which is to enable a worker who is owed wages following the insolvency of his employer to recover the amounts due to him within the limits laid down by that Law do not constitute 'unemployment benefits' within the meaning of Article 4 (1) (g) of Regulation No 1408/71.

In Case 39/76

Reference to the Court pursuant to Article 177 of the EEC Treaty by the Centrale Raad van Beroep for a preliminary ruling in the proceedings pending before that court between:

BESTUUR DER BEDRIJFSVERENIGING VOOR DE METAALNIJVERHEID, The Hague,

v

L. J. MOUTHAAN, residing at Alphen aan de Rhijn,

on the interpretation of certain provisions of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community, in particular the provisions relating to unemployment,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Mr L. J. Mouthaan, a Netherlands national, pursued activities as an employed person in the Netherlands

until 30 September 1972. From 1 October 1972 he worked in the Federal Republic of Germany for a Netherlands undertaking established in the Netherlands. Nevertheless he retained his residence in the Netherlands.

After financial difficulties with which the undertaking in question was confronted at the end of 1972 he became unemployed. On 21 December 1972 he made himself available for work to the employment services in the territory of the Netherlands and claimed:

(a) the unemployment benefits provided by the 'Werkloosheidwet' (The Netherlands Law on Unemployment);
(b) the payment of arrears of salary owed by his insolvent employer in accordance with Title III A of the abovementioned Law providing for the subrogation of the competent institution to the obligations arising from the contract of work in cases where the employer has become insolvent.

The competent social institution, the 'Bestuur der Bedrijfsvereniging voor de Metaalnijverheid' (the Board of the Trade Association of the Metallurgical Industry, hereinafter referred to as 'the BBV') first paid him unemployment benefits from 1 January 1963 to 26 March 1973, the date on which he found further work, but subsequently, by decision of 13 May 1973, asked him to repay this amount considering that while, in principle, he had a right to payments on the basis of the Netherlands legislation on unemployment pursuant to Article 71 (1) of Regulation No 1408/71 of the Council (OJ English Special Edition 1971 (II), p. 416) as he resided in a Member State other than that in which he worked, he could in fact not rely on this right in view of the fact that he did not qualify as an insured person under German law. As his last employer had solely pursued its activity on the territory of the Federal Republic of Germany the Netherlands Law only gave Mr Mouthaan a right to benefits if he had been insured under the German legislation.

Mr Mouthaan appealed against this decision to the Raad van Beroep of Arnhem which, by judgment of 26 February 1974, ruled that the appellant had a right to Netherlands benefits in so far as he complied with the legal conditions required by the Netherlands legislation.

The BBV lodged an appeal against this judgment to the Centrale Raad van Beroep in Utrecht.

After stating that the respondent could not be regarded as a 'frontier worker' within the meaning of Article 1 (b) of Regulation No 1408/71 but is covered by Article 13 (2) (a) of that Regulation as none of the exceptions or particular cases set out in Article 14 were applicable to the case, the Centrale Raad van Beroep decided that solution to the case was dependent on the interpretation of Community law, in particular on the following questions:

(a) Is the respondent to be regarded as a 'worker' within the meaning of Article 1 (a) of Regulation No 1408/71 of the Council, despite the fact that he has never taken the steps necessary in the Federal Republic of Germany to enable him to be considered as an insured person pursuant to the legislative provisions of that State?
(b) If the respondent cannot be regarded as an insured person pursuant to the abovementioned legislative provisions can he nevertheless claim benefits provided by the Netherlands legislation in respect of his unemployment on the basis of Article 71 (1) (b) (ii) of Regulation No 1408/71?
(c) Are the benefits laid down under Title III A of the Netherlands Law on Unemployment capable of being regarded as 'unemployment benefits' within the meaning of Article 4 (1) (g) of Regulation No 1408/71?

Therefore by order of 25 March 1976 the Centrale Raad van Beroep decided to stay the proceedings and to refer the abovementioned questions to the Court of Justice pursuant to Article 177 of the EEC Treaty.

2. A copy of the order making the reference was received at the Court of Justice on 7 May 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Bestuur der Bedrijfsvereniging voor de Metaalnijverheid, represented by its administrative director and by the Commission of the European Communities, represented by its Legal Advisers Raymond Baeyens and Marie-José Jonczy, acting as Agents.

