# OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 7 September 1999 *

## I — Subject-matter of the proceedings

1. By two separate applications, lodged on 12 February 1998 (Case C-34/98) and 7 May 1998 (Case C-169/98), the Commission of the European Communities has asked the Court of Justice to declare, on the basis of Article 169 of the EC Treaty (now Article 226 EC), that the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of Regulation (EEC) No 1408/71, [1]

(1) by applying the 'contribution pour le remboursement de la dette sociale' (social debt repayment contribution; hereinafter 'the CRDS') to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of the Regulation, are not subject to French social security legislation; and

(2) by applying the 'contribution sociale généralisée' (general social contribution; hereinafter 'the CSG') to the employment income and substitute income of employed and self-employed persons resident in France who, by virtue of the Regulation, are not subject to French social security legislation.

In both cases, the Commission has asked the Court to order the French Republic to pay the costs.

2. These cases concern the issue of moving gradually towards funding social security schemes from taxation. Financing social welfare systems requires substantial sums that account for between 20 and 30% of gross domestic product in the majority of the Member States and are largely (though in very differing proportions, depending on the Member State concerned) derived from compulsory contributions payable on earned income on the one hand and

* Original language: Italian.

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416; hereinafter 'the Regulation'), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1). After consolidation, the Regulation was further amended by Council Regulation (EC) No 1223/98 of 4 June 1998 (OJ 1998 L 168, p. 1), Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) and Council Regulation (EC) No 307/99 of 8 February 1999 (OJ 1999 L 38, p. 1).

revenue from taxation on the other. [2] In the course of a debate that began in the 1970s, a number of reasons have been suggested for the increasing use of revenue from taxation (direct taxation, whether general or specific taxation, and indirect taxation): the need to meet increasing levels of social security spending (a gradually ageing population combined with a reduction in the length of working life and an increase in social security benefits) [3] and the need to make the methods of funding more equitable. As we shall see, the two pieces of legislation at issue in these proceedings are a response to those problems. In my opening remarks, I said that the two cases 'concern' the funding of social security schemes from taxation. That requires clarification. These cases do not question the Member States' freedom to secure that funding using 'fiscal' measures that affect taxpayers generally. Rather, they concern the freedom to 'tax' *only in so far as* it affects the income of one specific category of taxpayer: migrant workers, that is to say, nationals of one Member State who, in the exercise of one of the fundamental freedoms guaranteed by the Treaty, are subject — or have been subject — to the (social security) legislation of one or more Member States.

## II — The relevant Community legislation

3. Articles 48 and 52 of the Treaty guarantee freedom of movement for employees and the self-employed. The Regulation was adopted by the Council on the basis of Article 51 of the EC Treaty (now, after amendment, Article 42 EC) [4] in order substantially to coordinate social security legislation as between the various Member States and thus reduce as far as possible the obstacles posed by national legislation to the free movement of all workers, both employed and self-employed. [5]

Under Article 1(j) of the Regulation, '"legislation" means in respect of each Member

2 — For example, in 1988, revenue from taxation accounted for the following proportion of total social security funding: 77.5% in Denmark; 18.2% in France; 25.2% in Germany; 14.6% in the Netherlands and 43.4% in the United Kingdom (see A. Euzeby, *Le financement de la protection sociale dans les pays de la CEE: problèmes et perspectives*, in the proceedings of the congress '*Quel avenir pour l'Europe sociale: 1992 et après?*', Brussels, 16 and 17 November 1990, published by Ciaco, 1992, p. 133, table 3, p. 157 in particular).

3 — Social security benefits are among the elements of expenditure with the most significant impact on variations in the 'burden' of total public expenditure in relation to the Community Member States' gross domestic product (see G. Sigillò Massara, *Il financiamento della sicurezza sociale nella CEE: problemi e prospettive*, in *Il sistema previdenziale europeo*, edited by R. Pessi, CEDAM, Milan, 1993, p. 135, p. 136 in particular, citing OECD statistics).

4 — The Regulation was also adopted on the basis of Article 235 of the EC Treaty (now Article 308 EC).

5 — The Regulation originally covered employed persons only but was later extended to the self-employed by Council Regulation (EEC) No 1390/81 12 May 1981 extending to self-employed persons and members of their families Regulation No 1408/71 (OJ 1981 L 143, p. 1). Since the EC Treaty made no provision for the specific powers to act required to extend the Regulation, the legal bases for Regulation No 1390/81 are Article 2 (now, after amendment, Article 2 EC), Article 7 (repealed by the Treaty of Amsterdam) and Articles 51 and 235 of the EC Treaty.

State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2)'.

Article 2(1) of the Regulation ('Persons covered') provides that '[t]his Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

Article 4(1) of the Regulation ('Matters covered') provides that 'this Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits'.

Article 4(2) of the Regulation provides that 'this Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory ...'.

Article 13(1) of the Regulation ('General rules'), which comes under Title II on 'Determination of the legislation applicable', provides that 'persons to whom this regulation applies shall be subject to the legislation of a single Member State only. ...'.

Lastly, subject to Articles 14 to 17 of the Regulation (governing special cases), Article 13(2) of the Regulation provides:

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

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

...'.

## III — The national rules in issue in Case C-34/98: the CRDS

4. The CRDS was introduced by Article 14-I of Order No 96-50 of 24 January 1996 on the repayment of the social debt (hereinafter 'Order No 96-50'). [6] All natural persons domiciled in France for income tax assessment purposes are liable to pay the CRDS [7] on (and this is the aspect relevant here) certain employment income (wages, for example) and certain substitute

6 — *Journal officiel de la République française* (Official Journal of the French Republic; hereinafter '*JORF*') of 25 January 1996, p. 1226.

7 — See Article 14-I of Order No 96-50 which refers to Article L. 136-1 of the Code de la Sécurité sociale (Social Security Code; hereinafter the 'CSS'); the current Article L. 136-I of the CSS (formerly Article 127 of Law No 90-1168 establishing the CSG — see footnote 20 below) was amended by the amending Finance law for 1993 No 93-859 of 22 June 1993.
Resident in France for tax purposes are those persons who fulfil the conditions laid down in Article 4B of the General Tax Code, that is to say: 'persons whose home or principal place of residence is in France; persons who are employed or self-employed in France, unless they prove that that employment is on an ancillary basis; and persons for whom France is the centre of their economic activities'.
Like the CSG (see footnote 21 below), therefore, the CRDS is not applied to income from professional or trade activities pursued in France by workers (either employed or self-employed) who, although subject to French social security legislation, are resident for tax purposes in another Member State.

income (pensions and unemployment allowances, for example).[8] Pursuant to Article 15-III(1) of Order No 96-50, the CRDS is also applied to employment income and substitute income from a foreign source which is subject to income tax in France, subject, naturally, to conventions on the avoidance of double taxation. The pre-printed income declaration forms for natural persons include a section for 'foreign' income subject to the CRDS.[9] The CRDS on income from a foreign source is calculated, collected and monitored by the French tax authorities in accordance with the same rules as apply to income tax, and with the same safeguards, facilitations and penalties.[10] The CRDS, the rate of which is set at 0.5% of taxable income,[11] is applied to income (both national and foreign) received between 1 February 1996 and 31 January 2009.[12]

5. Pursuant to Article 6-I of Order No 96-50, the proceeds of the CRDS are paid into the Caisse d'amortissement de la dette sociale (Social Debt Redemption Fund; hereinafter 'the CADES'),[13] a public body under the joint supervision of the Minister for the Economy and Finance and the Minister for Social Security.[14] According to Article 2 of Order No 96-50, the primary purpose of the CADES is to discharge the social debt of FRF 137 billion[15] incurred by the Agence centrale des organismes de sécurité sociale (Central Agency for Social Security Institutions; hereinafter 'ACOSS') and owed, as at 31 December 1995, to the Caisse des dépôts et consigna-

8 — The income on which the CRDS is levied is broadly the same as the income subject to the CSG (see the second subparagraph of Article 14-I of Order No 96-50 which refers to the employment income and substitute income cited in Articles L. 136-2 to L. 136-4 of the Social Security Code, concerning the CSG. Articles L. 136-1 to L. 136-5 of the Social Security Code incorporate into that Code the legislative provisions establishing the CSG (see Article 7 of Law No 93-936 of 22 July 1993, *JORF* of 23 July 1993, p. 10374; hereinafter 'Law No 93-936')).
Initially, the CRDS covered a range of income not subject to the CSG. The employment income exempt from the CSG but subject to the CRDS included, for example, employer contributions to social security and supplementary pension schemes, allowances payable on modification or termination of employment contracts and supplementary parental allowances for workers with children, while the substitute income on which the CRDS exclusively was levied included the unemployment, retirement or invalidity benefits of taxpayers not liable for income tax, daily sickness and maternity benefits, benefits payable in respect of accidents at work and housing benefits (see Article 14 of Order No 96-50 and the Report to the President of the Republic on Order No 96-50, *JORF* of 25 January 1996, p. 1225, p. 1226 in particular). Subsequently, as a result of Article 9 et seq. of Law No 96-1160 of 27 December 1996 on the financing of the social security scheme for 1997 (*JORF* of 29 December 1996, p. 19369; hereinafter 'Law No 96-1160'), the basis of assessment for the CSG was extended as a result of amendments to Article L. 136-1 et seq. of the Social Security Code. In the case of employment income, the aim of that extension was to make the basis of assessment the same as the basis used for the CRDS, whereas in the case of substitute income, the current basis of assessment for the CSG is narrower than that of the CRDS, since family allowances and housing benefit remain excluded from it (see the Government report setting out policy guidelines in the field of health and social security and the objectives determining the general conditions of financial equilibrium, annexed to Law No 96-1160; *JORF* of 29 December 1996, p. 19376, paragraph 3.2.1). Making the basis of assessment for the CSG overlap more or less exactly with that of the CRDS has made it possible to simplify the process whereby undertakings make deductions at source from employees' wages (ibidem).

9 — Article 15-III(1) of Order No 96-50.

