OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 17 September 1991 *

Mr President,
Members of the Court,

1. The Commission seeks a declaration by the Court that, by refusing to grant family allowances to employed persons who have retired early and reside outside the national territory but in accordance with Articles 73 and 75 of Regulation No 1408/71 [1] fall under the Netherlands legislation, has failed to fulfil its obligations under the EEC Treaty.

2. Central to this case is Article 6(1) of the Algemene Kinderbijslagwet (General Law on Child Benefit) which provides as follows:

'An insured person for the purposes of the provisions of this law is a person who is,

(a) a resident;

(b) is not a resident but is subject to income tax in respect of employment in the Netherlands.'

It follows from that provision that all residents — that is those who live in the Netherlands (see Article 2 of the Law), irrespective of whether they are employed persons or not, are entitled to family allowances for their dependent children. Non-residents may also claim benefit when they are employed in the Netherlands and are subject there to income tax. Moreover, it is not disputed between the parties that non-residents to whom an old-age pension is payable under Netherlands legislation can also claim family allowances.

3. The case turns on whether the residence requirement mentioned in Article 6 of the Law can be relied on as against non-residents no longer employed in the Netherlands, or any other Member State, who do not satisfy the residence requirement provided for in the Netherlands pension legislation in order to be able to claim an old-age pension. Persons who leave employment in the Netherlands before

* Original language: Dutch.

1 — Council 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 as amended with regard, *inter alia*, to Articles 73 and 75, by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p.1). This version of Regulation No 1408/71 was approved by the Council after the date of the reasoned opinion (30 May 1989) but before lodgment of the application in the present case (28 June 1990). Like the Commission I consider it to be applicable in this case in view of the fact that the provisions of Regulation No 3427/89 relevant to this case were declared to be applicable with effect from 15 January 1986 (that is from the date of the *Pinna* judgment). From a substantive point of view it makes no difference to the present case whether this version or the previously applicable version of Articles 73 and 75 of Regulation No 1408/71 is applicable.

the pensionable age may, depending on the undertaking or sector in which they were employed, receive early retirement benefit. Early retirement benefit, as the Netherlands Government explained, is not provided for by law but is based on a private arrangement between employers and employees, by way of either a company scheme or a sectorial scheme. The person taking early retirement is not an employed person within the meaning of the Ziektewet (Law on Sickness Assurance), the Wet op de Arbeidsongeschiktheidsverzekering (Law on Assurance against Incapacity to Work), the Werkloosheidswet (Law on Unemployment Assurance) and the Ziekenfondswet (Law on Sickness Funds), and is therefore not insured under that legislation and is not liable to pay contributions. In this connection an exception applies in the case of certain persons taking early retirement with regard to the Ziekenfondswet. Compulsory sickness insurance remains applicable for the period of early retirement in regard to employed persons who were already compulsorily insured for sickness before leaving their employment.

The dispute viewed in a wider context

4. Arrangements similar to the Netherlands scheme for early retirement benefit also exist in other Member States, but those are generally not private schemes but schemes provided for by legislation. As the Court indicated in the *Valentini* judgment (paragraph 17),[2] these early-retirement schemes were introduced in the context of the Member States' employment policy. They seek to assist workers approaching pensionable age to relinquish their jobs in favour of younger unemployed persons. These schemes give rise to difficult problems of interpretation because they were established only after the entry into force of Regulation No 1408/71 against the background of the economic crisis of the end of the 1970s.

Problems arise in particular in regard to the provisions of Regulation No 1408/71 in relation to family allowances. The regulation deals with the payment of this benefit expressly in the case of children dependent on employed persons (Article 73), unemployed persons (Article 74) and pensioners (Article 77). In accordance with the relevant provisions family allowances are paid by the competent authority of the appointed Member State, irrespective of the Member State in which the worker, the unemployed person or the pensioner, or their children, are residing. An employed person, an unemployed person or a pensioner under the relevant provisions cannot therefore be required to comply with a residence requirement as provided for in Article 6 of the General Law on Child Benefit. However, the payment of benefit for children dependent on persons taking early retirement is not expressly provided for in Regulation No 1408/71.

5. The Commission has for some time endeavoured to close this gap. As early as 1980 it submitted a proposal to the Council for the amendment of Regulation No

2 — Judgment in Case 171/82 *Valentini* v *ASSEDIC* [1983] ECR 2157.