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

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the Bestuur der Bedrijfsvereniging voor de Metaalnijverheid

1. The BBV first states its opinion on the question of whether Mr Mouthaan may be regarded as a worker within the meaning of Article 1 (a) of Regulation No 1408/71 in spite of the fact that he did not take steps in Germany in order to be insured there. The BBV is of the opinion that the words 'who is insured, compulsorily' contained in that provision do not mean that all the conditions to which the national legislative provisions of a Member State subject the status of an insured person must be complied with. Under the system of the regulation there must first be established whether a person in a given case falls within the scope of application of the regulation and, if so, what is the legislation of the Member State to which that person belongs. Only after these questions have been resolved can it be decided whether the person concerned in fact complies with the conditions attached by the relevant legislation to the benefit of the insurance.

In such a system the definition of the word 'worker' given in Article 1 (a) of Regulation No 1408/71 should therefore be interpreted as meaning that the article in question indicates whether compulsory insurance as provided therein is *in principle* applicable to a particular person. Therefore in this respect the first question should be answered in the affirmative.

2. In view of this it must subsequently be determined whether Mr Mouthaan may, in view of the fact that he is unemployed, claim the benefits provided by the Netherlands legislation on the basis of Article 71 (1) (b) (ii) of Regulation No 1408/71 if he cannot be regarded as an insured person under the German legislation.

As a provision adopted pursuant to Articles 48 to 51 of the EEC Treaty, Article 71 (1) (b) (ii) of Regulation No 1408/71 is intended to eliminate so far as is possible obstacles preventing a worker insured in a Member State in which he pursues a professional or trade activity from obtaining unemployment benefits by virtue of the activities which he there pursues but who resides in another Member States (the State of residence) and who, after becoming unemployed, makes himself available for work to the employment services in the territory of the State of residence or returns to that State.

In other words, the aim of the article in question is to ensure that rights

conferred in the State in which the professional or trade activity is pursued are maintained in the State of residence in accordance with the provisions of the latter State. Thus the rules are based on the idea that a right to benefits was properly conferred in the States where the trade or professional activity was pursued and more exactly that the worker was insured in that State: that is an element of fact whose existence in each individual case must be proved to the competent institution of the State of residence.

If the position were different a worker who did not qualify as an insured person in the State in which he pursued his professional or trade activity but who solely qualified under the legislation of the State of residence, which would be applicable to him as though he had worked there last, could claim unemployment benefits. In this case Article 71 (1) (b) (ii) of the Regulation would give rise to a right to benefits although its aim was not to create a right to benefits but to regulate the receipt by the person concerned of unemployment benefits in the State of residence.

The reply to this question should therefore be in the negative.

3. As to the question concerning benefits provided by Title III A of the Netherlands Law on Unemployment, the BBV is of the opinion that these benefits do not fall within the scope of application of Regulation No 1408/71.

The very essence of social legislation relating to unemployment and the consequent benefits within the meaning of Article 4 (1) (g) of the Regulation is in fact to protect workers against the financial consequences (loss of salary) of *involuntary unemployment* whereas the abovementioned provisions of Title III A were intended to protect a worker against the financial consequences of the *employer's inability to pay.*

Therefore the risks covered by the two provisions are of a different nature. Title III A, which was only inserted in the Netherlands Law on Unemployment in 1968, constitutes a foreign element within that Law (cf. explanatory preamble to the draft of the 'Law of 10 July 1967 concerning the extension of the objectives and the amendment of the Law on Unemployment Insurance'.

The BBV deduces from this that the reply to the last question must also be in the negative.

B — Observations submitted by the Commission of the European Communities

The Commission of the European Communities observes first that although there was no written contract there can be no doubt that the relationship existing between the insured person and the undertaking for which he worked in the Federal Republic of Germany contains all the characteristic elements of a contract of employment. It follows that Mr Mouthaan had the status of an employed person working for the abovementioned undertaking.

Because of this status he should have been affiliated to the social security scheme in one or other of the two Member States in question, the Netherlands or the Federal Republic of Germany. In conformity both with the Netherlands legislation and the German legislation employed persons were compulsorily insured by social security against a certain number of risks, in particular the risk of unemployment: this insurance is merely the necessary consequence of the existence of a contract of employment.

In view of this Article 1 (a) of Regulation No 1408/71 cannot be interpreted as signifying that a worker does not have the status of an 'employed person' within the meaning of that regulation in so far as he has not taken the necessary steps in

order to be considered as an insured person under the applicable legislation. The abovementioned Article 1 (a) does not intend to define the concept of worker but offers a criterion of reference enabling workers covered by the regulation to be identified by means of the compulsory insurance.

The first question referred to the Court of Justice therefore in effect asks to what social security legislation Mr Mouthaan *should have been* subject during his period of employment in the Federal Republic of Germany by his Netherlands employer established in the Netherlands and what are the ensuing consequences with regard to unemployment benefits.

