OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 30 April 1998 *

1. The questions on which the Court is to give a preliminary ruling in this case have been referred by the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), the Netherlands ('the Gerechtshof'), and have arisen in the context of an appeal lodged by Mr Terhoeve against a decision of the Head of the Foreign Individuals and Undertakings Section of the Rijksbelastingsdienst (National Inland Revenue Department) concerning a combined assessment, covering income tax and social security contributions, for the period in the 1990 fiscal year during which he was regarded as a non-resident in the Netherlands.

I — The facts in the main proceedings

2. It appears from the documents before the Court that the appellant in the main proceedings is a Dutch national who resided and worked in the United Kingdom from 1 January to 6 November 1990, having been posted there by his employer, a company established in the Netherlands. From 7 November 1990 until the end of that year he resided and worked in the Netherlands.

3. Under the bilateral convention between those two States for the avoidance of double taxation, Mr Terhoeve's income from employment in the United Kingdom was not subject to income tax in the Netherlands. However, that income was taken into account when it came to determining the tax basis to be applied in calculating the social security contributions for the period during which he worked in the United Kingdom, throughout which he remained subject to the social security legislation of the Netherlands.

While he was working abroad he was regarded as a non-resident taxpayer in the Netherlands, with the result that income arising in that country remained liable to tax there. From 7 November 1990 he became a resident taxpayer in the Netherlands once again.

4. In accordance with Article 14(1)(a) 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, as amended and updated by Council Regulation

* Original language: Spanish.

(EEC) No 2001/83 of 2 June 1983 [1] ('Regulation No 1408/71'), Mr Terhoeve continued to be subject, throughout the whole of 1990, to the social security legislation of the Netherlands in spite of working most of the time in the United Kingdom.

5. On 29 April 1992 he received in the Netherlands a combined assessment to income tax and social security contributions for the period from 7 November to 31 December 1990, during which he was a resident taxpayer. His taxable income during that period was NLG 15 658 so that, after the deduction of NLG 9 136 to which he was entitled at that time, the taxable amount was NLG 6 522.

Income tax at 13%, amounting to NLG 847, and social security contributions amounting to 22.1%, amounting to NLG 1 441, were charged on that sum, giving a total due of NLG 2 288. In the order for reference, the Gerechtshof states that the appellant withdrew the objection lodged by him against that assessment, which therefore became final.

1 — OJ 1983 L 230, p. 6.

6. The case now before the Gerechtshof arises from a combined assessment to income tax and social security contributions for the period from 1 January to 6 November 1990, when the appellant was a non-resident taxpayer. That assessment was sent to him by the National Inland Revenue Department on 30 June 1992.

7. The income tax in question was calculated on a taxable amount of NLG 16 210, representing income obtained entirely in the Netherlands from personal employment and from real property situated in that country.

By contrast, the social security contributions were calculated not only on that income but also on the income received by the appellant in the United Kingdom, with the result that the taxable amount for this purpose amounted to NLG 98 201. As the contribution rate of 22.1% applies only to the first tranche of income, which was NLG 42 123 for the period in question, the amount due was NLG 9 309, which was the maximum contribution for 1990.

8. It appears from the observations which have been submitted in this case that the existence of a ceiling for social security contributions is due to the fact that the amount

of the benefits payable by the social security authorities does not depend on the amount of the contributions paid by the person concerned. In providing for that ceiling, the intention of the Dutch legislature was to prevent a person with a very high income from being compelled to pay high contributions, calculated as a percentage of global income, without being entitled to receive benefits in proportion to those contributions.

9. The dispute between the parties to the main proceedings centres on the calculation of the social security contributions for the period from 1 January to 6 November 1990. The first question which the national court has to decide is whether the National Inland Revenue Department was right to treat the income from employment in the United Kingdom as income subject to contributions for that period. Then, if the answer to that question is in the affirmative, the national court will have to decide whether the 22.1% rate must be applied to the sum of NLG 42 123, which would mean that the appellant would have to pay the maximum contribution, amounting to NLG 9 309, or whether, as he claims, that amount should be reduced in proportion to the number of days during 1990 to which the assessment relates.

10. Mr Terhoeve argues that in 1990 he did not receive the whole or even almost all of his income in the Netherlands and that he considers himself the victim of indirect discrimination on grounds of nationality, which is prohibited by Article 48 of the EC Treaty. In his appeal he seeks annulment of the contested assessment and a reduction of the taxable amount, for the purpose of calculating the contributions, to NLG 16 201, corresponding to the income received in the Netherlands during the period in question, or, alternatively, to NLG 35 804, corresponding to the proportionate part of the maximum taxable amount, which in that year was NLG 42 123, represented by the number of days in 1990 to which the assessment relates, nanely from 1 January to 6 November.

II — The national legislation

11. In the order for reference the Gerechtshof states that in 1990 the system for collecting income tax and social security contributions underwent a radical change and was simplified. Since that year both income tax and social security contributions have been collected by means of a combined assessment. As a general rule, the basis on which the contributions are calculated is the same as that for income tax, the two forms of taxation being closely linked inasmuch as contributions are levied only in respect of income falling within the first income tax bracket.

12. Article 62 of the Wet op de inkomstenbelasting (Income Tax Law) provides that, where, in a calendar year, a person is deemed to be resident and then non-resident for tax purposes, separate income tax assessments are to be issued, one for the entire income received while resident and the other for the income received in the Netherlands while he is non-resident. If the taxpayer was subject to the social security legislation of the Netherlands throughout the whole year, two assessments will also be issued for general social insurance contributions. There is no provision for a reduction, in proportion to the period covered by the assessment, in the first tranche of income subject to income tax, which forms the basis for calculating contributions.

