OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 10 JUNE 1975

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour de Cassation of France. The appellant before that Court is the Caisse primaire d'assurance maladie of Sélestat. The Respondent is the Association du Foot-Ball Club d'Andlau.

Andlau and Sélestat are both in Alsace, in the Département of the Bas-Rhin.

Early in 1970 the Respondent ran three dances, one on 14 February, one on 11 April and the third on 17 May. To provide the music at these dances, the Respondent engaged the services of a band of five players, all of them German nationals, resident in the Federal Republic of Germany. The leader of the band was one Peter Schworer.

Article L 242-1 of the French Code de la Sécurité Sociale provides for the compulsory insurance with the appropriate social security institutions of all public performers, whatever their nationality, and imposes the obligations of an employer, in regard to them, on anyone who calls upon their services, even casually. This is subject, so far as relevant in the present case, to the provisions of Article 29 (s) of Book I of the Code du Travail, which, whilst creating a presumption that the contract under which a musician is engaged is one of employment, enables that presumption to be rebutted by proof that he is a 'commerçant'.

In reliance on those provisions the appellant claimed from the Respondent employer's contributions in respect of the services of the five members of Herr Schworer's band on the three occasions in question. The contributions so claimed amounted in all to 812·50 FF.

Against that claim the respondent appealed to the Commission de Première Instance du Contentieux de la Sécurité Sociale of the Bas-Rhin, which allowed the appeal. It did so on the ground that the application of the French legislation that would otherwise have been relevant was in this case excluded by Article 13 (1) (c) of Council Regulation No 3 (as amended) and Article 11 (2) of Council Regulation No 4.

It is from that decision that the Appellant now appeals to the Cour de Cassation.

Your Lordships remember that Regulations No 3 and No 4 (which have, since 1972, been superseded by Regulations (EEC) No 1408/71 and (EEC) No 574/72) were adopted by the Council in 1958 pursuant to its obligation under Article 51 of the EEC Treaty to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers'.

As there is no authentic English text of Regulations Nos 3 and 4, I propose to make my citations from them in French.

Articles 12 to 15 of Regulation No 3, which were grouped under the heading 'Dispositions déterminant la législation applicable', contained a code of which the purpose, as has been stated in many a Judgment of this Court, was to ensure that, in general, a worker should, at any one time, be subject to the social security legislation of only one Member State, so as to avoid, in the interests not only of the worker himself and of his employer or employers but also of the social security institutions of the Member States, unnecessary duplications and complications, which might in themselves constitute obstacles to the

free movement of workers within the Community — see Case 92/63 *Nonnenmacher v Sociale Verzekeringsbank* [1964] ECR at pp. 288-289, Case 19/67 *Sociale Verzekeringsbank v Van der Vecht* (Rec. 1967 at pp. 455-457, Case 35/70 *Manpower v Caisse Primaire d'Assurance Maladie de Strasbourg* (Rec. 1970 at p. 1257), Case 73/72 *Bentzinger v Steinbruchs-Berufsgenossenschaft* [1973] ECR at p. 288 and Case 13/73 *Angenieux v Hakenberg* [1973] ECR at pp. 948-951. It is to be observed that the principle established by those cases is now expressly stated, and in even more categorical terms, by Article 13 (1) of Regulation No 1408/71, which reads:

'A worker 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.' (OJ L 149 of 5. 7. 1971, p. 2)

Articles 12 to 15 of Regulation No 3 may thus accurately be described, borrowing the terminology of Private International Law, as 'choice of law' provisions.

The general rule applicable to inland workers was stated in Article 12 (1), which read:

'Sous réserve des dispositions du présent titre, les travailleurs salariés ou assimilés occupés sur le territoire d'un État membre sont soumis à la législation de cet État, même s'ils résident sur le territoire d'un autre État membre ou si leur employeur ou le siège de l'entreprise qui les occupe se trouve sur le territoire d'un autre État membre.' (JO No 30 of 16. 12. 1958)

Article 12 (2) contained a similar general rule applicable to seamen, subjecting them to the legislation of the country of the flag of their ship, if it was the flag of a Member State.

Article 13 stated a number of exceptions to the general rules contained in Article 12.

Thus Article 13 (1) (a) dealt with the case of a worker whose employer was established on the territory of one Member State and who was sent by that employer to work for him, temporarily, on the territory of another Member State. Such a worker was to remain subject to the legislation of the former Member State. Article 13 (1) (b) dealt, elaborately, with workers employed by transport undertakings. Article 13 (1) (c) had two paragraphs. The first, which is the one on which the decision of the Commission de Première Instance in this case rested, was as follows:

'Les travailleurs salariés ou assimilés, autres que ceux visés à l'alinéa (b), qui exercent normalement leur activité sur le territoire de plusieurs États membres, sont soumis à la législation de celui de ces États sur le territoire duquel ils ont leur résidence.' (JO No 30 of 16. 12. 1958)

The second paragraph of Article 13 (1) (c) dealt with the case of a worker normally employed on the territory of several Member States but not on the territory of the Member State of his residence. Article 13 (1) (d) dealt with workers employed by undertakings straddling the frontier between two Member States.

