OPINION OF ADVOCATE GENERAL LENZ
delivered on 19 January 1995 *

A — Facts

1. This reference for a preliminary ruling from the Schleswig-Holsteinisches Landessozialgericht concerns the determination of the legal system applicable pursuant to Regulation (EEC) No 1408/71, [1] 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 to the implementing regulation (Regulation (EEC) No 574/72). [2]

2. The dispute before the national court is based on the following facts:

The parties to the proceedings before the national court — Calle Grenzshop Andresen GmbH & Co. KG, as plaintiff, and the Allgemeine Ortskrankenkasse für den Kreis Schleswig-Flensburg, as defendant, — are in dispute concerning the plaintiff's obligation to pay German social security contributions for its employees, including the third joined party, Mr W. The defendant has demanded social security contributions for Mr W in the amount of DM 74 627.23 for the period from 1 April 1982 to 31 August 1987.

3. The plaintiff runs a retail shop in the Federal Republic of Germany near to the German-Danish border. That shop is part of a chain of shops. The majority of persons employed there are Danish nationals who are resident in Denmark, as is Mr W. The distinctive feature of Mr W's employment is that he works as a manager in the business located in Germany and also works for his employer for about ten hours each week in Denmark. In answering the questions referred for a preliminary ruling it is to be assumed that his activity in Denmark consists of helping to formulate company policy at head office and carrying out coordinating and supervisory tasks. That employment relationship needs to be legally classified in order to determine the legal system applicable for the purposes of Regulation No 1408/71. Moreover, at issue is the question whether the applicable legal system can be bindingly determined by the issue of a Form E 101 certificate.

* Original language: German.

1 — In the version enacted by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 8).

2 — In the version enacted by Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86).

4. The national court has referred the following questions to the Court of Justice:

(1) Is there a posting within the meaning of Article 14(1)(a) of Regulation (EEC) No 1408/71, or is it equivalent to a posting, if a Danish worker resident in the Kingdom of Denmark and employed exclusively by an undertaking whose place of business is in the Federal Republic of Germany is posted by that undertaking to Denmark to perform work there for that undertaking on a regular basis and for several hours each week, with the anticipated duration of the posting not being limited to twelve months?

(2) Is a person normally employed in the territory of two Member States, within the meaning of Article 14(2) of Regulation (EEC) No 1408/71, if he is employed exclusively by an undertaking whose place of business is in the Federal Republic of Germany and in connection with that employment regularly pursues his activity partly (for several hours each week) in the territory of the Kingdom of Denmark?

(3) Does 'activity' within the meaning of Article 14(2)(b)(i) of Regulation (EEC) No 1408/71 cover the term 'employed' within the meaning of that provision?

(4) (a) Is the competent institution of a Member State legally bound by a Form E 101 certificate issued under Article 12a of Regulation (EEC) No 574/72 by the (non-competent) institution of another Member State?

(b) If so, is this the case even if the certificate has been given retroactive effect?

5. The plaintiff in the proceedings before the national court, the Bundesversicherungsanstalt für Angestellte, as joined party in those proceedings (hereafter 'BfA'), the German Government, the Italian Government and the Commission participated in the written procedure. The United Kingdom also submitted oral observations at the hearing.

B — Analysis

6. Article 13(1) of Regulation No 1408/71 lays down the rule that persons to whom that regulation applies shall be subject to the legislation of a single Member State only. Exceptions to that rule are permissible only in limited circumstances, [3] which are clearly not relevant in the present case. The legislation applicable to a person to whom the regulation applies is determined according to Title II of the regulation. The legislation normally applicable is laid down by Article 13(2) and is basically that of the place of employment. [4] There are special rules in Articles 14 to 17. Article 14 contains rules applicable to persons [5] engaged in paid employment. Since the third joined party is employed by the plaintiff, the answer to the question of the legislation applicable is to be sought in the context of that provision.

7. The first three questions referred are designed to ascertain whether Article 14(1)(a) or Article 14(2)(b)(i) is applicable.

8. Article 14(1) lays down rules for the case of a person who is posted. Article 14(1)(a) states:

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

9. Under Article 14(1)(b), the period of posting, which is limited to twelve months, may be extended with the consent of the appropriate authority for a maximum period of twelve months, if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances.

10. Article 14(2) lays down the rules for a person normally employed in the territory of two or more Member States. Article 14(2)(a) applies to a person who is a member of the travelling or flying personnel of certain transport undertakings and is clearly not rel-

3 — Cf. Article 14c in conjunction with Annex VII to the Regulation.

4 — Article 13(2)(a) states:
'A person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State'.

5 — Namely persons 'other than mariners', as stated there.

evant in the present case. On the other hand, Article 14(2)(b) states:

'A person other than that referred to in (a) shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertaking or several employers who have their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity'.

