JUDGMENT OF THE COURT

10 February 2000 *

In Case C-202/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank te Amsterdam, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Fitzwilliam Executive Search Ltd, trading under the name of 'Fitzwilliam Technical Services',

and

Bestuur van het Landelijk Instituut Sociale Verzekeringen

on the interpretation of Article 14(1)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and of Article 11(1)(a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the versions codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and as updated at the time of the events in question,

* Language of the case: Dutch.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch (Rapporteur) and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Fitzwilliam Executive Search Ltd, trading under the name of 'Fitzwilliam Technical Services (FTS)', by P.C. Vas Nunes and G. van der Wal, of The Hague Bar, and R.A.M. Blaakman, tax expert, Rotterdam,

— the Bestuur van het Landelijk Instituut Sociale Verzekeringen, by C.R.J.A.M. Brent, manager productcluster Bezwaar en Beroep van de Uitvoeringsinstelling GAK Nederland BV, acting as Agent,

— the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Belgian Government, by J. Devadder, General Adviser in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same ministry, acting as Agents,

— the French Government, by M. Perrin de Brichambaut, Director for Legal Affairs of the Ministry of Foreign Affairs, and C. Chavance, Foreign Affairs Adviser at the Legal Affairs Directorate of the same Ministry, acting as Agents,

— the Irish Government, by A. Buckley, Chief State Solicitor, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and M. Hoskins, Barrister,

— the Commission of the European Communities, by P.J. Kuijper and P. Hillenkamp, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Fitzwilliam Executive Search Ltd, trading under the name of 'Fitzwilliam Technical Services', represented by P.C. Vas Nunes and R.A.M. Blaakman; of the Bestuur van het Landelijk Instituut Sociale

Verzekeringen, represented by M.F.G.H. Beckers, Legal Adviser at GAK Nederland BV, acting as Agent; of the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department at the Ministry of Foreign Affairs, acting as Agent; of the German Government, represented by C.-D. Quassowski; of the French Government, represented by C. Chavance; of the Irish Government, represented by A. O'Caoimh SC and E. Barrington BL; of the United Kingdom Government, represented by J.E. Collins and M. Hoskins; and of the Commission, represented by P.J. Kuijper, at the hearing on 24 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 January 1999,

gives the following

Judgment

1 By judgment of 22 May 1997, received at the Court on 27 May 1997, the Arrondissementsrechtbank (District Court), Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 14(1)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and of Article 11(1)(a) of Regulation

(EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the versions codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71' and 'Regulation No 574/72') and as updated at the time of the events in question.

2 The two questions have been raised in proceedings between Fitzwilliam Executive Search Ltd, trading under the name of 'Fitzwilliam Technical Services' (hereinafter 'FTS'), an Irish company established in Dublin and engaged in the provision of temporary personnel, and the Bestur van het Landelijk Instituut Sociale Verzekeringen (hereinafter 'the LISV') concerning employers' contributions payable under the Netherlands social security system in respect of temporary workers employed in the Netherlands on FTS's account.

Community legislation

Regulation No 1408/71

3 Title II of Regulation No 1408/71, which comprises Articles 13 to 17a, contains rules determining the legislation applicable in the matter of social security.

4 Article 13(2) of the regulation provides:

'Subject to the provisions of Articles 14 to 17:

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

5 Article 14(1) of the regulation provides:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

(1) (a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does

not exceed 12 months and that he is not sent to replace another person who has completed his term of posting'.

6 That provision replaced Article 13(a) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (JO 1958, p. 561), in the version resulting from the amending Regulation No 24/64/EEC of the Council of 10 March 1964 (JO 1964, p. 746, hereinafter 'Regulation No 3'), according to which, under certain conditions, 'A wage-earner or assimilated worker who, being in the service of an undertaking having in the territory of a Member State an establishment to which he is normally attached, is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the former Member State as though he were still employed in its territory ...'.