13. The collection of general social insurance contributions is governed by the Wet financiering volksverzekeringen (Law on the financing of social security). Under Article 8, the income on which contributions are levied is the same as the total taxable income or, as the case may be, the taxable income arising in the Netherlands. That article makes no provision for contributions to be levied where a person subject to compulsory insurance receives income which is not taxable in the Netherlands. However, Article 6 of the Uitvoeringsregeling premieheffing volksverzekeringen 1990, the regulation implementing the abovementioned law, widens the class of income in respect of which contributions are to be paid by providing that persons who are insured by reason of activities the income from which is not liable to income tax are to be deemed, for social security contribution purposes, to be liable to income tax on such income also. The net income received by such persons from the activities in respect of which they are insured is added, for the purpose of calculating contributions, to the income of domestic origin which is liable to income tax.

14. In practice, those provisions mean that anyone who, in one and the same calendar year, is subject to income tax in the Netherlands as a resident taxpayer and subsequently as a non-resident taxpayer, or vice versa, receives two combined assessments. For those who are insured under the compulsory general social insurance scheme throughout the whole year, each assessment is made by reference to the maximum tax base on which contributions are calculated. Depending on the circumstances of each case, the effect of that scheme may be that the total sum assessed for social security contributions exceeds the ceiling obtained by applying the percentage contribution to the first tranche of income. The example of Mr Terhoeve offers a good illustration of those perverse effects. For 1990 the contribution claimed for the period during which he was a non-resident taxpayer is NLG 9 309, which corresponds to the maximum possible total contributions for a single year and which was obtained by taking 22.1% of the first tranche of income, fixed for that year at NLG 42 123, and for the period during which he was resident the additional contri-

bution claimed is NLG 1 441. However, if he had been resident throughout the whole year and subject to the same Netherlands social security scheme, the maximum he would have had to pay by way of contributions would have been NLG 9 309. It is true that this disadvantage may be offset, depending on the circumstances, by the fact that the income is subject to income tax separately for each period, which may result in the application of lower rates of tax.

III — The questions referred

15. In order to give a decision in this dispute, the Gerechtshof has referred the following questions to the Court for a preliminary ruling:

'1. Are the provisions of Community law on freedom of movement for workers applicable to a national of a Member State who transfers his residence in the course of a year from another Member State to the Member State of which he is a national and who is successively employed in that year in each of those Member States, and who did not earn most of his income during that year in one of those two Member States?

2. (a) Does it follow from Community law, in particular Articles 7 and 48(2) of the EEC Treaty and Article 7(2) of Regulation 1612/68, [2] that in the application of legislation operating to the disadvantage of emigrants and immigrants as regards liability to make social security contributions there is a presumption that such disadvantage mainly affects nationals of other States?

(b) If question (a) is answered in the affirmative, is that presumption rebuttable or not?

(c) If the presumption in question is rebuttable, is the possibility of doing so governed solely by national procedural law, in particular the rules of evidence of the Member State concerned, or does Community law also lay down requirements in that regard?

(d) If Community law makes the rebuttal of such a presumption subject to certain requirements, what signifi-

2 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ, English Special Edition 1968 (II), p. 475.

cance attaches in the present case to the following circumstances:

— the respondent authority has stated that, of the very much broader category of taxpayers residing abroad, almost one half are its own nationals, without adducing any evidence in support of that assertion;

— the appellant, who pleads indirect discrimination on grounds of nationality, has not contested the correctness of that assertion by the authority;

— the respondent authority is in an appreciably better position than the appellant to collect information capable of rebutting the aforementioned presumption?

3. Is there any rule of Community law precluding a Member State, regardless of any question of (indirect) discrimination on grounds of nationality, from imposing, in a given year, a heavier social security contributions burden on an employee who transfers his residence during that year from that Member State to another Member State, or vice versa, than on an employee who, in otherwise similar circumstances, continues to reside throughout the whole year in a single Member State?

4. If the imposition of a heavier contributions burden, as referred to in the previous question, is in principle incompatible with Article 7 or Article 48(2) of the EEC Treaty, or with any other rule of Community law, can it be justified by one or more of the following circumstances, whether or not they are linked with each other:

— the measure results from legislation whereby the levying of income tax and social security contributions is intended, in order to simplify matters, to coincide to a very great extent, if not entirely;

— solutions which, whilst maintaining that link, preclude the imposition of the heavier contributions referred to above, result in technical problems of implementation or in possible overcompensation;

— in certain cases, albeit not in the present case, overall liability to income tax and social security contributions is lower for immigrants and emigrants in the year in which they move than for persons who, in otherwise identical circumstances, retain the same residence throughout the whole year?

5. (a) If a heavier contributions burden, as referred to in question 3, is incompatible with Article 7 or Article 48(2) of the EEC Treaty, or with any other rule of Community law, should there be taken into account, in determining whether in any specific case a heavier burden is actually involved, only income from employment or, in addition, other income received by the person concerned, such as profits from real property?

(b) If other income apart from earnings from employment is to be left out of consideration, how is it to be determined whether, and to what extent, the levying of contributions on income from employment places the migrant worker concerned at a disadvantage?

