14(1)(a) of EC Regulation No 1408/71?

(iii) In that context may the condition be imposed that the activities of the employer in the different Member States be exactly the same?

(iv) If the conditions mentioned in (ii) and (iii) cannot be imposed, what conditions may be imposed?

(v) Must such conditions — where imposed — be communicated to the employer before the commencement of the employment?

(c) If not,

(i) Do the implementing institutions have a discretion in interpreting the words "undertaking to which he is normally attached" in Article 14(1)(a) of EC Regulation No 1408/71, on the basis of the judgments of the Court of Justice in Case C-19/67 *van der Vecht* and Case C-35/70 *Manpower*?

(ii) If so, what is its extent?

2. (a) Is a certificate issued by the competent institution of a Member State in accordance with Article 11(1)(a) of EC Regulation No 574/72 binding on the authorities of another Member State in all circumstances as regards the legal consequences it determines?

(b) If not,

(i) In what circumstances is it not?

(ii) Can the evidential value of the certificate be rebutted by the authorities of a Member State without involving the institution which issued the certificate?

(iii) If not, in what must that involvement consist?'

9. Written observations have been submitted by the parties, the Belgian, French, German, Irish, Netherlands, and United Kingdom Governments, and the Commission. With the exception of the Belgian Government, all those who submitted written observations were represented at the hearing.

The Community provisions

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

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

'Subject to the provisions of Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State.

...'

12. Thus the legislation applicable is normally that of the State of employment. However, Article 14 establishes 'special rules applicable to persons, other than mariners, engaged in paid employment'. Paragraph 1(a) of that Article, which is at issue in the present case, lays down rules for posted workers. It provides as follows:

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

13. It is in particular the phrase 'undertaking to which he is normally attached' which has given rise to debate.

14. The precursor to Regulation No 1408/71, Regulation No 3/58,[5] contained similar provisions. It is relevant to note the terms of that provision because the Court's main judgments on this issue were given in relation to Regulation No 3/58 rather than Regulation No 1408/71. Article 13(a) of Regulation No 3/58 was worded as follows:

'Wage-earners and assimilated workers whose permanent residence is in the territory of one Member State and who are employed in the territory of another State by an undertaking, having in the territory of the former State an establishment to which they are normally attached, shall be subject to the legislation of the former State as though they were employed in its territory, in so far as the probable duration of their employment in the territory of the latter State does not exceed 12 months.'

15. That provision was later amended by Regulation No 24/64[6] and became Article 13(1)(a) of Regulation No 3/58. The amended provision was to the following effect:

'A wage earner or assimilated worker who, being in the service of an undertaking having in the territory of a Member State an establishment to which he is normally attached, 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 former Member State as though he were still employed in its territory, provided that the anticipated duration of the work which he is to perform does not

5 — Regulation (EEC) No 3 of 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561).

6 — Regulation (EEC) No 24/64 of the Council of 10 March 1964 (Journal Officiel 1964, p. 746).

exceed 12 months and that such a worker be not sent to replace another worker who has reached the end of his term of posting.'

16. Article 14(1)(a) of Regulation No 1408/71 has been the subject of interpretative decisions issued by the Administrative Commission of the European Communities on Social Security for Migrant Workers ('the Administrative Commission'). Those decisions are issued pursuant to Article 81 of Regulation No 1408/71 (previously Article 43 of Regulation No 3/58). Paragraph 1 of Decision No 128 [7] of the Administrative Commission, which was in force at the relevant time, provided that:

'The provisions of Article 14(1)(a) ... of Regulation (EEC) No 1408/71 shall also apply to a worker subject to the legislation of a Member State who is engaged in that Member State in which the undertaking has its registered office or place of business with a view to his posting ... to another Member State ..., provided that:

(a) there exists a direct relationship between that undertaking and the worker during his period of posting;

(b) the undertaking normally carries out its activities in the first Member State, that is to say, in the case of an undertaking whose activity consists in making staff temporarily available to other undertakings, ... [8] that it normally makes staff available to hirers established in that State for employment in that State.'

