OPINION OF MR ADVOCATE GENERAL CARL OTTO LENZ

delivered on 19 September 1991 *

Mr President,
Members of the Court,

A — The facts

1. In this case the Commission is bringing an action against the French Republic for having failed to fulfil its obligations under the combined provisions of Article 13(1) and Article 33 of Council Regulation (EEC) No 1408/71 [1] by deducting sickness insurance contributions from supplementary and early retirement pensions received by persons who are resident in a Member State other than France. (It should be explained in this respect that, according to the definition of the subject matter of the action and the content of the whole proceedings, this case relates exclusively to persons covered by the sickness insurance of another Member State, whose costs are not therefore borne by the French scheme.)

2. The *Commission* considers that its case is well founded, although it finds that it must concede that, because the benefits in question derive from *industrial agreements*, those benefits do not come within the matters covered by Regulation No 1408/71 by virtue of the combined provisions of Article 4 and Article 3(1)(j).

3. According to the *Commission*, the important point is that the persons concerned are covered by the abovementioned regulation and that the case concerns payments to sickness insurance schemes which undoubtedly fall within the scope of application of Regulation No 1408/71. Another decisive point for the Commission is that it believes it can deduce from Regulation No 1408/71 (having regard to the relevant case-law) that there is a principle according to which migrant workers should be subject to *only one* system of legislation, as Article 13(1) provides that persons to whom the regulation applies are to subject to the legislation of a single Member State only and Article 33 puts this rule in concrete form with regard to deductions from pensions in respect of sickness and maternity benefits. It should accordingly be assumed — the Commission referring at this stage to the principle known as *parallelism* — that a Member State may not deduct any sickness insurance contributions where, under Community law, the sickness insurance is governed the legislation of another Member State (a view which is shared by the majority of members of the Administrative Commission on Social Security for Migrant Workers).

4. In considering whether — having heard the arguments put forward in the proceedings — the objection raised by the Commission is indeed well founded or whether deductions may be made from benefits not covered by Regulation No 1408/71 in order to finance sickness insurance the following matters are to be taken into account.

* Original language: German.

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 (OJ L 149, p. 2).

B — Appraisal

5. *1.* Consideration should be given, first of all, to the defendant's argument in relation to recipients of *early retirement benefits*, which is that under French legislation there always exists entitlement to benefits in the case of sickness and maternity, regardless whether the recipient resides in France or in another Member State. The defendant is of the opinion that, in such a case, to require those recipients to contribute towards the French sickness insurance scheme as well would not in any way infringe the principle of parallelism referred to by the Commission — if any such principle exists at all under Community law.

6. We have seen from the defendant's rejoinder that, in cases in which early retirement pensions *alone* are paid (subject to compliance with the condition that no professional or trade activity is being pursued), the relevant case-law (see the judgment in Case 302/84)[2] provides that French law is applicable as the law of the State in which the person concerned was last employed, so that the cost of benefits in the case of sickness is borne by the French State in accordance with Article 19 of Regulation No 1408/71. That judgment also states that the same applies to persons who *also receive an old-age pension*, since early retirement pensions can only be drawn simultaneously with certain old-age pensions (i. e. those which relate to an activity *which precedes* the activity for which the early retirement pensions are paid). Therefore, in a case of this kind, French law is applicable by reference to the territory in which the person was last employed, and the cost of benefits in the case of sickness would therefore have to be borne by the French authorities in accordance with Article 19 of Regulation No 1408/71, even where the retirement benefits are paid in another Member State. For the decisive factor is that recipients of early retirement pensions are to be regarded as *employed persons*, so that Article 34(2) of Regulation No 1408/71, according to which Articles 27 to 33 are not to apply to pensioners who are entitled to benefits under the legislation of a Member State as a result of pursuing a professional or trade activity, applies.

7. I would state right now, however, that it seems difficult on this basis to maintain the point of view that recipients of early retirement pensions as a whole are in any event wrongly included in the action brought by the Commission and in the form of order sought.