Question 1

11. The parties are all of the opinion that there is no posting within the meaning of Article 14(1)(a), but that the employment relationship of the third joined party constitutes normal employment in two Member States within the meaning of Article 14(2)(b)(i).

12. The following arguments are made against the assumption that a posting is involved:

The BfA claims that the exception laid down in Article 14(1)(a) is limited to twelve months and cannot be applied to a worker who, for an undertaking on whose behalf he pursues his principal activity in one Member State, pursues an additional activity without any time limitation in another Member State. A different view of the case would have to be taken only if the activities in Denmark were not a fixed, integral part of the main activities, but it was uncertain from the start whether, and when, the worker would have to perform a job in Denmark for his employer established in Germany.

13. The German Government, too, points to the time limit on a posting. The fact that the third joined party has been employed, regularly and on a long-term basis, for several years in Denmark clearly militates against there being a posting.

14. The Italian Government is of the opinion that there is no posting, since that requires the work done by the person to be performed *wholly* in a Member State other than that of the employer's. That must be assumed in view of the fact that the excep-

tion is subject to the condition that the foreseeable duration of the work is not to exceed twelve months: that condition makes sense only if it relates to cases of continuous activity in another Member State, because it is an exception from the basic principle that the legislation applicable is that of the Member State in which the employed person normally (i. e. for a length of time) peforms his work.

15. The Commission contends that for Article 14(1)(a) to apply would presuppose that, in this particular case, German legislation is in principle applicable and then continues to apply for periods of posting. The posting rule is an exception which is merely intended to prevent a worker who is posted to perform short-term work in another Member State from being subject to the social security legislation in force there. However, there is doubt precisely as to whether German legislation does apply. It must be examined whether a special rule comes into play, such as Article 14(2)(b)(i).

16. In the Commission's view, there cannot be a posting if from the outset the worker has worked in Germany and Denmark at the same time. The question cannot therefore be whether a posting is sufficient for there to be employment in two Member States. Employment in more than one Member State is a special situation, which is precisely not a case of a posting, in particular because the result differs according to whether Article 14(2) or Article 13(2)(a) in conjunction with Article 14(1)(a) is to be applied.

17. It is conceivable, in principle, for there to be a posting even in the case of employment in the territory of more than one Member State as provided for in Article 14(2), for example, where a person is posted to a third State which is not one of the States where the person is normally employed. In support of its argument the Commission refers to the hierarchical relationship between Article 14(2) and Article 13(2), in conjunction, in some circumstances, with Article 14(1).

18. As the Commission correctly states, in principle, the question of the applicable legislation comes before the question whether there is a posting. Only when the applicable legislation has been determined should it be examined whether that legislation, exceptionally, continues to apply in the event of a temporary activity in another Member State arising out of the existing employment relationship. I therefore consider that to examine whether the abstract characteristics of a posting are present in order, if that be the case, to draw a conclusion as to the applicable legislation is problematical.

19. However, in the present case, even the objective criteria for a posting do not appear to be met. The tasks performed by the third joined party in Denmark are not temporary in nature. Indeed, it is to be presumed that he has been performing certain activities in Denmark for several years. It must be assumed that the tasks to be performed by the third joined party are the result of his position within the undertaking. The requirement of a twelve-month limitation on the anticipated duration of the work in another Member State is therefore not fulfilled.

20. Furthermore, the Italian Government must be right in submitting that an activity in two Member States does not constitute a posting. Without having to decide whether, in the case of an activity in two Member States, a posting can never be presumed, it must nevertheless be assumed that the typical form of posting entails the temporary shifting of occupational activity to another Member State pursuant to an existing employment relationship.

21. When applied to the same set of facts, a posting as envisaged by Article 14(1)(a) and employment in two Member States as envisaged by Article 14(2)(b)(i) are mutually exclusive. That is made clear by the fact that both provisions refer, for their legal effects, to different legal systems.

22. In answer to the first question, I would conclude that the conditions for the existence of a posting are not fulfilled.

Question 2

23. By its second question the national court wishes to know whether the conditions of Article 14(2)(b)(i) are fulfilled. It is apparent from the question that the national court has doubts as to the applicability of that provision, because the person concerned is employed exclusively by an undertaking with its seat in the Federal Republic of Germany. It seeks clarification as to whether an activity in two Member States within the meaning of the provision also requires two employment relationships which are independent of one another.

24. The Commission's view is that the applicability of Article 14(2)(b)(i) does not depend on the activity being pursued for several different undertakings. The wording of the provision does not require that. It merely contains an additional alternative to the basic position. That alternative is that the person is attached to several undertakings or several employers. The conjunction 'or' shows that it is not a question of characteristics which must be present in addition to

the activity of a person in two Member States in order to render the provision applicable.