17. That Decision has since been replaced by Decision No 162. [9] The latter Decision is in similar terms, although it is noteworthy that in the English version the phrase 'normally makes staff available' was replaced by the phrase 'usually makes staff available'. It also provides that, in the case of an undertaking whose activity consists in something other than making staff temporarily available to other undertakings, the undertaking must carry out 'substantial activities' in the territory of the first Member State and 'usually' employ staff there.

18. It may be mentioned at this stage that, according to established case-law, although such decisions may provide an aid to social

7 — Decision No 128 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.

8 — The word 'and' appears here in the English text but seems to be an error: cf. French version.

9 — Decision No 162 of 31 May 1996 concerning the interpretation of Articles 14(1) and 14(b)(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers, OJ 1996 L 241, p. 28.

security institutions responsible for applying Community law, they are not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply Community law (*Sociale Verzekeringsbank* v *van der Vecht*; [10] *Romano* v *INAMI* [11]).

19. As stated above, the applicability of the posted workers rule to a particular worker is attested by a certificate issued pursuant to Article 11 of Regulation No 574/72. That article provides that, at the request of the employed person or his employer, the 'institution designated by the competent authority of the Member States whose legislation is to remain applicable shall issue a certificate stating that an employed person shall remain subject to that legislation up to a specific date'.

21. It is clear that the provisions of a regulation cannot be supplemented other than by further Community legislation. If a Member State were free to impose further terms or conditions, that would plainly defeat the uniform application of the regulation in question, and would prejudice the very purpose of the regulation. That is particularly clear in relation to Title II of Regulation No 1408/71 which is in issue in the present case. The Court has consistently held that the provisions of Title II 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 more than one legislative system from being applicable and to avoid the complications which may result from that situation. [12] The present case provides an illustration of how that aim could be frustrated if a Member State were to impose supplementary conditions: if those conditions were not consistent with the Regulation, that could have the result that a worker would be simultaneously subject to more than one social security system.

Question 1

20. In the first part of its first question, the national court asks whether the words 'undertaking to which he is normally attached' in Article 14(1)(a) of Regulation No 1408/71 may be supplemented by other terms or conditions not expressly mentioned therein.

22. Even the Administrative Commission [13] may not impose further terms or conditions, since it is charged only with questions of interpretation arising from the provisions of Regulation No 1408/71.

10 — Case 19/67 [1967] ECR 345.

11 — Case 98/80 [1981] ECR 1241, paragraph 20 of the judgment.

12 — See for example Case C-425/93 *Calle Grenzshop Andresen* [1995] ECR I-269, paragraph 9 of the judgment.

13 — See paragraph 16 above.

23. However, as Fitzwilliam observes, the first question, taken as a whole, can be regarded as asking in substance how Article 14(1)(a) should be interpreted: i.e. what criteria are to be applied in order to establish whether a worker is normally attached to an undertaking. I shall accordingly deal with the remainder of the first question on that basis.

24. In answering that question, guidance can be obtained from the Court's previous case-law.

25. The Court has already established in two early judgments (*van der Vecht* [14] and *Manpower* v *Caisse d'Assurance* [15]) certain principles relevant to the factual situation in the present case. It is true that those judgments were delivered many years ago and concerned the predecessor to Regulation No 1408/71, Regulation No 3/58. (In fact the provisions at issue in those two cases also differed slightly from each other since *Manpower* concerned Regulation No 3/58 as amended by Regulation No 24/64.) However, the relevant provisions of Regulation No 3/58 were in similar terms to Article 14(1)(a) of Regulation No 1408/71.