1408/71 on that point.[3] That proposal sought to make the provisions of Article 74 of Regulation No 1408/71 on family allowances applicable to persons taking early retirement.[4] The proposal was not approved by the Council.

In bringing this action under Article 169 of the EEC Treaty, the Commission has changed its strategy. Evidently, it is now proceeding on the basis (but see paragraph 6 below) that the lacuna may be filled by way of the interpretation of the existing provisions without amendment of Regulation No 1408/71. In its reply to a written question asked by the Court and at the hearing it stated that three solutions may lead to this result, that is to say to assimilate persons taking early retirement either to employed persons within the meaning of Article 73 of the Regulation, or unemployed persons within the meaning of Article 74 of the Regulation, or pensioners within the meaning of Article 77 of the Regulation.

None of these solutions is free from difficulty. The Commission itself described as theoretical the assimilation of persons taking early retirement with unemployed persons by way of the interpretation of Article 74. It was correct to do so since persons who have taken early retirement are no longer available on the labour market. It paid more heed to the solution whereby persons entitled to an early-retirement pension might be assimilated to pensioners within the meaning of Article 77 of the Regulation. In itself this viewpoint certainly seems arguable.[5] However, the Commission pointed out that the Court in the abovementioned *Valentini* judgment established such differences between early retirement benefits and old-age benefits that it is not possible to regard them as analogous for the purposes of Regulation No 1408/71.

In the context of the two cases of assimilation mentioned above the Commission for its part drew attention to the fact that Articles 74 and 77 concern persons entitled to unemployment benefits or pension benefits payable under the legislation of a Member State. As the Court stated in the *Lohmann* judgment[6] the term 'legislation' has the scope defined in Article 1(j) of Regulation No 1408/71. However, benefits in respect of early retirement based on contractual arrangements between employers and employees cannot, it is said, be payable pursuant to 'legislation' within the meaning of that provision.

6. In the present case the Court is not asked to form a view on either of the two preceding solutions since neither in its Reasoned Opinion nor in the application

3 — Proposal submitted by the Commission to the Council on 18 June 1980 for a Council Regulation amending, for the benefit of unemployed workers, Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1980 C 169, p.22).

4 — The proposal concerned solely persons taking early retirement as provided for under the legislation of a Member State. It is not therefore clear whether the proposal also covered the situation of persons in receipt of early retirement benefits under the Netherlands scheme since, according to the Netherlands Government, those payments are not provided for by law but are derived from private arrangements between employers and employees (see also paragraph 5 in fine).

5 — In another context, namely the examination of the personal scope of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24), Advocate General Darmon, in his Opinion of 29 May 1991 in Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank* [1991] ECR I-3757, considered that persons who have taken early retirement fall under the scope of that directive in the same way as old-age pensioners.

6 — Judgment in Case 129/78 *Sociale Verzekeringsbank* v *Lohmann* [1979] ECR 853.

has the Commission alleged that the Netherlands infringed either Article 74 or Article 77. On the contrary the Commission is proceeding on the basis that persons who have taken early retirement are to be regarded as employed persons within the meaning of Article 73 of the Regulation and that the refusal to pay family allowances to such persons on the basis of a residence requirement constitutes an infringement of Articles 73 and 75 of the regulation. It is solely in conjunction with those provisions that the present case must be examined.

That continues to be the case although the Council in the meantime on 25 June 1991[7] approved a proposal submitted to the Council by the Commission on 3 August 1990 — that is about one month after the application in the present case was lodged.[8] That proposes to add to Article 13(2) of Regulation No 1408/71 (see in this connection paragraph 8 et seq. below) a subparagraph (f) whose text is as follows:

'(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

The existence of this proposal was mentioned for the first time by the representative of the Netherlands Government at the hearing, when he stated that on the basis of the provision laid down persons who have taken early retirement who go to live in another Member State may henceforth receive child benefit for dependent children in accordance with the legislation of the Member State in which they reside. This assertion was neither confirmed nor denied by the Commission, which itself had not mentioned the existence of the proposal. The Commission representative merely pointed out that the proposal was intended to give effect to the *Ten Holder* judgment,[9] which I find rather strange since the Commission seeks in the present case to draw an entirely different conclusion (see paragraph 8 below) from that which appears at first sight to flow from the new provision.