10 — See Article L. 136-6, III, of the Social Security Code, to which the third subparagraph of Article 15-I of Order No 96-50 refers (that provision actually relates to the CRDS on income from property which does not form part of the subject-matter in Case C-34/98). Article 15-III on the CRDS on 'foreign' income in turn refers to Article 15-I.

11 — Article 19 of Order No 96-50.

12 — See Articles 14-I and 15-III of Order No 96-50. According to the Commission, the law on financing the social security system for 1998 extended the period of validity of the CRDS to January 2014.

13 — The CADES was set up by Article 1 of Order No 96-50.

14 — The organisation and administrative and financial management and accounting system of the CADES are regulated in detail by Decree No 96-353 of 24 April 1996 on the Social Debt Redemption Fund (*JORF* of 26 April 1996, p. 6395; hereinafter 'Decree No 96-353').

15 — Approximately EUR 20.6 billion. In 1996, the interest on that debt amounted to FRF 8.2 billion, equivalent to approximately EUR 1.25 billion (see the report to the President of the Republic, cited at footnote 8 above, p. 1225).

tions (Consignments and Loans Fund; hereinafter 'the CDC'). [16] That debt has accumulated because the CDC financed the deficits of the general social security scheme in 1994 and 1995, as well as the anticipated deficit for 1996. In order to meet its responsibility, the CADES, to which the ACOSS debt was transferred as of 1 January 1996 (see Article 4-I), must make a series of payments to defray the social debt; in particular, between 1996 and 2008, the CADES must make annual payments to the general State budget of FRF 12.5 billion. [17] In addition, for 1996 alone, the CADES had to pay FRF 3 billion [18] to the Caisse nationale d'assurance maladie et maternité des travailleurs non salariés des professions non agricoles (National Sickness and Maternity Fund for Self-Employed Workers in Non-Agricultural Occupations; hereinafter 'the CANAM') in order to clear (in part at least) the debt existing at 31 December 1995 and to fund the anticipated deficit for 1996 (see Article 4-II). The resources which the CADES uses to make those payments are not restricted to the CRDS on employment income and on substitute income (that is to say the levy at issue in these proceedings), but also include, for example, the proceeds of the CRDS on income from property (Article 15-I) and on sales of certain precious metals, jewels and objets d'art (Article 17-I), the proceeds of the issue of bonds (Article 5-I) and the management and sale of the housing stock of social security institutions (Article 9). [19]

## IV — The national legislation in issue in Case C-169/98: the CSG

6. The CSG was introduced by Article 127 of the 1991 Finance Law, Law No 90-1168 of 29 December 1990. [20] As in the case of the CRDS, all natural persons resident in France for income tax assessment purposes

16 — See Article 4-I of Order No 96-50. The CDC is a national public body with a special status: originally the — 'statutory, sole and compulsory' — depositary and manager of private funds, it was subsequently given responsibility, on its own behalf and on behalf of other bodies, for the management and administration of a whole range of funds whose protection is considered to be in the public interest (savings, provident, retirement, social and notarial funds, among others; see M. Pomey, *Le régime juridique de la Caisse des dépôts et consignations*, in *La Revue Administrative*, 1974, No 157, p. 18). The CDC is also responsible for the direct disbursement of certain social welfare benefits (see Case 157/84 *Frascogna I* [1985] ECR 1739, and Case 256/86 *Frascogna II* [1987] ECR 3431.

17 — Approximately EUR 1.9 billion; see Article 4-III of Order No 96-50.

18 — Approximately EUR 0.45 billion.

19 — For detailed information on CADES resources and expenditure, see Articles 9 and 10 of Decree No 96-353. The CRDS followed in the wake of a series of special measures that had proved inadequate but were designed to cover the deficit in social security funding that arose during the 1990s and, as part of a general reform of the French social security scheme, it was accompanied by structural and emergency rebalancing measures, such as Order No 96-51 of 24 January 1996 on emergency measures to restore the financial equilibrium of the social security scheme (*JORF* of 25 January 1996, p. 1230; Order No 96-51 is designed to achieve financial equilibrium in the sickness and family sectors). According to the report to the President of the Republic on that order, 'the reform of social protection tabled by the Government includes structural measures designed to secure, on sound bases, the future equilibrium of the social security schemes. That equilibrium is an absolute prerequisite if those schemes are to survive and be socially and economically effective' (*JORF* of 25 January 1996, p. 1229).

20 — *JORF* of 30 December 1990 (Article 127 is on page 16387); hereinafter 'Law No 90-1168'. After the contribution was introduced, the legislative provisions on the CSG were introduced into the CSS (Article L. 136-1 et seq.), in accordance with Law No 93-936 (see footnote 8). On two occasions, the Conseil constitutionnel (body monitoring the constitutionality of, among other things, legislative acts of the French Republic) has confirmed, on the basis of French national law, that the CSG is purely fiscal in nature (see Decision No 90-285 of 28 December 1990 (*JORF* of 30 December 1990, p. 16609), and Decision No 96-384 of 19 December 1996 (*JORF* of 29 December 1996, p. 19380)).

are liable to pay the CSG. [21] The CSG came into effect on 1 February 1991 (see Article 127 of Law No 90-1168) and is payable (and this is the aspect relevant here) on all the employment income and substitute income (including income from a foreign source or that received abroad) referred to in Article L. 136-2 et seq. of the Social Security Code (formerly Article 128 et seq. of Law No 90-1168): that means that, following the extension of the basis of assessment under Law No 96-1160 (see footnote 8), the basis of assessment for the CSG is now more or less the same as for the CRDS. Naturally, the income on which the CSG is payable is income taxable in France, subject, in the case of income received abroad, to the relevant international conventions on the avoidance of double taxation.

7. However, unlike the CRDS, the CSG on employment income and substitute income is directly collected by the institutions responsible for collecting compulsory contributions to the general social security scheme, in application of the same rules, safeguards and penalties as apply, in respect of the same categories of income, to the collection of contributions to the general scheme. [22] According to the Commission's originating application, in order to make it possible to apply the provisions on the CSG to workers not registered with the French social security scheme because they pursue an occupation in another Member State, those workers were asked to register with the agencies of the Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Union for the Collection of Social Security and Family Allowance Contributions; hereinafter 'the URSSAF'). [23] However, problems in collecting the CSG and the need to improve collection procedures prompted the French Republic unilaterally to suspend, on 28 November 1994, the imposition of the CSG on persons in receipt of employment income or substitute income from a foreign source. [24]

8. The ordinary rate of the CSG was initially set at 1.1% of taxable income and later increased to 2.4% in 1993, 3.4% in 1996 and 7.5% (6.2% for substitute income) in 1997. [25] Initially, all proceeds

21 — See Article L. 136-1 of the CSS (formerly Article 127 of Law No 90-1168). As regards persons liable to pay the CSG, the French Government points out that (as in the case of the CRDS, see footnote 7) the contribution is not payable on employment income received in France by (employed or self-employed) workers who, although subject to French social security legislation, are in fact resident for tax purposes in another Member State.

22 — See Article L. 136-5 (I) of the CSS (formerly Article 131-I of Law No 90-1168).

23 — Pursuant to the second paragraph of Article L. 136-5(I) of the CSS (formerly the second paragraph of Article 131-I of Law No 90-1168), the URSSAF and the general social security funds have the authority to monitor payment of the CSG in accordance with the procedures laid down under the CSS.

24 — According to the French Government, collecting the CSG from: (a) frontier workers, (b) employed persons whose employers are not established in France, and (c) the holders of retirement pensions linked to activities pursued outside France had posed a number of specific problems, including the requirement to be registered with a French social security agency (whereas the CRDS is paid directly to the tax authorities to which a single declaration of income is sent) and to make a periodic declaration of income received abroad converted into French francs.

25 — The various rates of the fiscal levy were set, respectively, by Article 134-I of Law No 90-1168; Article 8-III of Law No 93-936; Article 17 of Law No 96-1160, and Article L. 136-8(I) and (II) of the CSS. For the 1997 tax year, the abovementioned Government report accompanying Law No 96-1160 states that proceeds from the CSG totals FRF 44.2 billion (the equivalent of approximately EUR 6.7 billion), 74% deriving from the CSG on employment income, 19% from the CSG on substitute income and 7% from the CSG on income from property (*JORF* of 29 December 1996, p. 19378).

from the CSG were paid into the Caisse nationale des allocations familiales (National Family Allowances Fund; hereinafter 'the CNAF').[26] Under Article L. 136-8 (IV) of the CSS, 1.1% of the proceeds from the CSG on (employment or substitute) income is now paid to the CNAF, 1.3% to the Fonds de solidarité vieillesse (Old-age Solidarity Fund; hereinafter 'the FSV')[27] and 5.1% (CSG on employment income) or 3.8% (CSG on substitute income) to the compulsory sickness insurance schemes. Under the Finance Law for 1997, the CSG on employment income and substitute income became partially deductible from taxable income.[28]

9. The purpose of the CSG is gradually to replace a regressive system of social security contributions with a form of progressive 'contributory' system based on taxable income (that is to say, based on the individual's ability to pay). The object of the law establishing the CSG is to achieve greater equity, solidarity and social justice. Universal entitlement to cover for the risks insured is thus paralleled by a universal obligation to provide funding: '(through the CSG), the State has sought to enhance the redistributive nature of the scheme'.[29] Based on the principle that the same level of contribution must be paid on the same level of income, the CSG therefore provides a mechanism by which the methods of financing social security may be adapted to reflect a new conception of solidarity, now defined as 'universal', which underpins the French social security scheme. Thus the CSG partly replaces those social security contributions which placed an excessive burden on lower incomes and, at the same time, boosts the revenue earmarked for social security spending.[30] Moreover, the progressive nature of the CSG means that it is possible to lower the levels of social security contributions.[31] As the French Government has pointed out, the CSG is the first stage in the move towards partially funding social security from taxation; it

26 — See Article 134-II of Law No 90-1168.

27 — The FSV was set up by Article 1 of Law No 93-936 and is now provided for by Article L. 135-1 of the CSS.

