OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 30 APRIL 1974 [1]

Mr President,
Members of the Court,

The questions submitted by the Labour Court of Tournai with which I shall today have to deal are in the main concerned with the area of application, so far as subject matter is concerned, of Regulation No 1408/71, on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971, No L 149). The national court desires to know whether the Belgian system on payment of benefits to handicapped persons is caught by this Regulation.

Mrs Callemeyn, the plaintiff in the Belgian proceedings, is French. She is married to a Belgian national and had resided in Belgium since 1957. She is 40 years of age and permanently incapacitated to the extent of 70 %. As a person who was employed she receives invalidity benefits under the Belgian Law of 9 August 1963, which regulates compulsory insurance for sickness and invalidity. On 9 March 1972 Mrs Callemeyn applied for the so-called ordinary benefit (allocation ordinaire under the Law of 27 June 1969 on payment of benefit to handicapped persons. By a decision that reached the applicant on 26 February 1973, the Minister for Social Security rejected the application. In support of his decision he stated that under the Law and its implementing provisions, the benefits were payable only to Belgian nationals. Admittedly it could apply to foreigners under the European Interim Agreement on social security schemes in respect of old age, invalidity and survivors of 11 December 1953, but Mrs Callemeyn did not satisfy the conditions of this Interim Agreement, as regards the duration of residence in the host country and the date of first medical diagnosis of the illness giving rise to the invalidity.

On 2 March 1973 Mrs Callemeyn appealed against the rejection of her claim. She maintained that she satisfied the conditions of the Interim Agreement.

The Labour Court at Tournai adjourned the proceedings since it is of the opinion that the application to the applicant of the Law on benefits for handicapped persons is not regulated by the Interim Agreement of 11 December 1953, but by Regulation No 1408/71 of the Council of the European Communities of 14 June 1971.

The Court referred the following two questions for a preliminary ruling:

1. Insofar as it concerns employed persons, does the scheme of benefits for handicapped persons set up under the Law of 27 June 1969 come within the ambit of Regulation (EEC) No 1408/71 of the Council of 27 June 1971 on the application of social security schemes to employed persons and their families moving within the Community? In other words, does the list of benefits in Article 4 (EEC) No 1408/71 embrace the provisions made by national legislation for payment of grants to handicapped persons insofar as these provisions relate to employed persons?
2. Insofar as is more favourable for those entitled, does Regulation No 1408/71 of the Council replace the European Interim Agreement on social security schemes in respect of old age, invalidity and survivors, signed in Paris on 11 December 1953 and referred to in Article 7 of the Regulation?

1 — Translated from the German.

I — As regards the first question:

To answer this question it is necessary to know the contents of the Belgian Law of 27 June 1969 on the payment of benefits to handicapped persons: it provides for the grant of benefits to handicapped persons who are Belgian nationals and reside in Belgium and

1. are at least fourteen years of age (in the case of ordinary benefits),
2. are incapacitated to the extent of at least 30 %,
3. whose income does not exceed a certain amount.

The claim to benefit, which is legally enforceable, is independent of contributions and requirements of membership. Furthermore, the handicapped person need never have worked.

The law provides three kinds of benefit: ordinary benefit, supplementary benefit (which in the case of handicapped persons having reached pensionable age supplements the old-age pension) and the special benefit for certain categories of handicapped persons, especially those totally unable to work. The amount of the benefit is calculated on the basis of the percentage of inability to work and of the income exceeding a basic amount. The necessary finance is provided by the Belgian State.

Now before I turn to the question whether such a law complies with the conditions of Article 4 of Regulation No 1408/71, I should just like to go briefly into the question whether it is important that the Kingdom of Belgium did not specify the Law of 27 June 1969 in the Declaration under Article 5 of the Regulation concerning legislation and schemes referred to in Article 4 (1) and (2) (OJ 1973, No C 12).

As regards the legal situation under Regulation No 3, the predecessor of Regulation No 1408/71, the Court decided that the Declaration of a Member State cannot be a condition precedent for the applicability of the EEC Regulation to the relevant national provision since otherwise the applicability of Community law would be dependent upon a unilateral act of the State concerned (Judgment of 15 July 1964 —*Van der Veen v Bestuur van de Sociale Verzekeringsbank,* Case 100/63 Rec. 1964 p. 1215 and Judgment of 2 December 1964 *Dingemans v Sociale Verzekeringsbank,* Case 12/64 Rec. 1964 p. 1375).