26. The original version of Regulation No 3/58 did not include the term 'posted'. According to Advocate General Dutheillet de Lamothe in his Opinion in *Manpower*, that term was included to avoid abuse of the system. He explained that certain undertakings had 'opened sites outside their country of origin and made such rotations of the personnel posted as were necessary so that this personnel might remain subject to the legislation of the country of origin where the social charges were less than in the country where they were employed; these practices were found in particular in France in the building and timber industry'. [16] In addition it may be noted that the amended version of Regulation No 3/58 also added the stipulation that Article 13(1)(a) would not apply if the worker had been sent to replace another worker who had reached the end of his term of posting.

27. The original version of Regulation No 3/58 was worded in terms of the application of the social security system of the law of the State in which the undertaking had *an establishment to which the worker was normally attached* and in which the worker had his *permanent residence*, in circumstances in which the worker was employed in the territory of another Member State by that undertaking, provided that the probable duration of the employment in that other State did not exceed 12 months. The amended version of that Regulation stated that a worker continued to be subject to the social security system of the State in which the undertaking had *an establishment to which he was normally attached*, as though he were *still* employed in its territory, if he was

14 — Case 19/67, cited in note 10.

15 — Case 35/70 [1970] ECR 1251.

16 — See the Opinion at p. 1264.

posted by that undertaking to another Member State to perform work there for that undertaking, provided that the anticipated duration of the work did not exceed 12 months and that the worker was not sent to replace another worker who had reached the end of his term of posting.

28. Article 14(1)(a) of Regulation No 1408/71 provides for the continuation of the legislation of the Member State *in which a person is employed by an undertaking to which he is normally attached* when he is *posted* by that undertaking to the territory of another Member State, provided that the anticipated duration of the work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

29. The case-law mentioned above established that the posted workers rule does not cease to apply:

— on the ground that the worker is sent to another Member State by an employment agency providing temporary personnel (*Manpower*, paragraphs 13 to 15);

— on the ground that the worker has been engaged to work in the territory of a Member State other than that in which the undertaking which engages him is established (*van der Vecht*, p. 354; *Manpower*, paragraph 14); or

— on the ground that the work in question differs from that normally carried out by the undertaking in question (*van der Vecht*, p. 354).

30. The Court has stated that the posted workers rule 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' (*Manpower*, paragraph 10). The Court has also observed that, if it were necessary to apply the social security system of the State in which short periods of work were carried out by the posted worker, the worker would suffer more often than not because national legislative systems generally exclude short periods from certain social benefits (*Manpower*, paragraphs 11 and 12).

31. In the light of those statements by the Court, it does not seem to me that the provisions of Article 14(1)(a) should be construed restrictively on the ground that — as is argued by the Belgian and German Governments — they constitute an exception to the general rule laid down by that Regulation (the law of the State of employment). It seems to me that Article 14(1)(a) lays down a *lex specialis* which is fully consistent with the basic objectives

of the regulation and which is designed to further the freedom of movement for workers — and indeed another fundamental freedom of the Treaty, namely the freedom to provide services. The terms of Article 14(1)(a) should not therefore be construed restrictively but should be given their normal meaning.

32. The Court has also provided guidance on the meaning of the phrase 'undertaking to which he is normally attached' in Article 14(1)(a). In order to determine whether a worker has been posted to the host State by an undertaking to which he is normally attached, it is necessary to deduce from all the circumstances of his employment whether he remains under the authority of that undertaking throughout the period of his posting (*van der Vecht*, p. 354). The fact that a worker posted abroad retains his relationship with his employer can be proved in particular by the fact that it is the employer who pays the salary and can dismiss him for any misconduct by him in the performance of his work with the hiring undertaking; it is also relevant that the hiring undertaking is indebted not to the worker but only to his employer (*Manpower*, paragraphs 18 and 19). Fitzwilliam concludes from the emphasis on the connection between the posted worker and the undertaking in the first State that the nature of the undertaking's link with the first State is not relevant.