28 — See Article 94 of Law No 96-1181 of 30 December 1996 (*JORF* of 31 December 1996, p. 19490).

29 — Sigillò Massara, op. cit, p. 166, referring to the CSG specifically. The French model does not seem to be unique. According to Williams, during the latter part of this century, the techniques of income tax have come to be used for collecting funds for social security purposes (D. Williams, *Asscher: The European Court and the power to destroy*, in *EC Tax Review*, 1997, p. 4, and p. 6 in particular).

30 — See European Commission, *Social protection in Europe*, Office for Official Publications of the European Communities, Luxembourg, 1994, p. 32.

31 — For example, the one per cent increase in the rate of the CSG (from 2.4% to 3.4%, see point 8 above) allocated to sickness insurance was accompanied by a simultaneous 1.3% reduction in the relevant social security contributions on employment income (see the abovementioned Government report on Law No 96-1160, at paragraph 3.2.2, referring to Articles 17 to 26 of that law).

thus marks a point of transition from a system in which traditionally the State played only a limited role, because the legislature chose not to intervene, even where the general scheme was in deficit. [32]

10. Let me now summarise the essential characteristics of the CRDS and the CSG. Under French law, both are taxes. They are both 'direct' taxes, just like the tax on the income of natural persons, and are 'hypothecated', since the revenue thereby raised is allocated to a specific purpose. Both the CRDS and the CSG are used, albeit in different ways, to 'fund' the French social security system: the CRDS in general terms, since it is intended to clear the deficit accumulated by the scheme as a whole, [33] and more specifically, the CSG, which relates to family benefits (covered by the CNAF), old-age benefits (covered by the FSV) and sickness benefits. The CRDS and the CSG are payable (in almost identical manner) on all (and this is the aspect relevant here) employment income and substitute income originating (or received) in another Member State (and liable for taxation in France, under both national law and the provisions of the conventions for the avoidance of double taxation) of all persons deemed to be resident in France for income tax purposes. Finally, while the CRDS on income originating abroad is collected by the tax authorities, in accordance with the procedures and applying the penalties laid down in relation to income tax, the CSG is deducted directly by the social security bodies, in accordance with the procedures and applying the penalties laid down in relation to compulsory contributions. That particular feature has not, however, prevented the Conseil constitutionnel from considering the CSG, on several occasions, to be a genuine tax. In the light of the evident similarities between the two cases, I think it appropriate to

32 — See Sigillò Massara, op. cit, pp. 144 and 145, where the author points out that 'there is an increasing tendency to use public funds to finance benefits accorded to all citizens, as regards family benefits, in many countries, such as Germany, Denmark, Italy, Ireland, the Netherlands and the United Kingdom. France has adopted that approach in part only, by introducing — through the 1991 Finance Law — the contribution sociale généralisée (CSG), a charge levied over a broad basis of assessment, the proceeds of which are paid into the family benefits scheme (the CNAF), along with employer contributions' (p. 163, footnotes omitted). In an effort to improve the rationality of decisions on the style of levy used to raise resources, some States have made more or less use of forms of indirect taxation, generally earmarked for a specific purpose. For example: 'In Greece, 27% of funding for the lawyers' social insurance funds... comes from indirect taxes on tobacco, from the revenue from lotteries and from car taxes. In Belgium, a proportion of indirect taxation on tobacco and a 10% additional motor vehicle insurance premium are paid into the employee social insurance schemes (see Case C-191/94 *AGF Belgium* [1996] ECR I-1859), while in France agricultural workers benefit from a proportion of the taxes levied on alcoholic beverages' (Sigillò Massara, op. cit, p. 160, footnotes omitted) and, again in France, in 1997, indirect taxes on tobacco and alcohol were introduced to fund the CNAMTS (Caisse nationale de l'assurance maladie des travailleurs salariés — National sickness insurance fund for employees) and the FSV (see Article 27 et seq. of Law No 96-1160 and the relevant Government report, JORF, p. 19380).

33 — The same kind of debt clearance is provided for, again in general terms, in respect of the CANAM, to which only a minimal portion of CADES resources are allocated (see point 5 above). As we shall see, the French Government rejects the claim that the CRDS has to 'sustain' the social security scheme and contends that the proceeds of the contribution go 'via' the CADES, a financial body, and are destined, in the final analysis, for the general State budget.

examine them together and to present a single Opinion covering both sets of proceedings.

## V — Summary of the arguments of the parties

11. For the reasons set out above, the two actions brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC) and the statements of defence submitted by the French Republic have a number of elements in common, as I shall explain below.

12. The disagreement between the parties arises chiefly because the Regulation contains no definition of the term 'social security contribution'. The Commission takes the view that the CRDS and the CSG are not so much taxes (the classification given in the national legislation and defended by the French Government in both proceedings) as ordinary social security contributions and that, as such, they fall within the scope of the Regulation. The Commission bases its argument on objective factors, such as the purpose of the CRDS and the CSG, and the use to which they are put.[34] As far as their purpose is concerned, the Commission points out that they are assessed on the basis of (employment or substitute) income, generated as a result of worker mobility within the Community, on which compulsory social insurance contributions are already payable in another Member State pursuant to Article 13 of the Regulation. As regards the use to which they are put, although some distinctions have to be made, both the CRDS and the CSG are specifically intended to fund the social security scheme. According to the Commission, the CRDS relates to that scheme as a whole and, therefore, unquestionably benefits the branches listed in Article 4(1) of the Regulation.[35] Although, as the Commission acknowledges, the CSG relates only to certain branches of the French social secur-

34 — The criterion for interpretation put forward by the Commission is based on that used by the Court to establish whether certain social security benefits fall under the matters covered by the Regulation: 'the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within it is based essentially on the constituent element of each particular benefit, in particular its purpose and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation' (see, *inter alia*, Case 207/78 *Even* and *ONPTS* [1979] ECR 2019, paragraph 11; Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 11; Case 122/84 *Scrivner and Cole* [1985] ECR 1027, paragraphs 18 and 19; Case C-45/90 *Paletta and Others* v *Brennet* [1992] ECR I-3423, paragraph 16; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 28; Case C-66/92 *Acciardi* [1993] ECR I-4567, paragraph 13; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 17; Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 19).
The Court adopts a similar approach, based on an analysis of the 'essential characteristics' of the contribution (such as the basis of assessment and the fact that it applies to all stages of production and distribution), in order to ascertain whether there has been any infringement by the Member States of the prohibition — under Article 33 of the Sixth VAT Directive (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, OJ L 145, p. 1) — on introducing taxes, duties or charges which can be 'characterised as turnover taxes' (see, for example, Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, paragraphs 12 to 14; Case C-347/90 *Bozzi* [1992] ECR I-2947, paragraphs 14 to 17; Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273, paragraph 6; Case C-318/96 *SPAR* [1998] ECR I-785, paragraphs 22 to 29).

35 — As regards the CANAM (see point 5), sickness and maternity benefits are covered by Article 4(1)(a) of the Regulation.

ity scheme, these overlap with some of those listed in Article 4(1) of the regulation: sickness benefits (Article 4(1)(a)), old-age benefits (Article 4(1)(c)) and family benefits (Article 4(1)(h)). The Commission goes on to point out that as well as being partially deductible from gross taxable income for income tax purposes, the CSG is actually collected by the social security bodies themselves, in accordance with the procedures laid down for the collection of compulsory contributions.

13. Again, in the Commission's view, these contributions that are payable on the employment or substitute income originating (or received) abroad of any person considered to be resident in France for tax purposes in connection with the assessment of income tax, affect the income of workers who fall into the category of persons covered by the Regulation, and therefore of all those workers 'who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States' (Article 2(1) of the Regulation). Essentially, these are the workers who, although resident in France, actually obtain their (employment or substitute) income from a different Member State in which they are pursuing (or have pursued) a professional or trade activity, as a result of having exercised the freedom of movement guaranteed under the Treaty. The Commission goes on to point out that the range of workers covered by the Regulation and affected by the two actions that it has brought is certainly not limited to frontier workers, as defined in Article 1(b) of the Regulation, [36] or, as the French Government contends (see below), the categories of 'frontier' workers provided for in the conventions on the avoidance of double taxation which the French Republic has concluded with neighbouring Member States. [37]

14. Under Article 13 of the Regulation — the conflict rule used, as the Commission points out, to determine the legislation applicable — workers covered by the Regulation are to be subject only to the legislation of the Member State in which they pursue their occupation (or, in the case of employees, the State in which the registered office or place of business of the undertaking or individual employing them is situated). According to that provision, therefore, workers resident in France for tax purposes who are (or have been) employed (or are, or have been, employed by an undertaking with its registered office or place of business) in another Member State are liable to pay compulsory contributions on the relevant income only in that other Member State. According to the Commission, the levying of the CRDS and the CSG, in addition to the contributions

36 — According to which, '"frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached, or who engages in the provision of services elsewhere in the territory of the same or another Member State, shall retain the status of frontier worker for a period not exceeding four months, even if he is prevented, during that period, from returning daily or at least once a week to the place where he resides'.

37 — Not only is the definition of frontier worker contained in these bilateral conventions not uniform, it does not match the definition given in Article 1(b) of the Regulation either. By way of illustration, the Commission has pointed out that the convention with the Federal Republic of Germany accords the status of 'frontier worker' to French workers who reside in France at a distance of not more than 20 km from the German border and pursue their occupation in Germany at a distance of not more than 30 km from the French border.

already paid in another Member State using the *same* basis of assessment, [38] prejudices the coordination achieved brought about by Article 13 of the Regulation, because it amounts to a double 'contributory' levy and is thus incompatible with the principle, established in Article 13, that the legislation of a single Member State only is to apply. Basically, by making the 'foreign' income of 'migrant' workers subject to the 'contributory' levy, the French Republic is exercising a power which it does not possess (see Article 13(2) of the Regulation). Finally, the effect of arbitrarily applying the same provisions to individuals — French residents who are not migrant workers and French residents who are pursuing or have pursued an occupation in another Member State — who are in objectively different situations in terms of the social security legislation applicable (which includes the provisions on contributory levies) constitutes, according to the Commission, discrimination in breach of Articles 48 and 52 of the Treaty.

