OPINION OF ADVOCATE GENERAL LENZ
delivered on 10 February 1994 *

Mr President,
Members of the Court,

A — Facts

1. Mr Aldewereld, the plaintiff in the main proceedings, is a Netherlands national. According to the judgment of the Hoge Raad der Nederlanden, which made the reference for a preliminary ruling, he took a job in 1985 with an undertaking established in Germany, which posted him immediately to Thailand, where he worked throughout 1986. On the basis of that employment the German authorities charged social security contributions under German law. The relevant contributions in respect of unemployment, old-age pension, and accident insurance were deducted from Mr Aldewereld's salary. However, the German authorities rejected an application for child allowance on the ground that, in their opinion, Mr Aldewereld did not satisfy the requirements under German law.

2. Under Netherlands law, persons who have their residence in the Netherlands are required to pay social security contributions. According to the findings of the Hoge Raad der Nederlanden, Mr Aldewereld had his residence (within the meaning of those social security provisions) in 1986 in the Netherlands. Mr Aldewereld brought an action before the Gerechtshof, Arnhem, contesting the decision of the Netherlands authorities which required him to pay contributions for that year to the Netherlands social security scheme. However, the Gerechtshof dismissed his action. Mr Aldewereld applied to the Hoge Raad der Nederlanden for review of that decision.

3. The Hoge Raad der Nederlanden referred the following question to the Court of Justice under Article 177 of the EEC Treaty:

'Do the rules forming part of European Community law which are designed to achieve freedom of movement for workers within the Community, and in particular the rules on determining the national legislation applicable set out in Title II of Regulation (EEC) No 1408/71 of the Council of the European Communities of 14 June 1971, preclude the collection of contributions under the social legislation of the State of residence from a person who resides in one Member State and, in the employment of an undertaking established in another Member State, works exclusively outside the Member

* Original language: German.

States, on the basis of which employment he is liable to pay contributions under the social legislation of the other Member State?'

B — Analysis

4. The essential question in these proceedings is whether Community law permits a person in Mr Aldewereld's situation to be subjected to the social security provisions of more than one Member State. It is obvious that an answer to the question should be sought in Regulation (EEC) No 1408/71 of the Council of 14 June 1971, [1] which is referred to in the national court's question and which aims to coordinate the social security schemes of the Member States. [2]

5. Article 2(1) of Regulation No 1408/71 provides that the regulation applies *inter alios* to employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States. All the parties to the proceedings before this court — the Netherlands, Italy, the Commission and Mr Aldewereld — quite rightly agree that that is the case here and Mr Aldewereld therefore falls within the scope *ratione personae* of the regulation. The decisive factor is that the social security provisions of (at least) one Member State applied to him. The fact that at the material time Mr Aldewereld was working outside the Community is therefore not relevant in that regard. [3]

6. Provisions concerning the determination of the legislation applicable are contained in Title II (Article 13 et seq.) of the regulation. Article 13(1) of the regulation states:

'Subject to Article 14c, 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.' [4]

7. It is clear that Title II of Regulation No 1408/71 contains no provision directly applicable to this case. I assume however that the social security contributions paid by Mr Aldewereld in Germany were *compulsory*

1 — 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 (OJ 1971 L 149, p. 2) as amended by Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 — The text of the regulation applicable at the material time (1986) must be taken as the basis. The regulation has been amended several times since then (most recently by Council Regulation (EEC) No 1945/93 of 30 June 1993, OJ 1993 L 181, p. 1). However those amendments are not relevant to the question considered here.

3 — Cf. the judgment in Case 300/84 *Van Roosmalen* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1986] ECR 3097, paragraph 30).

4 — Article 14c contains a special rule (not relevant in this case) applicable to persons who are, at the same time, employed in one Member State and self-employed in another.

under the German legislation. The court making the reference also appears to have made that assumption, although its judgment does not expressly say so. The following observations therefore apply only to *that* situation.