25. The Commission also refers to Article 14(2)(b)(ii) which lays down rules for the special case of a person who is employed in two or more Member States, but resides in a third state in which he does not pursue an activity. In that situation, the regulation states that the competent Member State is that in which '*the* undertaking or *the* individual (singular) employing him has its seat'. The regulation therefore assumes that it is indeed the normal case for a person to be employed in two Member States but for one and the same employer.

26. I consider the Commission's arguments based on the wording of the regulation to be convincing. Article 14(2)(b)(i) deals with two alternatives. The first is that: 'A person ... shall be subject to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory' and the second alternative is based on the fact that 'he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States'.

27. For the sake of completeness, I would point out that also in the situations regulated by Article 14(2)(a) and 14(3) it is always assumed that the person, though employed in more than one Member State, is employed by *one* undertaking. I therefore share the Commission's view that the rule is that in the normal situation a person works for *one* employer. In my opinion, the first alternative in Article 14(2)(b)(i) does not therefore preclude a person being attached to *one* undertaking in several Member States.

28. Both the German Government and the BfA have commented on the criteria of pursuing an activity 'normally' and 'in part' in the territory of a State and discussed the question whether there must be a minimum amount of occupational activity in order to satisfy those criteria.

29. The German Government takes the view that an activity is a normal activity only if it is significant having regard to its duration and economic results. Applied to an actual case, that means that the person must be employed in his State of residence for approximately one-quarter of his regular working hours.

30. According to the BfA, the expression 'in part' must be regarded as a mere description of the factual situation and not as a description of the extent to which part of the activity must be pursued in another Member State. However — as the BfA concedes — the importance of the work must not be so subsidiary and unimportant that it could be regarded as insufficient to bring into play the legal consequences of Article 14(2)(b)(i), that is to say a change in the legislation applicable. As an example of such a subsidiary and secondary work, it mentions the job given to an employee of posting the undertaking's post in a postbox at his place of residence in another Member State. The decisive question is solely whether the person in question actually performs work in two Member States. How the undertaking records the time worked as a whole, and which section of the undertaking pays the person, and in which currency, is irrelevant.

31. At the hearing, the representative of the plaintiff undertaking took the view that it ought not to depend on a minimum amount of the activity, to be measured in terms of working hours. The criterion should instead be the significance of the work performed. However, it conceded that a wholly subsidiary and secondary activity is not sufficient to satisfy the requirements laid down in Article 14(2)(b)(i). In the present case the third joined party's activity in Denmark as market manager consisted of helping to shape business policy at the undertaking's head office and it was therefore of considerable importance.

32. The extent and importance of work cannot be determined necessarily in terms of working hours. [6] That conclusion applies to managerial tasks, as they are evidently to be performed in the present case by the third joined party, but is equally valid in other areas of activity. In my opinion, regard should be had to the work actually performed in the employee's state of residence. [7] In so doing, wholly insignificant activities should be disregarded in order to prevent any dishonesty. In any event, there should be no criteria laid down requiring a minimum amount of activity, first, because that is not required by the text of the regulation and, secondly, so as to avoid making it more difficult to apply the law in practice.

33. The answer to be given to the national court should be as follows: A person employed exclusively by an undertaking

6 — In assessing an activity's connection with the territory of a State, the Court of Justice has held: 'For this purpose not only must the duration of periods of activity be considered, but also the nature of the employment in question' (judgment in Case 13/73 *Angenieux* v *Hakenberg* [1973] ECR 935, paragraph 20).

7 — In Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755 the Court found that working two hours twice a week was sufficient to constitute an employment relationship, which meant that Regulation (EEC) No 1408/71 was applicable.

whose seat is in the Federal Republic of Germany and, in connection with that employment, regularly pursues his activity in part (for several hours each week) in the territory of the Kingdom of Denmark, is normally employed in the territory of two Member States within the meaning of Article 14(2).

Question 3

34. Finally, the national court expresses one further doubt concerning the applicability of Article 14(2)(b)(i). By its third question it asks for clarification as to whether 'activity' within the meaning of Article 14(2)(b)(i) covers the term 'employed' within the meaning of that provision. [8] In the grounds of the reference for a preliminary ruling the court refers to Article 12a(2)(a) of Regulation No 574/72, in which both terms are used alongside each other. That provision states:

'Where, in accordance with Article 12(2)(b)(i) or the first sentence of paragraph 2 of Article 14a of the Regulation, a person who is normally employed or self-employed in the territory of two or more Member States and who pursues part of his activity in the Member State in whose territory he resides is subject to the legislation of that Member State, the institution designated by the competent authority of that Member State shall issue to the person concerned a certificate ...'

