

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 6 February 1985 *

*Mr President,
Members of the Court,*

1. By this action under Article 169 of the EEC Treaty, the Commission seeks a declaration that Article 121 (10) of the Belgian Law of 9 August 1963 establishing and organizing a compulsory sickness and invalidity insurance scheme,¹ as amended by the Law of 8 August 1980 concerning the budget proposals for 1979/80,² is incompatible with Community law.

That provision, which came into force on 1 October 1980, provided for a deduction from statutory old-age, retirement, service-related and survivors' pensions applicable to all persons in receipt of such pensions; that deduction was paid to the Institut National d'Assurance Maladie-Invalidité [National Sickness and Invalidity Insurance Institution].³ In fact, Article 33 of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community provides that:

'The institution responsible for payment of a pension, and belonging to a Member State whose legislation provides for deductions

from pensions in respect of contributions for sickness and maternity shall be authorized to make such deductions from the pension payable by such institution, calculated in accordance with the legislation concerned to the extent that the cost of the benefits under Articles 27, 28, 28 a, 29, 31 and 32 are to be borne by an institution of the said Member State'.⁴

In other words, such a deduction from a pension may only be made in respect of insured persons who receive from the social security institution in question benefits in consideration of which the deductions are made. However, if the benefits are not provided by the institution of the Member State where the deduction is made, no contribution may be deducted. That is precisely the situation of insured persons who reside *in a Member State other than Belgium* and who, by virtue of Articles 27 to 32 of Regulation No 1408/71, are in receipt of benefits provided by the competent social security institution of *the Member State where they are residing*. When applied to such persons, Article 121 (10) of the Belgian Law infringes the principle laid down in Article 33 of Regulation No 1408/71.

2. The Belgian Government does not deny that the application of the Belgian legislation at issue to all insured persons regardless of the Member State in which they reside constitutes a failure to comply with Article 33 of Regulation No 1408/71.

* Translated from the French.

1 — Moniteur belge [Belgian Official Gazette] of 1-2 November 1963, p. 10553.

2 — Moniteur belge of 15 August 1980, p. 9463, Article 161 at p. 9514.

3 — Article 121 (10), fourth subparagraph.

4 — Official Journal, English Special Edition 1971 (II), p. 416, as amended by Regulation No 2864/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December), L 306, p. 15).

At the hearing it stated that two measures would be adopted to bring that failure to an end:

First, a circular addressed to the Institut National d'Assurance Maladie-Invalidité would exempt pensioners residing in another Member State from the operation of the provision in question;

Secondly, draft legislation derogating from the limitation period of three years in respect of social security matters would enable the insured persons in question to claim repayment of the sums deducted since 1 October 1980 by providing that the limitation period would run from the date on which the law amending the general rule came into force.

4. Consequently, I propose that the Court declare that, by retaining unamended the provisions of Article 121 (10) of the Law of 9 August 1963, as amended by the Law of 8 August 1980, and by failing to provide an exception in respect of Community nationals residing in another Member State, Belgium has failed to fulfil its obligations under Article 33 of Regulation No 1408/71 of the Council.

3. In my opinion this is not the place to examine those measures with regard to the alleged failure of Belgium to fulfil its obligations. I would merely observe that the situation to which the Commission has rightly objected remains unchanged today. The Belgian Government explains that its delay in conforming to Article 33 is due to difficulties encountered both in the choice and in the drawing up of the national amending provisions. In that respect it is sufficient to recall that the Court has consistently held that:

'A Member State cannot plead the provisions or practices of its internal order in order to justify failure to observe obligations and time-limits arising from Community Regulations'.⁵

5 — Case 30/72 *Commission v Italy* [1973] ECR 161, paragraph 11; see also the more recent Case 279/83 *Commission v Italy* [1984] ECR 3403, paragraph 4, in relation to a directive.