6. (a) If in the present case there was an infringement of any rule of Community law, is the national court obliged to bring that infringement to an end even if to do so would require a choice between different alternatives each of which entails advantages and disadvantages?

(b) If the national court in this case does bring an infringement of EC law to an end, does Community law provide any directions as to the choice which the national court should make between different conceivable solutions?'

IV — The Community legislation

16. The first paragraph of Article 7 of the EEC Treaty, which is now Article 6 of the EC Treaty, [3] provides as follows:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

3 — As amended by Article G.8 of the Treaty on European Union, signed at Maastricht on 7 February 1992 (OJ 1992 C 191, p. 1).

Article 48(2) of the Treaty reads as follows:

'Freedom of movement [for workers within the Community] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

17. Title II of Regulation 1408/71 contains a complete system of conflict rules for determining the law applicable to persons within its scope. Under Article 13:

'1. Subject to Article 14(c), persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to 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;

...'

So far as the present case is concerned, Article 14, which lays down special rules applicable to persons, other than mariners, engaged in paid employment, provides as follows:

'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.

(b) If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first Member State shall continue to apply until the completion of such work, provided that the competent authority of the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial 12-month period. Such consent cannot, however, be given for a period exceeding 12 months.

2. He shall enjoy the same social and tax advantages as national workers.

...'

...'

V — Analysis of the questions referred

19. Written observations have been submitted by the appellant in the main proceedings, the Government of the Netherlands and the Commission. The defendant authority has informed the Court that it adopts and joins in the observations of its Government. Representatives of the appellant in the main proceedings, of the Government of the Netherlands and of the Commission appeared at the hearing on 17 March 1998.

18. On the other hand, Article 7 of Regulation No 1612/68 provides:

Question 1

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

20. I deduce from the reasoning of the Gerechtshof in the order for reference that the first question aims to establish whether a worker may rely, as against the Member State of which he is a national, on the provisions of Community law relating to freedom of movement for workers when his employer, an undertaking established in that State, posts

him to another Member State to work there for that undertaking for less than one year. The Gerechtshof adds that the greater part of the worker's income during that period was not obtained in one of those Member States only.

21. The appellant in the main proceedings asserts that nationals of a Member State may rely on Community law as against their own State if they work or have worked in another Member State. That is precisely his situation, since he has resided and worked, as a citizen of the Netherlands, in the United Kingdom.

22. The Netherlands Government proposes that the answer to this question should be in the affirmative. It adds that the national court's observation that in 1990 the person concerned did not receive the greater part of his income in one of the two Member States is not relevant for the purpose of the answer to this question.

23. The Commission considers that a situation such as that of the appellant in the main proceedings has sufficient points of connection with Community law. In moving to the United Kingdom in order to reside and work there, he exercised his freedom of movement and that is sufficient to differentiate his situation from that of other Community nationals who have never exercised such freedom.

24. I agree with the Commission. The Court has held in numerous judgments that a national of a Member State who exercises one of the freedoms conferred by the Treaty may rely on Community law as against the State of which he is a national. For example, in the *Knoors* judgment, [4] which concerned a Dutch national who wished to settle in the Netherlands and use the trade qualifications which he had acquired in Belgium, the Court observed that, although the provisions of the Treaty relating to establishment and the provision of services could not be applied to situations which are purely internal to a Member State, the reference in Article 52 to 'nationals of a Member State' who wish to establish themselves in the 'territory of another Member State' could not be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification, are, with regard to their State of origin, in a situation which may be assimilated to that of any other person enjoying the rights and liberties guaranteed by the Treaty.

This statement was repeated in the *Bouchoucha* judgment [5] and *Kraus*, [6] in which the Court added that the same reasoning must be followed as regards Article 48 of the Treaty.

4 — Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 24.

5 — Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13.

6 — Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraphs 15 and 16.

It was reiterated in the *Scholz* judgment, [7] in which the Court confirmed that any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of Article 48 of the Treaty, and in the *Asscher* judgment, [8] where the Court held that this case law applied to a national of a Member State pursuing an activity as a self-employed person in another Member State in which he resided, so that he could rely on Article 52 of the Treaty as against his State of origin, on whose territory he pursued another activity as a self-employed person.

25. The Court reached a similar conclusion in the *Broekmeulen* judgment, [9] in which it stated that the free movement of persons, the right of establishment and the freedom to provide services guaranteed by Articles 3(c), 48, 52 and 59 of the Treaty, which are fundamental to the system set up by the Community, would not be fully realized if Member States were able to deny the benefit of provisions of Community law to those of their nationals who have availed themselves of the freedom of movement and the right of establishment.

26. Mr Terhoeve's situation differs completely from that of Mr Werner, a German national, who obtained his qualifications and vocational training in Germany, where he had always worked. In Mr Werner's case, the only foreign element was his residence in the Netherlands, with the result that the Court held that it was a purely internal situation to which Article 52 of the Treaty did not apply. [10] In the present case Mr Terhoeve, a Dutch national, exercised his freedom of movement conferred by the Treaty when he moved to the United Kingdom and worked there from 1 January to 6 November 1990 for his employer, established in the Netherlands, whither he subsequently returned and continued working.

27. I consider therefore that Mr Terhoeve is entitled to rely, as against his State of origin, on the Treaty rules concerning freedom of movement for workers. The question whether or not he received the greater part of his income in one only of the States concerned during the period in question is irrelevant.

Question 2

28. By this question the national court asks, in essence, whether the Dutch legislation in question gives rise to indirect discrimination on grounds of nationality since it affects mainly nationals of other Member States. The

7 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9.