That must also apply to the current state of the law under Regulation No 1408/71. And whilst under Article 3 of Regulation No 3 there could still be room for doubt, since this stated: 'Annex B specifies ... the legislation ... to which this Regulation applies', the wording of the Regulation is now quite clear, since the list of national legislation and schemes notified is no longer published in an annex, i.e. in a legal provision in the nature of a Regulation, but in Part C of the Official Journal. The list cannot therefore have the force of legislation.

The crucial question, therefore, is whether a law such as the Belgian Law of 27 January 1969 is caught by Regulation 1408/71. The condition for this is that the law on the one hand provides such benefits as are enumerated in the list in Article 4 (1) and on the other hand contains no social assistance schemes such as are mentioned in Article 4 (4). In the present case it is item (b) of Article 4 (1) that is relevant: 'invalidity benefits, including those intended for the maintenance or improvement of earning capacity'. The possibility of describing the supplementary aid for handicapped persons of pensionable age as 'old-age benefits', under paragraph 1 (c) need not detain us, since in this case it is the claim to ordinary benefit that is in dispute.

One can probably — following in this respect the written observations of the Belgian Government — describe invalidity benefits as benefits having the purpose of compensating for a reduced or extinct capacity to ensure one's livelihood by means of oocupational activity. The entitlement to benefit is therefore linked with the ability to work

that has ceased. On the other hand, the essential condition for the payment of benefits to handicapped persons provided for in the Belgian Law is invalidity as a medical fact. If however the incapacity has resulted in inability to work, then the conditions for aid to the handicapped and those upon which invalidity benefits are normally dependent, overlap. If one now further takes into account that the amount of benefit to the handicapped is dependent upon the percentage of inability to work (Article 5 of the Law), then it seems quite clear to me that the subject matter of the Belgian Law is invalidity benefits for at any rate those handicapped persons whose incapacity amounts to a reduction of a previously existing ability to work.

The Belgian Government argues in its written observations that under the Law of 9 August 1963 on compulsory insurance against sickness and invalidity the percentage of invalidity is calculated with reference to the exercise of a particular occupation but as regards the Law on benefits for the handicapped without any such reference. One cannot however deduce from this that the aid to handicapped persons is not an invalidity benefit, since the concept of invalidity does not imply a particular method of assessing the reduced capacity to work. Thus the German pension law system knows both the concept of Berufsunfähigkeit (incapacity to carry on one's occupation) (Article 1246 RVO) and that of Erwerbsunfähigkeit (incapacity to earn) (Article 1247 RVO) and the benefits in both cases will have to be treated as invalidity benefits.

Let us now turn to the question whether the Belgian Law comprises a system of social assistance and whether therefore under Article 4 (4) it falls outside the area of application of Regulation No 1408/71. An argument in favour of this view might be the fact that under the Law the entitlement to benefit is dependent upon the income of the handicapped person not exceeding a specific amount; the Law is therefore attuned to financial need. However, the Court in its case law has always striven not to allow the protection of migrant workers to be defeated by the organizational peculiarities of national systems, but to take account of the emergence of new forms of social protection that cannot be classified in time-hallowed categories. I am thinking of the *Torrekens* judgment (Judgment of 7 May 1969, Case 28/68 Rec. 1969, p. 125) in relation to French system of benefits for old workers and above all the judgment in the *Frilli* case (Judgment of 22 June 1972, Case 1/72 Rec. 1972, p. 457) in connexion with the Belgian law on the guaranteed income in old age. The last mentioned judgment found that there exist legal provisions that guarantee a minimum subsistence level to persons who are outside the system of social security, and that also improve social security benefits that are insufficient.