33. However, the Court has also stated in the context of Regulation No 3/58 that the posted workers rule is limited to workers engaged by 'undertakings normally pursuing their activity in the territory of the State in which they are established' (*Manpower*, paragraph 16). It is noteworthy that the requirement that the undertaking should carry on business in the Member State concerned was laid down by the Court on the basis of the requirement in Regulation No 3/58 that the undertaking should have an establishment in that Member State. Nevertheless, in my view, the Court sought by that condition, as the Commission points out, to exclude from the posted workers rule cases where the undertaking had a merely notional presence in the first State. Hence the requirement that the undertaking should carry on business 'normally' in the State of establishment. The use of the term 'normally' does not seem intended to imply that the first State is the principal place of business of the undertaking. Nor is there scope for any quantitative requirement concerning, for example, the proportion of turnover generated in a particular Member State. All that is required is that there is genuine business activity in the first State.

34. There is clearly no basis for any more demanding conditions in the case of Regulation No 1408/71 since Article 14(1)(a) imposes no conditions in that respect and, unlike Article 13 of Regulation No 3/58, does not even require that the agency 'has an establishment' in the Member State concerned. Nevertheless, since Article 14(1)(a) must be regarded as intended to cover only *bona fide* cases of posting, it can be understood, in particular by virtue of the expression 'undertaking to which he

is normally attached', as requiring that the undertaking carries on business in the first State. The requirement that the agency carries on genuine business activity in the State concerned can be justified in my view in order to prevent the risk of abuse and to exclude undertakings which do not have a genuine presence. But it should go no further.

35. It has been argued that, in order to counter the risk of abuse, quantitative conditions are necessary, for example relating to the scale of activities pursued by the employment agency in the different Member States, in particular the proportion of turnover and the number of employees engaged in the Member States concerned.

36. Indeed such criteria are applied by LISV. In a decision dated 13 June 1997 LISV stated that it would interpret Decision No 162 of the Administrative Commission [17] in the following way. The words 'normally carries out its activity' means that the centre of gravity of the activity of the undertaking must be in the sending State. Whether or not that is so must be determined in the light of all the facts and circumstances of each case. The following facts and circumstances may, *inter alia*, be taken into account: where the undertaking was founded and by whom; since when the undertaking has been active in the sending State; which activities are carried out in the sending State and in the Netherlands respectively; the amount of turnover relating to the Netherlands compared with that relating to the sending State considered on an annual basis; the number of temporary workers in the sending State compared with the number of temporary workers posted to the Netherlands on an annual basis; whether the undertaking has its own premises and management in the sending State; whether there is an establishment, a permanent representation, a managing office and/or premises in the Netherlands; whether the personnel are taken on in the Netherlands or in the sending State; and whether the undertaking pays social security contributions in the sending State.

37. Although that general policy decision postdates the specific decision taken in respect of Fitzwilliam which is in issue in this case, it appears that LISV applied similar criteria in reaching its decision in respect of Fitzwilliam, at least as regards the proportion of Fitzwilliam's turnover in the Netherlands as a proportion of its overall turnover, the number of staff supplied in the Netherlands and the type of employment in the Netherlands.

38. The applicability of such criteria is supported, to varying degrees, by the Dutch, German, and Belgian Governments. However it is impossible in my view to read such requirements into the terms of Article 14(1)(a).

17 — See paragraph 16 above.

39. In any event, as Fitzwilliam observes, the relative numbers of personnel employed in each of two States and/or the amount of turnover may vary considerably from one part of the year to the next and it would be unacceptable for the status of an employee to swing back and forth on that basis. As the Irish Government observes, that would defeat the purpose of the posted workers rule, which is to avoid the administrative complications which would arise were it necessary to switch from the social security system of one Member State to that of another on a short-term basis. [18]

40. Similarly, the nature of the activities in the respective States should not be relevant. Indeed, the Court has already held that that is of little importance to the application of the posted workers rule (*van der Vecht*). That approach is eminently sensible, particularly since some activities may only or mainly exist in a limited number of States. Tulip harvesting in the Netherlands may be one example. It cannot seriously be argued that a worker cannot be 'posted' to another Member State by an undertaking within the meaning of Article 14(1)(a) simply because the nature of the work carried out there on behalf of the undertaking differs from that undertaking's activities in the first State.

