

OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 April 1991*

*Mr President,
Members of the Court,*

(Article L 815-2 of the CSS, as amended by
Law No 87-39 of 27 January 1987).²

Article 3(1) of Regulation No 1408/71
concerning equal treatment states, however,
that:

1. In the present case the Commission is asking the Court to declare that the French Republic has failed to fulfil its obligations under Article 3(1) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.¹

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State'.³

2. Pursuant to Article L 815 of the French Code de la Sécurité Sociale (hereinafter referred to as 'the CSS'), the recipients of a French invalidity, old-age or widow's pension who are nationals of other Member States but reside in France, are entitled to claim supplementary allowance from the Fonds National de Solidarité (hereinafter referred to as 'the Fund') only if two conditions are satisfied, namely that, first, a reciprocal international agreement has been signed with the Member State of which the pensioner is a national (Article L 815-5 of the CSS) and, secondly, the pensioner has resided in France for a specified period

3. During the pre-litigation stage of this procedure under Article 169, the French Government maintained that the supplementary allowance granted by the Fund constituted social assistance to which Regulation (EEC) No 1408/71, including Article 3(1) thereof, did not apply.⁴ The Court has, however, repeatedly held that Regulation (EEC) No 1408/71 applies also to supplementary allowances⁵ and has again explicitly confirmed it in respect of supplementary allowances granted by the

2 — The arrangements for implementing the second requirement were to be laid down by decree.

3 — OJ 1983 L 230, p. 13.

4 — See Article 4(4) of Regulation (EEC) No 1408/71. However, the French Government used that argument only in its reply of 7 March 1986 to the Commission's letter of 4 December 1985.

5 — See, for example, judgments in Case 24/74 *Caisse Régionale d'Assurance Maladie v Bison* [1974] ECR 999, paragraphs 9 to 12; Joined Cases 379/85, 380/85, 381/85 and 93/86 *CRAM Rhône-Alpes v Giletti* [1987] ECR 955, paragraphs 9 to 12; Case 147/87 *Zaoui v CRAMIF* [1987] ECR 5511, paragraph 9.

* Original language: Dutch.

1 — As amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and also amending and updating Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1983 L 230, p. 6).

Fund, in its judgment of 12 July 1990. ⁶ In the light of that case-law, the French Government no longer disputes that the French legislation at issue is indeed incompatible with Community law and it has taken steps to modify its legislation. In the autumn of 1990, a draft law was introduced before the French Parliament for that purpose.⁷ But that circumstance does not remove the failure to comply with Treaty obligations.

4. While it no longer disputes that the legislation at issue is incompatible with Community law, the French Government states that in practice the legislation is not (or no longer) applied to nationals of other Member States of the Community and such persons now enjoy the same rights as French nationals, as required by Article 3(1) of Regulation (EEC) No 1408/71. On 26 November 1987 in its reply to the Commission's reasoned opinion, the French Government stated that the existence of a reciprocal international agreement for citizens of other Member States was no longer required for the purpose of granting a supplementary allowance and that all the

competent authorities had been informed of this by Ministerial Circular No 1370 of 5 November 1987.⁸ As regards the requirement of a specified period of residence in France, the French Government observes that the necessary implementing decrees have never been adopted and the requirement has therefore remained a dead letter.

It should, however, be pointed out that, the fact that legislation which is in itself discriminatory does not, as a result of instructions given to the competent authorities or the absence of implementing decrees, lead in practice to discrimination against nationals of other Member States, is not such as to make that legislation unobjectionable. To retain such legislation might lead to a situation which is ambiguous and uncertain for the competent authorities of the Member State in question, and especially for the nationals of other Member States who are concerned.⁹ That view is confirmed by the Commission's finding that in practice the supplementary allowance has sometimes nonetheless been refused to nationals of other Member States.¹⁰

5. I therefore propose that the Court rule that the French Republic has failed to fulfil its obligations under Regulation (EEC) No 1408/71, in particular Article 3(1), and order it to pay the costs pursuant to Article 69(2) of the Rules of Procedure.

6 — Case C-236/88 *Commission v France* (Fonds National de Solidarité) [1990] ECR I-3163). That case concerned a grant of the same supplementary allowance to pension-holders residing in another Member State of the Community. See also my Opinion of 12 June 1990 in that case.

7 — See the annex to the French Government's rejoinder. It should be noted that at the end of 1989 and beginning of 1990, the French Government had already made a first attempt to amend the legislation at issue. The draft law to amend Article L 815-5 of the CSS was, however, then declared invalid by the Conseil Constitutionnel.

8 — Annex V to the Commission's application.

9 — See, for example, the judgment in Case 167/73 *Commission v French Republic* [1974] ECR 359, paragraphs 41 and 42.

10 — See the Report for the Hearing, section I., 2.