8 — Case C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089.

9 — Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, paragraph 20.

10 — See the judgment in Case C-112/91 *Werner* [1993] ECR I-429.

legislation provides that workers in a situation similar to that of Mr Terhoeve in 1990 are to receive a combined assessment for income tax and general social security contributions for the period during which they are resident taxpayers and another such assessment, for the same purposes, for the period during which they are non-resident taxpayers. As a result, the contributions levied for that year may be higher than the maximum payable by workers who remained resident throughout the whole year.

29. Mr Terhoeve maintains that this legislation, which applies irrespective of nationality, but which makes a distinction according to residence, is discriminatory. The obligation to pay, by way of general social security contributions for a whole year, an amount greater than the annual maximum was triggered by his change of residence, which entailed a change in his tax status from resident taxpayer to non-resident taxpayer, or vice versa. That should not have any effect on contributions because he was compulsorily covered by the general social insurance scheme of the Netherlands throughout the whole year. Nevertheless, since he was both a resident taxpayer and a non-resident taxpayer in the same year — for which he had to pay contributions of NLG 1 441 and NLG 9 309 — he was placed in a worse position than a person who remained a resident taxpayer throughout the whole year because the maximum such a person could have been required to pay was NLG 9 309, the contributions ceiling set for 1990.

In Mr Terhoeve's opinion, the legislation in question applies mainly to migrant workers, most of whom are nationals of other Member States, and it is they who will have to pay social security contributions higher than the annual ceiling.

30. The Netherlands Government observes that migrant workers are in a worse position only in certain specific sets of circumstances and that the collection of general social security contributions must be considered in context, that is to say, together with the collection of income tax. Unlike contributions to the social insurance scheme for employees, contributions to the general social insurance scheme are based on the principle of social equity and are similar in some respects to taxes. Thus they are collected together with income tax and in both cases the basis of assessment is the same, not being limited to salaries or wages but covering income of all kinds.

The Dutch Government adds that what is at stake in this case is the need to preserve the cohesion of the tax system, of which the rules

governing the collection of funds intended for general social insurance form part. Depending on the many different individual circumstances, the system may have favourable or unfavourable consequences. For example, it will be favourable where two assessments are issued in one year and the progressive nature of income tax is therefore less pronounced. The Netherlands Government concludes that there is nothing whatever to indicate that the disadvantages of this system of collection mainly affect nationals of other Member States, and maintains that in reality the persons affected are mostly nationals of the Netherlands.

31. The Commission maintains that the Netherlands legislation in question does not give rise to any discrimination on grounds of nationality.

32. I have no hesitation in agreeing with the Commission's view that the Netherlands legislation at issue does not give rise to indirect discrimination on grounds of nationality.

33. First of all, the Court has consistently held that Article 6 of the Treaty, which lays down the general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination. [11] However, with regard to freedom of movement for workers, the principle of equal treatment has been applied and amplified by Article 48(2) of the Treaty, which provides for the abolition of any discrimination as regards employment, remuneration and other conditions of work and employment.

Accordingly, it is unnecessary in this case to refer to Article 6 of the Treaty in order to reply to the questions referred by the Gerechtshof.

34. To my mind, it is likewise unnecessary to have recourse to Article 7(2) of Regulation No 1612/68, to which the national court also refers and which, in effect, requires Member States to extend the same social and tax advantages to workers who are nationals of other Member States as to their own nationals. However, the central issue in this case is the amount which Mr Terhoeve has to pay by way of Netherlands social security contributions which, although calculated on the first tranche of the taxable amount for income tax purposes, is nevertheless a contribution to one of the social insurance schemes of a Member State. If, therefore, in order to reply to the questions from the Gerechtshof, it were necessary to refer to a provision other than

11 — See the *Scholz* judgment, cited in footnote 7, paragraph 6; also the judgments in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 19, and Case C-193/94 *Skanavi* v *Chrysanthakopoulos* [1996] ECR I-929, paragraph 20.

Article 48 of the Treaty, I think it would be more appropriate to use Article 3(1) of Regulation No 1408/71, which lays down the fundamental principle of non-discrimination in social security matters.

35. It is also settled law that the Treaty rules regarding equal treatment forbid not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. It may therefore be that, in certain circumstances, the use of criteria such as the place of origin or residence of a worker may, in terms of its practical effect, be tantamount to discrimination on grounds of nationality, as prohibited by the Treaty. [12]

36. In the cases in which the Court has found indirect discrimination on grounds of nationality, it is often the criterion of residence which has given rise to discrimination because it is a requirement which nationals generally fulfil more easily than migrant workers who are nationals of other Member States. [13] That is the reasoning informing both the order for reference and the observations submitted by Mr Terhoeve.

37. I would point out, however, that is a worker exercising his right to freedom of movement is to be adversely affected by the Netherlands legislation at issue, two conditions must be satisfied. He must have been a resident taxpayer, then subsequently a non-resident taxpayer (or vice versa), in the Netherlands in the course of one and the same calendar year and, last but not least, he must have remained subject to the Netherlands general social security legislation in spite of working and residing in another Member State.

38. The general rule for determining the social security legislation applying to a migrant worker is set out in Article 13(1)(a) of Regulation No 1408/71, which provides that a worker employed in the territory of one Member State is 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.

39. Under that general rule, a migrant worker is subject to the social security legislation of the Member State in which he works. I conclude from this that nationals of other Member States who work for part of the year in the

12 — See the judgment in Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11.