Decision No 128 of the Administrative Commission

7 Under Article 81(a) of Regulation No 1408/71, the Administrative Commission of the European Communities on Social Security for Migrant Workers (hereinafter 'the Administrative Commission'), established under Title IV of that regulation, which is responsible, in particular, for dealing with all matters of administration or interpretation arising from the provisions of the regulation, adopted for these purposes Decision No 128 of 17 October 1985 concerning the application of Articles 14(1)(a) and 14b(1) of Regulation No 1408/71 (OJ 1986 C 141, p. 6), which was in force at the time of the events in question. That decision was replaced by Decision No 162 of 31 May 1996 (OJ 1996 L 241, p. 28), which entered into force after the events in question.

8 According to point 1 of Decision No 128, the provisions of Article 14(1)(a) of Regulation No 1408/71 also apply to 'a worker subject to the legislation of a

Member State who is engaged in that Member State in which the undertaking has its registered office or place of business with a view to his posting either to another Member State... provided that:

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

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

Regulation No 574/72

9 Regulation No 574/72 provides, in Article 11(1), which forms part of Title III, entitled 'Implementation of the provisions of the regulations for determining the legislation applicable':

'The institutions designated by the competent authority of the Member State whose legislation is to remain applicable shall issue a certificate stating that an employed person should remain subject to that legislation up to a specific date:

(a) at the request of the employed person or his employer in cases referred to in Articles 14(1) ... of the Regulation'.

10 The certificate mentioned in the provision set out above is known as a 'posting certificate' or an 'E 101 certificate'.

The main proceedings and the questions referred for a preliminary ruling

11 In the course of its business, FTS places temporary workers both in Ireland and in the Netherlands. All the workers which it employs — including those engaged in order to be posted directly to undertakings established in the Netherlands — are Irish nationals resident in Ireland. The workers sent to the Netherlands are employed mainly in agriculture and horticulture whilst those made available to undertakings established in Ireland work in other sectors.

12 All FTS's placing activities are carried out from Ireland, so that all its employment contracts, including those concerning its Netherlands clients, are concluded by its Dublin office. This office has a staff of 20 people whereas only two persons are employed at its Delft branch in the Netherlands.

13 Workers are engaged on the basis of employment contracts governed by Irish law and are subject to the Irish social security system, also during the period of

posting to the Netherlands. FTS deducts the relevant contributions from the workers' gross wages, namely pay-related social insurance contributions, and pays them to the Irish authorities together with its employer's contributions and income tax deductions.

14 In the case of workers posted to the Netherlands, E 101 certificates and E 111 certificates, the latter concerning sickness insurance, are requested from the Department of Social Welfare ('the DSW').

15 Whilst FTS's turnover during the three years from 1993 to 1996 was higher in the Netherlands than in Ireland, the relationship between the results obtained in those two Member States varied according to the economic climate in those two countries.

16 Given the volume of FTS's business in the Netherlands, the Nieuwe Algemene Bedrijfsvereniging ('the NAB'), the body which preceded the LISV, considered that the workers sent by FTS to the Netherlands were wrongly affiliated to the Irish social security system. After FTS had contested that assessment, the NAB, after an exchange of written argument, confirmed its interpretation by a decision of 31 March 1996 by which it made FTS's employees working in the Netherlands subject to the Netherlands social security system. Consequently, it required the employer's contributions payable in this regard to be recovered.

17 FTS challenged that decision before the Arrondissementsrechtbank, claiming that the issue of E 101 certificates by the DSW to the posted workers should be determinative and that all the conditions laid down in Article 14(1)(a) of

Regulation No 1408/71 and those laid down in Decision No 128 had been complied with.

18 The Arrondissementsrechtbank concluded that the resolution of the case depended both on the interpretation of the criteria for the application of Article 14(1)(a) of Regulation No 1408/71 and on the effects of an E 101 certificate, which had still not been fully clarified by case-law, and decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

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

(b) If so,

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

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

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

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

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

(c) If not,

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

(ii) If so, what is its extent?

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

(b) If not,

(i) In what circumstances is it not?

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

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

The first part of the first question

19 By the first part of its first question, the national court is essentially asking, in relation to the interpretation of the phrase 'undertaking to which he is normally attached' in Article 14(1)(a) of Regulation No 1408/71, whether, in order to benefit from the advantage afforded by that provision, an undertaking providing temporary personnel which, from a first Member State, makes workers available on a temporary basis to undertakings based in another Member State must have ties with the first Member State in the sense that it must normally carry on its activities there.

