OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 24 October 2000 [1]

1. By this action brought before the Court of Justice on 25 February 1999, the Commission seeks a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Article 169 of the EC Treaty (now Article 226 EC).

The Commission maintains that the application of Paragraph 23 et seq. of the Künstlersozialversicherungsgesetz (Law on social security for artists and journalists) to authors who reside in another Member State and are normally self-employed in that other Member State and in Germany, is contrary to Articles 51 and 52 of the EC Treaty (now, following amendment, Articles 42 EC and 43 EC) and/or Article 59 of the EC Treaty (now Article 49 EC). It also infringes Title II of Regulation (EEC) No 1408/71 [2] (hereinafter 'Regulation No 1408/71'), in particular, the first sentence of Article 14a(2), in conjunction with Article 13(1) and (2)(b), according to which those authors are subject to the social security legislation only of the Member State in which they reside.

I — Pre-litigation procedure

2. This alleged incompatibility between German law and the Community rules was pointed out by the Commission in the letter of formal notice it sent to the German Government on 17 September 1997. The infringement proceedings arose out of a complaint lodged by Mr Stutzer, a German journalist who resides in Belgium and works in a self-employed capacity both in Belgium and in other Member States.

3. The German Government replied to the formal notice in a statement dated 21 November 1997 which it enclosed in a letter sent to the Commission on 1 December 1997.

4. The Commission was not satisfied with the reply and, on 7 August 1998, delivered

1 — Original language: Spanish.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

a reasoned opinion to Germany pursuant to Article 169 of the Treaty. On 22 September 1998 Germany's Permanent Representative to the European Union sent a letter to the Secretariat-General of the Commission enclosing his Government's reply, which was to the same effect as its reply to the formal notice.

II — The German legislation in issue

5. Under Paragraph 23 et seq. of the Law on social security for artists and journalists, publishing houses and press agencies are required to pay a social charge known as *Künstlersozialabgabe* into the social security fund for those professionals. Its basis of assessment is composed of the remuneration paid by a taxable person during the calendar year to self-employed artists and journalists (hereinafter 'authors') for their work. The percentage varies depending on the sector. [3]

All self-employed authors are required to join the social security scheme. However, the law provides a series of situations in which they are exempt from the obligation to contribute, for example, where they have other self-employed or employed work or where, as part of their work as artists, they employ more than one worker.

The contribution must be paid by the employers irrespective of whether the authors whose work they are marketing are required to join the social security scheme or they are exempt from doing so.

The funds are provided, as to half, by contributions made by the person insured. The contribution paid by the employers must cover 25% of the scheme's financial needs and is fixed one year in advance. The other 25% is provided by the State, through subsidies. The cover extends to old-age pension, sickness insurance and invalidity benefit.

Under Paragraph 36a of the Law, in conjunction with Paragraph 32 of the Sozialgesetzbuch (social security code), the contribution for which the employer is liable may not be passed on to the authors.

3 — The German Government points out that, for 1997, the rate was 3.8% for the *Wort* (literature) sector, 5.9% for the *bildende Kunst* sector, 2.6% for the *Musik* sector and 5.1% for the *darstellende Kunst* sector. On the other hand, for the same period, the artist or journalist covered by the compulsory scheme was required to contribute 10.15% of his income to the old-age pension, 0.85% to invalidity benefit and, depending on the sickness fund, between 6% and 7% for sickness insurance.

III — The Community legislation allegedly infringed

6. The Commission considers that, by applying that legislation, the Federal Republic of Germany has infringed Articles 51, 52 and/or 59 of the EC Treaty and several provisions of Title II of Regulation 1408/71 concerning the determination of the legislation applicable.

In particular Article 13(1) and (2)(b) provide:

'1. 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.

2. Subject to Articles 14 to 17:

...

(b) a person who is self-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;

...'.

7. The first sentence of Article 14a(2) of the Regulation states as follows:

'Special rules applicable to persons, other than mariners, who are self-employed

Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

...

2. A person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member States in whose territory he resides if he pursues any part of his activity in the territory of that Member State...'.

IV — Examination of the action

8. For the purpose of assessing the claims of the parties, I have divided them into two sections. I shall deal, first, with those which refer to the nature of the social security contribution and then with those which question the compatibility of the legislation in issue with Articles 51, 52 and 59 of the Treaty and with the provisions of Title II of Regulation No 1408/71.