Article 13 (2) contained a set of exceptions applicable to seamen in special situations.

I need not trouble Your Lordships with the provisions of Articles 14, 14 bis and 15, which have no direct bearing on the present case, except that they too were manifestly designed to give effect to the principle that, in general, no worker should, for social security purposes, be subject at the same time to the legislation of more than one Member State.

Nor need I dwell for long upon Article 11 (2) of Regulation No 4. This provided:

'Lorsque la législation allemande est applicable, en vertu de l'article 13 alinéa (b) ou (c) du réglement, à un travailleur dont l'employeur ne se trouve pas sur le territoire de la République fédérale d'Allemagne, la dite législation doit être appliquée comme si ce travailleur était occupé au lieu de sa résidence.'

It is, I think, now common ground that this provision was of limited application. It did no more than to enable it to be determined which German social security institution should be competent in the case of a worker who was found, pursuant to Article 13 (1) (b) or (c), to be subject to German legislation although that legislation would not have been applicable to him apart from those provisions.

The Cour de Cassation asks this Court what is the true interpretation of Articles 13 (1) (c) and 11 (2) and in particular –

'1. whether German social security legislation is applicable to a German musician, resident in Germany, whether or not insured in the Federal Republic of Germany with a social security institution, either as an employee or as an independent worker, who occasionally appears as a public performer in France, where such performances would normally entail his being subject to the French social security system for "travailleurs salariés et assimilés";

2. if so, whether the application of the Community Regulations has the effect of exempting a French employer from the contributions which would normally be due from him to the French social security institutions in respect of the employment in France of public performers and of making it more advantageous for him to employ German musicians than French musicians;

3. whether, in the case of an accident at work, or on the way to or from work, in France, the French social security institutions would not have to pay benefit to German musicians'.

My Lords, the answers to those questions would, to my mind, present little difficulty in the case of a German musician, resident in Germany, who was treated as a 'travailleur salarié ou assimilé' (within the meaning of that phrase in Regulation No 3) not only in France but also in Germany, and who was accordingly insured as such in Germany. For then Article 13 (1) (c) of the Regulation would clearly apply to him and the 'choice of law' rule contained in that provision would point to the German legislation as being applicable in this case.

It was submitted on behalf of the Appellant, both in the Cour de Cassation and in this Court, that Article 13 (1) (c) was concerned only with the payment of benefits and could not absolve a French employer from the payment of contributions for which he was liable under French law. That, in my opinion, is manifestly wrong. As is pointed out by the Commission in its very helpful Observations, 'la législation' of a Member State to which reference was made in each provision of Articles 12 and 13 was defined by Article 1 (b) of Regulation No 3 in terms showing that the expression connoted the whole body of the law of that Member State relating to the types of social security to which the Regulation applied. Moreover, a study of the Regulation as a whole evinces that, in the mind of its authors, except in the case of non-contributory systems, the payment of contributions and the receipt of benefits went hand in hand. It follows in my opinion that where a provision of Article 13 made the legislation of a particular Member State applicable to a particular worker, that legislation applied to him as much for the purpose of contributions as for the purpose of benefits.

The Commission in its Observations mentioned a difficulty arising from the fact that Article 13 (1) (c) used the word 'normalement' whereas the question asked by the Cour de Cassation relates to the case of a worker whose activities on the territory of a Member State other than that of his residence were only occasional. Occasional work on the territory of another Member State was really, the Commission suggested, the province of Article 13 (1) (a). But, my Lords, I do not think that it can have been exclusively the province of that provision. There is an important difference between Article 13 (1) (a) and Article 13 (1) (c) in that the former was concerned only with the case of a worker who had a single employer whereas the latter applied regardless of the number of employers the propositus had — see the *Bentziger* and *Hakenberg* cases, both of which I have already cited. To hold that Article 13 (1) (c) applied to an individual who 'normally' worked for employers in different Member States but could not apply to one who 'occasionally' did so would be, not only to thwart the essential purpose of the code contained in Articles 12 to 15, but to do so in quite an absurd manner. It would mean that the occasional migrant, because his migrancy was only occasional, could be subjected at one and the same time to the social security legislation of different Member States, whereas the normal migrant could not. I would have no hesitation in holding it to be implicit in Article 13 (1) (c) that what was true of the normal migrant was *a fortiori* true of the occasional one. Where, I think, the distinction between a normal activity and an occassional one might have become relevant would have been in a case where the propositus normally worked in a Member State other than that of his residence but occasionally did so in the country of his residence. It might there have been held that his occasional activity in the country of his residence was insufficient to displace the general rule in Article 12 (1) so as to make him insurable in that country. But that is not this case.