15. The French Government points out that the Regulation, adopted on the basis of Article 51 of the Treaty, merely provides for the coordination of national legislation on social security and does not deprive the Member States of the freedom of organisation which they possess in this area in the absence of Community harmonising measures (and, according to the French Government, the same thing applies to taxation). As currently structured, that coordination leaves in being substantial differences between the various schemes of national legislation. In that connection, the French Republic points out that the Regulation provides definitions of the matters and persons covered by the coordination of the various national social security schemes, but contains no definition of the term 'social security contributions'. Given that 'Article 51 leaves in being [substantive and procedural] differences between the Member States' social security systems', [39] the omission just pointed out is significant, according to the French Government, because it demonstrates that, when adopting the Regulation, the Council did not wish to intervene in the choice of arrangements for financing such schemes, as it would otherwise have had to make a whole series of fiscal provisions subject to the Regulation. It has therefore of necessity to be concluded that the provisions in issue, which are exclusively fiscal in nature, although they are used to finance, in the broad sense, a social security scheme, do not fall within the scope of the Regulation, but remain a matter for the Member States themselves. The French Government is thus arguing that the CRDS and CSG are strictly fiscal in nature and therefore not covered by the social security branches listed in Article 4 of the Regulation, and it points out that liability for the contributions is based solely on residence for tax purposes, regardless of whether the taxpayers have the status of 'workers' and of whether they belong to (or are registered with) the

38 — These proceedings do not therefore relate to the CRDS and the CSG to the extent that they are levied on employment or substitute income received (or derived from the pursuit of an occupation) in France. As regards the CRDS in particular, Case C-34/98 does not relate to it in so far as it is levied on other types of income, such as income from property (see point 5).

39 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 20.

French social security scheme. [40] As regards the CRDS in particular, not only is it paid in accordance with the procedures laid down for ordinary income tax, it does not give entitlement to any consideration (which is usually a feature of compulsory contributions), since not only is the revenue generated merely intended to defray the social debt in general (so that it does not contribute to specific funding for any particular social security branch with a view to the payment of social security benefits), it is, in the final analysis, paid into the State budget after having simply gone 'via' the CADES. Furthermore, the CADES, to which the CRDS is initially channelled, is not a social security body, but a financial institution whose purpose is certainly not to disburse benefits of any kind. As regards the CSG, the French Government similarly argues that there is no direct consideration by way of social security benefits (as when income tax is paid).

16. The French Republic also maintains that the effect of the levies in question on the movement of persons is minimal, given their low levels, particularly in the case of the CRDS. Finally, as regards the 'persons covered' by the levies in issue, the French Government does not accept that the CRDS and the CSG affect *all* migrant workers who have maintained their residence for tax purposes in France (as the Commission claims), because the majority of them at any rate avoid French taxes (including the CRDS and the CSG) on income from foreign sources on the basis of the general principle, laid down in the conventions for the avoidance of double taxation, according to which the State of taxation is the State of employment. Consequently, if my understanding is correct, the fiscal legislation applicable is the same, generally coinciding with that provided for by Article 13 of the Regulation. Only exceptionally, and, moreover, in response to a specific request from those concerned, given the favourable nature of the French taxation system, do the bilateral taxation conventions to which the French Republic is party provide that 'frontier' workers (see footnote 37) who reside in France but are employed in another Member State are subject in France to taxation on income from that employment: those then are the only 'migrant' workers affected by the levies in question. Furthermore, according to the French Government, the fact that the taxation arrangements provided for in the conventions for the avoidance of double taxation apply as a matter of course to the CRDS and the CSG confirms that they are purely fiscal and not contributory in nature. Finally, the CRDS and CSG are not discriminatory, even though they affect both 'resident' and 'migrant' workers, since they are levied on the basis of an objective factor common to all those required to pay them, namely residence for tax purposes in French terri-

40 — In that connection, as further proof that the CRDS and CSG are fiscal and not contributory in nature, the French Government points out that there is an exemption for workers who, although pursuing an occupation in France, are resident for tax purposes in another Member State. That appears to be significant inasmuch as these charges are clearly treated differently from compulsory contributions which, according to the French Government, are the only contributions that have to be compatible with the principles laid down in Article 13(1) and (2) of the Regulation (stipulating that the contributions are to be paid in the State of employment) because they fall within its scope.

tory (the factor that gives rise to the tax), regardless of the taxpayer's nationality. [41]

## VI — Legal assessment

### A — *The fact that the French authorities have suspended collection of the CSG is irrelevant*

17. I should like to make a preliminary observation on an aspect which, although mentioned by the Commission, does not appear in the French Government's pleadings, in relation to the CSG. These proceedings were brought under Article 169 of the Treaty, and it is quite irrelevant that the Member State concerned should have unilaterally taken the decision to suspend collection of the CSG from 'frontier' workers (see point 7 above) on the day after it received the Commission's letter of formal notice initiating the pre-litigation procedure in Case C-169/98. Suspending the fiscal levy is not sufficient to remedy any failure of the Member State concerned to fulfil its obligations if there remains within its legal system legislation incompatible with provisions of Community law, having direct effect. That would perpetuate an ambiguous state of affairs which leaves individuals in a state of uncertainty as to the possibilities for them of relying on Community law. [42] I would further observe that the French Government explained its decision to suspend collection of the CSG on the ground that it intended to establish new CSG collection procedures (implying that the levy will in any case be applied sooner or later), and not on the ground that it was persuaded that the Commission's observations, which moreover it firmly rejects in the pleadings submitted in these proceedings, were well-founded. Furthermore, in its rejoinder, the French Republic again confirmed that the real reason for continuing to suspend collection of the CSG for the past five years has been that it is awaiting the Court's judgment in this matter. That suspension, which was decided in 1994, is neither intended to, nor capable of, meeting the Commission's complaints.

### B — *CRDS and CSG: direct taxes or social security contributions? That question is irrelevant.*

18. I shall now turn to the substance. It is clear from the arguments put forward by

41 — In accordance with the principle of taxation generally recognised in all legal systems, and subject to the application of the relevant provisions of the conventions for the avoidance of double taxation, persons resident for tax purposes in a particular State are subject in that State to a so-called 'universal' obligation to pay tax on all their income from anywhere in the world, unlike non-residents who are liable only to pay tax on income generated in the State concerned.

42 — See, *inter alia*, Case C-185/96 *Commission* v *Greece* [1998] ECR I-6601, paragraphs 30 and 32.

the parties that the main point on which they differ is how the CRDS and the CSG are to be classified, that classification determining whether they will, or will not, be covered by the Regulation. In my opinion, however, the problem the Court has to consider must be viewed in terms other than those in which it is viewed by the parties — which have in any case arrived at conflicting solutions.

19. Firstly, the approach taken by the French Government does not appear to me to be correct. Naturally, I am aware of the principle whereby 'Community law does not detract from the powers of the Member States to organise their social security systems'.[43] I have, however, to draw attention to the settled case-law of the Court of Justice, according to which 'although direct taxation is a matter for the Member States, they must nevertheless exercise their direct taxation powers consistently with Community law'.[44] Furthermore, in exercising their authority to organise their social security schemes, the Member States must comply with provisions of Community law in force,[45] even though the legislation on social security (and similarly direct taxation) has yet to be harmonised.[46] Moreover, again according to the Court, even '[t]he fact that a rule is contained in a law which falls *outside* the scope of the Regulation does *not* necessa-

43 — Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17, and Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 21; see also Case 266/78 *Brunori* [1979] ECR 2705; Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Case C-186/90 *Durighello* [1991] ECR I-5773, paragraph 14; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 6; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27.

44 — Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; see also Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12; Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19; Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 21; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19.

45 — See, for example, Case 275/81 *Koks* [1982] ECR 3013, paragraph 10; Case 276/81 *Kuppers* [1982] ECR 3027, paragraph 14; Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 21; Case 60/85 *Luijten* [1986] ECR 2365, paragraph 14; Case C-120/95, cited in footnote 43 above, paragraph 23 and Case C-158/96, cited in footnote 43 above, paragraph 19, as well as the Opinions in those cases of Advocate General Tesauro (points 17 to 25); Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 34. See also Case 43/86 *De Ryke* [1987] ECR 3611, paragraph 12; Case C-245/88 *Daalmeyer* [1991] ECR I-555, paragraph 15; Case C-340/94 *De Jaeck* [1997] ECR I-461, paragraph 36, and Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 45, in which the Court explained that the powers of the Member States in the field of social security must be exercised in such a way as not to give rise to discrimination between nationals and citizens of other Member States, that is to say in compliance with one of the fundamental principles of the Community legal order, laid down in Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and Article 3 of the regulation.

46 — With the exception, in the case of direct taxation, of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p.1) and Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p.6).

rily imply that that rule itself falls outside the scope thereof'.[47] Therefore, I do not consider it possible to accept the claim that direct taxes, as such, can never undermine Article 13 of the Regulation. That article establishes a fundamental rule for Community coordination of social security schemes, implemented on the basis of the Regulation which seeks to establish freedom of movement for workers (see Article 51), one of the Community's basic principles.[48] The Member States may not adopt taxation or social security measures which conflict with, impede or discourage the exercise of that fundamental freedom for workers.[49] Unlike the French Government, I would therefore rule out the possibility that a kind of 'fiscal immunity' for Member States exists in the field of social security.

