

2. National social security schemes introduced under agreements concluded by the competent authorities with trade or inter-trade bodies or under collective agreements concluded between both sides of industry which have not been the subject of a declaration mentioned in the second paragraph of Article 1(j) of Regulation No 1408/71 do not constitute legislation within the meaning of the first paragraph of Article 1(j) and the benefits which they provide do not come within the matters covered by that regulation. Article 33 of the regulation, which prohibits Member States from

making deductions from statutory pensions received by nationals of EEC countries where the cost of the benefits received in return is not borne by one of their institutions, cannot therefore be invoked against a Member State which, under its sickness and maternity scheme, introduces a contribution which is deducted from payments of early retirement or supplementary pensions provided for under industrial agreements, where such payments are made to persons resident in another Member State who enjoy sickness benefits under the legislation of that other State.

REPORT FOR THE HEARING

in Case C-57/90 *

I — Legal framework

National rules and regulations

1. Law No 79-1129 of 28 December 1979, enacting various measures to finance social security (*Official Gazette of the French Republic* No 302 of 29.12.1979, p. 3279), as supplemented by Implementing Order No 80-298 of 24 April 1980 (*Official Gazette of the French Republic* No 99 of 26.4.1980, p. 1080), and Implementing Orders Nos 80-598 and 80-599 of 30 July 1980 (*Official Gazette of the French Republic* No 177 of 31.7.1980, p. 1931), makes provision for the deduction of a

sickness insurance contribution intended to finance the general social security scheme which is levied by supplementary pension benefit offices. According to a letter dated 18 February 1981 from the Minister of Health and Social Security to the Head of the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (National Old-Age Pension Fund for Employed Persons), that contribution does not apply to statutory pensions. It does apply, however, to supplementary pensions and to early retirement pensions, irrespective of the recipients' place of residence.

2. In the case of *special early retirement allowances* paid by the Fonds National de l'Emploi (National Employment Fund, hereinafter referred to as the 'FNE'),

* Language of the case: French.

Article L 322-4 of the Code du Travail (Labour Code) provides (in Order No 86-948 of 11 August 1986) that

'in the cases governed by this Article, the following may be granted under agreements concluded with trade or inter-trade bodies, trade union organizations or individual undertakings:

1) —

2) — special allowances granted to certain categories of older workers where it is shown that they are unsuitable for relocation measures or where the circumstances of the undertaking lead to their full-time employment being changed to part-time employment, with their consent. The rights of these workers for social security purposes shall be determined by statutory regulation.

3) —'

Article R 322-1 of the Code du Travail provides that the Minister of Employment may adopt 'temporary measures to provide, by way of cooperation agreements, a certain guaranteed income for workers deprived of all or part of their pay due to economic circumstances'. Article R 322-7 describes the measures laid down by agreement.

The Order of 15 September 1987, as amended by the Order of 26 October 1987 (*Official Gazette of the French Republic*

No 252 of 30.10.1987, p. 12644), established the conditions of accession and the rights of recipients under FNE special allowance agreements.

3. *Supplementary pensions for employed persons*, coming within the general scheme for old-age pensions and agricultural insurance, became obligatory for all employed persons and former employed persons under Article L 731-5 of the Code de la Sécurité Sociale (Social Security Code) (Law of 29 December 1972).

Collective agreements concluded between both sides of industry set out the provisions applicable to contributions and benefits. These agreements apply to employers who are members of one of the two employers' organizations signatories to them. Inter-ministerial orders implementing Articles L 731-2 and L 731-3 of the Code de la Sécurité Sociale extend these provisions to employers which are not members of those employers' organizations and expand them to encompass employers in areas of activity which are not represented by those organizations but which do come within the scope of the general old-age pension scheme.

Community regulations

4. Article 13(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (*Official Journal* 1983 L 230, p. 6), provides that

'... persons to whom this Regulation applies shall be subject to the legislation of a single Member State only.'

Article 33 of that Regulation provides that:

'The institution of a Member State which is responsible for payment of a pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorized to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.'