41. It seems generally accepted by those submitting observations that mere 'brass plate' companies (for example, companies which have a notional presence merely so as to be able to process paperwork through a particular Member State) should not be able to benefit from the posted workers rule.

42. However, it is not suggested that Fitzwilliam is a mere 'brass plate' company. Moreover, Article 14(1)(a) of the Regulation itself contains certain safeguards against that type of abuse: first the anticipated duration of the work must not exceed 12 months, and secondly, the worker must not be sent to replace another person who has completed his period of posting. In addition, as discussed earlier, [19] the Court has stressed the need for the retention of a genuine link between the undertaking in question and the employee purportedly posted abroad.

43. As the Commission observes, those restrictions constitute significant safeguards against abuse of the system. I see no further need for the application of the social security rules to restrict an undertaking's choice as to the State in which it sets up and purports to employ personnel in circumstances, as here, in which that State recognises the establishment of the company and has no objection to the applica-

18 — *Manpower*, cited in note 15, paragraph 10 of the judgment.

19 — At paragraph 32.

tion of its own social security rules, and the undertaking conducts at least some business in that State.

44. The Netherlands Government argues that public interest requires the application of the posted workers rule to be strictly limited and that it is not sufficient simply to exclude 'brass plate' undertakings. I do not agree that the rule needs to be strictly construed for the following reasons.

45. All that is at issue in the present type of case is which State's social security system is to apply. It may be that in some instances the rules of the State to which the employee is posted would be more favourable to the employee. However, avoidance of such rules does not prejudice the general interest. [20] (Indeed, even as regards the employees, the Court observed in its judgment in *Manpower* [21] that the application of the social security system of the State to which the employee is posted would mean that 'the worker would suffer more often than not because national legislative systems generally exclude short periods from certain social benefits'. [22]) Nor does avoidance of the rules disrupt the financial equilibrium of the host State's social security system since it is the State which continues to receive the contributions which foots the bill for any treatment or benefits payable in respect of the posted worker in the host State. [23]

46. The Netherlands Government objects that the application of the posted workers rule in the present cases disadvantages Netherlands companies since they incur higher social security costs and cannot compete on the same basis. That, however, is simply a natural consequence of the single market. [24] As the Commission observed at the hearing, in retaining competence for social security matters, the Member States necessarily accepted that there would be a difference between the systems in the different Member States. They cannot now object to companies or workers exercising their fundamental freedoms under the Treaty on the ground that the exercise of those freedoms may confer an advantage on the companies or workers concerned.

47. In conclusion, I consider it appropriate to maintain the requirement, arising from the judgment of the Court in *Manpower* in relation to Regulation No 3/58, that the undertaking must normally pursue its activity in the State whose legislation is certified to continue to apply. That phrase should however be read not as meaning that the

20 — Contrast Case 33/74 *van Binsbergen* v *Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; and Case C-23/93 *TV 10* [1994] ECR I-4795.

21 — At paragraph 12.

22 — Contrast the Court's reference to the public interest relating to the social protection of workers in Case C-272/94 *Guiot* [1996] ECR I-1905, paragraphs 16 and 17 of the judgment.

23 — Contrast the Court's reference to the need to preserve the coherence of the applicable tax system in Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249.

24 — See, in a different context, the Opinion of Advocate General La Pergola in Case C-212/97 *Centros* v *Erhvervs- og Selskabsstyrelsen* of 16 July 1998, pp. 41 and 42.

undertaking must usually, in the sense of mainly, pursue its activity in that State but rather simply that it must genuinely pursue some activity there. That view appears to be supported by the Irish, French and United Kingdom Governments. The Commission states that the undertaking must have substantial activities in the first State and not simply a formal, administrative link with that State.