Having stated these general considerations the Commission goes on to examine more closely the questions referred to the Court of Justice and in particular makes the following observations:

1. The first question

The statement of the facts contained in the order making the reference enables three different possibilities to be envisaged:

(a) Mr Mouthaan was a 'posted' worker within the meaning of Article 14 (1) (a) (i) of Regulation No 1408/71.

That provision states that:

'A worker 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 worker who has completed his term of posting.'

The absence of a certification of posting is not decisive for the purposes of refusing a worker the status of a posted worker within the meaning of that article. For posting to exist it is sufficient that the worker satisfies the conditions laid down in that article, in particular that of the anticipated duration of the work.

It is for the court of trial in the main action to examine whether in the present case the worker was or was not posted, taking account in particular of the conditions of employment established with his employers and of the fact that he was insured in the Netherlands.

If that question is answered in the affirmative then, by virtue of the abovementioned provision, Mr Mouthaan would have been subject to the Netherlands legislation, that of the country from which he was posted. The unemployment benefits would be payable by the Netherlands social security institution.

(b) Mr Mouthaan was a worker who 'normally pursues his activity in the territory of two or more Member States' within the meaning of Article 14 (1) (c) of Regulation No 1408/71. There is force in such a hypothesis as according to his own statement Mr Mouthaan pursued his activity in Germany from Monday to Friday and accounted for this activity to his employer in the Netherlands on Friday. In this case also it is for the court of trial in the main action to examine whether the respondent complied with the conditions of the abovementioned provision.

In such a case, which is covered by Article 14 (1) (c) (i), he would also be subject to the Netherlands legislation as the Netherlands was the State 'in whose territory he resides'. Similarly the unemployment benefits would be payable by the Netherlands institution.

(c) If Mr Mouthaan satisfied neither the conditions of Article 14 (1) (a) nor those

of Article 14 (1) (c) then Article 13 (2) (a) would be applicable to him.

In this last case Mr Mouthaan would have been subject to the German legislation in respect of all sectors of social security. As this insurance was obligatory the fact that Mr Mouthaan did not pay contributions to the German social security institutions is of no importance. The wrong committed by his employer cannot work to the detriment of the respondent who, in good faith, may have thought that he was insured in the Netherlands as his employer was affiliated to the 'Bedrijfsvereniging voor de Metaalnijverheid'.

In respect of the payment of unemployment benefit two possibilities must however be distinguished:

— Either Mr Mouthaan could have been a frontier worker within the meaning of Article 1 (b) of Regulation No 1408/71 and in this case the unemployment benefits would be payable to him by virtue of Article 71 (1) (a) (ii). Pursuant to this article he would receive the benefits 'in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed . . .'.

As the Netherlands was the State of residence of Mr Mouthaan the unemployment benefits in question should therefore have been paid to him by the Netherlands social security institution in accordance with the legislation applicable to it. The passage 'as if he were . . . last employed' referred to above certainly seems to indicate that the legislation of the country of residence must be applied to a frontier worker for the payment of unemployment benefits in their entirety both as regards the amount and the duration of benefits and as regards the conditions for the award (qualifying period). Since the periods of work completed in Germany had, under Article 71 (1) (a) (ii), to be regarded as having been completed in the Netherlands and as, by virtue of these periods, the respondent satisfied the conditions laid down by the Netherlands Law on Unemployment (Articles 27 and 35) he would also be entitled to the unemployment benefits provided by that law payable by the Netherlands institution and the costs of which are to be met by that institution.

— Or Mr Mouthaan was not a frontier worker but was merely a worker who, in the course of his last employment, resided in the territory of a Member State other than that where he was employed (that is the competent Member State) and that in this case his position would be governed by Article 71 (1) (b) (ii) of Regulation No 1408/71. Under that provision such a worker, who is wholly unemployed and who makes himself available for work in the employment services in the territory of the Member State in which he resides, or who returns to that territory, would receive benefits in accordance with the legislation of that State 'as if he had been employed there'.

The words 'as if he had last been employed there' imply that, as in the case of the frontier worker, the legislation of the competent Member State is applicable in its entirety.

In such a case the unemployment benefits should have been paid by the Netherlands institution in accordance with its legislation subject to the condition that the respondent first exhausted any right to benefits which may have been acquired in the country of employment. In the present case as Mr Mouthaan did not acquire a right to benefits in Germany and as he satisfied the conditions for award laid down by the Netherlands legislation, the Netherlands institution should have paid him, at its own expense, the benefits in question from the beginning of the period of unemployment.