20. Furthermore, I am also puzzled by the argument advanced by the Commission to demonstrate that, in certain cases, the implementation of the CRDS and CSG by

47 — Case C-327/92 *Rheinhold & Mahla* [1995] ECR I-1223, paragraph 22 (my emphasis); to the same effect, Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 8 in particular. In Case C-57/90 *Commission* v *France* [1992] ECR I-75, Advocate General Lenz firmly rejected the defendant's argument that the Regulation does not concern the methods of financing social security schemes in so far as it provides merely for coordination of the national rules. That argument (very similar to that put forward by the French Government in these cases) was based on the failure of the Regulation to provide any definition of the term 'contribution' and, at the same time, on the differences in the way in which the national social security schemes were organised and funded. Advocate General Lenz agreed with the Commission's argument concerning the rule that the legislation of a single Member State is to apply and the principle that contributions and benefits parallel each other (see paragraphs 18 and 19 of the Report for the Hearing and point 22 of the Opinion of 19 September 1991 respectively). The Court did not give a ruling on that point because it considered that the early retirement and retirement pensions that formed the subject-matter of the financing were not covered by the Regulation, and that the provisions of Title II of the Regulation could not therefore be applied to them (paragraph 14 of the judgment).

48 — See Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 16.

49 — Having said that, I cannot agree with the French Government's argument that the Council took a conscious decision not to intervene in the financing of the social security schemes (see point 15 above). Even when the Regulation was adopted, use of fiscal instruments was quite widespread and subsequently became more prominent (see point 2 above); moreover, that is illustrated by the case-law of the Court of Justice which has had on several occasions to consider cases relating to the social security sector and involving public funding (see below, in this footnote). It therefore seems unlikely that — simply by failing to clarify a decision to that effect — the Council (which has nevertheless acted on several occasions over the years to amend the Regulation) intended to exclude from the scope of the Regulation a major element like the funding of social security schemes from taxation (moreover, when the Community legislature wished to exclude specific elements from the Regulation, it did so explicitly: see, for example, the last part of Article 1(j) and Article 4(2b)).
The judgments in which the Court has had occasion to consider social security benefits (held to fall under the matters covered by the Regulation) funded from tax revenue include: Joined Cases 379/85 to 381/85 and 93/86 *Giletti and Others* [1987] ECR 955, paragraph 3; Case C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraph 3, and Case C-66/92, cited in footnote 34 above. See also *Poucet and Pistre*, in which the Court considered two social security schemes — partly financed by 'small percentages of various taxes' or 'a contribution from the State, the amount of which is fixed in the Finance Law' (see the Opinion of Advocate General Tesauro, at point 4, fifth indent and point 5, fourth indent) — in order to assess the possible status of 'undertaking' within the meaning of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC respectively), and *Duphar and Others* concerning a social security scheme in part funded by 'financing from the public authorities' (paragraph 16). Finally, I would point out that in Case 295/84 *Rousseau Wilmot* [1985] ECR 3759, the Court was asked to consider a parafiscal charge introduced specifically for the purpose of financing social security funds.

the French legislature is incompatible with Article 13 of the Regulation. The Commission arrives at that conclusion by regarding the levies in issue as contributory rather than fiscal. However, such reasoning introduces an unnecessary complication into this case. The concept of social security contribution is not in fact defined by the Regulation. The clarification of the levies provided for under the French legislation as contributions in the light of criteria, such as the use to which the sums paid are put, is based solely on some of the Court's case-law concerning social security benefits or turnover taxes. That case-law is, however, based on definitions provided by the Community legislature itself. [50] At any rate, the idea that a financial levy can be considered to be a social welfare or social security contribution by reason of the use to which the proceeds are put cannot be regarded as confirmed with certainty by the Court's case-law. In *AGF Belgium*, [51] the Court actually held that the mere fact that indirect taxes, such as compulsory additional premiums for motor insurance, are *intended to contribute* to the funding of social bodies does not mean that they should be regarded as social contributions (paragraph 15). Not only is the argument put forward by the Commission not supported by the definitions in the legislation, although it is those definitions which underpin the Court's decisions and to which the Commission refers, but this is also a problem concerning a very complex legislative sector in which coordination is indeed provided for, but certainly not to the extent of eliminating important substantive and procedural differences between the solutions adopted at national level. [52] Although frequently cited by the French Government, the principle of legal certainty precludes interpreters of the law from creating categories using criteria such as, in this case, the purpose of the levy, or the use to which it is put, in order to classify the case in point and therefore mould the scope of the Regulation to dovetail with the preferred system of categorisation. Nor should we lose sight of the fact that the methods of funding social security schemes are many and varied: any attempt to pigeon-hole individual levies within general categories may well prove fruitless here. [53] We need only call to mind a number of the Court's judgments in this

50 — To confine my analysis to cases concerning social security benefits, and bearing in mind that, according to the Court, 'the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within it is based essentially on the constituent elements of each particular benefit, in particular its purpose and the conditions on which it is granted' (see footnote 34 above), I am thinking of the combined provisions of Article 1(t), (u) and (v) (definitions of 'benefits', 'pensions', 'family benefits', 'family allowances' and 'death grants') and Article 4 ('Matters covered', which provides a detailed list of the relevant branches of social security) of the Regulation; Article 4, in particular, has frequently been considered crucial by the Court, in its case-law, in determining whether or not a specific benefit is covered by the Regulation (in addition to the case-law cited in footnote 34, see *Frascogna I* and *Frascogna II* in which the Court ruled that a benefit constituted assistance rather than a social security benefit).

51 — Cited in footnote 32 above.

52 — On all these points, see Case 41/84 *Pinna*, cited in footnote 39 above, paragraph 20, and Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 13.

53 — Moreover, when required to consider whether national measures that combine the features of social security and assistance fall within the scope of the Regulation, the Court itself has acknowledged that, whilst it may seem desirable from the point of view of applying Community social security legislation to establish a clear distinction between legislative schemes that fall respectively within social security and assistance, one cannot exclude the possibility that by reason of the persons covered, its objectives and its method of application, legislation can come close to *both* these categories, thus preventing any comprehensive classification (Case 24/74 *Biason* [1974] ECR 999, paragraph 9, and *Giletti*, cited in footnote 49 above, paragraph 9).

area. In *Klomp*, [54] the Court in fact held that 'a contribution intended to finance a social security scheme [may be levied] in a manner resembling the levying of taxes'. In *Rousseau Wilmot*, [55] the Court defined as a 'charge of a non-fiscal nature' a 'solidarity levy' which was created purely for social security purposes and levied on companies at the rate of 0.1% of turnover. More recently, in *AGF Belgium*, the Court defined as 'taxes' certain charges which the national court was inclined to regard as 'social contributions'. [56] Experts who have studied the financing of social security schemes have also established that States adopt '*techniques on the borderline* between contributions and taxes... so that it is complicated to distinguish between them', [57] and point out that 'examples of that trend are to be found in Great Britain, France and the Netherlands'. [58] It should be added that the Court, which is perfectly well aware that social benefits are not

54 — Case 23/68 *Klomp* [1969] ECR 43, paragraph 20.

55 — Cited in footnote 49 above.

56 — See paragraphs 8 and 16; I should make clear that, in that case, disregarding the data available from the legal system of the Member State concerned, the Court redefined the charge (as a compulsory fiscal charge as opposed to a social security contribution) in the light of the (broad) *concept* of taxes contained in Article 3 of the Protocol on the Privileges and Immunities of the European Communities (the national court having requested an interpretation of that provision) and referred directly in particular to 'contributions or taxes of any type or nature which constitute internal taxation *under Community law*' (paragraph 20; my emphasis). The reference to 'Community law' must be interpreted as a reference to the Court's case-law on the national taxes contemplated by the rules of the Treaty, according to which 'the fact that a tax or levy... is a charge which is special or appropriated for a specific purpose cannot prevent its falling within the scope of those provisions [in that case, Article 95 of the EC Treaty (now, after amendment, Article 90 EC)] (see Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraph 19)' (*AGF Belgium*, cited in footnote 32 above, paragraph 18). It is clear that, in that case, as in the cases relating to the nature of social security benefits or turnover taxes (see footnote 34 above), the Court established its own definition of the charge in question since it was dealing with concepts specific to the Community legal order.

57 — Sigillò Massara, op. cit, p. 165 (my emphasis), citing P. Mouton, *Methods of financing social security in industrial countries: an international analysis*, in AA.VV., *Financing social security: the options. An international analysis*, Geneva, ILO, 1984, p. 29. We also read that 'awareness of the increasing interdependency between the different mechanisms for financing social security... and the general endeavour to achieve equity and convergence of charges has led the countries of the Community to include taxation and social contributions in a new aggregate, "the comprehensive financial levy", for the purposes of international comparison' (G. Tamburi, *Welfare State, Sistemi di finanziamento. Politiche di convergenza dei sistemi di financiamento della sicurezza sociale nei Paesi della Communità europea*, proceedings of the CNEL Assembly, Rome, 19 February 1992, p. 56, quoted in Sigillò Massara, op. cit, p. 165).
With reference to hypothecated indirect taxes (not in issue in these proceedings), Pieters has taken substantially the same view, considering it particularly difficult to identify the true nature of charges used for social security because the 'labels' used by the Member States are politically determined and because the range of labels seems to make it difficult to categorise them (*Social security, taxation and European integration*, in *De sociale zekerheid her-dacht*, 1992, p. 235, p. 239 in particular).

58 — Sigillò Massara, op. cit, p. 165. In the Netherlands, in particular, 'wages tax and national insurance contributions are now collected together, so that taxation in the first band of income comprises a tax element and a social security contribution element' (Opinion of Advocate General Léger in *Asscher*, point 3). Commenting on *Asscher*, Williams has pointed out that Dutch social security contributions are of two kinds, specific contributions and general contributions. Whatever the nature of specific contributions, general contributions are — labels apart — part of the general tax system. [Advocate General Ruiz-Arabo Colomer pointed out that contributions to the general social insurance scheme in the Netherlands 'are similar in some respects to taxes', Opinion of 30 April 1998 in *Terhoeve*, cited in footnote 45 above, point 30.] What we have is a system whereby the Government has used an earmarked income tax as a way of funding the larger part of its social security budget, while using the proceeds of general taxation, including the non-earmarked income tax, to fund the rest of the budget. (Williams, op cit, p. 4). Williams notes that a similar system is used in Sweden where it is the tax authorities which collect social contributions (ibidem, p. 5, footnote 6).

financed solely from compulsory contributions,[59] has held that the classification of an allowance as a social security benefit covered by the Regulation does not depend upon the manner in which it is financed.[60]

21. What conclusion may be drawn from the foregoing observations? The Member States must in any event exercise their powers in the field of direct taxation in compliance with Community law. I do not therefore see the need to demonstrate, as a preliminary to establishing that there may have been a failure to comply with Article 13 of the Regulation, that a direct tax actually constitutes a contribution in the true sense when, in accordance with the unambiguous case-law of the Court referred to in point 19 above, whether the levy in issue is defined as a 'tax' or a 'contribution' has no bearing on whether the provision in issue has been infringed. The abovementioned case-law in fact requires the Member States always to comply with Community law (including the Regulation) regardless of whether they are exercising their powers in the field of direct taxation or that of social security.