II — Facts and procedure

5. In a letter dated 15 July 1985 the Commission drew the attention of the French authorities to the consequences, under Community rules, of applying the sickness insurance deduction to recipients of supplementary pension benefits residing in a Member State other than France. The French authorities did not reply to that letter.

On 5 October 1988 the Commission sent a letter under Article 169 of the EEC Treaty formally pointing out that the French legislation was incompatible with Article 13(1) in conjunction with Article 33 of Regulation No 1408/71 in so far as it resulted in the deduction of sickness insurance contri-

butions from supplementary and early retirement pensions drawn by persons who, whilst resident in the territory of a Member State other than France, received sickness benefits in that other Member State. In that letter the Commission also gave the French Government a period of two months from receipt of the letter in which to submit its observations to it.

6. In its reply of 3 February 1989 the French Government opposed the Commission's standpoint. It argued, firstly, that the contribution in question constituted a solidarity contribution which did not, as such, provide any entitlement to benefits and, secondly, that in some Member States health benefits were financed out of taxation.

7. The Commission did not consider those arguments well founded and therefore delivered a reasoned opinion on 26 June 1989, requesting the French Government to take the necessary measures to comply with it within a period of two months from the date of notice.

8. In a letter dated 22 August 1989 the French Government disputed the content of the reasoned opinion. It maintained that Regulation No 1408/71 did not apply to cases of supplementary and early retirement pensions, that methods of financing social security schemes were matters of national jurisdiction, that the French system was not discriminatory and that the Commission's viewpoint would result in inequality of treatment between migrant workers and indigenous workers, to the detriment of the latter.

9. The Commission then brought the present action. The application was lodged at the Court Registry on 7 March 1990.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Forms of order sought

10. The Commission claims that the Court should:

- (1) declare that, by applying a sickness insurance deduction to recipients of pension benefits resident in a Member State other than France, the French Republic has infringed its obligations under Article 13(1) in conjunction with Article 33 of Council Regulation (EEC) No 1408/71;
- (2) order the French Republic to pay the costs.

The *French Republic* contends that the Court should:

- (1) dismiss the Commission's application;
- (2) order the Commission to pay the costs.

IV — Pleas in law and arguments of the parties

11. The Commission considers that the levies made by the French authorities, by way of a deduction for sickness and maternity, on supplementary and early retirement pensions paid by their departments to persons resident in another Member State, are incompatible with Article 13(1) in conjunction with Article 33 of Regulation No 1408/71 on the grounds that the cost of sickness and maternity benefits for those persons is not borne by a French scheme. Article 13(1) lays down the fundamental principle that a single system of legislation should apply and Article 33 puts this in concrete form with regard to sickness insurance contributions deducted from old-age benefits covered by that regulation.

12. In support of its contention the Commission argues that the principle that a single system of legislation should apply can be invoked in favour of the workers concerned as a general principle which, as is illustrated by Article 13(1) of that regulation, was in existence prior to Regulation No 1408/71. Its application should not therefore be confined to those situations covered by that regulation. This principle is therefore applicable in this case even though the matters covered by the Regulation do not specifically include either supplementary or early retirement pension schemes. The Commission adds that the authority of that principle is not undermined by the existence of exceptions, such as those contained in Article 14c and Annex VII of the regulation, relating to cases in which a person is

subject to the legislation of two Member States at the same time.

13. The Commission also notes that, according to the case-law of the Court of Justice relating to situations existing prior to the date on which Regulation No 1408/71 entered into force, the aim of Articles 48 and 51 of the Treaty is to secure as much freedom of movement for workers as possible, necessitating the abolition of legislative obstacles which could prejudice migrant workers. These provisions are therefore to be interpreted in any event as meaning that they are designed to prevent migrant workers from being placed at a disadvantage. For example, the Court has held that the application of the legislation of a State other than that in which a person works was prohibited if it required that person 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 the same period (see Case 92/63 *Nonnenmacher v Sociale Verzekeringsbank* [1964] ECR 281).