48. It is not in my view necessary in the present case, if indeed at all, to determine the minimum degree and nature of the activity necessary in the State from which the worker is purportedly posted since it appears that Fitzwilliam is not only incorporated in Ireland but also has a significant number of administrative staff based there and provides a significant number of personnel to the Irish market. Moreover, it appears that the workers posted to the Netherlands are Irish workers resident in Ireland. There is no suggestion that Fitzwilliam is a mere 'brass plate' company. Application of the safeguards built into the terms of Regulation No 1408/71 itself should in any event go a long way to ensuring that the posted workers rule is not abused.

Question 2

49. The second question posed by the national court concerns the extent to which Member States are bound by E 101 certificates issued by other Member States. As mentioned earlier, such certificates are issued pursuant to Article 11 of Regulation No 574/72; [25] they certify that a particular worker has been posted to another Member State and that the legislation of the State from which he was posted continues to apply.

50. The question of the status of such certificates has already been discussed at length by Advocate General Lenz in his Opinion in *Calle Grenzshop Andresen* [26] and by Advocate General Ruiz-Jarabo Colomer in his Opinion in *Barry Banks* v *Théâtre Royal de la Monnaie*. [27]

51. The Court has addressed the question of the nature of various other certificates issued by Member States in the social security field. [28] However, as Advocate General Lenz observed in *Calle Grenzhop Andresen*, [29] there are many different kinds of certificates and their purposes differ. An abstract answer to the question of the legal

25 — Cited at paragraph 19 above.

26 — Case C-425/93, cited in note 12. See the specimen E 101 certificate reproduced at pp. 289 and 290.

27 — Case C-178/97, Opinion of 24 November 1998.

28 — See for example Case 93/81 *INAMI* v *Knoeller* [1982] ECR 951, Case C-102/91 *Knoch* v *Bundesanstalt für Arbeit* [1992] ECR I-4341, and Case C-206/94 *Brennet* v *Paletta* [1996] ECR I-2357.

29 — See paragraphs 56 and 57 of the Opinion.

effect of such certificates is accordingly impossible. The only common principle may be that, as the Court stated in *Knoeller*,[30] the legal significance of the form in question must be assessed in the light of Articles 48 to 51 of the EC Treaty, upon which Regulation No 1408/71 is based.

52. Articles 48 to 51 are of course aimed at securing freedom of movement for workers. It is clear that the simultaneous application of more than one social security system to migrant workers would discourage the movement of workers and one of the basic principles of Regulation No 1408/71 (set out in Article 13(1)) is that only one Member State's legislation should be applicable.

53. The role of an E 101 certificate is to testify which social security system applies to a posted worker. In the words of Advocate General Lenz: 'If the authority of another Member State does not recognise a declaration in Form E 101, that can only mean that the body appraising the form considers legislation other than that designated in the form to be applicable, which may lead precisely to double insurance with all the associated consequences.'[31] He concluded that such a result conflicts with the aims of Articles 48 to 51 of the Treaty.

54. It is clear in my view that it is unlawful for the authorities of a Member State unilaterally to refuse to give effect to an E 101 certificate issued by the authorities of another Member State. In particular I consider it essential that any dispute between national authorities as to the applicable legislation should be resolved as between those authorities. It should not be possible for each State to require contributions from the worker in question and to leave it up to him to resolve the matter, perhaps even by means of litigation. As Fitzwilliam observed at the hearing, even if contributions unduly paid may be reclaimed, such a solution is likely to be impracticable, lengthy and expensive. It is thus contrary to the aim of the posted workers rule of 'overcoming the obstacles likely to impede freedom of movement of workers and ... encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organisations'.[32]

55. In my view, the host State may not impose its own social security system unless and until the E 101 certificate issued by the other State has been withdrawn by the issuing authority. The fact that the certificate is based on a standard form drawn up by the Administrative Commission whose decisions cannot bind national authorities is irrelevant since it is the completion of that form by the competent institution

30 — Paragraph 9 of the judgment.