35. The doubt about whether the two terms correspond is no doubt due to the fact that — as the BfA points out — in the language of German social law the term 'activity' (*'Tätigkeit'*) normally refers to self-employed activity. Article 12a(2)(a) of Regulation No 574/72 also adds to the uncertainty in so far as it refers both to Article 14(2) of Regulation No 1408/71, which deals with employment in at least two Member States, and also to Article 14a(2) of Regulation No 1408/71, which concerns a self-employed activity in at least two Member States.

36. The clear distinction made between the terms 'employed' in Article 14, on the one hand, and 'self-employed' in Article 14a, on the other hand, would indicate that the term 'activity' within the meaning of Article 14(2)(b)(i) refers to paid employment. The special case where a person is both employed and self-employed is dealt with in Article 14c of Regulation No 1408/71. I am therefore of the opinion that both the term 'employed' and the term 'activity' relate, in the context of Article 14, to the pursuit of an employed activity.

8 — The term 'employed' is used several times in Article 14. The term used in the first sentence of Article 14(2) is decisive for the interpretation of the provision in question.

37. The reply to be given to the national court is therefore that the terms 'activity' and 'employed' have the same meaning for the purposes of Article 14.

Question 4(a)

38. Although the parties agree on the answer to be given to Questions 1 to 3, there is disagreement over the answer to Question 4.

39. The court making the reference regards its question concerning the binding effects of Form E 101 to be relevant for its decision, because, if the requirements of Article 14(2)(b)(i) are not fulfilled, Danish legislation may nevertheless be applicable as a result of the issue of the form.

40. The plaintiff takes the view that Form E 101 must have binding effect. That follows from the spirit and purpose of Regulation No 574/72. If a certificate from the Member State of residence is required for the application of Article 14 of Regulation No 1408/71, the other Member State must *a contrario* be bound by it. The mutual recognition of official action militates in favour of that view.

41. It argues that the binding effect must also be retroactive. In the great majority of cases the necessity for a certificate only becomes apparent subsequently. Form E 101 is evidence of the fact that social security protection exists in a particular State. The other State must recognize that. Where the issue of the certificate has been obtained in the course of lengthy proceedings, it ought not to be possible to call it into question so easily again.

42. The BfA contends that the legal position is determined according to Articles 13 to 17 of Regulation No 1408/71; the form can only confirm that position. The BfA refers to the need to issue the form quickly, [9] which precludes an examination of all the details provided by the applicant, but which would be necessary, if the certificate were to be legally binding. If the certificate were to have been issued on the basis of inaccurate information, that ought not to preclude the correct application of Articles 13 to 16 of the regulation.

9 — Where the period of posting does not exceed three months, even the employer can issue the certificate according to Decision No 148 of the Administrative Commission on Social Security for Migrant Workers, as provided for in Article 80 of Regulation No 1408/71 (OJ 1993 L 22, p. 124).

43. With regard to the question of retroactive effect, the BfA contends that it is perfectly possible for the certificate to be issued *ex post facto* and that this does not limit its effects.

44. The German Government takes the view that the effect of the certificate is not constitutive, but declaratory. It creates a presumption which may be rebutted. The 'competent State' may itself examine the legal position. That applies in particular to certificates issued by a non-competent institution. The binding effect of certificates which do not reflect the legal position would lead to the law being incorrectly applied.

45. The Italian Government takes the view that Form E 101 has binding effect. With that form the authority of the Member State whose legislation is applicable to the worker confirms that a particular worker — in the various cases covered by Article 14 et seq. — is subject to that specific legislation. The certificate is legally effective as against the individual to whom it is issued and therefore also apt to bind the institution of another Member State. The retroactive effect of the certificate follows from the confirmation which it provides. That is confirmed by the widespread practice between the Member States.

46. The United Kingdom presented submissions only at the hearing. However, it did comment in detail on the question of the legal effects of Form E 101. The United Kingdom's representative discussed various possible legal effects and finally characterized Form E 101 as follows. It contains a declaration concerning the legal status of the person to which it relates and must be considered to be valid unless and until withdrawn by the issuing authority. The legislation applicable is determined solely in accordance with Articles 14 to 17 of Regulation No 1408/71. The form shows how a Member State interprets the regulation. If the form is incorrectly issued, it must be withdrawn. If there are differences of opinion regarding the competence of the authorities of various Member States, they should be settled by the Administrative Commission. Finally, Form E 101 should be given retroactive force so long as it has not been withdrawn.

47. Finally, the Commission also starts from the assumption that the legal position is determined by the regulation. Whether the provisions of the regulation are actually satisfied, can only be established by comparing them with the actual circumstances. In so

doing, all usual methods of proof can be used. The regulation does not confer any particular evidential value on the forms. The Court of Justice has held [10] that the use of a form does not deprive other documents of their evidential force. In certain circumstances, the evidence of the form may be thus rebutted.