8. Admittedly, the defendant's argument seems indisputable in the case of persons who receive *only* early retirement pensions. For Article 19 of Regulation No 1408/71 must be decisive in relation to these persons, as can be seen from the reasoned Opinion of the Commission attached to the defence which does not relate to the present case. It is difficult, however, to accept the defendant's line of argument in the — equally conceivable — situations in which recipients of an early retirement pension are *simultaneously* entitled to a pension in respect of a previous activity in another Member State. The defendant is therefore wrong in this case to apply Article 19 by way of Article 34(2), whose terms I have already indicated, since the

2 — *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821.

latter situation does not really concern pensioners 'who are entitled to benefits as a result of *pursuing a professional or trade activity*,' but pensioners who are entitled to *early retirement* pensions. I find more convincing the Commission's view that in such a case Article 28 of Regulation No 1408/71, for example, might be relevant, which, in the case of sickness insurance, would in fact entail reference to a legal system other than the French system.

9. It is not therefore possible to consider dismissing the claim in so far as it concerns the levying upon recipients of early retirement pensions of contributions to French sickness insurance on the ground that the condition mentioned in the subject-matter of the action (sickness insurance cover provided by institutions other than French institutions) is not fulfilled.

10. 2. It is accordingly necessary to consider, first of all, whether the existence of the principle relied upon by the Commission and described at the beginning of my Opinion can actually be established, or whether the defendant is right in maintaining that no such principle can apply since Regulation No 1408/71 contains many exceptions to the general rule that only one system of legislation should be applicable and often allows more than one system of legislation to apply at the same time (as, for example, Article 14c and Annex VII to which that article refers, show).

11. It should be explained straight away that the defendant appears to overlook the fact that the Commission is not only relying on Article 13 of Regulation No 1408/71 and Article 33 (the terms of which are clearly not directly applicable to the circumstances in point in this particular case): it also bases its case on the conclusions which may be drawn from case-law as regards the issue arising in this case. I should also point out that a line of judgments (dating from the period before Regulation No 1408/71 came into effect) would appear to support the applicant's point of view.

12. One relevant judgment is that in Case 92/63,[3] which concerned, in particular, the interpretation of Article 12 of Regulation No 3, that is to say, the provision equivalent to Article 13 of Regulation No 1408/71 because it determined the law applicable to employed persons, the difference being, however, that it did not make it so clear as Article 13 of Regulation No 1408/71 that the persons covered by Regulation No 3 were to be subject to the legislation of *only one* Member State. In order to determine the proper scope of Article 12, it was therefore necessary to examine whether the simultaneous application of more than on system of legislation to the same employed person was contrary to Articles 48 to 51 of the Treaty. After examining that question in the light of the abovementioned provisions of the Treaty, the Court, whilst emphasizing the principle that migrant workers should be protected from any disadvantages in social security matters, concluded that Article 12 of Regulation No 3 precluded the application of the legislation of a Member State other than the State on whose territory the person worked. To judge by

3 — *Moebs, née Nonnenmacher* v *Sociale Verzekeringsbank* [1964] ECR 281.

the whole tenor of the deduction, this can only be considered to be demonstrating a *general principle*. Given that the point was also made in that judgment that it was not permissible to oblige the persons concerned to pay contributions to a social security institution which did not provide them with additional advantages in respect of the same risk and of the same period, this too (given the absence of any corresponding express provision in Regulation No 3), is to be seen as the deduction of a principle on which the regulation was impliedly based.

13. The situation is similar with regard to the judgment in Case 19/67,[4] which also refers to Article 12 of Regulation No 3. It is noteworthy that the Commission's case is supported by the fact that this judgment stated that it was in the interests of both workers and employers, as much as of insurance funds, to avoid any plurality or purposeless confusion of contributions and liabilities which would result from the simultaneous or alternate application of several legislative systems. The ruling that Article 12 prohibits the concurrent application of national legislation if this would lead to an increase in the charges borne by wage-earners or their employers without any corresponding supplementary protection is particularly relevant in this regard.