Alleged infringement of Articles 73 and 75

7. The Commission bases its application for a declaration that Articles 73 and 75 of Regulation No 1408/71 have been infringed on the following threefold reasoning.

First, it points out that persons who have taken early retirement are employed persons within the meaning of Article 1(a) of Regulation No 1408/71 and that they fall within

7 — 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, to self-employed persons and to members of their families moving within the Community and amending Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal 1991 L 206, p.2).

8 — Proposal for a Council Regulation (EEC) amending Regualtion (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, and of Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1990 C 221, p.3).

9 — Judgment in Case 302/84 *Ten Holder* [1986] ECR 1821.

the personal scope of that Regulation as defined in Article 2 thereof.

It goes on to submit that persons who have taken early retirement remain subject to Netherlands legislation. In the formal letter before action, as indeed in its reply to a parliamentary question which is at the origin of this action,[10] the Commission based that view on the abovementioned *Ten Holder* judgment, and in particular on paragraph 1 of the operative part in which the Court held:

'Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a worker who ceases to carry on an activity in the territory of a Member State and who has not gone to work in the territory of another Member State continues to be subject to the legislation of the Member State in which he was last employed, regardless of the length of time which has elapsed since the termination of the activity in question and the end of the employment relationship.'

Thus, the Commission evidently proceeded on the basis that persons taking early retirement not resident in the Netherlands, since they have ceased activities on Netherlands territory and do not go to work on the territory of another Member State, remain subject to Netherlands legislation, and in particular to the General Law on Child Benefit.

In the Reasoned Opinion and in the application the Commission also bases its assessment on the *Ten Holder* judgment but relies on paragraph 2 of the operative part which provides that:

'The effect of determining that a given Member State's legislation is the legislation applicable to an employed person pursuant to Article 13(2)(a) of Regulation No 1408/71 is that only the legislation of that Member State is applicable to him.'

The Commission applies this pronouncement to the fact acknowledged by the Netherlands Government that persons taking early retirement — in fact certain persons taking early retirement — namely those who before leaving their employment were compulsorily insured under the sickness assurance legislation, remained insured pursuant thereto. In so doing, the Commission says that the Netherlands Government is acknowledging that persons who have opted for early retirement fall under the Netherlands legislation.

The Commission finally submits that employed persons within the meaning of Regulation No 1408/71 to whom the Netherlands legislation is applicable are entitled to equal treatment as defined in Article 3 of Regulation No 1408/71, and that in accordance with Article 73 of the Regulation they are eligible for family allowances with no need, as is apparent from Article 75 of the Regulation, for them to comply with a residence requirement.

8. I am at one with the Netherlands Government in thinking that the

10 — Written Question No 1481/87 by Lambert Croux to the Commission (19 October 1987) and reply by Mr Marin on behalf of the Commission (12 January 1988) (OJ 1988 C 121, p. 21).

Commission's arguments are based on an incorrect interpretation of Regulation No 1408/71.

It is of course true, and moreover not disputed by the Netherlands Government, that persons who have taken early retirement are employed persons within the meaning of Article 1(a) of Regulation No 1408/71 and that they fall within the personal scope thereof as defined in Article 2 thereof. But that does not mean that they are also employed persons for the purposes of Article 73 of Regulation No 1408/71. For that article does not concern all employed persons within the meaning of Article 1 of the regulation, which is clearly demonstrated by the existence of distinct provisions on benefits for children dependent on unemployed persons (Article 74) and of pensioners (Article 77), two categories which, together with the category of employed persons laid down in Article 73, fall within the broad term of 'employed person' mentioned in Article 1(a) and Article 2 which defines the personal scope of the regulation.

Solely employed persons 'subject to the legislation of a Member State' are contemplated by Article 73. In view of the structure of the regulation that expression must be interpreted as meaning the legislation of a Member State which pursuant to the provisions of Title II 'Determination of the legislation applicable' (that is primarily the general rules contained in Article 13 of the Regulation) is indicated as being the applicable legislation. That interpretation, it seems to me, was confirmed by the Court in its judgment in *Beeck* v *Bundesanstalt für Arbeit*[11] (see in particular paragraph 7). In that judgment the Court stressed the link between Article 73 and the provision of Title II applicable in that case, namely Article 13(2)(a). In its written pleadings the Commission, moreover, bases itself on a similar interpretation of Article 73 of the Regulation. With reference to the interpretation given by the Court to Article 13(2)(a) in the *Ten Holder* judgment, it takes the view that this provision points to Netherlands legislation as being the legislation applicable to persons who have taken early retirement.