48. However, the Commission goes on to point out that, in its view, the *competent* authority acted in the present case and the certificate reflects the substantive legal position.

49. The national court has indicated that it considers the question of the binding effect of Form E 101 to be relevant to its decision because there may be a discrepancy between the actual legal position — as the national court considers it to be — and the content of the form. According to the abovementioned considerations, the actual legal position appears to accord with the position certified in Form E 101, in so far as Danish legislation is declared to be applicable. The question whether a Form E 101 can override the actual legal position would not therefore arise in the national proceedings. However, it is not for the Court of Justice to appraise the main proceedings, so that the national court's fourth question should be answered.

10 — Judgment in Case 93/81 *INAMI* v *Knoeller* [1982] ECR 951.

50. In assessing the legal effects of Form E 101 one should proceed on the basis that it is issued in accordance with Regulation No 1408/71, a regulation which, as is well known, is binding in its entirety and directly applicable in all Member States. [11] When applied to the same facts, the legal consequences for a particular worker must be the same irrespective of whether a competent authority of one or another Member State is assessing the case. [12] Nevertheless, in practice, discrepancies can occur, for various reasons.

51. An error of law in a certificate may result from the fact that, for example, an authority acts without being competent to do so. Furthermore, the legal appraisal may be made on the basis of inaccurate facts and, finally, the legal consequence may also be incorrect as a result of a defective legal appraisal.

52. The court making the reference clearly assumes that the Form E 101 produced in the national proceedings has been issued by a non-competent authority. That appraisal is

11 — Cf. the second paragraph of Article 189 of the EEC Treaty.

12 — In its judgment in Case 60/85 *Luijten* v *Raad van Arbeid* [1986] ECR 2365, paragraph 14, the Court stated: 'The provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as persons who are subject thereto and the territory within which the provisions of national law take effect are concerned'.

questionable as a matter of law, as the Commission has rightly pointed out.

53. Under Article 12a of implementing Regulation No 574/72, the institution designated by the competent authority of the Member State is to issue a certificate concerning the applicable legislation. [13] Article 4(10) of Regulation No 574/72 refers to Annex 10 to the regulation lists the institutions or bodies which are 'designated by the competent authorities pursuant, in particular, to the following provisions: (a) ...; (b) implementing Regulation: ... Article 12a, ...'. In Annex 10 it is stated under 'B. Denmark' 1: 'For the purposes of applying ... Article 12(a) ... of the implementing Regulation: Socialministeriet (Ministry for Social Affairs), København.' [14] That designation is valid with effect from 1 July 1989 [15] and to that extent is an amendment, since originally the 'Sikringsstyrelsen (National Social Security Office) København' had been designated. [16]

54. Uncertainties as to which is the competent body of another Member State can stem from the fact that in the text of the regulation reference is made to the designated 'institution', [17] which appears to preclude designation of another authority. On the other hand, the wording in Article 4(10) is broader, [18] so that designation of the Socialministeriet does not conflict with the text of the regulation. Without doubt the change in designation brought about by Regulation No 2195/91 [19] has contributed to the confusion as to what the 'competent body' now is.

55. It is a matter for the national court to make a definitive appraisal in the dispute pending before it as to whether the form has been issued by the competent body. However, for the purposes of the following examination I shall assume that the form, which, according to the file, was drawn up by the Socialministeriet, was issued by the competent body.

56. In order to appraise the legal effects of Form E 101 it is appropriate first to deal with the normal case of a form drawn up on the basis of correct information. The Court of Justice has not yet had an opportunity to consider the legal effects of Form E 101. The *Knoeller* case, [20] which has been cited in the proceedings, concerned only the question whether Form E 26 (now E 205) was definitive as to certain facts, or whether its content

13 — For the content of Article 12(a), cf. footnote 34 above.

14 — See the consolidated version of implementing Regulation No 574/72 (OJ 1992 C 325, p. 96, p. 191).

15 — See Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulations (EEC) No 1408/71 and (EEC) No 574/72 (OJ 1991 L 206, p. 2, p. 12).

16 — See Regulation No 574/72 in the version of Regulation No 2001/83, cited above, p. 196.

17 — Cf. Article 12(a) of Regulation No 574/72.

18 — Reference there is to 'institutions or bodies'.

19 — Cited in footnote 15 above.

20 — Case 93/81 *INAMI* v *Knoeller*, cited in footnote 10 above.

could be supplemented by additional information from the competent body without the form having to be drawn up anew. The judgment in *Knoeller* cannot, however be decisive for the question to be answered here, since Form E 26 is appropriate and intended to provide evidence of a fundamentally different set of facts than Form E 101. [21] Moreover, *Knoeller* did not concern the question whether an authority of a Member State was bound by the information in Form E 26, but only whether, and if so in what form, it was possible to supplement the information set out in the form.