C — *Scope of the Regulation and, therefore, Article 13*

22. Having said that, it seems to me that the solution to the dispute between the Commission and the French Republic is actually to be found in a different reading of the Regulation as a whole, and Article 13 in particular, which is apparent from the originating applications in these two cases. While stressing the 'contributory' nature of the levies in question, the Commission nevertheless also refers to the broad concept of 'legislation' provided for by the Regulation, the rationale underlying Article 13 of the Regulation and the fact that, given its legal basis (see, in particular, Article 51 of the Treaty), the Regulation is designed to facilitate freedom of movement for persons. The clear conclusion is that any conflict with the spirit (and of course the letter) of Article 13 constitutes, in the final analysis, an infringement of Articles 48 and 52 of the Treaty.[61] The Court has previously adopted a similar interpretative approach when analysing cases on which, as in the instant cases, the Regulation was silent. I am referring in particular to *Aldewereld* which concerned the situation — not directly covered by any of the provisions of Title II of the Regulation, which includes Article 13 — of a worker pursuing his occupation outside Community territory. In that case, the Court resolved the problem of which legislation

59 — 'Social bodies may be funded both by special contributions and by taxation' (*AGF Belgium*, paragraph 15); see also the case of benefits in respect of which it is the employer rather than a social insurance body that has to carry the financial burden (*Paletta*, cited in footnote 34 above, paragraphs 3 and 18); then we have the various judgments, listed in footnote 49 above, in which the Court considered benefits financed from tax revenue.

60 — See *Giletti*, cited in footnote 49 above, paragraph 7, *Paletta*, cited in footnote 34 above, paragraph 18, and *Acciardi*, cited in footnote 34 above, paragraph 18.

61 — In relation to all these points, see Case C-60/93 *Aldewereld* [1994] ECR I-2991, in which the Court ruled that 'the rules of Community law which are designed to achieve freedom of movement for workers within the Community, *and in particular* the rules on determining the national legislation applicable set out in Title II of Regulation No 1408/71, preclude' social contributions being levied twice over (paragraph 26; my emphasis).

should apply by reference to the 'aims' of the provisions in question. [62] That being said, I consider it necessary to establish whether — regardless of how they are defined — the two levies in issue may, one way or another, fall within the scope of the Regulation and, therefore, Article 13. I would point out that the Regulation (and consequently Article 13) does not provide any definition that can help directly in resolving the dispute between the Commission and the French Republic, but that does not prevent the Court from considering whether the defendant has failed to fulfil an obligation. 'An action for failure to fulfil obligations is [in fact] objective in nature and in the context of such an action it is for the Court to decide whether or not the Member State in question has failed to fulfil its obligations as alleged', [63] clearly taking account of the specific evidence furnished by the applicant.

23. The Community rules relied on by the Commission include Article 1(j) of the Regulation. That provision includes a general definition of the term 'legislation' which is pivotal to Article 13 (see point 3 above). It means any measure 'relating' to the branches and schemes of social security covered by the Regulation. Moreover, according to the Court '[t]his definition [of legislation] is remarkable for its breadth... and must be taken to cover all the national measures applicable in this case'. [64] In addition, again according to the Court's settled case-law, not only are the provisions of Title II of the Regulation (which includes Article 13) intended to 'prevent the simultaneous application of a number of national legislative systems and the complications which might ensue', [65] but they also 'constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory

62 — See paragraph 15. For other cases in which the Court has relied on the aims of Community rules on social security to secure their proper application see, for example, *Pinna*, last sentence of paragraph 21, and *Paletta*, paragraph 24. Moreover, '[i]t is settled case-law that in interpreting a provision of Community law it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which it is part', Case C-221/95 *Hervein and Hervillier* [1997] ECR I-609, paragraph 15, which refers to Case 292/82 *Merck* [1983] ECR 3781, paragraph 12.

63 — Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19 (my emphasis); see also Case 7/71 *Commission* v *France* [1971] ECR 1003 where it is stated that 'the procedure for a declaration of a failure on the part of a State to fulfil an obligation itself affords a means of determining the exact nature of the obligations of the Member States in case of differences of interpretation' (paragraph 49), reflecting Advocate General Roemer's view that an action for failure to fulfil an obligation 'is merely an objective procedure *intended to clarify the legal situation*, without any moral judgment' (Opinion, p. 1026; my emphasis). Among legal writers, see, on all those points, D. Simon, *Recours en constatation de manquement*, in *Juris Classeur — Europe*, Vol. 380, paragraph 1, according to which these actions are objective and based on the need to secure compliance with a 'Community public order'.

64 — Case 87/76 (*Bozzone* [1977] ECR 687, paragraph 10; my emphasis). That judgment is not an isolated example of the philosophy underlying it. The Court tends to interpret the provisions of the Regulation, including Article 13, broadly (see, for example, *Biason*, paragraphs 12 to 16; Case 150/82 *Coppola* [1983] ECR 43, paragraph 11; *Ten Holder*, paragraphs 13 to 15; *Giletti*, paragraph 11; and *Commission* v *France*, paragraphs 10 and 16).
I should point out that in Case 109/76 *Blottner* [1977] ECR 1141, paragraphs 9 to 13, although the Court noted that the concept of 'legislation' in Article 1(j) refers exclusively to social security laws and regulations 'present or future', it construed the provision as meaning that it 'must not be interpreted in such a way as to exclude measures which were previously in force but had ceased to be so when the said Community regulations were adopted' because otherwise the *objective* of Article 51 of the Treaty, the legal basis of the Regulation, 'would not be attained'. In my view, the Court's 'broad' interpretation is all the more significant in the light of the case-law according to which even 'the fact that a rule is contained in a law which falls outside the scope of the Regulation does not necessarily imply that that rule itself falls outside the scope thereof' (see *Rheinhold & Mahla*, paragraph 22, and *Jordens-Vosters*, paragraph 8).

65 — See Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 12; see also, *inter alia*, *Luijten*, paragraph 12, and Case C-196/90 *De Paep* [1991] ECR I-4815, paragraph 18. As is clear from its wording, the Court's case-law is founded on the eighth recital in the preamble to the regulation.

within which the provisions of national law take effect are concerned'. [66]

24. It is therefore necessary to take account of the obligation on the Member States to comply — when exercising their powers to organise their social security schemes — with the provisions of Community law in force (see footnote 45); the very broad nature of the concept of 'legislation' under Article 1(j) of the Regulation; the purpose of Article 13 which is to prevent migrant workers being faced, as a result of being subject to several overlapping sets of rules, with *any* complication (that would stand in the way of the freedom guaranteed under the Treaty); [67] as well as the abovementioned 'effect' that the conflict rules have on the powers of the Member States in relation to social security. If that is so, then I am inclined to the view that the scope of the Regulation (and, therefore, of Article 13) has to encompass a measure which, despite being defined as 'fiscal' in the national legal system, has, by its very nature, characteristics linking it to or 'relating to' the social security scheme, within the meaning of Article 13. In addition, in contrast to the other cases provided for, [68] Article 1(j) of the Regulation does not exclude financing measures from the concept of 'legislation'; nor are such measures the subject of other specific provisions of the Regulation. [69] In other words, it does not seem to me to be correct to separate 'fiscal' financing measures from the array of measures which, unquestionably included within the scope of the Regulation, structure a given social security scheme and, as the French Republic acknowledges, include 'contributory' financing measures. The proper application of the Regulation demands that as far as possible its provisions on the determination of the legislation applicable be interpreted *coherently*. [70] Plainly, I am leaving aside the definition of those financing measures under national law. That construction of Article 13 certainly does not conflict with the Court's case-law which tends to interpret the provisions of the Regulation anything but restrictively (see footnote 64). Not only that. The Court's same case-law has frequently made clear, specifically with reference to the interpretation of the Regulation, that 'the requirement that Community law be applied uniformly within the Community implies that the concepts to which

66 — *Luijten*, paragraph 14; see also, for example, *Kits van Heijningen*, paragraph 12, and *De Paep*, paragraph 18.

67 — I have said 'any' complication because the Court's settled case-law has established the principle whereby even the smallest obstacle to one of the fundamental freedoms has to be regarded as contrary to the Treaty: in relation to the free movement of goods, see Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 18, and Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13; on freedom of movement for persons, see Case 270/83 *Commission* v *France* ('*Avoir fiscal*') [1986] ECR 273, paragraph 21, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; on the free movement of services, see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 43; on the free movement of capital, see my Opinion of 24 June 1999 in Case C-35/98 *Verkooijen* [2000] ECR I-4071, point 17; on the four fundamental freedoms, see Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8.

68 — For example, the provisions of special schemes for self-employed workers, the creation of which is left to the initiative of the persons concerned.

69 — See Case C-23/92 *Grana-Novoa* [1993] ECR I-4505, paragraph 16, in which the Court ruled that the concept of 'legislation' in Article 1(j) of the Regulation did not include international conventions on social security because 'there are specific provisions in the Regulation covering such conventions', such as Article 6 which lays down the principle that the Regulation 'is to replace the provisions of any social security convention binding either two or more Member States exclusively ...' (paragraph 17).

70 — *De Jaeck*, paragraph 30, and *Herrem and Herrmann*, paragraph 20

that law refers *should not vary according to the particular features of each system of national law* but rest upon objective criteria defined in a Community context'. [71] In this case, in the light of the problems of interpretation the subject-matter poses (see point 20 above), the objective criterion to be adopted is, in my view, the identification of a direct link between the measures in issue and the French social security scheme.