20 It must be remembered first of all that the provisions of Title II of Regulation No 1408/71, of which Article 14 forms part, constitute, according to the settled case-law of the Court, a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation (see Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 12; Case C-425/93 *Calle Grenzshop Andresen* [1995] ECR I-269, paragraph 9; Case C-131/95 *Huijbrechts* [1997] ECR I-1409, paragraph 17, and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28).

21 It is clear from the judgment in Case 19/67 *van der Vecht* [1967] ECR 345 and the judgment in Case 35/70 *Manpower* [1970] ECR 1251, which concerned Article 13(a) of Regulation No 3, both in its original version and in the version in Regulation No 24/64, which preceded Article 14(1)(a) of Regulation No 1408/71, that the exception derogating from the rule that a worker is to be subject to the legislation of the Member State in whose territory he is employed (hereinafter 'the State of employment rule'), now laid down by Article 13(2)(a) of Regulation No 1408/71, can apply to undertakings providing temporary personnel only if, *inter alia*, the following two conditions are met.

22 The first condition, as FTS in particular submits in its written observations, concerns the existence and nature of a necessary link between the undertaking providing temporary personnel and the posted worker, in so far as the posted worker must normally be attached to the undertaking which posted him to another Member State.

23 The second condition concerns the relationship between the undertaking providing temporary personnel and the Member State in which it is established. In this regard, the Court has held, in paragraph 16 of its judgment in *Manpower*, cited above, that the exception allowing derogation to be made from the State of employment rule in the case of workers sent on a temporary posting is applicable only to workers employed by undertakings normally carrying on their business in the territory of the State in which they are established.

'Undertaking to which he is normally attached'

24 As far as this notion is concerned, suffice it to say, as is clear from all the observations submitted, that what is required under Decision No 128 is the maintenance of a direct link between the undertaking established in a Member State and the workers which it has posted to another Member State during the period of posting of those workers. In order to establish the existence of such a direct link, it is necessary to deduce from all the circumstances of the worker's employment that he is under the authority of that undertaking (see, in this regard, the judgments in *van der Vecht*, at p. 354 and *Manpower*, at paragraphs 18 and 19).

25 However, while only the national court has competence to determine whether this is so in the case before it, neither the parties to the main proceedings nor the Member States which have submitted observations under Article 20 of the EC Statute of the Court of Justice have expressed any doubts as to the existence of such a direct link in the case before the national court.

The requirement for the undertaking to have ties with the Member State in which it is established

26 Apart from FTS, which expresses doubts in this regard, all the other participants in the proceedings before the Court submit that, both under Regulation No 1408/71 and under Regulation No 3, it is necessary for the undertaking concerned to have ties with the Member State in which it is established. To justify the need for such links, most of them rely on the judgment in *Manpower*, cited above. In paragraph 16 of that judgment, the Court held that undertakings to which workers are attached must normally pursue their activity in the territory of the State in which they are established.

27 In order to examine whether the condition laid down in *Manpower*, cited above, continues to apply, reference must be made to the aims of the exception laid down to the 'Member State of employment' rule by Article 14(1)(a) of Regulation No 1408/71.

28 The purpose of Article 14(1)(a) of Regulation No 1408/71 is, in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established. It is aimed at overcoming obstacles likely to impede freedom of movement of workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (*Manpower*, cited above, paragraph 10).

29 As the Court held in paragraph 11 of its judgment in *Manpower*, in order to prevent an undertaking established in a Member State from being obliged to register its workers, normally subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration — which would complicate exercise of freedom to provide services — Article 14(1)(a) of Regulation No 1408/71 allows the undertaking to keep its workers registered under the social security system of the first Member State if the undertaking observes the conditions governing that freedom to provide services.

30 It follows that Article 14(1)(a) of Regulation No 1408/71 remains an exception to the State of employment rule (see *Manpower*, paragraph 10) and that, consequently, an undertaking which provides temporary personnel and wishes to offer cross-border services may benefit from the advantage afforded by that provision only if it normally carries on its activities in the Member State in which it is established.

31 Consequently, it must be held that the condition laid down in paragraph 16 of the judgment in *Manpower*, admittedly in relation to the system under Regulation No 3, continues to apply under Regulation No 1408/71.