A. *Whether the social security charge should be regarded as an employers' contribution*

9. The Commission argues, in its application, that, irrespective of the name it is given, the charge which employers pay directly into the social security scheme for artists and journalists is an employers' contribution intended to form part of its funding. It has the same effect, both for the undertaking which pays it and for the author who is affiliated to the scheme, as a social security contribution.

The Commission takes the view that, although the charge is not, officially, an employers' contribution in the strict sense of the term, it may be described as extremely similar in structure. It cannot be considered a tax, since its aim is not to acquire income for the German State but to fund a specific social security scheme. Nor may it be likened to a parafiscal charge because its beneficiaries are not the taxable persons but the authors who are affiliated to the scheme. In its reply, the Commission maintains that, in spite of the differences between parafiscal charges and social security contributions, the latter have the same effect as a charge equivalent to a customs duty, in so far as authors who also pursue their activity in another Member State, in which they reside, are not entitled to the benefits which they help to fund.

10. The German Government maintains that the charge, although intended to provide funds for a social security scheme, has characteristics which distinguish it from an employers' contribution. It is received collectively, it benefits all of those insured under a specific social security scheme and it is not designed to ensure the social protection of each of them individually. Moreover, the remuneration paid to authors, whether or not they are affiliated to the scheme, is only a formula for allocating the charge, which falls exclusively on the undertaking which markets the work. Furthermore, it does not have the same basis of assessment as the contribution paid by the authors themselves; it is calculated on the remuneration actually paid, which includes the author's overall costs, whereas these are deducted from the profits in respect of which the person concerned pays contributions. Moreover,

when calculating it, no account is taken of the minimum and maximum limits of the charges for the undertaking liable for it, and the percentage of the charge differs from that of the contribution. It takes the view that this is a parafiscal charge on all undertakings, established in Germany, which market the work of artists and journalists.

It does not agree with the Commission that the social charge may be regarded as a charge having an equivalent effect to a customs duty. It maintains that the charge is intended to fund a specific social security scheme and not, as would be the case if it were a charge of such kind, to finance actions to promote the production or sale of artistic or journalistic works, so that it does not particularly benefit national works.

11. I agree with the Commission that the social charge, which the German Government describes as a parafiscal charge or levy is, in practice, an employers' contribution to a social security scheme, no matter how much some of its characteristics, which the German Government has described in great detail, may differ from those of the employers' contribution in the strict sense of the term. The Court itself seems to have put an end to any controversy in this respect by stating, in two recent judgments, that the fact that a levy is categorised as a tax under national legislation does not mean that, as regards Regulation No 1408/71, that same levy cannot be regarded as falling within the scope of that regulation and caught by the prohibition against overlapping legislation. [4]

B. *Whether there is double liability to pay contributions, contrary to Articles 51, 52 and 59 of the Treaty and Title II of Regulation No 1408/71*

12. The Commission points out that the contested legislation requires a journalist in Mr Stutzer's position to contribute to the financing of two social security schemes, even though one of them does not grant him entitlement to benefits. As he resides and is self-employed in Belgium, he pays contributions in that State, where the legislation does not provide for the payment of contributions by employers who market the work of artists and journalists. Furthermore, when he publishes in Germany, his remuneration is included in the basis of assessment of the charge payable by the undertaking which markets his work, so that the author is taxed, albeit indirectly. Moreover, the requirement that the undertaking pay the charge has no social advantage for a journalist in Mr Stutzer's position. The Commission considers that this outcome is contrary to the wording and purpose of Regulation No 1408/71 according to which, in order

4 — Judgments of 15 February 2000 in Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 34 and Case C-169/98 *Commission* v *France* [2000] ECR I-1049, paragraph 32.

to avoid double liability to pay social security contributions, a worker is in principle subject to the legislation of one Member State only.

It maintains that the remuneration paid by the employer in such a case may be affected by the requirement to pay the charge, to the detriment of the author, whose fees in the German market would be reduced, and that, whether the charge was payable by one or other of them, the cross-border provision of services would be penalised. If the undertaking which markets his work in Germany did not have to pay that charge, it could pay the sum to him and thus help him to finance his social security in Belgium.

13. The German Government, on the other hand, considers that its legislation does not infringe Regulation No 1408/71, since the social charge is not borne, either directly or indirectly, by the authors but by the employers, who cannot pass it on to the authors. It believes that, if the charge were abolished, the undertakings would still not make a corresponding increase in the remuneration they pay to the authors, while competition would be distorted, to the detriment both of the authors working and residing in Germany and subject to its social security legislation and of the undertakings which market their work. It believes it unlikely that it would be of advantage to authors established in another Member State if their fees were not included in the basis of assessment on which the charge is calculated, and points out that it is more logical to assume that the employer would not pass on to the professionals the financial benefit it would obtain.