31 — Paragraph 61 of the Opinion.

32 — *Manpower*, cited in note 15, paragraph 10 of the judgment.

which constitutes the certificate and the certificate draws its authority from Article 11 of Regulation No 574/72. [33]

56. The obligations of Member States in this field derive not only from Regulation No 574/72 but also more generally from Article 5 of the Treaty, which requires Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the Community institutions. Article 5 must be regarded as obliging Member States and their social security institutions in particular to cooperate in good faith to give full effect to the Community provisions on social security and to ensure fulfilment of the objectives of Articles 48 to 51 of the Treaty. The authorities of the Member State which issue the E 101 certificate must ensure that the conditions for its issue are fulfilled, and the authorities of the host State must not unilaterally disregard a certificate which has been issued.

57. In accordance with that duty of cooperation under Article 5 of the Treaty, Member States should consult each other in the event of disagreement as to the applicable legislation. If, following consultation, agreement can still not be reached the matter can be raised before the Administrative Commission. If the matter can still not be resolved then in the last resort, as Advocate General Lenz observed, the dispute may be brought before this Court pursuant to Articles 169 or 170 of the Treaty. [34]

58. It has been argued that the host State may nevertheless refuse to recognise a certificate where it is based on a manifest error and that Advocate General Lenz himself recognised that type of exception. In my view, however, in such cases the host State must still contact the issuing authority and may not unilaterally ignore the certificate. If the error really is manifest or the host State can show that the certificate was obtained by means of fraud, the issuing authority should have no problem in withdrawing its certificate. If the issuing authority does nevertheless refuse to withdraw its certificate then the dispute should be resolved between the competent authorities in the manner discussed above since the worker should in no circumstances be subjected to two social security systems simultaneously.

59. According to the Commission, if the content of an E 101 certificate issued by one Member State is contested by another Member State, it is for the national court, and in the last resort the Court of Justice, to establish whether the conditions of the Regulation are satisfied. The Commission does not however specify which of the two Member States' courts have jurisdiction or how any conflict between their decisions might be resolved.

33 — Compare, however, the reasoning of the Court in Case C-102/91 *Knoch*, cited in note 28, paragraphs 50 to 54 of the judgment.

34 — Paragraph 66 of the Opinion.

60. On the view I take of the principles governing Article 14(1)(a) of the Regulation and the effect of an E 101 certificate, only the courts of the issuing State can review the decision to issue the certificate. The jurisdiction of the courts of the host State will be limited, in my view, to setting aside any decision of the host State which fails to recognise the certificate and purports to treat the worker as subject to the social security system of the latter State. That division of jurisdiction is consistent with the normal principle that the decisions of a Member State's authorities should be reviewed by the courts of that State. It is also a solution which is better suited to avoid the risk of conflicting decisions, to give full effect to the E 101 certificate, and to ensure that the worker is not simultaneously subject to two social security systems contrary to the objective of Regulation No 1408/71.

Conclusion

61. Accordingly the questions referred by the Arrondissementsrechtbank, Amsterdam, should in my opinion be answered as follows:

(1) The authorities of Member States are not entitled to supplement the provisions of Article 14(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 by other terms or conditions not expressly mentioned therein.

(2) Those provisions apply where a worker is employed by an undertaking in order to be posted to another Member State provided that the worker remains subject to the authority of that undertaking throughout the period of posting and that the undertaking carries on genuine business activity in the Member State from which the worker is posted.

(3) An E 101 certificate issued pursuant to Article 11(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 continues to have effect until withdrawn by the issuing authority. Where the authorities of another Member State consider that the conditions for the issue of the certificate are not fulfilled they are not entitled to treat the certificate as unlawful but must request the issuing Member State to withdraw it. The Member States concerned must seek to resolve the question by cooperating in good faith in accordance with Article 5, paragraph 1, of the Treaty. If they are unable to resolve the question it must be resolved by the Community authorities, and if necessary by the Court of Justice.