I shoud like to examine on the basis of the criteria in the afore-mentioned judgment whether the Belgian Law on aid to the handicapped must be included amongst the provisions having a double function as described in the judgment. In the first place one must bear in mind that the Law — like that on the guaranteed minimum earnings — does not on the one hand lay down periods of occupational activity, periods of membership or periods during which contributions were paid, but does on the other hand require — in addition to invalidity — a certain degree of need. In this respect it shows characteristics of welfare. On the other hand the law shows characteristics of social security by providing the handicapped person with a legally defined position and by granting him a right that can be asserted before the Labour Courts. The assessment on its merits of each individual case — and that presumably means the exercise by the authorities of discretionary powers — which, according to your judgment in the *Frilli* case, is the distinguishing characteristic of welfare, is not provided for here. It is

therefore reasonable to proceed on the basis that the benefit for the handicapped must — at any rate to the extent that they are employed persons or persons treated as such — be attributed to the field of social security within the meaning of Article 51 of the Treaty and the implementing provisions relating thereto, such as Regulation No 1408/71, since for those who receive an insufficent invalidity pension it fulfils the task of improving such pension. Whether the law must be classified differently in respect of other groups of handicapped might perhaps be left open.

I should still like to emphasize that the task of supplementing the system of social security must be looked at objectively. This however means that the intention of the Belgian legislator, to which the representative of the Belgian Government so emphatically drew our attention — that is to create a system of social assistance — cannot be of decisive significance.

All this being said, it seems clear that the laws of a Member State of the kind involved in this case, must in the case of those employed persons from other Member States who in that State also receive an invalidity pension, be regarded as invalidity benefits.

Permit me however to undertake a further examination in order to establish still more securely that the Belgian Law does not comprise a purely social assistance scheme. I share the opinion of my colleague Mayras which he argued in his opinion in the *Frilli* case, which is of fundamental importance, to the effect that its subsidiary nature is one of the crucial features of social assistance (welfare). The Belgian Law does not however grant its benefits on a purely subsidiary basis: pursuant to Article (5) thereof, in conjunction with Article 25 of the Arrêté Royal (Royal Decree) of 17. 11. 1969 there are not taken into account in assessing a person's own means, benefits received from the public welfare authority, that is to say from the 'Commissions d'Assistance Publique' referred to by the representative of the Belgian State in his plea, nor maintenance payments which relatives are legally required to make.

Added to this is the fact that benefits under the Law of 9 August 1963 on compulsory insurance in cases of illness and invalidity are not deducted from the benefits. There is here a difference from the Gesetz über das garantierte Einkommen (Law on guaranteed minimum income) pursuant to which the guaranteed income is reduced by benefits received from 'Alterspflichtversicherung' (compulsory old-age insurance).

Admittedly, the cumulative treatment of payments of benefit and of compulsory insurance is not possible to an unlimited extent. Thus Article 231 of the Royal Decree of 4 November 1963 (amended by the Royal Decrees of 16 December 1969 and 30 November 1972) provides in relation to payments on account of invalidity, that the basic amount of these payments, increased by 25 % or 50 %, shall be reduced by the amount of the ordinary or the supplementary benefit. Thus, if one accumulates the insurance and benefit payments, the handicapped person receives more than he would receive from the compulsory insurance only. Here too, we have confirmation that the benefits under the Belgian Law do not have the subsidiary characteristics of social assistance.

Allow me to make a further comment on the oral arguments on the part of the representative of the Belgian Government: he fears that applying the EEC Regulation to the Belgian Law on aid to the handicapped would constitute an overthrow, a 'bouleversement' as he called it, of the purpose of the Belgian legislation. In saying this he probably hinted at that part of your Court's judgment in the *Frilli* case, which states that the protection for migrant workers that is possible under the Community regulations must not lead to a position where the system of relevant national legislation is thereby overthrown (bouleversé).

Members of the Court, going along with the representative of the Commission, I cannot see how this can happen because a group of foreign workers — just like their Belgian colleagues — receive, as the practical result, an increase in their benefits from compulsory invalidity insurance. As regards the possibility at which the representative of the Belgian Government hinted, that the Belgian State might find itself impeded in extending its social legislation to further groups of socially under-privileged people, I can only say on this point that you here have to apply the law notwithstanding such financial considerations.

Besides, I have full confidence in the Belgian legislative organs; they will not allow themselves to be pushed off their course in furthering the construction of Belgian social legislation in the spirit of the Treaty of Rome and the development of a Community social policy.

On the question raised by the Italian Government whether the benefits under the Belgian law constitute social advantages within the meaning of Article 7 (2) of Regulation No 1612/68 (OJ 1968 No L 257), I consider that in relation to social security benefits, Regulation No 1408/71 is the more specific law, so that, just as in the *Frilli* case, there is no need to go into Regulation No 1612/68. Still, I should be inclined to accept that, if one did not want the benefits under the Belgian law to come under Regulation No 1408/71, one would have to treat them in any event as social *advantages* within the meaning of the Regulation on freedom of movement for workers.