It points out that, for a national rule to constitute a restriction on freedom to provide services, it need not directly affect a provider established in another Member State but only be capable of deterring the recipient of the service from commissioning him to provide it. It takes the view that the charge would be contrary to Community law, even if the German legislature had opted to calculate it on a different basis of assessment, since it would still constitute a tax on the remuneration of authors who also pursue their activity in another Member State, in which they reside. It concludes that the contested legislation cannot be justified on grounds of the public interest associated with the protection of workers.

Nor does the German Government consider that the social charge infringes Articles 52 and 59 of the Treaty. The remuneration paid to the authors who are not affiliated to that social security scheme by the undertaking which markets their work is included in the basis of assessment on which the charge is calculated, irrespective of whether they are not affiliated as a result of either national law or Community law. It adds that the German legislature, when determining the method of financing the social security system for artists and journalists, could also have decided that the social charge would be calculated on the undertaking's profits or turnover, in which case the authors' financial position still

would not have been affected. It is a scheme which is necessary and justified in order to ensure that authors resident in Germany and not subject to the compulsory social security scheme are not treated less fairly that those who reside in other Member States, [5] and does not prevent the latter, even indirectly, from exercising their right to freedom of establishment or freedom to provide services.

14. Although I am not wholly persuaded by the arguments put forward by the Federal Republic of Germany in its defence, I do not agree with the analysis made in these proceedings by the Commission of the consequences of the application of the contested legislation to self-employed workers who, like Mr Stutzer, exercise their right to freedom of movement.

15. Article 51 of the Treaty imposed on the Council the duty to adopt such measures in the field of social security as were necessary to secure for migrant workers aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries. The Council considered that it had fulfilled that duty by adopting Regulation No 1408/71, which harmonises the social security schemes of the Member States. Subsequently, Regulation No 1390/81, [6] which came into force on 1 July 1982, extended Regulation No 1408/71 to self-employed persons and members of their families.

16. Title II of Regulation No 1408/71 contains a complete system of rules for determining the legislation applicable to the persons who fall within its scope. The general principle, as expressed in Article 13(1), is that a worker is subject to the legislation of a single Member State. Provision for persons who normally exercise a self-employed activity in the territory of two or more Member States is made in Article 14a(2), under which they are subject to the legislation of the Member State in which they reside, if they pursue part of that activity in its territory.

The only exception to that principle is provided for in Article 14c(b), applicable to persons employed in the territory of one Member State and simultaneously self-employed in the territory of another Member State who are in one of the situations

5 — In support of this argument, it cites a decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 8 April 1997 (BVerfGE 75, p. 108 et seq.), and a judgment of the Bundessozialgericht (Federal Social Court) of 20 July 1994 (BSGE 75, p. 20 et seq.) in which it is stated that the remuneration paid to artists and journalists established abroad must be included in the basis of assessment on which the charge is calculated.

6 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 (OJ 1981 L 143, p. 1).

provided for in Annex VII; such persons are to be subject to the legislation of each of the States. [7]

17. The parties to these proceedings agree that, under these rules of Community law, a journalist such as Mr Stutzer is subject to Belgian social security legislation. They disagree, however, in their assessment of the consequences of applying the German social security legislation to his situation.

18. Indeed, except in the circumstances established in Article 14c of Regulation No 1408/71, a migrant worker is subject to the legislation of a single Member State, and the Court, in its case-law, has shown staff to be against the fact that a worker or undertaking, because he exercises his right to freedom of movement, might have to pay additional financial charges which, moreover, do not provide him with any social advantage.

As we have seen, the Commission maintains that, when publishing in Germany, the professional is compelled, albeit indirectly, to pay contributions to a social security scheme which does not afford him any entitlement to benefits, while the German Government states that, where an author does not reside in Germany, the only person required to fund the national social security scheme for artists and journalists is the undertaking which markets his work, and the economic rights of the professional remain completely unaffected since the contribution cannot be passed on to him.

19. When the Community rules applying to social security for migrant workers were contained in Regulation No 3, [8] the Court of Justice ruled, in the *Nonnenmacher* judgment, [9] when determining whether the compulsory application of the legislation of the State where the worker is employed excludes the application of that of any other Member State, that Article 12 of Regulation No 3, forming part of Title II, did not prohibit application of the legislation of a Member State other than that in which the person concerned worked, except to the extent that he was required to contribute to the financing of a social security institution which was unable to provide him with additional advantages in respect of the same risk and of the same period.