13 — See the judgments in Case 41/84 *Pinna* [1986] ECR 1; Case C-175/88 *Biehl* [1990] ECR 1779; Case C-326/90 *Commission v Belgium* [1992] ECR I-5517; Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817; Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-266/95 *Merino García* [1997] ECR I-3279; and Case C-57/96 *Meints* [1997] ECR I-6689.

Netherlands and then go to work in another Member State will not be adversely affected by the legislation in question because, as soon as they begin to work in the other State, they will no longer be subject to the Netherlands social security legislation and will be liable for contributions only in respect of the period during which they were so subject. The same applies to those who work for part of the year in another Member State and then go to work in the Netherlands. These are the most typical cases of migrant workers, most of whom will be nationals of other Member States.

40. Article 14(1) of Regulation No 1408/71 expressly provides for an exception to this general rule where a national of a Member State is posted by his employer to another Member State, as was Mr Terhoeve. The third recital in the preamble to Decision No 162 of the Administrative Commission of the European Communities on Social Security for Migrant Workers [14] states that the purpose of that exception is 'to avoid, for workers, employers and social security institutions, the administrative complications which would result from the application of the general rule laid down in Article 13(2)(a) or (c) of the Regulation [No 1408/71] where the period of employment is of short duration in a Member State ... other than the State in which the undertaking has its registered office or a place of business'.

14 — Decision No 162 of 31 May 1996 on the interpretation of Article 14(1) and 14a(1) of Council Regulation (EEC) No 1408/71 on the legislation applicable to posted workers (OJ 1996 L 241, p. 28).

41. In my opinion, the migrant workers likely to be adversely affected by the Netherlands legislation at issue will for the most part be employees in the Netherlands of undertakings established in that State who are posted by their employer to another Member State to work there for it for a limited, relatively short period.

In such cases, the workers concerned will continue, pursuant to Article 14(1) of Regulation No 1408/71, to be subject to the social security legislation of the Netherlands while working in the other Member State. Consequently, under the legislation in force since 1990, they will receive two combined assessments for income tax and social security contributions and, like Mr Terhoeve, they may be compelled to pay contributions above the maximum payable if they had not exercised their right to freedom of movement.

42. I suspect that, as a general rule, the workers involved will be nationals of the Netherlands. In any case, there is nothing to indicate that the legislation at issue is likely to operate to the disadvantage mainly of workers from other Member States, even potentially. It cannot be said, therefore, that it gives rise to indirect discrimination on grounds of nationality.

43. However, can a Member State compel a worker in Mr Terhoeve's situation to pay social security contributions in excess of the maximum payable had he not exercised his right to freedom of movement during the period in question? That is precisely the issue raised by the third question.

Question 3

44. The purpose of the third question is to ascertain whether Community law precludes a Member State from requiring a Community national — possibly even one of its own nationals — who has exercised his right to freedom of movement to pay social security contributions in excess of the maximum payable by workers who have not exercised that right.

45. Mr Terhoeve argues that to impose a heavier financial burden on those who exercise the right to freedom of movement may constitute an obstacle to doing so.

46. The Netherlands Government maintains that workers in the situation postulated in the question are not always required to pay higher contributions when they transfer residence and that, even where this occurs, the unfavourable effects are not permanent since they arise only in respect of the financial year during which the worker temporarily resided abroad.

47. The Commission considers that the effect of the Netherlands legislation at issue, or at least the way in which it is applied, is to deprive workers who have exercised their right to freedom of movement during the calendar year in question of a social security advantage, that is to say, the right enjoyed by those who work in the Netherlands throughout the whole year not to pay general social security contributions in excess of the ceiling fixed for the period in question. The Commission concludes that this situation may have the effect of preventing a worker from exercising his right to freedom of movement and that the Netherlands legislation, or the way in which it is applied, constitutes an obstacle to the freedom of movement of workers, contrary to Articles 48 to 51 of the Treaty.

48. Here, again, I agree with the Commission. The Court has consistently held that freedom of movement for workers is one of the fundamental principles of the Community and the Treaty provisions guaranteeing that freedom have had direct effect since the

end of the transitional period. [15] The Court has also held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and to preclude national legislation which might place them at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. [16]

49. In the field of social security for migrant workers there is a consistent body of case law to the same effect. For example, in *Masgio* [17] the Court held that Article 48(2) of the Treaty and Article 3(1) of Regulation No 1408/71, which lay down the principle of equal treatment within the scope of the Regulation, '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' and that 'Articles 48 to 51 of the Treaty and the Community legislation adopted in implementation thereof, in particular Regulation No 1408/71, are intended to prevent a worker who, by exercising his right of free movement, has been employed in more than one Member State from being placed in a worse position than one who has completed his entire career in only one Member State'.

50. In this connection the Court added, in *Masgio*, that 'the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State'. [18] Such a consequence could deter Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [19]

51. Pursuant to Article 14(1) of Regulation No 1408/71, a worker employed in the Netherlands who exercises his right to freedom of movement upon being posted by his employer to another Member State to work there for a limited, relatively short period and who — in the same year or, at the latest, the following year — returns to the Netherlands to work remains subject to the social security legislation of the Netherlands. It is clear from the

15 — See the judgments in Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16; Case 222/86 *Heylens* [1987] ECR 4097, paragraph 8; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, paragraph 18; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 15; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 93.