57. The difference between Form E 26, which was the subject-matter of the *Knoeller* case, and Form E 101 shows that an abstract answer to the question of the legal effects of forms is impossible. There is a large number of such forms, [22] which are intended to simplify the administrative treatment of cross-border situations. *One* statement in the *Knoeller* judgment concerning the legal significance of Form E 26 seems, however, to apply to all forms. The Court stated in that judgment that the relevant articles of the regulation and the rules adopted by the Administrative Commission as regards the form in question must be interpreted in the light of Article 48 to 51 of the EEC Treaty, which the regulations in the field of social security have as their basis, framework and bounds. 'Those provisions are aimed at securing freedom of movement of workers within the common market by permitting them *inter alia* to avail themselves of rights arising out of periods of employment completed in different Member States. The legal significance of Form E 26 must therefore be appraised in such a way as not to jeopardize the effectiveness of those articles and those regulations concerning the rights of migrant workers in the field of social security.' [23]

58. In order to appraise Form E 101 we must therefore consider precisely what are the circumstances which the form is intended to evidence. [24] The form has the following heading:

'Certificate concerning the legislation applicable

Reg. 1408/71: Art. 14.1. a; Art. 14.2. b; Art. 14a.1. a, 2 and 4; Art. 14b.1, 2 and 4; Art. 14c.1. a; Art. 17

21 — Form E 26 provides evidence of completed insurance periods, whereas form E 101 designates the applicable legislation.

22 — Cf., for example, Decision No 130 of the Administrative Commission of the European Communities on Social Security for Migrant workers of 17 October 1985 on the model forms necessary for the application of Council Regulations (EEC) No 1408/71 and (EEC) No 574/72 (E 001; E 101-127; E 201-215; E 301-303; E 401-411) (OJ 1986 L 192, p. 1).

23 — See paragraph 9 of the judgment in *Knoeller*, cited above.

24 — A specimen of the form is annexed to this Opinion.

Reg. 574/72: Art. 11.1; Art. 11a.1; Art. 12a.2. a, 5. c and 7. a'

The form is divided into five sections. Section one is intended for personal details of the employed or self-employed person. In section two the employer is named. Section three is for details concerning the periods during which the person concerned is, or will, carry out an activity — and, as appropriate, the undertaking involved. In section four the applicable legislation is to be designated and the relevant legal basis under Regulation No 1408/71 indicated. Finally, in section five the institution of the Member State whose legislation applies to the abovementioned person is to be indicated, and that institution must be the issuer of the form.

59. It would therefore appear that by Form E 101 the competent authority of a Member State designates the legislation applicable. No more and no less. The issue of Form E 101 documents the legal appraisal of specific facts. In issuing Form E 101, the competent authority treats the legislation of its own Member State as the legislation applicable.

60. The purpose of Form E 101 is to avoid positive, and also negative, conflicts of competence in precisely defined cases. [25] It is in the nature of things that doubts as to the legislation applicable will arise as a result of temporary activities in another Member State and atypical employment relationships involving the performance of work in more than one Member State. In order to avoid such conflicts, Article 17 of Regulation No 1408/71 provides that the competent authorities of the Member States involved may by common agreement provide for exceptions to the provisions of Articles 13 to 16. [26] If, in such cases, binding effect were to be denied to a competent authority's declaration concerning the legislation applicable, which normally amounts to a commitment by that authority, Form E 101 would be completely useless.

61. If the declaration of a competent authority of one Member State could easily be called into question by the competent authority of another Member State, there would be no point in having a formal system of proof based on a binding declaration as to the legislation applicable. Moreover, that would jeopardize one of the basic principles of Regulation No 1408/71, which is that only *one* Member State's legislation should be applicable. [27] If the authority of another

25 — Cf. the heading to form E 101.

26 — Cf. also Article 14(a)(4), under which the competent authorities may by common agreement determine the applicable legislation.

27 — Cf. Article 13(1) of Regulation No 1408/71. Cf. also the judgment of the Court of Justice in the *Perenboom* case, where the Court held that Article 13(1) excludes 'any possibility of the overlapping of several national legislations in respect of one and the same period' (Case 102/76 *Perenboom* v *Inspecteur der Directe Belasting* [1977] ECR 815, paragraph 11).

Member State does not recognize a declaration in Form E 101, that can only mean that the body appraising the form considers legislation other than that designated in the form to be applicable, which may lead precisely to double insurance with all the associated consequences. However, such a result conflicts with Article 13(1) of Regulation No 1408/71 and thus also with the aims of Articles 48 to 51 of the EEC Treaty.

62. Consequently, I am of the opinion that, as regards the legal consequence thus established, a regularly drawn up Form E 101 binds the authorities of another Member State.