The Court has also upheld the principle that Member States other than the State in which a person works are prohibited from applying their social security legislation, if it would lead to an increase in the charges borne by workers without any corresponding supplementary protection by way of social security (See Case 19/67 *Soziale Verzekeringsbank v Van der Vecht* [1967] ECR 345).

14. According to the Commission, that case-law shows that the aim of the principle of having a single system of legislation is to avoid any plurality of legislation or needless confusion of contributions and liabilities which would result from the application of

several bodies of national legislation. The Court thus drew a parallel between the system applicable to contributions and the system applicable to entitlement to benefits. The Commission also notes that, although Member States may be free to legislate on matters which come within their competence, they may not, however, rely on their national legislation in order to avoid their obligations under Community law. The Commission therefore considers that no Member State may levy contributions to finance its own sickness insurance scheme, even where those contributions are deducted from benefits not covered by Regulation No 1408/71, if Community rules provide that the legislation of another Member State is to be the system applicable.

15. In its judgment in Case 275/83 (*Commission v Belgium* [1985] ECR 1097, at paragraph 3), the Court held that, even where there is no direct connection between the contribution and the risk insured, deductions from pensions may not be made by a Member State where the cost of the benefits in question is not borne by an institution of that Member State. In the present case, the Commission claims that there is no difference in nature between contributions charged on statutory pensions and those charged on supplementary or early retirement pensions. All these deductions are governed by the same statutory provisions and are intended to finance the general sickness insurance scheme.

16. The Commission also argues that the fact that the contributions constitute solidarity contributions and are akin to a parafiscal levy, as claimed by the French authorities in their letter of 3 Feb-

ruary 1989, is quite irrelevant. Regulation No 1408/71 does not distinguish at all between contributions which consequently cannot escape the scope of that Regulation. The determining factor, for the purposes of the application of the Regulation, is not the basis on which the contributions are computed but their intended purpose; it is at this level that the parallelism between contributions and entitlement to benefits breaks down.

17. On the question of inequality of treatment between indigenous workers and migrant workers, the Commission notes that the sole aim of the Community rules is to protect workers moving within the Community. That aim might therefore leave any 'reverse discrimination' in existence in the sphere of the free movement of persons.

18. The *French Government* observes, first of all, that Regulation No 1408/71 does not concern national methods of financing social security schemes. It points out in this respect that, according to the case-law of the Court of Justice (see the judgments in Case 41/84 *Pinna*, [1986] ECR 1, Case 313/86 *Lenoir*, [1988] ECR 5391, and Case 141/88 *Jordan*, [1989] ECR 2387), Article 51 of the EEC Treaty provides simply for the coordination of Member States' legislative systems and not for their harmonization.

19. The French Government considers that, in view of the absence in Regulation No 1408/71 of any definition of the term 'contributions' and in view of the different ways in which national social security schemes are organized and financed, the means of financing such

schemes do not fall within the scope of the regulation. In France, sickness and maternity insurance is funded, firstly, from contributions, the payment of which constitutes a pre-condition for acquisition of entitlement to benefits and, secondly, from solidarity contributions which do not give rise to any entitlement but are payable even if the person paying the contributions does not receive sickness or maternity benefits under the French scheme. From this point of view, there is no connection between the contribution and the risk insured, as laid down in Regulation No 1408/71. The French Government adds that, although a solidarity contribution is undoubtedly a social security levy in that its purpose is to finance social security schemes, the Court has never held that any levy which is designed to finance, or might be used to finance, the provision of social security constitutes a contribution for the purposes of Regulation No 1408/71.

20. The French Government also argues that early retirement and supplementary pension benefits do not come within the matters covered by Regulation No 1408/71. Those matters are clearly defined in Article 4 of the Regulation, which lists the branches of social security covered by the resultant coordination of the legislation of the Member States. As the law currently stands, however, this list does not include supplementary or early retirement pensions.