25. In the present case, the Commission has adequately demonstrated that there exists between the CSG and the CRDS, on the one hand, and the French social security scheme, on the other, a link that brings them fully within French social security 'legislation' within the meaning of Article 1(j) of the Regulation. That link essentially consists in the specific allocation of the proceeds of the CSG and CRDS. That allocation is absolutely clear. Precisely because of their specific purpose, both the levies can be regarded as 'relating' to branches of social security covered by the Regulation. With a view to the proper application of the Regulation, moreover, the Court itself has referred to the 'objectives' of a specific national provision where that provision cannot be rigidly classified in a way that allows it to be included with certainty among the provisions subject to the Regulation. [72] As further illustration of the fact that, when determining whether the Regulation is applicable, the Court disregards classifications and focuses on the nature of the national measures at issue, it is worth pointing out that it has held that not even a national provision which falls outside the scope of the Regulation may be exempt from the application of Community legislation, provided that there is a link between the provision in question and 'the legislation governing the branches of social security listed in Article 4 of Regulation No 1408/71, and *that link [is] direct and sufficiently relevant*'. [73] In the present case and for the abovementioned reasons, I consider that a link of that kind does indeed exist.

26. However, as regards the link between the levies in question and the social security scheme at issue in this case, the French Government has drawn a number of distinctions. While acknowledging, in principle. that the CSG contributes to the current financial assets of certain branches of social security, it has stated that the same cannot be said of the CRDS, since that levy is, in the final analysis, hypothecated to the general budget for the purpose of discharging the deficit accumulated by the whole of the French social security scheme ('simply a mechanism for discharging a financial debt'). I am not persuaded by the defendant's argument here. While it is true that the CADES is an exclusively financial body which is not responsible for managing social security funds proper and is required to pay over the proceeds of the CRDS to the State budget annually, the purpose of those payments is to discharge a financial debt of social security bodies or at any rate bodies responsible for managing social security and pension funds, such as ACOSS

71 — *Jordens-Vosters*, paragraph 6; my emphasis.

72 — See *Biason*, paragraph 9 and *Giletti*, paragraph 9.

73 — *Rheinhold & Mahla*, paragraph 23; my emphasis; to the same effect, see the Opinion of Advocate General Gulmann, at point 16.

and the CDC, and that debt, transferred by law to the CADES before the CRDS was set up, was incurred, in particular, as a result of the payment of social security benefits during the 1990s. In the absence of 'fiscal' funding, that debt would probably have had to be met on the basis of 'contributory' financing (an increase in social security contributions) or, were the same level of funding retained, by reducing or limiting the payment of social security benefits. Moreover, that is exactly what happened in the case of the CSG: it partly replaced social security contributions (which were reduced), thereby covering the growing financial requirements of the French social security scheme and, at the same time, avoiding the need to increase contributions (see point 9 above). In my view therefore, the 'stratagem' of transferring to the CADES the social debt incurred by ACOSS is not sufficient to change the fundamental nature of the 'financial mechanism' in question, and it neither can nor should remove the CRDS from the scope of the Regulation. That kind of reorganisation of the instruments for financing a social security scheme continues to be subject to the general principle of Article 13 of the Regulation, which would otherwise be ineffective. To regard methods of financing such as the CSG and the CRDS as completely outside the scope of the Regulation would allow the appearance of an alternative 'contributory' scheme which would call into question the objectives of the Regulation itself.

27. It has then to be pointed out that Order No 96-50, which introduced the CRDS, is part of a general reform of the French social security system that had become essential because of the deficit accumulated during the 1990s. As expressly stated by the legislature, this reform, as the Commission pointed out, made it possible to secure the 'future equilibrium' and the 'social and economic effectiveness' of French social protection (see footnote 19): that means that, currently, without structural initiatives such as the introduction of the CRDS, the French social security system would not be able to meet its responsibilities properly. It seems to me that the result of introducing the CRDS — enabling a social security scheme to function properly and to continue to disburse the appropriate benefits to those entitled to them — demonstrates the direct link that exists between the specific funding instrument in question (a levy with a specific purpose) and the French social security system as a whole. Moreover, for an instrument like the CRDS to fall within the scope of the Regulation, it is sufficient that it 'relate' to the branches and schemes of social security referred to in Article 4(1) and (2) of the Regulation. Finally, I must firmly reject the objection raised by the French Government, according to which the CRDS falls outside the scope of the Regulation because it does not relate specifically to any of the branches referred to in Article 4 but concerns the social security scheme as a whole. Here again, the approach taken by the defendant seems to me to be formalistic. In fact, it seems clear to me that if a measure concerns the social security scheme as a whole, it is bound also to 'relate' to the individual branches listed in the Regulation for the purpose of defining its material scope. To take the contrary view would make it too easy to evade provisions such as Article 13. It is therefore my opinion that the CRDS and the CSG are in substance and for the

purposes of the Regulation 'social security contributions' forming part of French social security 'legislation'.[74]

D — *No direct consideration is received in return for the CRDS or the CSG*

28. Again in an attempt to demonstrate that the CRDS and CSG are genuinely fiscal in nature and, therefore, not covered by the Regulation, the French Republic points out that there is no direct consideration, by way of a social security benefit: only genuine contributions give entitlement to consideration of that nature. However, I take a different view.

29. As I have already said, the measures structuring a given social security scheme and introduced in order to fund it are also covered by Article 13 of the Regulation, be they specifically fiscal rather than contributory in nature or on the borderline between the two. Similarly, whether there is direct consideration is without relevance; it is true that if the abovementioned financing is 'tax-based', there is no genuine direct consideration for the levy, but that does not mean that a fiscal measure that concerns or 'relates to' the social security scheme as defined above can escape the conflict rules that determine the law applicable. The Court's case-law, cited by the French Government, according to which only a due constituting consideration for a given service can be regarded as a 'contribution', cannot be used to support such a conclusion.[75] There are several reasons for that. Firstly, *AGF Belgium*, cited by the French Republic, does not appear to be relevant: in dealing with the distinction between a charge intended to meet the general expenses of the public authorities and a charge constituting consideration for a given service, it does not in fact refer to 'social security contributions'[76] but to different kinds of charges, all of them fiscal in nature. Secondly, and as I have set out above, since they are instruments for funding social security schemes, the national measures introducing 'contributory levies' do not fall outside the specific 'legislation' referred to in Article 13 of the Regulation. Thirdly, since the CSG partly *replaces* contributions proper and *makes it possible to avoid an increase* in existing contributions and the CRDS, presumably, makes it possible to avoid increases in contributions

74 — Concerning the CSG, I should point out, as a corollary to the assertion that it 'relates' to the French social security system, that this charge is collected by bodies, and according to procedures, which are typical of the social security scheme. Furthermore, like standard contributions, and in contrast to all standard taxes, it is deductible, even if only in part, from gross taxable income.

75 — See *AGF Belgium*, paragraphs 25 to 28.

76 — The Court considered whether the charge in issue was in the nature of a social security contribution or a tax in another part of the judgment, relating to the first question referred. The Court held that this was a fiscal charge because 'the charges in question [indirect charges consisting in supplementary motor insurance premiums for the benefit of social insurance bodies] cannot be treated as contributions due from persons subject to a social security scheme or from members of a social insurance body. It appears, in fact, from the information contained in the national court's judgment that the additional premiums are payable by all those who take out motor insurance, including those who are not covered in any respect by the recipient institutions; they are thus payable regardless of whether the person concerned is subject to, or a member of, those bodies' (paragraph 16).

or reductions or limitations in the payment of social security benefits (see point 26 above), endorsing the French Government's argument would, paradoxically, have the effect of legitimising the renewed imposition of 'social charges' on migrant workers not registered with the French social security scheme (that is not required to pay any contributions in France), with the result that the migrant workers subject to the Regulation could be subject to a levy (with no consideration) which is generally intended to reduce the level of contributions (in respect of which there is consideration) payable by French workers resident in France. [77]

30. Moreover, with regard to the CSG in particular, the French Government's argument is contradictory. On the one hand, the defendant seeks to demonstrate the fiscal nature of the levy at issue on the ground that, unlike a normal social security contribution, it does not confer entitlement to any direct consideration, but, on the other, it claims that this levy is an 'instrument for national solidarity in which everyone's income is used to contribute to social protection for all' — all part of a general endeavour to reestablish a scheme of progressive 'contributions' based on an individual's taxable income ('the same level of contribution is payable on the same level of income': see point 9 above). [78] But if that is the case, social protection is decreasingly characterised by the direct link that the French Republic seeks to identify between the *contributions* paid by French workers and the corresponding benefits. [79]

77 — I should add that the payment of social security contributions does *not* give entitlement to specific benefits in all the Member States (see Williams, op. cit, pp. 5 and 6, in which he takes specific examples from the British, Irish and Swedish social security schemes, and disagrees with Advocate General Léger when, in his Opinion in *Asscher*, he takes the view that '[t]he payment of social security contributions forms part of an insurance scheme: it bestows entitlement to specific benefits. The payment of taxes, however, which is unconnected with any insurance transaction, does not give rise to any benefits as such' (point 82). According to Williams, therefore, a statement of the kind made by Advocate General Léger — similar in every way to the argument put forward by the French Government — cannot accurately be applied to the social security schemes of the European Community generally).

## E — *Analysis of the compatibility of the CRDS and the CSG with Article 13 of the regulation*

31. That being so, it is clear that the social charges in issue are contrary to Article 13.

78 — I would point out that, like the CSG, the CRDS includes an element of solidarity in that it requires everyone to contribute on the basis of his own income, regardless of the quality and quantity of benefits received during the years in which the deficit, which the CRDS is intended to discharge, accumulated.