II — As regards the second question

This raises the question of the relationship between Regulation No 1408/71 and the European Interim Agreement signed on 11 December 1953 in Paris on social security schemes in respect of old age, invalidity and survivors.

Allow me to give you my conclusions right away, for they are quite free from any doubt and all the pleadings submitted to you as well as the referring court agree in this respect:

The Interim Agreement, to which Article 7 (1) of Regulation No 1408/71 refers, must not be applied in such a manner as to have prejudicial effects for a worker who is a national of a Member State.

This much already emerges from a comparison of the objects of the Regulation and of the Interim Agreement: whilst the former is within its area of application, directed to the coordination of national systems of social security, the latter in essence limits itself, in respect of certain kinds of benefits, to guaranteeing, in the territory of each Contracting State, to nationals of the other Contracting States, the same treatment as its own nationals (Art. 2) and, by a kind of most-favoured-nation clause, granting them treatment under the most favourable social security agreement concluded between any contracting Status (Art. 3). Article 5 also shows that the Interim Agreement is only concerned with prevention of discrimination: the Agreement does not therefore oppose national regulations or agreements that are more advantageous to the beneficiaries.

By way of justification of the application of Regulation No 1408/71 one might — as was pointed out by the Italian Government and by the national court — adduce the reference in Article 5 of the Interim Agreement to more favourable provisions and agreements. In my view this course does not however seem tenable since Community Regulations are neither national legal provisions nor international agreements. Besides, one would have to attribute to the authors of the Regulation a most peculiar legislative technique, were one to assume that in the fields corresponding to those of the Interim Agreement the Regulation only becomes effective via such a reference back.

The Commission's assumption that

Article 7 (1) is intended to make it clear that Regulation No 1408/71 might apply to nationals of third countries via the equal-treatment clause of the Interim Agreement, also does not seem quite convincing. Why should a Community Regulation make a statement on the rights of individuals who are not subject to the regulatory power of the Community? Admittedly the explanation might lie in the history of the preceding Regulation No 3 which in this respect agrees with Regulation No 1408/71, the former having after all been conceived before the coming into force of the Treaty of Rome, as an agreement under international law between the members of the Coal and Steel Community.

I do not think that in the present case there is any need for a final classification of the relationship between Regulation No 1408/71 and the Interim Agreement.

As will be seen from a comparison of the terms used in Article 7 (1):

'This Regulation shall not affect obligations arising from (the following agreements) . . .'

and in Article 7 (2):

'The provisions of Article 6 notwithstanding, the following shall continue to apply',

it is not at any rate the intention that the agreements mentioned in paragraph 1 shall take the place of the Regulation. Whether by the expression 'obligations' in paragraph 1 there are meant obligations *vis-à-vis* third states that are parties to the agreements, or *vis-à-vis* their nationals, or possibly even *vis-à-vis* nationals of Member States of the Community, need not be decided. For even if the legal position of nationals of the Member States is referred to, it is already clear from the words 'this Regulation shall not affect obligations . . .' that the reference to international agreements is not intended to have an effect to the extent that the Regulation gives rise to obligations on the part of the Member States, and therefore to rights of employed persons and persons treated as such, which go beyond these agreements.

This interpretation also corresponds to the basic purpose of Article 51 of the EEC Treaty — repeatedly underlined by the Court — to create the most favourable conditions in order to provide freedom of movement for workers of the Community.

III — Finally, I would suggest the following replies to the questions submitted:

1. General legal provisions of a Member State that provide for financial benefits for handicapped persons having their normal residence within the State concerned are to be treated as invalidity benefits under Article 4 (1) (b) of Regulation No 1408/71, insofar as they relate to workers within the meaning of Regulation No 1408/71 who are within that Member State in connexion with their invalidity entitled to benefits under a compulsory insurance against invalidity.

2. The European Interim Agreement on social security schemes in respect of old age, invalidity and survivors signed in Paris on 11 December 1953 is not to be applied where the provisions of Regulation No 1408/71 are more favourable for beneficiaries who are nationals of a Member State.