At the hearing the representative of the Netherlands Government did indeed express slight doubts whether Mr Aldewereld had in fact been required by law to pay social security contributions in Germany. If those doubts were well founded, that would of course place the question considered here in a quite different light. If the contributions made in Germany were contributions to a *voluntary* insurance scheme, the conflict with the *compulsory insurance* under Netherlands law would doubtless be resolved on the basis of Regulation No 1408/71 (cf. Article 15). However, that is a question of fact, which is a matter to be determined by the national court.

8. Firstly, the general rule in Article 13(2)(a) is inapplicable to this case; it provides that subject to Articles 14 to 17, an employed person is to be subject to the legislation of the *Member State* in which he is employed, even if he resides in another Member State or if his employer has its registered office or place of business in another Member State. That rule cannot apply to this case, because Mr Aldewereld was employed in a *non-member country*.

Nor do the special rules provided in Article 14 cover the present situation.[5] Article 14(1) concerns cases in which a person, who is employed in a *Member State*, is posted by his employer temporarily to another *Member State*. Article 14(2) contains a special rule for cases in which a person is normally employed in two or more *Member States*.

Article 17 of the regulation provides that two or more Member States (or the competent authorities of those States or the bodies designated by those authorities) may by agreement provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain categories of persons or of certain persons. However, there does not appear to be any such agreement which could be applied to the case in point.

9. The Netherlands Government concludes from those circumstances that Title II of Regulation No 1408/71 either does not apply at all in the present case or at least does not contain any provision determining the legislation applicable. It contends that in such a situation it is exclusively the Member States which are competent to determine whether a person such as Mr Aldewereld is subject to their social security systems. It argues that, although in the present case that would result (partially) in double insurance, there is

5 — The special rules for self-employed persons (Article 14a) and mariners (Article 14b) are inapplicable to the case in point.

no gap in Title II, because the aim of the provisions on which Regulation No 1408/71 is based (Articles 48 to 51 of the EEC Treaty) is merely to bring about free movement *within* the Community.

10. I am unable to adopt that argument. It is not necessary to consider whether, as the Italian Government has submitted, the mere fact that Mr Aldewereld began working for an undertaking from another Member State, which then sent him to a non-member country, is to be regarded as the exercise of the right to freedom of movement guaranteed by Article 48 of the EEC Treaty. In any case, the decisive factor is that according to the case-law of the Court of Justice the provisions of Title II of Regulation No 1408/71 constitute 'a complete system of conflict rules'. [6] The aim of the provisions of Title II is *inter alia* to ensure that the persons concerned 'shall be subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation'. [7] Since Mr Aldewereld falls within the scope *ratione personae* of Regulation No 1408/71, that must also apply to him. The legislation applicable must therefore be determined, in his case too, on the basis of Title II of Regulation No 1408/71.

11. Since that title contains no provision which could be applied directly to the case in point, it must be asked whether an appropriate solution can be reached by way of *interpretation*. In that respect, we should proceed on the basis that Regulation No 1408/71 provides essentially three criteria to determine the legislation applicable: a connection with the legislation of the Member State in which the person is employed ('the State of employment'), a connection with the legislation of the Member State in which the employed person resides (the 'State of residence'), and a connection with the legislation of the Member State in which the employer has its registered office or place of business ('the State of establishment'). [8]

12. As I have already mentioned, under Article 13(2)(a) it is basically the legislation of the State of employment which is decisive. As the Commission has correctly pointed out, if before his posting to Thailand Mr Aldewereld had first — even only for a short period — been employed in Germany, there would have been hardly any doubt that the German social security legislation was to be applied. However, in view of the fact that Mr Aldewereld was posted by his employer *directly* to Thailand, the criterion of the State of employment cannot be used.

13. A situation in which it would not be sensible to take the State of employment as

6 — Judgment in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 12; judgment in Case C-196/90 *De Paep* [1991] ECR I-4815, paragraph 18.