14. Later judgments, in Cases 73/72,[5] 276/81,[6] 302/84[7] and 60/85,[8] are also worth mentioning. The first of these judgments refers, in relation to Article 12 of Regulation No 3, to a 'principle' and a 'general rule' whilst in the other three judgments the Court not only emphasizes that the aim of the provisions of Title II of Regulations Nos 3 and 1408/71 is to ensure that the persons concerned are subject to the social security scheme of a single Member State but also states that 'that principle, which was applied by the Court in relation to Regulation No 3' is expressed in Article 13(1) of Regulation No 1408/71.

15. Reference should also be made to the judgment in Case C-140/88,[9] which gave detailed consideration to Article 33 of Regulation No 1408/71, which states: 'The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorized to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits . . . is to be borne by an institution of the said Member State'). This judgment is worth mentioning because, in referring to the objectives pursued by Regulation No 1408/71, it states that the rules laid down by Article 33 constitute the application of a *more general* principle.

16. Given that case-law, the reference by the defendant to Annex VII of Regulation No 1408/71, with its exception to the principle that only one system of legislation should apply, does not take us very far. The point is that it is of the very essence of a

4 — *Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 345.

5 — *Bentzinger* v *Steinbruchs-Berufsgenossenschaft* [1973] ECR 283.

6 — *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027.

7 — Judgment in Case 302/84, loc. cit.

8 — *M. E. S. van Vermoolen, née Luijten* v *Raad van Arbeid,* Breda [1986] ECR 2365.

9 — *G. C. Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387.

principle to allow certain exceptions to it (although, as the Commission quite rightly observes, these must then strictly construed). Secondly, the Annex in question only relates to the very specific case in which a person is self-employed and gainfully employed at the same time and therefore has absolutely nothing to do with the problem of sickness insurance.

17. If this line of reasoning is followed and the Commission's proposition concerning the application of the principle of a single system of legislation or the principle of parallelism between the obligation to pay contributions and benefits is accordingly accepted, it must necessarily be concluded that rules like the French provisions which are the subject of this dispute are fundamentally incompatible with those principles in so far as they require recipients of early retirement or supplementary pensions who, by virtue of Community law, are insured against sickness in another Member State to pay contributions towards French sickness insurance cover.

18. *3.* This conclusion is not altered by various other arguments put forward by the defendant, which I will now examine.

19. (a) This is particularly so in so far as it points out that the deductions in question are *solidarity contributions*, which do not give rise to any entitlements.

20. The Commission countered this point with the observation that under French legislation there is no distinction between contributions deducted from statutory pensions and those deducted from early retirement or supplementary pensions. All these deductions are governed by the same provisions, and the common purpose of all of them is to finance general sickness insurance. The Commission observed, secondly, that Regulation No 1408/71 does not contain a specific definition of the term 'contribution' and that none of its provisions indicate that some contributions should be treated separately by virtue of their character as solidarity contributions.

21. (b) In so far as the defendant also relies on the principle of *legal certainty*, developed in case-law which is of particular importance with regard to the financial consequences of Community law (see the judgment in Case C-30/89) [10] and therefore also plays a prominent role in social security law, it is open to the counter-argument that the principle invoked by the Commission is one which — as has already been demonstrated — the Court derived long ago from the rules of the Treaty on the abolition of obstacles to the free movement of persons. Its scope of application has therefore been beyond doubt for some considerable time, even if Article 33 — in accordance with the matters covered by Regulation No 1408/71 — only refers to the institutions paying such old-age insurance benefits which come within the scope of the Regulation and to their right to deduct contributions for sickness insurance.

10 — *Commission* v *France* [1990] ECR I-691.