79 — The Court itself, analysing the characteristics of a social security scheme based on the principle of solidarity, noted the elements which make the contributions merge into a general category that also includes payments that have no direct and proportionate link with the benefits beneficiaries receive: '[s]olidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover ... It is also reflected by the grant of pension rights *where no contributions have been made* and of pension rights that are *not proportional* to the contributions paid ... there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties' *Poucet and Pistre*, paragraphs 10 to 12; emphasis added). Again in *Poucet and Pistre*, Advocate General Tesauro pointed out that '[i]n public insurance schemes, by contrast with private insurance schemes, there is no direct link between the contributions made and the benefits paid' (Opinion, last sentence of point 9).

First, they affect, as the Commission has explained, all persons resident in France for tax purposes, including the migrant workers included among the 'persons covered' by the Regulation. Second, the CRDS and the CSG are levied according to the basis of assessment already used for the social security contributions in the Member State in which those same workers are pursuing (or have pursued) an occupation. That basis of assessment is the result of the exercise of the freedom of movement guaranteed under the Treaty. In *Perenboom*, the Court held that '[t]he fact that a worker is required to pay, in respect of the *same* earned income, *social charges* arising under the application of several national legislations, although he can be an insured person only in respect of one of those legislations, involves the worker in payment of contributions twice over, contrary to the provisions of [Article 13 of the regulation].... the remuneration received by a worker for [the] work [carried out in another Member State] does not constitute a basis of assessment for contributions levied, *even partially*, under [the] legislation [of the Member State of residence] and is exempt, therefore, from the *social charges* arising from its application'. [80] As regards workers who have definitively ceased to be employed in any way (and are entitled to substitute income, similarly subject to both the CRDS and the CSG), the rule applicable is that, again on the basis of the provisions of Title II of the regulation: 'a pensioner cannot be required, *by virtue of his residing in the territory of a Member State*, to pay contributions for compulsory insurance to cover benefits payable by an institution of another Member State.' [81]

32. Let me again make the point that to consider the levies in issue to be outside the scope of the Regulation and, therefore, not subject to the requirements of Article 13, would be to deprive that provision, as interpreted in *Perenboom* and *Noij*, of any effectiveness. [82] The provisions for determining the law applicable in the field of social security (including Article 13) '*must be interpreted in the light of their objective*, namely to contribute, particularly in the field of social security, to the establishment of the *greatest possible* freedom of movement for migrant workers, which is one of the foundations of the Community'. [83] Furthermore, according to the Court's settled case-law, national provisions in the field of social protection which have the effect of operating to the detriment of, or placing at a disadvantage, the pursuit of occupational activities outside the territory of the Member State concerned are con-

80 — Case 102/76 *Perenboom* [1977] ECR 815 (operative part of the judgment and paragraphs 13 and 14; my emphasis).

81 — Case C-140/88 *Noij* [1991] ECR 387, paragraphs 15 and 17 and the operative part of the judgment. Incidentally, the Court included in the scope of the Regulation the case of workers who have definitively ceased to be employed in any way, even though they are not provided for in any of the provisions of the Regulation itself (see paragraph 9). Bearing in mind the aim of the Regulation ('to contribute to the establishment of the fullest possible freedom of movement for migrant workers'), the Court considered it incompatible with that aim that 'a worker could be deprived of part of a pension received under the legislation of one Member State simply because he has gone to reside in another Member State' (paragraph 13).

82 — In *Kits van Hijningen*, a very similar consideration was crucial in establishing the incompatibility of a national measure with Article 13(2)(a) of the Regulation (see paragraph 21).

83 — *Masgio* (paragraph 16; my emphasis); to the same effect, see Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19; see also *Noij*, paragraph 13.

trary to Articles 48 and 52 of the Treaty; [84] obviously, that also applies to national provisions on the financing of social protection. [85] That being said, it seems to me to be incontestable that the levying of 'social charges' — of whatever kind — by a Member State other than the State in which the migrant worker is pursuing (or has pursued) an occupational activity always constitutes an obstacle to freedom of movement for workers, in so far as it discourages workers from taking advantage of their rights guaranteed under the Treaty.

F — *Assessment of the effects of the CRDS and the CSG*

33. According to the French Republic, it is necessary to place in context the effect of any obstacle regarded as a consequence of the application of the two levies in question. In that connection, the French Republic points to the low rate of the levies (the rate of the CRDS being 0.5%, while that of the CSG, equivalent to either 7.5% or 6.2%, depending on the basis of assessment, is far lower than the rate of normal contributions) and the fact that the two levies affect only a minimum number of migrant workers who, although pursuing an occupation outside France, have continued to be resident in France for tax purposes. In accordance with the model tax convention drawn up by the Organisation for Economic Cooperation and Development, the international conventions for the avoidance of double taxation concluded by the French Republic generally provide that income from employment or self-employment is taxable in the contracting State in which that income originates or the State in which the occupation is pursued (see Articles 14 and 15). That means that the income from an occupation pursued in another Member State by workers who have continued to be resident in France for tax purposes cannot be subject to the two levies in question. Only exceptionally do the conventions on taxation which France has concluded with neighbouring Member States provide that the income of a particular category of migrant taxpayers, namely 'frontier workers' (see footnote 37) may be subject to tax in the State of residence and not in the State of employment (see point 13 above). According to the French Government, however, the CRDS and the CSG affect only a tiny number of workers covered by the Regulation, implying, if I understand correctly, that there can be no objection to the two levies.

34. However, the French Government's argument elicits two sets of objections. First of all, according to the Court's settled case-law, the fact that a national measure places only a 'minor' obstacle in the way of

84 — See *Spruyt*, paragraph 19; Case 143/87 *Stanton* [1988] ECR 3877, paragraph 14; Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraph 14; *Masgio*, paragraphs 16 and 17; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22; Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 27; Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 11.

85 — *Terhoeve*, paragraph 35.

freedom of movement for persons, or another of the fundamental freedoms guaranteed under the Treaty, does not mean that it is not incompatible with Community law (see footnote 65). Secondly, the argument based on the provisions of the conventions to which the French Republic is a party fail to take account of the difference in treatment reserved, in conventions, for substitute income as opposed to employment income. Unlike employment income, substitute income is, as a rule, taxable in the contracting State of residence. That applies to pensions, or any income from other sources (excluding employment) specifically covered in other provisions of the conventions. [86] Consequently, the CRDS and the CSG affect the substitute income of *all* workers who have continued to be resident in France for tax purposes, and not only 'frontier' workers.

G — *The discriminatory aspect of the CRDS and the CSG*

35. The Commission contends, finally, that the levies in issue, which are applicable in the same way to all persons resident in France for tax purposes, discriminate against migrant workers because they fail to take account of their objectively different situation. In point of fact, unlike those workers who have not left France to pursue an occupational activity elsewhere, those workers fall within the scope of the Regulation. It seems to me that the Commission is only focusing, in the light of Articles 48 and 52 of the Treaty, on the same infringement as that found in the context of Article 13 of the regulation.

36. The purpose of Article 13 of the Regulation is in fact to make a distinction between the position of a migrant worker and that of a resident worker and thus to prevent the former from being subject to the social security scheme of the State of residence, if it is not the same as the State of employment. By providing that there may be no overlapping application of the laws of more than one Member State, the Regulation seeks clearly to distinguish the position of migrant workers. It plainly does so in order to prevent the complications that can affect a migrant worker if, as a result of having pursued his occupational activity in more than one Member State, he is, or has been, subject to more than one set of legislation (see Article 2(1) of the Regulation), *unlike* a worker who has not left his country of origin. It is therefore the Regulation itself that has made a distinction, by providing for the necessary coordination of legislation in view of the particular situation of migrant workers.

86 — See Articles 18 and 21 of the OECD Model Tax Convention.

The tenth recital in the preamble to the Regulation is very clear on the substance: 'with a view to guaranteeing the *equality of treatment* of all workers occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment or self-employment' (my emphasis). The factor which the Community legislature took into account for the purpose of determining the legislation applicable was not 'residence for tax purposes', but the place in which the occupational activity is being (or has been) pursued. It is thus clear that the indiscriminate application of the CRDS and the CSG to all workers resident in France for tax purposes, including migrant workers who are pursuing an occupation in *another* Member State, results in discrimination against migrant workers in breach of Article 13 — which prohibits overlapping legislation — and, ultimately, Articles 48 and 52 of the Treaty, on which the Regulation, as an instrument implementing them, is based (see Article 51, the legal basis).

37. In that connection, finally, it has to be pointed out that the Court's case-law on discriminatory internal taxation (prohibited under Article 95 of the Treaty), may similarly provide guidance here.[87] More specifically: while it is true that in the case of both the CRDS and the CSG, the basis of the levy is objective and the same for all French residents, it is also true that to compel migrant workers to contribute to the financing of a social security scheme with which they are *not* registered has the effect of discriminating against them as compared with non-migrant workers, who are the only workers entitled to the benefits paid under that scheme.

87 — In accordance with the Court's settled case-law (see, for example, Case C-17/91 *Lornoy and Others* [1992] ECR I-6523; Case C-114/91 *Claeys* [1992] ECR I-6559; Joined Cases C-144/91 and C-145/91 *Demoor and Others* [1992] ECR I-6613; Case C-266/91 *CELBI* [1993] ECR I-4337; Case C-72/92 *Scharbatke* [1993] ECR I-5509), '[w]here a charge is imposed on domestic and imported products according to the same criteria... it may be necessary to take into account the purpose to which the revenue from the charge is put. Thus, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic products, it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on the domestic products is neutralised by the advantages which the charge is used to finance, whilst the charge on the imported product constitutes a net burden' (*Claeys*, paragraph 16).

## VII — Conclusion

38. In the light of the foregoing I propose that the Court should:

— grant both applications and declare that the French Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty (now, after amendment, Articles 39 EC and 43 EC) and Article 13 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community,

(1) by applying the social debt repayment contribution to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who, by virtue of the Regulation, are not subject to French social security legislation; and

(2) by applying the general social contribution to the employment income and substitute income of employed and self-employed persons resident in France

who, by virtue of the Regulation, are not subject to French social security legislation;

and

— order the French Republic to pay the costs.