7 — In the Opinions which I delivered in the cases which led to the judgments of 30 January 1997 in Case C-340/94 *De Jaeck* [1977] ECR I-461 and Case C-221/95 *Hervein and Hervillier* [1977] ECR I-609, especially pp. I-494 and I-634 respectively, I proposed to the Court, apart from the replies to be given to the national courts which had referred the questions for a preliminary ruling, that it should declare that Article 14c(b) and Annex VII to Regulation No 1408/71 were invalid, in so far as they provide that a person employed in the territory of one Member State and simultaneously self-employed in the territory of another Member State is to be subject to the legislation of each of those States.

8 — Regulation No 3 of the Council of the EEC concerning social security for migrant workers (OJ, English Special Edition 1952-1958, Series I, p. 63).

9 — Judgment of 9 June 1964 in Case 92/63 *Nonnenmacher* [1964] ECR 281 et seq., particularly 288.

Likewise in the *Van der Vecht* judgment, [10] the Court held that the purpose of Article 12 of Regulation No 3 was to avoid any simultaneous application of national laws which could increase unnecessarily the social security charges of the employee and the employer, and that Article 12 prohibits Member States other than the State of employment from applying their own social security legislation to the worker if such application entailed an increase in social security charges for employees or employers, without a corresponding increase in social security protection.

In the *Perenboom* judgment, [11] the Court reiterated that the fact that a worker is required to pay, in respect of the same earned income, social charges arising under the legislation of several States, although he can be an insured person only in respect of the legislation of one State, means that the worker must pay contributions twice over, contrary to the provisions of Article 13 of Regulation No 1408/71. [12] This precedent was confirmed by the Court in February this year. [13]

20. In the context of freedom of establishment, the Court held, in the *Kemmler* judgment, [14] that Article 52 of the Treaty precludes a Member State from requiring contributions to be paid to the social security scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme, that obligation affording them no additional social security cover. In that case, a German lawyer, who resided and practised in Germany, had, at the same time, a residence in Brussels, where he also practised his profession. In Belgium he received a claim for payment of contributions due. He refused to pay them on the ground that, during the same period, he was affiliated to the German compulsory social security scheme for self-employed persons.

21. With regard to the freedom to provide services, the *Seco* judgment [15] considers the position of an employer who is liable in the State in which he is established to pay employers' contributions and is also required to pay additional contributions in the State in which work is performed in respect of the same workers and periods of employment, even though the contributions paid in the State in which work is performed do not entitle those workers to any social security benefits. The Court held that an employer cannot be required to pay the employers' share of the social security contributions for the workers he takes to

10 — Judgment of 5 December 1967 in Case 19/67 *Van der Vecht* [1967] ECR 345 et seq. particularly 354.

11 — Judgment of 5 May 1977 in Case 102/76 *Perenboom* [1977] ECR 815, paragraph 13.

12 — See also judgment of 29 June 1994 in Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 26.

13 — Judgments in Case C-34/98 *Commission* v *France*, paragraph 31, and Case C-169/98 *Commission* v *France*, paragraph 29, cited above in footnote 4.

14 — Judgment of 15 February 1996 in Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 14.

15 — Judgment of 3 February 1982 in Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 15.

that State, even if the requirement were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State is which the work is performed. [16]

In its judgment in *Arblade and Others*, [17] the Court held that national rules which require an employer to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to the fund of the Member State in which he is established, constitute a restriction on freedom to provide services. Such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services in the host Member State.

22. In all the abovementioned cases, the infringement of Community law arose out of the fact that the employed or self-employed worker or the employer had to bear a double financial burden because he had to pay contributions in two States, one of which did not grant the worker any corresponding entitlement to benefits.

23. In the case which I am considering, however, I see no such double obligation to pay contributions.

24. Firstly, the only social security legislation applicable to a professional such as Mr Stutzer, who is self-employed and exercises his right to freedom of establishment or freedom to provide services within the meaning of the Treaty, is that of the State in which he resides, in this case Belgium. Under Article 14d of Regulation No 1408/71 he will be regarded in that State as if he carried out all his professional activities within its territory. It is in that State that he must pay contributions, probably on all his professional income and, perhaps, subject to minimum and maximum limits. In the other Member States in which he provides services, whether or not he is established in them, he may not be required to join a social security scheme nor may the income he receives be subject to contributions. Furthermore, as the parties to the dispute have explained, no deduction is made from the remuneration agreed between the professional and the employer who markets his work in Germany for the purpose of financing a social security scheme in that State.