Still on the footing that the musician in question was a 'travailleur salarié ou assimilé' both in France and in Germany and accordingly insured as such in Germany. I turn to deal with the second and third questions asked by the Cour de Cassation.

The second question has two limbs.

The first is whether the application of the Community Regulations may have had the effect of exempting a French employer from the payment of contributions that would otherwise have been due from him to French social security institutions in respect of the employment in France of public performers. The answer to that limb of the question is obviously 'Yes', and it calls for no further elaboration.

The second limb of the question is whether in consequence, the application of those Regulations made it more advantageous for the French employer to engage German musicians than French ones. My Lords, I do not think that this Court can supply a complete answer to that question. It depends on the one hand upon the provisions of German law as to the liability of the French employer in the particular circumstances of the case and, on the other hand, upon the efficiency of the administrative and legal machinery available for the enforcement of any such liability. What cannot be doubted is that the authors of Regulations No 3 envisaged that, where appropriate, the social security institutions of one Member State should be able to recover contributions from employers in other Member States. Article 51 of the Regulation provides:

'Le recouvrement des cotisations dues à une institution de l'un des États membres peut se faire sur le territoire d'un autre État membre, suivant la procédure administrative et avec garanties et privilèges applicables au recouvrement des cotisations dues à une institution correspondante de ce dernier

État. L'application de cette disposition fera l'objet d'accords bilatéraux qui pourront également concerner la procédure judiciaire du recouvrement.'

So far as I have been able to discover, no such bilateral agreement was concluded between France and Germany. It does not however follow that Article 51 was a dead letter.

The third question asked by the Cour de Cassation also has two limbs. The question is whether the French social security institutions would have had to pay benefit to a German musician (a) in the case of an accident at work in France or (b) in the case of an accident on the way to or from work in France. On the hypothesis I have postulated the answer to neither limb presents any difficulty.

The answer to limb (a) is, as is pointed out by the Commission, to be found in Article 29 of Regulation No 3, and in particular in paragraphs (1) and (7) of that Article. The effect of these provisions, shortly stated, would have been that the German musician concerned was entitled to benefits in kind from the French institutions, the cost of which would have been recoverable by those institutions from the competent German institution, and that he would have been entitled to benefits in cash from the competent German institution. So no part of the burden would, ultimately, have fallen on the French institutions.

The answer to limb (b) – and again this is pointed out by the Commission – lies in the decision of this Court in the *Van der Vecht* case, which I have already cited. The Court there applied the general principle stated by Mr Advocate-General Gand (Rec. 1967 at p. 463) that the place where an accident on the way to or from work occurred could not affect the social security legislation applicable to a victim of it. Once the legislation applicable to a particular worker had been determined pursuant to Articles 12 and 13 of the Regulation, that legislation, and it alone, was and remained applicable to him, regardless of the place where he might suffer an accident. To hold otherwise 'serait la négation du système unitaire voulu par le règlement no 3'. Thus again no burden would fall, in the case put, on the French institutions.

This is, however, by no means the end of the case, because it is not established that in fact Herr Schworer and his players were insured as 'travailleurs salariés ou assimilés' in Germany. The only relevant finding of fact made by the Commission de Première Instance seems to have been that Herr Schworer himself was insured with the Kaufmännische Krankenkasse Halle of Freiburg in Brisgau, which, from its name, appears to be an institution for self-employed persons. It is said on behalf of the Respondent that, according to a certificate signed by all the members of the band at Andlau on 20 February 1971, they were all insured in Germany. But there seems to be no finding of the Commission de Première Instance to that effect, nor is there any indication of the capacity in which it is alleged that they were insured. Nor does the Commission de Première Instance appear to have dealt expressly with allegations put forward on behalf of the Appellant that the fees earned by the band were shared equally by its members and that Herr Schworer was not a 'commerçant'. Indeed the general scantiness of that Tribunal's findings is a matter of complaint by the Appellant and of comment by the Commission.

It also explains, I think, why the first question asked by the Cour de Cassation contains a double alternative. The effect of that double alternative may be expressed as follows: Would the answers that I have suggested to be applicable where the musician in question was insured in Germany as a 'travailleur salarié ou assimilé' be different if (a) he was insured there as an independent worker or (b) not insured there at all?