16 — See the judgments in Case 143/87 *Stanton* [1988] ECR 3877, paragraph 13, and Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraph 13; and in the *Singh* and *Bosman* cases, cited in footnote 15, paragraphs 16 and 94 respectively.

17 — Case C-10/90 [1991] ECR I-1119, paragraphs 16 and 17. See also the judgments in Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 5; Case 284/84 *Spruyt* [1986] ECR 685, paragraph 18, and Case C-293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 13.

18 — Ibid., paragraph 18. This observation also appears in the judgments in Case 24/75 *Petroni* [1975] ECR 1149, paragraph 13; Case 807/79 *Gravina* [1980] ECR 2205, paragraph 6, and in the *Spruyt* and *Winter-Lutzins* judgments cited in footnote 17, paragraphs 19 and 14 respectively.

19 — Ibid., paragraph 18. See also the judgments in Case C-228/88 *Bronzino* [1990] ECR I-531, paragraph 12, and Case C-12/89 *Gatto* [1990] ECR I-557, paragraph 12. This case law was followed more recently in the judgment in Joined Cases C-45/92 and C-46/92 *Lepore and Others* [1993] ECR I-6497, paragraph 21.

documents before the Court that, under the national legislation at issue, if the posting to another Member State and the return to the original Member State take place within the same calendar year, the worker in question may receive two combined assessments for income tax and general social security contributions — one for the period during which he is a resident taxpayer and the other for the period during which he is a non-resident taxpayer — whereas, if the posting straddles two calendar years, he may receive up to four assessments for those purposes. Mr Terhoeve is in the first situation. As I have said, he has to pay contributions in excess of the maximum payable had he remained a resident taxpayer throughout the whole year, that is to say, if he had not exercised his right to freedom of movement. In the second situation, the worker might have to pay contributions in excess of the maximum for two consecutive years. However, he is not thereby entitled to greater social security benefits in return.

52. That, in my opinion, will be the outcome whenever a worker is posted by his employer in the circumstances described above. It is difficult to believe, therefore, that workers will willingly agree to work in another Member State. In any case, I do not think a worker would be interested in being posted more than once in his working life after experiencing the negative financial consequences entailed.

53. It is my view, therefore, that the Netherlands legislation at issue, which applies irrespective of the nationality of the workers concerned, adversely affects the social security position of workers who exercise their right to freedom of movement in accordance with Article 14(1) of Regulation No 1408/71, because it places them at a disadvantage as compared with workers who do not exercise that right. I therefore consider that such legislation may create an obstacle to freedom of movement for workers. If a worker faces the prospect of having to pay higher social security contributions if posted to another Member State by his employer than if he continues to work in the Netherlands, he may well think twice about exercising his right to freedom of movement.

Question 4

54. By this question the national court wishes to ascertain whether, if the answer to the third question is in the affirmative, the obligation to pay higher contributions may be justified by one or more specified factors: a desire on the part of the legislature to simplify the collection of tax and social security contributions; the technical difficulties raised by mechanisms for offsetting overpayment; or, finally,

the fact that in certain circumstances the legislation may result in a lower overall financial burden, in terms of income tax and social security contributions, for workers who exercise their freedom of movement than for those who remain in the Netherlands. The Netherlands Government maintains that the legislation is justified by the need to preserve the cohesion of the tax system.

55. On that point I agree with the Commission's observation that the case-law of the Court on freedom of movement for workers in general and the coordination of social security schemes in particular applies various criteria for assessing the soundness of purported justifications. For example, in *Masgio*, [20] the Court adopted a very restrictive position, stating that 'Article 48(3) of the Treaty allows of no limitation on the exercise of the right of freedom of movement for workers other than those which can be justified on grounds of public policy, public security or public health. Consequently, there can be no justification for any obstacle to freedom of movement for workers other than in the cases explicitly provided for in the Treaty'. Given the narrow discretion which Directive 64/221/EEC [21] leaves to Member States, it is clear that none of the grounds of justification referred to by the national court or the Netherlands Government fulfils those requirements.

56. However, in other more recent judgments, in order to determine whether or not an obstacle to freedom of movement for workers was justified, the Court has referred to the case-law on freedom to provide services. Thus, in *Kraus*, [22] the Court stated that 'Articles 48 and 52 preclude any national measure ... where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper, or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest ... It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose'. [23]

Thus the Court aligns its approach to Article 48 of the Treaty with that already adopted in

20 — Cited in footnote 17, paragraph 24.

21 — Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ Sp. Ed. 1963-4, p. 117).

22 — Cited in footnote 6, paragraph 32.

23 — This finding was repeated in the *Bosman* judgment cited in footnote 15, paragraph 104.

respect of Article 59. The result of this is that although, on the one hand, the prohibition covers any measure which, albeit applicable irrespective of nationality, nevertheless constitutes an obstacle to freedom of movement, on the other hand, the number of possible grounds of justification has increased beyond those already provided for in Article 48(3) of the Treaty.

57. However, in my view, the grounds of justification suggested by the national court do not satisfy even the conditions laid down by this less restrictive line of case-law.

58. First, although the legislature's aim of simplifying the collection of tax and social security contributions is not incompatible with the Treaty, it cannot be said to be based on pressing reasons of public interest.