16 — In that case, the applicant companies were established in France and had moved to Luxembourg with their workers, who were nationals of non-member States, to carry out construction and maintenance work on the railway network.

17 — Judgment of 23 November 1999 in Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 50.

25. Secondly, the only person who pays contributions to the German social security scheme for artists and journalists is the employer established in Germany who markets the author's work and who is prohibited from passing on the contribution to him.

26. Although this is an employers' contribution to a social security scheme, which does not give a self-employed worker resident in another Member State entitlement to benefits, in my view the fact that the amount of the remuneration paid to professionals resident in other Member States is included in the basis of assessment does not constitute an infringement of Community law.

27. Indeed, as the Court of Justice has stated, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions governing the right or duty to be insured with a social security scheme. [18] As I pointed out in the Opinion I delivered in the *Terhoeve* case, [19] it is also for the legislation of each Member State, in the absence of any applicable Community measures, to specify the factors which shall form the basis for calculating contributions to its social security schemes.

Case-law has imposed some restrictions on the exercise of those powers by the Member States: they must observe the principle of equal treatment so as not to discriminate between their own nationals and those of other Member States; they must ensure that their national social security provisions do not constitute an obstacle to the effective exercise of the freedoms guaranteed by the Treaty, [20] and that a migrant worker, who has exercised his right to freedom of movement, is not placed at a disadvantage in relation to a non-migrant worker. [21]

28. I therefore believe that there is no double financial burden either for the worker or for the employer; the German legislation does not infringe the principle of equality since it does not treat workers who exercise their right to freedom of establishment or freedom of movement any differently from national workers; it is unlikely to prevent the providers of services from exercising those rights or to deter the recipients of services from approaching

18 — Judgments of 18 May 1989 in Case 368/87 *Hartmann Troiani* [1989] ECR 1333, paragraph 21; 21 February 1991 in Case C-245/88 *Daalmeijer* [1991] ECR I-555, paragraph 15; and 20 October 1993 in Case C-297/92 *Baglieri* [1993] ECR I-5211, paragraph 13; See also the judgments of 7 February 1984 in Case 238/82 *Duphar* [1984] ECR 523, paragraph 16; and 17 June 1997 in Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27.

19 — The matter which led to the judgment in Case C-18/95 *Terhoeve* [1999] ECR I-345 et seq. in particular I-370.

20 — Judgments of 28 April 1998 in Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and in Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; and the judgment in *Terhoeve*, cited above in footnote 19, paragraph 34.

21 — Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 34.

professionals established in other Member States.

The Commission rightly points out that the Federal Republic of Germany may apply less favourable treatment to authors who are subject to its legislation and not required to join the social security scheme for artists and journalists, but the contested legislation, as I have said, is not prejudicial either to freedom of establishment or to freedom to provide services, and therefore the Community legal system cannot require that professionals who are established in other Member States and publish in Germany receive different treatment.

29. I would add that the arguments put forward by the Commission in this action are too vague and hypothetical to obtain a declaration that a Member State has failed to fulfil its obligations. In any event, I must stress that it has not been established in these proceedings that the remuneration of a professional in Mr Stutzer's position is reduced by the fact that the employers who market his work in Germany have to include the amounts which they have paid him during the calendar year in the basis of assessment on which their contribution to the social security system is calculated. Nor has the Commission succeeded in proving that, if those amounts could be excluded from the basis of assessment, it would be the professional who would directly benefit.

30. According to the case-law of the Court, in infringement proceedings under Article 169 of the Treaty, it is incumbent upon the Commission to prove the alleged infringement and to place before the Court of Justice the information necessary to enable the Court to establish the existence of the infringement, and in doing so the Commission may not rely on any presumption.[22] Since the Commission has not succeeded in proving the existence of the alleged infringement, its application should be dismissed.

V — Costs

31. Under Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the German Government has applied for an order for costs against the Commission and since the arguments put forward by the applicant have not been upheld, I propose that the Court order the Commission to bear the costs.

22 — Judgments of 25 May 1982 in Case C-96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and 12 September 2000 in Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 15.

VI — Conclusion

32. In the light of foregoing considerations, I propose that the Court of Justice should:

(1) dismiss the application;

(2) order the Commission to pay the costs.