Mr Mouthaan does not, it is true, fall within one of the categories of persons who, under Decision No 94 (OJ 1974, C

126, p. 22) of the 'Administrative Commission on social security for migrant workers', are covered by Article 71 (1) (b) (ii) referred to above. Nevertheless the decisions of this Commission merely have the authority of opinions and are not binding on the courts: the list is not of an exhaustive nature and it must in the near future be amplified at the request of certain members of the Commission.

2. The second question

Title III A of the Netherlands Law on Unemployment was inserted into the text by a Law of 10 July 1968, Article 42 (a) of which provides for the subrogation of the professional or trade association to which the employer was affiliated to the obligations of an employer who has ceased to make payments or has been declared insolvent, in respect of the wage for the last 13 weeks of work at most, in respect of the wage payable during the period of notice if the person concerned was unemployed and in respect of holiday pay. All workers are entitled to benefit from this provision irrespective of their age and without any conditions relating to qualifying periods but they can only be insured against unemployment until the age of 65 and only receive the relevant benefits if certain conditions relating to qualifying periods are satisfied.

Thus although it is the same social security institution which is obliged to pay the unemployment benefits and the wages owed by the insolvent employer and although payment of these wages is provided for by the Law on Unemployment it appears that the two types of benefits do not serve the same objective and do not have the same class of beneficiaries and therefore are of different kinds. Whereas the unemployment benefit is intended to compensate a worker who remains unemployed for future loss of wages the abovementioned Title III A is intended to make the competent institution assume the obligations which the employer had undertaken when the contract of employment was made, that is before the loss of employment. Therefore although Title III A of the Netherlands Law on Unemployment was not expressly excluded from the scope of application of Regulation No 1408/71 in the declaration of the Netherlands (OJ 1973, C 12, p. 21) concerning 'legislation and schemes referred to in Article 4 (1) and (2) of the Regulation' it would appear that this title does not form part of the 'branch of social security concerning... unemployment benefits'.

Finally the Commission proposes the following answer to the questions referred:

'1. The term 'worker' within the meaning of Regulation No 1408/71 of the Council includes any person who, in accordance with the legislation applicable to him, must be insured on a compulsory basis against one or more risks corresponding to the branches of a system of social security applicable to employed persons — even if through the fault of his employer the formalities which should have been accomplished for his affiliation to the social security system have not been completed.
The words 'shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed' contained in Article 71 (1) (a) (ii) of Regulation No 1408/71 of the Council mean that the legislation of the country of residence must be applied to the worker concerned in its entirety, and therefore also with regard to the conditions for the award of the abovementioned benefits. The same applies to the corresponding terms contained in paragraph 1 (b) (ii) of that same article.

2. The benefits provided by Title III A of the Netherlands Law on Unemployment Insurance concerning the payment of arrears of wages which the employer owed to the

worker in respect of work carried out by him but which the employer did not pay because of his insolvency cannot be regarded as unemployment benefits within the meaning of Article 4 (1) (g) of Regulation No 1408/71 of the Council because the two types of benefits differ in their nature and objectives.

III — Oral procedure

The Commission of the European Communities presented oral argument at the hearing on 11 November 1976.

The Advocate-General delivered his opinion at the hearing on 2 December 1976.

Law

1 By order of 25 March 1976, which was received at the Court on 7 May 1976, the Centrale Raad van Beroep referred, pursuant to Article 177 of the EEC Treaty, questions concerning the interpretation of various provisions of Regulation No 1408/71 of the Council (OJ English Special Edition 1971 (II), p. 416) on the application of social security schemes to employed persons and their families moving within the Community.

2 These questions arose in the context of a case concerning the right to unemployment benefits of a wholly unemployed Netherlands worker who, while maintaining his residence in the Netherlands was, in the course of his last employment, working in the Federal Republic of Germany for a Netherlands undertaking established in the Netherlands.

3 As this undertaking had become insolvent the worker made himself available for work to the unemployment services of his State of residence and sought from the competent social security institution of that State payment of the unemployment benefits prescribed by the Netherlands Law on Unemployment (Werkloosheidswet) and the payment of the arrears owed by his employer by virtue of Title III A of that Law.

4 In the present case the competent social security institution maintained that as the person concerned was not insured under the German social security legislation by virtue of his employment in the Federal Republic of Germany he could not receive the benefits prescribed by the Netherlands legislation on unemployment pursuant to Article 71 (1) of Regulation No 1408/71.

5 The first question asks the Court whether a worker who is in the position described by the national court and becomes unemployed may be regarded as a 'worker' within the meaning of Article 1 (a) of Regulation No 1408/71 in spite of the fact that the necessary steps making it possible for him to be insured under the German legislation had not been taken.