In any event, such early retirement pensions and benefits do not fall within the matters covered by Regulation No 1408/71, because they arise from industrial agreements. In Article 1(j) of the regulation, the term 'legislation' excludes provisions of existing or future industrial

agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. The early retirement scheme is organised by way of industrial agreements and arises from the conclusion of specific contracts between the Government and the individual undertakings concerned. Supplementary pension advantages are also provided for by way of industrial agreements.

21. With regard to early retirement pensions in particular, the Court considered in its judgment in Case 171/82 (*Valentini v ASSEDIC*, [1983] ECR 2157) that allowances paid in respect of 'guaranteed retirement income', introduced under a national inter-trade agreement, differed from old-age benefits because their aim derived from employment policy, in that they helped to free jobs held by employees close to retirement age, thus benefitting younger unemployed persons. It was only after Regulation No 1408/71 had been implemented when the Community began to feel the effects of the economic crisis after a number of years that this aim emerged.

The abovementioned judgment shows that early retirement pensions, which are similar to the allowances paid by way of 'guaranteed retirement income' mentioned above, cannot be treated in the same way as either old-age benefits or unemployment benefits for the purposes of the regulation or, therefore, in the same way as pensions in general. The solidarity contribution constituting the sickness insurance deduction complained of and levied on early retirement pensions cannot therefore be considered a sickness contribution within the meaning of Article 33 of the regulation.

22. The French Government contends that, contrary to the Commission's argument, contributions appropriated to finance its sickness insurance scheme are not covered by Article 33 of Regulation No 1408/71 by reason of such appropriation alone and, irrespective of the basis of computation. Article 33 covers contributions calculated on pensions payable under the legislation of the competent State. The very basis of such contributions is one factor in determining whether that article applies. A solidarity contribution deducted from an early retirement or supplementary pension is not a pension contribution for the purposes of Article 33 of the Regulation.

23. The French Government denies the existence of a general principle that a single legislative system should apply. It argues that there are a number of exceptions contained in Regulation No 1408/71, including those contained in Article 14c and Annex VII of the regulation. As Community law stands at present, workers may find themselves subject to more than one body of legislation on social security at the same time.

24. With regard to the principle that Member States other than the country in which a person works are prohibited from applying their social security legislation where this would lead to an increase in the charges borne by workers without any corresponding supplementary protection by way of social security, the French Government states that, under the French legislation, recipients of early retirement pensions are always entitled to sickness and maternity benefits under its general scheme. The French Government expresses its astonishment that, in the present case, the Commission should consider recipients of early retirement pensions to be pensioners

when, in a reasoned opinion dated 11 June 1987 in another matter, it was asked to apply Article 19 of Regulation No 1408/71, which relates to workers pursuing an activity, to recipients of early retirement pensions.

25. The French Government also points out that Regulation No 1408/71 has financial implications for the Member States and institutions concerned. As the Court observed in its judgment in Case C-30/89 (*Commission v France* [1990] ECR I-691, at paragraph 23), in such a case it is settled that the principle of certainty and foreseeability constitutes an essential requirement which must be strictly applied.

By virtue of the principle of legal certainty, therefore, the provisions of Regulation No 1408/71 cannot be made applicable to particular classes of social security benefits without any legal basis.

26. Finally, the French Government denies that the sole object of the Community rules on this matter, which is to protect workers moving within the Community, necessitates the acceptance of 'reverse discrimination'. The recitals in the preamble to Regulation No 1408/71 show that equal treatment under national legislation is guaranteed to all nationals of Member States and not only to migrant workers. It would not therefore be in accordance with the aforementioned principle to exempt pensioners residing in a Member State other than France from paying solidarity contributions.

27. In its reply the *Commission* states that reference to the judgment in Case 171/82 (*Valentini*, cited above) is irrelevant as the present action does not concern the application of Regulation No 1408/71 to recipients of early retirement pensions. The *Commission* again states that it is necessary to examine the case in point in the light of the combined provisions of Article 13(1) and Article 33 of Regulation No 1408/71. The fact that supplementary and early retirement pensions do not as such come under the matters covered by the regulation should not allow Member States to use regulatory instruments which result in frustrating the useful effect of the regulation by impeding the free movement of workers.