59. Secondly, as regards the technical difficulties raised by mechanisms for preventing the payment of excess contributions, it is clear that in the context of Community law administrative problems or difficulties of implementation cannot justify the fact that workers who have exercised their right to freedom of movement are placed in a worse position than those who have not. The Court has stated that 'although it is true that the application of those provisions may give rise to practical difficulties, that fact ... must not prejudice the rights which individuals derive from the principles of the social legislation of the Community'. [24]

60. Finally, with regard to the tax advantages which a migrant worker may receive and which may offset the loss resulting from having to pay higher social security contributions if posted to another Member State, suffice it to note that that was not the aim of the legislation in question and that such advantages, when they arise, depend on the particular circumstances of each case. On this point the Court has held that discrimination stemming from a provision which works to the disadvantage of certain migrant workers cannot be either eliminated or offset by the fact that other migrant workers, in other circumstances, may derive an advantage from it. [25]

24 — See the judgment in Case C-236/88 *Commission* v *France* [1990] ECR I-3163, paragraph 17.

25 — See the judgment in Case 20/85 *Roviello* [1988] ECR 2805, paragraph 16.

61. Nor, in my view, is the legislation at issue, which has the effects I have described, justified by the need to preserve the cohesion of the tax system.

62. In two judgments in 1992, [26] the Court held that the need to preserve the cohesion of the tax system justified certain Belgian legislation concerning insurance which otherwise would have been incompatible with Article 48 of the Treaty. Under that legislation, the deductibility of certain insurance premiums from the total taxable income was conditional upon those premiums having been paid in Belgium.

The Court found that the legislation established a connection between the deductibility of life assurance premiums and the liability to tax of sums payable by insurers under pension and life assurance contracts because pensions, annuities, capital sums or surrender values under life assurance contracts were exempt from tax where there was no deduction of the contributions. In a tax system of that kind, the loss of revenue resulting from the deduction of life assurance contributions from total taxable income was offset by the taxation of pensions, annuities, capital sums or surrender values payable by the insurers. In cases where such contributions had not been deducted, those sums were exempt from tax.

The cohesion of a tax system of that nature presupposed, therefore that, in the event of the State in question being obliged to allow the deduction of life assurance premiums paid in another Member State, it should be able to tax sums payable by insurers. As Community law stood at that time, the cohesion of such a tax system could not be ensured by means of measures less restrictive than the Belgian legislation at issue (which provided that, if premiums were to be deductible, they had to be paid in Belgium); the Court therefore concluded that the measure in question was justified.

63. In 1995, on the other hand, [27] the Court rejected the argument put forward by the Luxembourg Government along the same lines in an attempt to justify the fact that the grant of an interest rate subsidy was subject to the requirement that the loans intended to finance the construction, acquisition or improvement of the housing were obtained from a credit institution approved in the Grand Duchy of Luxembourg, which implied that it had to be established there. On that occasion the Court considered that there was

26 — Case C-204/90 *Bachmann* [1992] ECR I-249, and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

27 — See the judgment in Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955.

no direct link between the grant of the interest rate subsidy to borrowers and the financing of such grant by means of a tax on the profits of financial institutions.

64. Although the Netherlands Government relies, in paragraph 21 of its written observations, on the need to preserve the cohesion of the tax system as justification for the legislation at issue (governing the collection of funds for the general social insurance scheme), it offers no further explanation in support of its argument. Nor, so far as I can find, do the documents before the Court throw any light on why the cohesion of the Netherlands tax system should require workers who exercise their right to freedom of movement to pay higher social security contributions than those who remain in the Netherlands.

Question 5

65. Should the Court hold that Community law precludes workers who have exercised their right to freedom of movement from being required to pay higher social security contributions than those who have not, the Gerechtshof asks whether, in order to determine whether the level of contributions is higher, account must be taken only of income from employment or whether other income — such as income from real property — must also be taken into account. If other income must be disregarded, the national court goes on to ask how it is to be determined whether, and to what extent, contributions levied on income from employment place the migrant worker in question at a disadvantage.

66. As we know, Article 51 of the Treaty provides for the coordination, not the harmonisation, of the laws of the Member States, leaving in place substantive and procedural differences between the Member States' social security schemes and in the rights of workers employed in the Member States. [28] In implementation of Article 51, the Council adopted Regulation No 1408/71 and Regulation (EEC) No 574/72, which lays down the procedure for implementing the former. [29] The primary purpose of both regulations is to coordinate the various national laws applying in this field in order to ensure that freedom of movement for workers does not result in disadvantages for those availing themselves of that freedom, as compared with those who work in a single Member State. [30]

67. As Community law stands at present, it is for the legislature of each Member State to lay down the conditions creating the right or

28 — See the judgments in the *Pinna* case, cited in footnote 13, paragraph 20; Case C-227/89 *Rönfeldt* [1991] I-323, paragraph 12, and Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 18.

29 — Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

30 — See the judgment in Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 12.

the obligation to become affiliated to a social security scheme. [31] However, to my mind, the Member States must, in exercising that power, not only comply with the principle of equal treatment by making sure that such rules do not discriminate between their own nationals and those of other Member States, but also ensure that national social security legislation does not create an obstacle to the effective exercise of the fundamental freedom guaranteed by Article 48 of the Treaty.

68. With the exception of Article 14e of Regulation No 1408/71, which lays down certain very specific provisions which do not apply in the present case, the Community law governing freedom of movement for workers does not lay down rules determining the basis on which contributions to national social security schemes are to be levied.