6 This question amounts to asking whether an employed person for whom the necessary steps were not taken to enable him to acquire the status of an insured person under the legislation to which he is or remains subject by viertue of Regulation No 1408/71 may be regarded as a 'worker' within the meaning of that regulation

7 Article 1 (a) of Regulation No 1408/71 defines the term 'worker' by reference to persons who are affiliated to a social security scheme applicable to employed persons or organized for the benefit of such workers.

8 By this reference the said provision does not seek to restrict the status of worker within the meaning of that regulation to persons who are in fact insured under one of the abovementioned schemes but is intended to define as a worker all persons to whom such schemes are applicable.

9 Affiliation to such schemes corresponds both in each Member State and in the Community order to a mandatory rule prescribing, for employed persons, compulsory insurance against one or more risks corresponding to the branches of a social security scheme.

10 Consequently it must be accepted that the status of worker within the meaning of Regulation No 1408/71 is acquired when the worker complies with the substantive conditions laid down objectively by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed.

11 The Court of Justice is then asked to rule whether a worker in the position described by the national court may claim unemployment benefits on the basis of Article 71 (1) (b) (ii) of Regulation No 1408/71 even if he cannot be regarded as an insured person under the German legislation.

12 Under Article 71 (1) (b) (ii) of Regulation No 1408/71 'a worker, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense'.

13 According to the ninth recital of Regulation No 1408/71, Article 71 (1) (b) (ii) serves to ensure that a worker placed in one of the situations therein set out may receive unemployment benefits in conditions most favourable to the search for new employment.

14 To this end this provision lays down that the unemployment insurance scheme applicable to such a worker shall be that established by the national legislation of the Member State to whose employment services the worker made himself available for work and on the territory of which he resides or to whose territory he returns.

15 As the work carried out in the course of the last employment must be regarded as having been carried out on the territory of that State it follows that Article 71 (1) (b) (ii) subjects the right to benefits of the person concerned to the national legislation of the same State both as regards the amount and the duration of the payments and as regards the conditions governing the acquisition of that right.

16 The reply to be given to the second question is, therefore, that a wholly unemployed worker who, in the course of his last employment, was employed in a Member State other than that of his residence by an undertaking established in the latter State and who, in respect of that activity, was subject to the legislation of the State of employment may, by virtue of Article 71 (1) (b) (ii) of Regulation No 1408/71, claim unemployment benefits under the provisions of the national legislation of the State where he resides and to whose employment services he makes himself available for work.

17 It is finally asked whether the term 'unemployment benefits' contained in Article 4 (1) (g) of Regulation No 1408/71 may be interpreted as being applicable to benefits such as those provided by Title III A of the Netherlands Law on Unemployment.

18 Title III A of that Law provides for the subrogation of the competent professional or trade institution to the obligations, in relation to the worker, arising from the contract of employment, of the employer who has become insolvent.

19 The aim of these provisions is to enable a worker who is owed wages following the insolvency of his employer to recover the amounts due to him within the limits laid down by that Law.

20 Such a subrogation does not partake of the nature of the unemployment benefits referred to in Article 4 (1) (g) of Regulation No 1408/71 which are essentially intended to guarantee to an unemployed worker the payment of sums which do not correspond to contributions made by that worker in the course of his employment.

21 The reply to be given to the third question is, therefore, that benefits such as those under Title III A of the Netherlands Law on Unemployment do not constitute 'unemployment benefits' within the meaning of Article 4 (1) (g) of Regulation No 1408/71.

Costs

22 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

23 As these proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 25 March 1976 hereby rules:

1. **It must be accepted that the status of worker within the meaning of Regulation No 1408/71 is acquired when the**

worker complies with the substantive conditions laid down by the social security scheme applicable to him even if the steps necessary for affiliation to that scheme have not been completed.

2. **A wholly unemployed worker who, in the course of his last employment, was employed in a Member State other than that of his residence by an undertaking established in the latter State and who, in respect of that activity, was subject to the legislation of the State of employment may, by virtue of Article 71 (1) (b) (ii) of Regulation No 1408/71, claim unemployment benefits under the provisions of the national legislation of the State where he resides and to whose employment services he makes himself available for work.**

3. **Benefits such as those under Title III A of the Netherlands Law on Unemployment do not constitute 'unemployment benefits' within the meaning of Article 4 (1) (g) of Regulation No 1408/71.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 15 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 2 DECEMBER 1976

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Centrale Raad van Beroep of the Netherlands.

The appellant in the proceedings before that Court is the Bestuur der Bedrijfsvereniging voor de Metaalnijverheid (Board of the Metallurgical Trade Association) which is, it appears, the institution responsible for