63. On the other hand, cases in which a Form E 101 has been drawn up on the basis of objectively incorrect facts must be appraised differently. In the course of the proceedings, reference was made frequently to the possibility that a Form E 101 could be obtained by fraud; it was argued that in such cases it should not prevail over the provisions of Regulation No 1408/71.

64. It is certainly correct that a form introduced in order to faciliate production of proof cannot create rights. Nevertheless, it creates the appearance of regularity and constitutes prima facie evidence. It cannot have any greater effect. In my opinion, a materially incorrect certificate must be rebuttable by means of the usual methods of proof available under Member States' procedural rules. If so rebutted, the person referred to in the certificate must be removed from the social security cover of the Member State which issued the form so that he can be brought under the social security cover of the competent State.

65. The United Kingdom's submission that the certificate must be regarded as binding until withdrawn by the issuing authority is, in my opinion, correct in so far as the evidential value of Form E 101 must not be nullified without the involvement of the issuing authority. Whether the issuing authority formally withdraws Form E 101 or whether it informally supplements [28] or amends it cannot, in my opinion, be decisive. In any case, in my view, in order to achieve the purpose of Form E 101, the certificate issued with binding force by the competent body of a Member State may not be ignored by another Member State. So long as the issuing State does not discharge the compulsorily insured person from its social insurance system, he cannot be subject to the scheme in force in the competent Member State, since that would make him subject to two systems

28 — Cf. Case 93/81 *Knoeller*, cited above.

of social insurance and would run counter to the purpose of Article 13(1) of Regulation No 1408/71 and Articles 48 to 51 of the EEC Treaty concerning the free movement of workers.

66. If the issuing State refuses to cancel the certificate, the competent State can raise the matter before the Administrative Commission. If that action is unsuccessful, an action can be brought for failure to fulfil obligations pursuant to Articles 169 and 170 of the EC Treaty, that is to say, the competent State can, if necessary, itself enforce its rights.

67. The answer to be given to the national court with regard to Question 4(a) should be as follows: The competent institution of a Member State is bound by a Form E 101 certificate under Article 12a of implementing Regulation No 574/72 with regard to the certified legal consequence. The correctness of the certificate can be challenged using all methods of proof provided for in the Member States' procedural rules; the evidential value of the certificate may not be nullified without the involvement of the issuing authority and, if appropriate, the Court of Justice.

Question 4(b)

68. Finally, Question 4(b) concerning the possible retroactive effect of the certificate must be considered. The declaration by the competent body as to the applicability of the legislation of a Member State is normally made in respect of particular periods. A declaration as to the legislation applicable within the meaning of Regulation No 1408/71 cannot be made without reference to periods of activity. The relevant periods are a constitutive part of the legal consequence evidenced by Form E 101 and therefore share its binding effect. In so far as those periods are in the past, Form E 101 has retroactive effect.

C — Conclusion

69. Having regard to the above considerations, I propose that the questions submitted for a preliminary ruling should be answered as follows:

1. It is not a posting, within the meaning of Article 14(1)(a) of Regulation (EEC) No 1498/71, nor is it equivalent to a posting, if a Danish worker residing in the Kingdom of Denmark and employed exclusively by an undertaking whose seat is in the Federal Republic of Germany is posted by that undertaking to Denmark to perform work there for that undertaking, on a regular basis and

for several hours each week, the anticipated duration of the posting not being limited to twelve months.

2. A person employed exclusively by an undertaking whose seat is in the Federal Republic of Germany and, in connection with that employment, regularly pursues his activity in part (for several hours each week) in the territory of the Kingdom of Denmark, is normally employed in the territory of two Member States within the meaning of Article 14(2).

3. 'Activity' within the meaning of Article 14(2)(b)(I) of Regulation (EEC) No 1408/71 covers the term 'employed' within the meaning of that provision.

4. (a) The competent institution of a Member State is bound by a Form E 101 certificate under Article 12a of implementing Regulation No 574/72 with regard to the certified legal consequence. The correctness of the certificate can be challenged using all methods of proof provided for in the Member States' procedural rules; the evidential value of the certificate may not be nullified without the involvement of the issuing authority and, if appropriate, the Court of Justice.

(b) In so far as the periods referred to in Form E 101 are in the past, the document has retroactive effect.

EUROPEAN COMMUNITIES
Social Security Regulations

See 'Instructions' overleaf

E 101 ☐ (1)

CERTIFICATE CONCERNING THE LEGISLATION APPLICABLE

Reg. 1408/71: Art. 14.1.a; Art. 14.2.b; Art. 14a.1.a, 2 and 4; Art. 14b.1, 2 and 4; Art. 14c.1.a; Art. 17
Reg. 574/72: Art. 11.1; Art. 11a.1; Art. 12a.2.a, 5.c and 7.a

1 ☐ Employed person ☐ Self-employed person

1.1 Surname (1a) .....

1.2 Forenames ..... Maiden name (1a) .....

1.3 Date of birth ..... Nationality ..... D.N.I (1b) .....

1.4 Permanent address (2) .....

1.5 Insurance No .....

2 ☐ Employer ☐ Activity as self-employed person

2.1 Name of employer or firm .....

2.2 Address (2) .....

3 The abovementioned insured person

3.1 ☐ is being posted or will carry out an activity as a self-employed person for a period probably lasting from ..... to .....