22. (c) In so far as the defendant further pointed out that Regulation No 1408/71 was adopted pursuant to Article 51 of the EEC Treaty (which only refers to the aggregation of all periods taken into account under the laws of the several countries and the payment of benefits to persons resident in the territories of other Member States) and that it is not therefore concerned with questions of social security *financing*, two points can be made: Article 51 of the EEC Treaty merely sets out in (a) and (b) the most important measures (as is shown by the use of the words 'insbesondere' and 'notamment' in the first paragraph) and does not therefore contain an exhaustive list of all the relevant provisions. Secondly, it is already quite clear from Article 33 of Regulation No 1408/71 (which regulates questions concerning the collection of contributions) and from the abovementioned principle of parallelism, which is mentioned in early case-law, that the defendant's view is not tenable.

23. (d) This adverse conclusion also applies to the argument based on Article 33 of Regulation No 1408/71 that the basis of assessment ('assiette') is decisive for this provision and that deductions from early retirement and supplementary pensions should be ignored since, according to case-law, these benefits should not be treated in the same way as old-age pensions (see the judgment in Case 171/82 [11] concerning the French system of 'guaranteed retirement income' and the judgment in Case C-262/88 [12] relating to a supplementary pension which was treated as 'pay' within the meaning of Article 119 of the EEC Treaty).

11 — *Valentini* v *Assedic* [1983] ECR 2157.

12 — *Barber* v *Guardian Royal Exchange Assurance* [1990] ECR I-1889.

24. Although it must be admitted that Article 33 certainly does not have direct application in the present case because of its limited scope, the fact remains that the Commission's view is at any rate consistent with the broad principle of parallelism developed in case-law, which makes it clear that it is not the basis of assessment which is the determining factor but the purpose of the deduction is also important under Community law.

25. (e) Finally, the Commission's position is not open to the objection that it leads to *discrimination* in two ways: first, because employees in receipt of early retirement pensions who are resident outside France would be given preferential treatment over employees residing in France through being exempt from paying contributions; secondly, because the Commission's assessment does not include social security systems financed from taxation, so that in Member States having such systems the deduction of contributions from supplementary pensions and early retirement pensions is possible in any event.

26. As far as the first point is concerned, I detect a certain contradiction in the defendant's arguments. In the written procedure the defendant stated that recipients of early retirement pensions resident in France paid contributions on those benefits even if they were not members of its sickness insurance scheme, whereas at the hearing its representative gave a clear negative answer to the question whether there were recipients of early retirement pensions resident in France who were not insured there against sickness. In response,

the Commission noted that some inequality of treatment also exists with regard to contributions charged on pensions which come within the scope of Regulation No 1408/71 (because the basis of assessment in the case of migrant workers might, in certain circumstances, be lower than that applicable to workers who remain employed in one Member State only) and also rightly pointed out in this respect that Community law did not seek to exclude such 'reverse' discrimination. Indeed, the recitals in the preamble to Regulation No 1408/71 clearly show that its purpose was not general equality of treatment for all employed persons but mainly the protection of those workers to whom the legislative systems of several Member States apply. This can be seen very clearly from the wording of the fifth recital, which reads: 'The provisions for coordination of national social security legislations fall within the framework of *freedom of movement* for workers who are nationals of Member States and should, to this end, contribute towards the improvement of *their* standard of living and conditions of employment'.

27. As far as the second point is concerned, it need merely be noted that the other systems mentioned by the defendant have a completely different method of financing. For this reason, any resultant differences cannot be classified in law as discrimination. I would add, however, that it is by no means certain whether the principle of parallelism should not also apply in some way to those systems (although this point need not be considered in this instance).

C — Opinion

28. *4.* In summary, I am compelled to conclude that the Commission's action appears to be well founded and that the Court of Justice should therefore declare that, by deducting sickness insurance contributions towards French sickness insurance cover from supplementary and early retirement pensions received by persons who are resident in a Member State other than France and who are insured against sickness there, the French Republic has failed to fulfil its obligations under Council Regulation (EEC) No 1408/71. In these circumstances the defendant should also be ordered to pay the costs.