28. As far as the reasoned opinion of 11 June 1987 is concerned, the *Commission* states that this was delivered in a completely different kind of case relating to the non-application of Article 19 of Regulation No 1408/71 to workers receiving an early retirement benefit in France and having their place of residence in another Member State.

29. The *French Government* points out in its rejoinder that French legislation provides that payment of early retirement pensions is normally suspended if occupational activity is resumed. The overlapping of such early retirement pensions with an old-age pension is possible only if the latter had been awarded before the contract of employment came to an end and before early retirement began, or in the case of a reversionary pension.

30. The French Government goes on to argue that a recipient of a French early retirement pension residing in a Member

State other than France, who has ceased all professional and trade activity and does not receive any old-age pension, is governed exclusively by French legislation. This is clear from the case-law of the Court, according to which Article 13(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a worker who ceases to carry on an activity in the territory of a Member State and who has not gone to work in the territory of another Member State continues to be subject to the legislation of the Member State in which he was last employed, regardless of the length of time which has elapsed since the termination of the activity in question and the end of the employment relationship (see the judgment in Case 302/84 *Ten Holder* [1986] ECR 1821). The French Government considers that, as Chapter 1 of Title III of Regulation No 1408/71, which relates to sickness and maternity benefits, does not include any provision specifically relating to recipients of early retirement pensions, Article 19 in Section 2 of that Chapter, which relates to workers who have established their place of residence in a Member State other than the competent State, should apply to those recipients.

31. In the case of a recipient of a French early retirement pension who resides in another Member State and has ceased all professional and trade activity but who still receives an old-age pension, the relevant rule is also that contained in Article 13(2)(a) of Regulation No 1408/71. As the judgment in Case 302/84 (*Ten Holder* [1986] ECR 1827) indicates, in such a case the Member State in which he was last employed is still France in view of the provisions governing the overlapping of an early retirement pension with an old-age pension. French legislation is therefore still applicable, as regards both contributions and benefits.

32. The French Government also argues that, according to the judgment in Case 171/82 (*Valentini*, cited above), early retirement pensions are not to be treated as pensions. A recipient of an early retirement pension is therefore a worker for the purposes of Section 2 of Chapter 1 of Title III of Regulation No 1408/71 and consequently subject to the provisions of Article 34(2) of that Regulation.

33. French legislation would therefore apply in all the cases mentioned above and the cost of sickness benefit paid to the recipient of an early retirement pension by the scheme in the country in which he resides would always be borne by the French scheme.

34. As far as supplementary pensions are concerned, the French Government, relying in particular on the judgment in Case 302/84 (*Ten Holder*, cited above), argues that a person who is in receipt of one or more pensions which are subject to French legislation alone and who resides in a Member State other than France is governed by the French legislation alone. In such a situation, Articles 28 and 28a of Regulation No 1408/71 apply and the cost of sickness benefits paid to the person concerned is consequently borne by France.

35. Finally, in the case of a person who is in receipt of one or more French pensions and one or more pensions paid by another Member State and who resides in a Member State other than France, the French Government points out that Article 33 of Regulation No 1408/71 makes express reference to sickness insurance contributions being deducted from pensions, within the meaning of the regulation. However, supplementary pensions do not come under the matters covered by the regulation. As can be seen from the judgment in

Case C-262/88 (*Barber Assurance Group v Guardian Royal Exchange*, [1990] ECR I-1889), the supplementary pensions in question, which are based on industrial agreements, constitute an element of deferred remuneration.

there is no infringement of the combined provisions of Article 13(1) and Article 33 of Regulation No 1408/71, nor any infringement of the principle of parallelism between contributions and benefits.

36. It follows from all the foregoing considerations that, in the present case,

P. J. G. Kapteyn
Judge-Rapporteur