3.2 ☐ has been employed since .....
☐ has been carrying out an activity as a self-employed person since .....

3.3 ☐ to the undertaking mentioned below ☐ on the ship mentioned below

3.4 Name of ship or firm .....

3.5 Address (2) .....

4 The insured person remains subject to the legislation of the country [ ] (1) in accordance with Article

4.1 ☐ 14.1.a ☐ 14.2.b ☐ 14a.1.a ☐ 14a.2 ☐ 14a.4
☐ 14b.1 ☐ 14b.2 ☐ 14b.4 ☐ 14c.1 a ☐ 17
of Reg. 1408/71

4.2 ☐ from ..... to .....

4.3 ☐ for the duration of the activity
(See the letter from the competent authority of the Member State whose legislation is applicable

of ....., ref. .....)

5 the insured person is subject

5.1 Name ..... Code number (2a) .....

5.2 Address (2) .....

5.3 Stamp

5.4 Date .....

5.5 Signature .....

E 101

INSTRUCTIONS

Please complete this form in block letters, writing on the dotted lines only.

The designated institution *of the Member State to whose legislation the worker is subject should fill in the form at the request of the worker or of his employer and return it to the person concerned. Where the worker is posted to Belgium, the institution should also send a copy to the 'Office national de sécurité sociale/Rijksdienst voor maatschappelijke zekerheid' (national office of social security), Brussels.*

Information for the insured person

Before you leave *the country where you are insured to go to another Member State for work, you should ask your sickness and maternity insurance institution for an E 111 form or E 106 form, as appropriate. An E 111 form is not required if you are going to stay in the United Kingdom. If you or a member of your family require benefits in kind (e.g. medical treatment, medicines, hospital treatment, etc.) in the country where you are working, you should submit an E 111 or E 106 form to the sickness and maternity insurance institution of the place where you are employed. If you are not in possession of that form, the latter institution should request it from the institution with which you are insured. In that case, you may have to pay for the* **cost of treatment, and the fees may be higher, in addition to which your costs would be reimbursed after a considerable delay.**

Information for the institution of the place of stay

If the person concerned produces the proper certificate (E 111 or E 106), the insurance institution in the country of stay will also provide him provisionally with benefits in the case of an accident at work or an occupational disease. If in such a case the institution requires certificate E 123, it should apply as soon as possible:

in **Belgium,** *to the 'Fonds des maladies professionnelles/Fonds voor beroepsziekten' (occupational diseases fund), Brussels, in the case of an occupational disease, or the insurance company designated by the employer; for self-employed persons, Institut national d'assurances sociales pour travailleurs indépendants (INASTI) (National Social Insurance Institute for the Self-Employed), Brussels;*

in **Denmark,** *to the 'Sikringsstyrelse' (National Office for Social Security), Copenhagen;*

in **Ireland,** *to the Department of Social Welfare, Records EEC Section, Dublin 1;*

in **Italy,** *to the competent provincial office of the 'Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro' (INAIL, National Institute for Insurance against Accidents at Work);*

in **Luxembourg,** *to the 'Association d'assurance contre les accidents' (Accident Insurance Association);*

in **Portugal,** *to the 'Caixa Nacional de Seguros de Doenças Profissionais' (National Insurance Fund for Occupational Diseases), Lisbon;*

in **all other Member States,** *to the competent sickness insurance institution.*

Where the worker is covered by the French social security scheme, the fund which is competent to recognize entitlement to benefits is his insurance fund, which may not be the one appearing on Form E 101. It will be necessary, where appropriate, to request Forms E 111 or E 123 from the fund of the worker's place of habitual residence.

NOTES

(1) Symbol of the Member State to whose legislation the worker is subject: B = Belgium; DK = Denmark; D = Germany; GR = Greece; E = Spain; F = France; IRL = Ireland; I = Italy; L = Luxembourg; NL = the Netherlands; P = Portugal; GB = United Kingdom.

(1a) In the case of Spanish nationals state both names.
In the case of Portuguese nationals state all names (forenames, surname, maiden name) in the order of civil status in which they appear on the identity card or passport.

(1b) In the case of Spanish nationals state the number appearing on the national identity card (D.N.I.), if it exists, even if the identity card is out of date. Failing this, indicate 'None'.

(2) Street, number, post code, town, country.

(2a) To be completed where this exists.