The appellant and the respondent are at one in submitting that the answer would be the same in whatever capacity he was insured in Germany, so long as he was insured there. The Commission on the other hand submits that since Regulation No 3 applies only to 'travailleurs salariés et assimilés', Article 13 (1) (c) can apply only where it is in that capacity that the *propositus* works in several Member States. I think that this is too narrow a view.

Your Lordships will have it in mind that the word 'assimilés' in the phrase in question has been the subject of interpretation by this Court in a number of cases. It connotes that the propositus is treated to a significant extent by the social security lesiglation of a Member State as if he were an employee. Thus in Case 75/63 *Hockstra v Bedrijfsvereniging Detailhandel* [1964] ECR 183 one who was permitted by the relevant Dutch legislation to continue to contribute voluntarily, after she had ceased to be employed, to the institution with which she had been insured when employed, was held to come within the concept. So also in Case 19/68 *De Cicco v Landesversicherungsanstalt Schwaben* (Rec. 1968, pp. 699-700) one who, as a self-employed craftsman, had, pursuant to Italian law, insured with an institution primarily designed for employed persons, was held to be entitled to aggregate, for the purpose of obtaining a pension under Regulation No 3, the resulting periods of insurance with those for which he had been insured as a wage-earner in Germany. So again in Case 23/71 *Janssen v Mutualités Chrétiennes* (Rec. 1971, pp. 863-865) one who, whilst not employed by his father, had helped him on the family farm, was held to be within the concept because the relevant Belgian legislation assimilated such 'aidants' to employed persons. And so lastly in the *Hakenberg* case it was common ground that a commercial traveller, who represented a number of French industrial firms but was the employee of none of them, must be regarded as 'assimilé' in view of the provisions of the French Code de la Sécurité Sociale that were applicable to him — [1973] ECR at p. 946.

There was therefore no rigidity about the concept of 'travailleurs salariés et assimilés'. Although it was a concept of Community law, its precise scope depended in each case on the provisions of the national legislation in point. That being so, it seems to me that it would be wrong to limit the application of Article 13 (1) (c) to a case where the propositus was treated as a 'travailleur salarié ou assimilé' by the legislation of each and every Member State where he worked. Again one must, I think, heed the underlying purpose of Articles 12 and 13, which was to avoid the kind of duplication and complication referred to in the authorities. Such undesirable duplication and complication could arise just as much in a case where the propositus was insured as a 'travailleur salarié ou assimilé' in one Member State and in some other capacity in another, as in a case where he was a 'travailleur salarié ou assimilé' in both.

It may be asked whether, if the view I take is right, the objection suggested by the Cour de Cassation does not become pertinent: would not a French promoter of entertainment then find it more advantageous to engage self-employed German musicians than French musicians? The answer is, I think, again, that it must depend on the relevant German law, for the self-employed must, in general, in fixing their fees, take into account, among other factors, the social security contributions to which they are liable. Indeed the same would be true in the case of a French musician who was a 'commerçant.'

I turn lastly to the question what would have been the position if the musician postulated by the Cour de Cassation had not been insured at all in Germany. My Lords, it seems to me that, in that case,

Article 13 (1) (c) could have no application, for, to my mind, that provision assumed, not only that the propositus worked in more than one Member State but also that he did so in a way that prima facie rendered him insurable in more than one Member State. Otherwise no problem of 'choice of law' could arise. As I read the Observations that have been submitted to the Court, and as I understood the oral submissions made at the hearing, no-one suggests that any other answer should be given to this question.

I am therefore of the opinion that the questions referred to the Court by the Cour de Cassation should be answered as follows:

1. Article 13 (1) (c) of Council Regulation No 3 should be interpreted as having meant that the social security legislation of the Federal Republic of Germany was applicable, to the exclusion of the French legislation, to a German musician, resident in the Federal Republic, who was insured there with a social security institution, whether as an employee or as an independent worker, even though he occasionally performed in France;

2. The application of that Article in such circumstances accordingly had the effect of exempting a French employer from the contributions which would otherwise have been due from him to the French social security institutions in respect of the employment of the musician in question, but did not necessarily have the effect of making it more advantageous for that employer to engage German musicians than French musicians;

3. In the circumstances postulated at (1) above, no burden would ultimately have fallen on the French social security institutions as a result of an accident suffered by the musician in question in France, either at work, or on the way to or from work;

4. Article 13 (1) (c) had no application to the case of a musician whose circumstances were as postulated at (1) above except he was not insured with any social security institution in the Federal Republic;

5. Article 11 (2) of Council Regulation No 4 should be interpreted as having been relevant only for the selection of the competent German social security institution once it had been established, pursuant to Article 13 (1) (b) or (c) of Regulation No 3, that the German legislation was applicable to a particular worker.