9. However, the interpretation given to the *Ten Holder* judgment by the Commission seems to me to be incorrect. It cannot be generally inferred from that judgment, as may be suggested by paragraph 1 of the operative part, that a worker who ceases his employment on the territory of one Member State and does not go to work in another Member State, remains subject to the legislation of the former State. Advocate General Mischo in his Opinion delivered on 14 June 1990 in Case C-245/88 *Daalmeijer* v *Bestuur van de Sociale Verzekeringsbank* [1991] ECR I-555 (particularly paragraphs 12 to 24), convincingly demonstrated that the Court did not thereby wish to introduce an unlimited affiliation in the country of employment for persons who have definitively ceased to be employed. In that judgment the Court was only envisaging the limited situation of a migrant worker who temporarily ceases to be employed, for example on account of sickness or pregnancy, and for the duration of the cessation settles in another Member State. What the Court wished to elucidate in *Ten Holder* was that such temporary cessation and establishment in another Member State, even if for quite a long period, does not result in the worker losing his affiliation to the social security system of the Member State in which he works (and intends to continue working).

11 — Judgment in Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503.

In its judgments in Cases C-140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387 (paragraphs 9 and 10) and in *Daalmeijer*, cited above, (paragraphs 12 and 13),[12] the Court upheld the line taken by Advocate General Mischo and held that Article 13(2)(a) or (d) of Regulation No 1408/71 does not apply to workers or officials who as persons who have taken early retirement have definitively ceased to be employed.

Consequently, the argument which the Commission seeks to infer from paragraph 2 of the operative part of the *Ten Holder* judgment is also erroneous. According to that argument persons who have taken early retirement are subject to the Netherlands General Law on Child Benefit because they are compulsorily insured under the sickness assurance legislation and the Netherlands legislature has thereby acknowledged that Netherlands legislation is, in their case as well, the applicable legislation under Article 13(2)(a). That conclusion is inferred from the *Ten Holder* judgment whereby the designation under the conflict rules in Title II of Regulation No 1408/71 of the legislation of a Member State as the legislation applicable to a worker means that only the legislation of that Member State is applicable to him. The Court's judgment is, however, applicable only *where* such designation has occurred which, as already stated, is not so in the case of workers who have definitively ceased employment. The fact that the Netherlands legislature acknowledged its legislation to be the legislation indicated by the conflict rule in Article 13(2)(a) is, moreover, irrelevant since, as the Court held in *Ten Holder* (paragraph 21) it is not for the Member States to determine 'the extent to which their own legislation or that of another Member State is applicable'.

10. The *Daalmeijer* judgment is relevant in another way to the present case. For in that case the Court answered the question whether a residence requirement laid down in the Nederlandse Algemene Ouderdomswet (Netherlands General Law on Old-age) in order to delimit the category of insured persons may be applied against a non-resident. In that connection the Court inferred the following (paragraphs 14 to 16) from the finding that Article 13(2)(d) of Regulation No 1408/71 does not concern persons who have definitively ceased to be employed:

'It follows that the residence requirements laid down for affiliation to the national social security scheme may be applied in a case such as this, unlike cases where the legislation of a Member State is applicable as a result of a conflict rule in Article 13(2) of Regulation No 1408/71 (see the judgment of 3 May 1990 in Case C-2/89 *Sociale Verzekeringsbank* v *Kits van Heiningen* [1990] ECR I-1755).

In that regard it should be borne in mind that, as the Court has consistently held, it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, which include the conditions governing the cessation of affiliation, provided always that in that connection there is no discrimination between nationals of the host state and

12 — Judgments in Case C-140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387, and Case C-245/88 *Daalmeijer* v *Bestuur van de Sociale Verzekeringsbank* [1991] ECR I-555.

nationals of the other Member States (see, *inter alia*, the judgment of 24 September 1986 in Case 43/86 *Sociale Verzekeringsbank* v *De Rijke* [1987] ECR 3611, at paragraph 12).

Nor does Regulation No 1408/71 contain any provision whose application, whether directly or by analogy, would make it possible to set aside a residence requirement of that kind.'