7 — Judgment in Case 60/85 *Luijten* v *Raad van Arbeid* [1986] ECR 2365, paragraph 12.

8 — Article 16 (a special rule for persons employed by diplomatic missions and consular posts and auxiliary staff of the European Communities) provides certain other connecting criteria (eg. the law of the Member State of which the employed person is a national).

the relevant criterion is also the basis for the special rule in Article 14(2). That provision applies to those cases in which a person is normally employed in the territory of two or more Member States.

Article 14(2)(a) provides that in the situations which it covers the legislation of the *State of establishment* [9] is to be applied. On the other hand, the legislation of the *State of residence* is to be applied, if the person is mainly employed in the State in which he resides. It seems that the Italian Government deduces from that provision that, where there is a choice between the legislation of the State of establishment and that of the State of residence, priority should be given to the former.

14. However, it should be pointed out that Article 14(2) *(a)* only applies to a narrowly defined category of persons, namely persons who are 'members of the travelling or flying personnel of an undertaking which operates international transport services for passengers or goods by rail, road, air or inland waterway'. Article 14(2) *(b)* applies to all other persons. It provides that the legislation of the *State of residence* is to be applied if the person is employed partly in that State, or if he is employed by several undertakings or employers who have their registered offices or places of business in different Member States (Article 14(2)(b)(i)); if the person does not reside in any of the Member States where he is pursuing his activity, the legislation of the *State of establishment* is to be applied (Article 14(2)(b)(ii)).

According to that provision, the legislation of the *State of residence* is therefore to be applied, if the person is also employed in that Member State.

15. However, in my opinion, a convincing solution for cases of the type considered here cannot be derived from either of the two lastmentioned provisions. It can only be stated that, where the adoption of the legislation of the State of employment does not lead to practicable results, the regulation declares that, in some cases, the legislation of the State of establishment is to apply and, in other cases, that of the State of residence. A general principle, according to which one criterion is basically preferable to the other, cannot be determined.

As the Commission has argued, the regulation is actually'neutral' in that respect. With regard to cases of the type being considered here, the regulation has a gap which cannot be satisfactorily filled by interpreting its provisions. The Commission has correctly pointed out that there are several conceivable ways in which that gap could be filled in an appropriate manner. The solution to that

9 — If the person is employed by a branch or permanent representation outside the State of establishment, it is however the legislation of the Member State in which the branch or permanent representation is situated which is to be applied (Article 14(2)(a)(i)).

problem should therefore be left ultimately to the legislature. In its written observations the Commission stressed that it was aware that it will have to draw up an appropriate proposal for that purpose.

16. In those circumstances the Commission's proposal that, until such legislation comes into effect, it should be left to the employed person to choose between the application of the legislation of the State of establishment (in this case Germany) and that of the legislation of the State of residence (in the present case the Netherlands) seems to me to be the most sensible solution. That solution enables the decision to be made by the person whose interests are most directly concerned. In that context, it may also be pointed out that Mr Aldewereld himself has indicated in his written observations that, in the event of him having to make a choice, the German legislation could be applied.

In addition, as a glance at Article 16 [10] shows, the possibility of a choice between the legislation of several Member States is in no way alien to the scheme of Regulation No 1408/71. That solution has moreover the additional advantage of not prejudging in any way future rules to be adopted by the legislature.

C — Conclusion

17. I therefore propose that the Court give the following answer to the question submitted by the Hoge Raad der Nederlanden:

The rules forming part of European Community law, and in particular the provisions of Title II of Regulation (EEC) No 1408/71, preclude that an employed person resident in a Member State, who is employed by an undertaking established in another Member State and works exclusively outside the Member States, be subject to the social security legislation of more than one of the Member States concerned. Until the applicable legislation has been determined by the Community legislature, a person in such a situation may choose between the application of the social security legislation of one or other of the Member States concerned.

10 — See footnote 8, above.