32 That conclusion is borne out by point 1(b) of Decision No 128, even though such a decision, whilst capable of providing guidance to social security institutions responsible for applying Community law in this sphere, cannot require those institutions to follow certain methods or to adopt certain interpretations when they come to apply the rules of Community law (see Case 98/80 *Romano* [1981] ECR 1241, paragraph 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraph 52). Moreover, all the participants in the proceedings before the Court accept that the wording of this point merely carries over the condition laid down in the judgment in *Manpower*.

33 It follows from all the foregoing considerations that Article 14(1)(a) of Regulation No 1408/71 is to be interpreted as meaning that, in order to benefit from the advantage afforded by that provision, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State must normally carry on its activities in the first State.

The second part of the first question

34 By the second part of its first question, the national court is essentially seeking to ascertain the criteria for enabling it to determine that an undertaking engaged in providing temporary personnel normally carries on its activities in the Member State in which it is established and whether such an undertaking satisfies that condition.

35 FTS, the Irish Government, the United Kingdom Government and the Commission submit that an undertaking normally carries on its activity in a Member State if it carries on a genuine activity there. In this regard, FTS and the Irish Government interpret the phrase in point by relying on the judgment in *Manpower* and on Decision No 128, and more specifically on an analysis of the word 'normally' contained in point 1(b) of that decision. In their submission, the purpose of that condition is solely to combat abuses and in particular to prevent 'brass plate' companies from taking advantage of Article 14(1)(a) of Regulation No 1408/71.

36 FTS, the two aforementioned Governments and the Commission submit in particular that the LISV cannot require a service-providing undertaking to have a certain volume of activity in the Member State in which it is established in relation to the activity in the Member State to which workers are posted. They contend that assessing the respective volumes of activity on the basis of certain quantitative elements — such as turnover, the number of hours worked and the nature of the work — is not in conformity with Community law, and more specifically with point 1(b) of Decision No 128.

37 In this context, they also argue that the method used by the Netherlands authorities lacks certainty. Under their approach, neither the posted workers nor the undertaking concerned could have known in advance the social security system to which the workers should have been affiliated.

38 The Netherlands, Belgian, German and French Governments support the LISV's argument. The LISV rejects FTS's argument that the purpose of the 'activity' condition is only to prevent 'brass plate' companies from abusing the exception provided for in Article 14(1)(a) of Regulation No 1408/71. According to the LISV, the activities of a temporary employment undertaking in the Member State in which it is established must be on a certain scale and represent a substantial part of its activities.

39 Thus, in order to determine whether FTS — in accordance with point 1(b) of Decision No 128 — normally carries on its activity in the Member State in which it is established, the LISV contends that it is necessary to make a comparison between the volume of that undertaking's activity in that Member State and the volume in the Member State to which it posts workers.

40 In this regard, it is clear from the scheme of Title II of Regulation No 1408/71 and from the purpose of Article 14(1)(a) thereof that only an undertaking which habitually carries on significant activities in the Member State in which it is established may be allowed the benefit of the advantage afforded by the exception provided for by that provision.

41 Only such an interpretation can reconcile the general rule in Article 13(2)(a) of Regulation No 1408/71, according to which workers are in principle subject to the social security scheme of the Member State in which they are employed, with the special rule in Article 14(1)(a) of that regulation, which is applicable to workers who are posted only for a limited period of time to another Member State.

42 In order to determine whether an undertaking engaged in providing temporary personnel habitually carries on significant activities in the Member State in which it is established, the competent institution of that State must examine all the criteria characterising the activities carried on by that undertaking.

43 Those criteria include the place where the undertaking has its seat and administration, the number of administrative staff working in the Member State in which it is established and in the other Member State, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to the employment contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand, and the turnover during an appropriately typical period in each Member

State concerned. That list cannot be exhaustive; the choice of criteria must be adapted to each specific case.

44 However, it is clear from the judgment in *van der Vecht*, cited above, that the nature of the work entrusted to workers made available to undertakings based in the Member State in which the temporary employment undertaking is established and to workers posted to another Member State is not one of those criteria. The Court has held in this regard that the fact that the work performed is different from that normally carried out in that establishment is of little consequence.