11. In the light of the *Noij* and *Daalmeijer* judgments, it seems to me to be established (i) that the conflict rule contained in Article 13(2)(a) of Regulation No 1408/71 is not applicable to persons who have taken early retirement and have definitively ceased to be employed; (ii) that it is for the national legislature in principle to determine the conditions governing the right or the obligation to be affiliated to a social security system or to such and such a branch of that scheme, without, however, on that occasion discriminating between its nationals and nationals of the other Member States; and (iii) that the national legislature may incorporate in its legislation a residence requirement as a condition of affiliation to one or more branches of the social security system, provided that that legislation is not the legislation determined under Article 13(2).

In line with that judgment, it seems to me that the Netherlands legislature was entitled to resolve to continue to operate the sickness assurance fund in the case of persons who have taken early retirement and already prior to their definitive cessation of employment were compulsorily insured under the sickness assurance legislation, without that leading to their being insured under all the other branches of the scheme including, in particular, the General Law on Child Benefit. Likewise it was entitled to make the application of that legislation subject to a residence requirement in the case of persons who have taken early retirement. In fact the prohibition contained in Article 75 of Regulation No 1408/71 is not applicable where Article 73 of the Regulation does not apply to persons who have taken early retirement and definitively ceased employment and for this category of employed persons (as defined in Article 1(a) of the Regulation) no legislation is designated as being applicable under a conflict rule contained in Title II of Regulation No 1408/71.

12. However, in *Daalmeijer* the Court pointed out that legislation not designated by a conflict rule in Title II may not discriminate between its own nationals and those of other Member States. In its reply to the question asked by the Court, the Commission stated, and repeated at the hearing, that that condition is not satisfied in the present case because the residence requirement is a disguised form of discrimination from the moment when it applies almost exclusively to non-Netherlands nationals, namely former Belgian frontier workers who have continued to reside in Belgium or have returned there.

According to the settled case-law of the Court [13]

'... the scope of an action brought under Article 169 of the EEC Treaty is delimited both by the preliminary administrative procedure provided for by that article and by the conclusions set out in the application

13 — See in particular the judgment in Case 166/82 *Commission* v *Italy* [1984] ECR 459, at paragraph 16.

and that the Commission's reasoned opinion and its application must be founded on the same grounds and submissions.'

However, neither in the pre-litgation phase nor in its application has the Commission alleged Article 6 of the General Law on Child Benefit to be a disguised form of discrimination. Nevertheless, in its application the Commission based its complaints on Article 3 of Regulation No 1408/71 which enshrines the principle of equal treatment. The assertion that the residence requirement is a disguised form of discrimination is to my mind a development of that argument which, moreover, may be regarded as having been raised by implication in the reasoned opinion, all the more so since the Netherlands Government did not claim an infringement of the rights of the defence on this point. I therefore consider that the argument as to a disguised discrimination is admissible, though not well founded.

13. It is true that the prohibition of discrimination at issue in *Daalmeijer* must be broadly construed as covering all kinds of discrimination, both overt and covert. However, it is clear from paragraph 16 of the judgment in *Daalmeijer* that a residence requirement — in that case the residence requirement laid down in Article 6(1) of the Algemene Ouderdomswet couched in the same terms as the condition contained in Article 6(1) of the General Law on Child Benefit — cannot be regarded in this case as a disguised form of discrimination. Such a condition is common to social security schemes such as the Netherlands Law on Child Benefit which gives to all residents, irrespective of whether they are employed persons or not, a right to benefit for dependent children financed not by employee and/or employer contributions but by public funds. The fact that non-residents who have taken early retirement as a result of that condition cannot claim child benefit is not the result of any discrimination against the nationals of other Member States but of the fact that the grant of family allowances is perceived differently in the Member States: in some Member States, such as the Netherlands and Germany, as public assurance schemes; in other Member States, such as Belgium, as a scheme linked to the exercise of occupational activities. In that connection it is significant that the Commission is only alleging disguised discrimination against former Belgian frontier workers and not for example former German frontier workers. The reason for this is that persons who have taken early retirement and reside in Germany can claim child benefit under the German legislation which like the Netherlands system is designed as a public assurance scheme, that is to say one that gives to all residents a right to benefit for dependent children.

14. In the light of all the foregoing, I propose that the Court should dismiss the application and order the Commission to pay the costs.