69. In my view, in this field — as in cases where it is necessary to specify the conditions creating the right or the obligation to join a social security scheme or a particular branch under such a scheme — it is for each Member State, in the absence of any applicable Community measures, to specify the basis for calculating contributions to its social security schemes, provided that the resulting legislation does not discriminate between its own nationals and those of other Member States, and that workers who exercise their right to freedom of movement do not find themselves at a disadvantage by comparison with those who do not.

Question 6

70. By the sixth and last question, the national court asks what it should do should it find that Community law has been infringed, given that, in the present case, the infringement would be the result of the combined application of different statutory provisions and there are several ways of remedying the infringement, none of which appears entirely satisfactory.

This is not the first time that a national court has found itself in a dilemma of this kind and on several occasions the Court has given a ruling on this question.

71. As I pointed out in my Opinion in *Morellato*, [32] the Court has already given clear guidance as to how conflicts between national law and Community law are to be resolved. Even today, this is best illustrated by *Simmenthal*, [33] in which the Court held that, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one

31 — See the judgments in Case 368/87 *Hartmann Troiani* [1989] ECR 1333, paragraph 21; Case C-245/88 *Daalmeijer* [1991] ECR I-555, paragraph 15, and Case C-297/92 *Baglieri* [1993] ECR I-5211, paragraph 13.

32 — See Case C-358/95 [1997] ECR I-1431 *ff.*, particularly I-1441 and I-1442. The Court delivered judgment on 13 March 1997.

33 — See the judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 17.

hand and the national law of the Member States on the other is such that those provisions and measures render automatically inapplicable, by their entry into force, any conflicting provision of current national law. The Court also stated that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect is incompatible with those requirements which are the very essence of Community law. [34] The Court concluded that the national courts which are called upon, within the limits of their jurisdiction, to apply provisions of Community law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the courts to request or await the prior setting-aside of such provision by legislative or other constitutional means. [35]

72. Furthermore, in *Van Duyn*, [36] the Court stated that Article 48 of the Treaty, which embodies the principle of freedom of movement for workers and which imposes on Member States a precise obligation which does not require the adoption of any further measure on the part of the Community institutions or the Member States and which leaves them, in relation to its implementation, no discretionary power, is directly applicable and confers on individuals rights which are enforceable by them and which the national courts must protect.

73. The Court has also consistently held that it is for the national courts, in application of the principle of co-operation laid down in Article 5 of the Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law. [37]

74. In view of the answers which I propose should be given to the previous questions and in the light of the case-law which I have just quoted, I think that it should be stated in reply to the sixth question from the Gerechtshof that the national court called upon to apply Community law must, in adjudicating the dispute before it, ensure the full effectiveness of Articles 48 to 51 of the Treaty, so that workers who exercise their right to freedom of movement are not deprived of any social security advantage and are not required, for example, to pay contributions in excess of the maximum payable by workers who remain in their own Member State, thus ensuring that workers are not deterred from exercising that right.

34 — Ibid., paragraphs 22 and 23. This judgment was confirmed in the judgment in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraphs 18 and 20.

35 — Ibid., paragraph 24. This decision was recently confirmed in the judgments in Case 170/88 *Ford España* [1989] ECR 2305; Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; Joined Cases C-228/90 to 234/90, C-339/90 and C-3253/90 *Simba* [1992] I-3713, paragraph 27, and *Morellato*, cited in footnote 32, paragraph 18.

36 — Case 41/74 [1974] ECR 1337, paragraphs 4 to 8.

37 — See the *Factortame* judgment, cited in footnote 34, paragraph 19. See also the judgments in Case 811/79 *Ariete* [1980] ECR 2545, and Case 826/79 *Mireco* [1980] ECR 2559.

VI — Conclusion

In the light of the foregoing observations, I propose that the Court reply as follows to the questions referred to it by the Gerechtshof te 's-Hertogenbosch:

(1) A national of a Member State is entitled to rely, as against the Member State of which he is a national, on the provisions of Community law concerning freedom of movement for workers when, as an employee of an undertaking established in that State, he is posted for a period of less than one year to another Member State in order to work there for that undertaking. Whether or not he receives the greater part of his income in one only of the States concerned during the period in question is irrelevant in that context.

(2) The Netherlands legislation at issue does not give rise to any discrimination on grounds of nationality.

(3) Articles 48 to 51 of the Treaty preclude a Member State from requiring Community nationals — including its own nationals — who have exercised their right to freedom of movement to pay general social security contributions in excess of the maximum payable by workers who have not exercised that right.

(4) The Netherlands legislation at issue, in so far as it creates an obstacle to freedom of movement for workers, cannot be justified on any of the grounds put forward by the national court — that is to say, the desire on the part of the legislature to simplify the collection of tax and social security contributions, the technical difficulties raised by mechanisms for offsetting overpayment, or the fact that in certain cases the legislation in question may result in a lower financial burden in terms of income tax and social security contributions for workers who have exercised their right to freedom of movement than for those who have not.

(5) In the absence of any applicable Community measures, it is for the legislation of each Member State to specify the basis for calculating contributions to its social security schemes, provided that the resulting legislation does not discriminate between its own nationals and those of other Member States, and provided that workers who have exercised their right to freedom of movement do not find themselves at a disadvantage by comparison with those who have not.

(6) The national court called upon to apply Community law must, in adjudicating the dispute before it, ensure the full effectiveness of Articles 48 to 51 of the Treaty, so that workers who exercise their right to freedom of movement are not deprived of any social security advantage and are not required, for example, to pay contributions in excess of the maximum payable by workers who remain in their own Member State, thus ensuring that workers are not deterred from exercising that right.