45 Consequently, the answer to be given to the second part of the first question must be that an undertaking engaged in providing temporary personnel normally carries on its activities in the Member State in which it is established if it habitually carries on significant activities in that State.

The second question

46 By this question, the national court asks essentially whether and to what extent a certificate issued by the institution designated by the competent authority of one Member State, within the meaning of Article 11(1)(a) of Regulation No 574/72, is binding on the social security institutions of another Member State.

47 Unlike the other governments, the Irish and United Kingdom Governments, and also FTS, which refer to the Advocate General's Opinion in the *Calle Grenzshop Andresen* case, contend that an E 101 certificate binds the competent institution of a Member State other than that under whose authority it was drawn up until it is withdrawn by the institution which issued it.

48 It is not disputed that the Court has not yet ruled on the character and legal nature of an E 101 certificate. However, it is clear from its judgment in Case 93/82 *Knoeller* [1982] ECR 951, paragraph 9, that a certificate such as that in question in the main proceedings — like the substantive rules in Article 14(1)(a) of Regulation No 1408/71 — is aimed at facilitating freedom of movement for workers and freedom to provide services.

49 In an E 101 certificate, the competent institution of the Member State in which an undertaking providing temporary personnel is established declares that its own social security system will remain applicable to posted workers for the duration of their posting. By virtue of the principle that workers must be covered by only one social security system, the certificate, in comprising this declaration, necessarily implies that the other Member State's social security system cannot apply.

50 However, the probative force of an E 101 certificate is limited to the competent institution's declaration as to the legislation applicable; it cannot affect the Member States' freedom to organise their own social protection schemes or the way in which they regulate the conditions for affiliation to the various social security schemes, which, as the French Government submits, are matters which remain exclusively within the competence of the Member State concerned.

51 The principle of sincere cooperation, laid down in Article 5 of the EC Treaty (now Article 10 EC), requires the competent institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E 101 certificate.

52 As regards the competent institutions of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 5 of the Treaty that these obligations would not be fulfilled — and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation

No 574/72 would be thwarted — if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system.

53 Consequently, in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking providing temporary personnel is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted.

54 The opposite result would undermine the principle that employees are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them.

55 Consequently, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that institution cannot therefore subject the workers in question to its own social security system.

56 However, it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information

contained therein, in particular because the information does not correspond to the requirements of Article 14(1)(a) of Regulation No 1408/71.

57 Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed and consequently on the question whether it is covered by Article 14(1)(a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission.

58 If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 170 of the EC Treaty (now Article 227 EC) in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the E 101 certificate.

59 It is clear from all the foregoing considerations that Article 11(1)(a) of Regulation No 574/72 is to be interpreted as meaning that a certificate issued by the institution designated by the competent authority of a Member State is binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. However, where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts and, consequently, as to the conformity of the information contained in the certificate with Regulation No 1408/71 and in particular with Article 14(1)(a) thereof, the issuing institution must re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it.

Costs

60 The costs incurred by the Netherlands, Belgian, German, French, Irish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arrondissementsrechtbank te Amsterdam by judgment of 22 May 1997, hereby rules:

1. **Article 14(1)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, and as updated at the time of the events in question, is to be interpreted as meaning that, in order to benefit from the advantage afforded by that provision, an undertaking engaged in providing temporary personnel which, from one Member State, makes workers available on a temporary basis to undertakings based in another Member State must normally carry on its activities in the first State.**

2. An undertaking engaged in providing temporary personnel normally carries on its activities in the Member State in which it is established if it habitually carries on significant activities in that State.

3. Article 11(1)(a) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the version codified by Regulation No 2001/83 and as updated at the time of the events in question, is to be interpreted as meaning that a certificate issued by the institution designated by the competent authority of a Member State is binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. However, where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts and, consequently, as to the conformity of the information contained in the certificate with Regulation No 1408/71 and in particular with Article 14(1)(a) thereof, the issuing institution must re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it.

Rodríguez Iglesias Moitinho de Almeida

Sevón Schintgen Kapteyn Gulmann

Puissochet Hirsch Wathelet

Delivered in open court in Luxembourg on 10 February 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President