legislation describes the benefit as a social security benefit.

The benefits provided by the employer to the worker by way of maintenance of wages in the event of illness, payment of which for a period of up to six weeks suspends payment of the daily sickness benefits provided for by national social security legislation, constitute sickness benefits within the meaning of Article 4(1) of Regulation No 1408/71. The fact that the financial burden of those benefits rests on the employer cannot remove those benefits from the scope of that regulation since classification of an allowance as a social security benefit covered by the regulation does not depend upon the manner in which it is financed.

2. Article 18(1) to (4) of Regulation No 574/72 should be interpreted as meaning that the competent institution, even where this is the employer and not a social security institution, is bound in fact and in law by the medical findings made by the institution of the place of residence or temporary residence concerning the commencement and duration of the incapacity for work, when it does not have the person concerned examined by a doctor of its choice, as it may do under Article 18(5).

Practical difficulties complained of by an employer who was not able to make good use of the possibility offered by Article 18(5) of Regulation No 574/72 cannot call in question the interpretation of one of the provisions of that regulation, as it follows from its wording and purpose.

REPORT FOR THE HEARING
in Case C-45/90 *

I — Facts and procedure

1. *Legal background*

Under Article 18(1) and (5) of Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159),

'1. In order to receive cash benefits under Article 19(1)(b) of the Regulation an

* Language of the case: German.

employed or self-employed person shall, within 3 days of commencement of their incapacity for work, apply to the institution of the place of residence by submitting a notification of having ceased work or, if the legislation administered by the competent institution or by the institution of the place of residence so provides, a certificate of incapacity for work issued by the doctor providing treatment for the person concerned.

...

5. In all cases the competent institution shall reserve the right to have the person concerned examined by a doctor of its own choice.'

It appears from the order of the national court that under Paragraph 1 of the Lohnfortzahlungsgesetz (German law on continued payment of wages, hereinafter referred to as 'the LFZG') of 27 July 1969 (BGBl I, p. 946), after commencement of his employment a worker is entitled to continued payment of his wages for a period of up to 6 weeks when prevented from working by incapacity for work resulting from illness.

Under Paragraph 3(1) of the LFZG, the worker is required not only to notify his employer without delay of his incapacity for work and its probable duration but also, within three days of commencement of the incapacity, to provide him with a medical certificate concerning the incapacity and its probable duration.

Where, on the commencement of the incapacity for work, the worker is staying outside the territory to which the law applies, he must without delay notify the sickness fund with which he is insured of his incapacity for work and its probable duration (Paragraph 3(2)).

The Bundesarbeitsgericht (Federal Labour Court) has consistently held that proof of incapacity for work for the purposes of Paragraph 3(1) is to be provided by the production of a certificate issued by a doctor. The Bundesarbeitsgericht makes no distinction in that respect between a certificate issued abroad by a foreign doctor and one issued by a German doctor. However, the former must show that the foreign doctor has distinguished between simple illness and an illness resulting in an incapacity for work and has thus carried out an assessment in accordance with the concepts contained in German labour and social security law.

However, again according to the Bundesarbeitsgericht, the evidentiary value of such a certificate may be diminished when the employer gives evidence in the proceedings of circumstances which give rise to serious doubts as to the incapacity for work. An example of such circumstances is the fact that the person concerned has repeatedly obtained certificates of incapacity for work at the end of prolonged foreign holidays.

2. *The dispute in the main proceedings*

Vittorio Paletta, his wife Raffaela and their children Carmela and Alberto, who are all

Italian nationals, are employed as workers by Brennet AG in the Federal Republic of Germany.

They spent the period from 17 July to 12 August 1989 in Italy on leave accorded by Brennet.

During their stay in Italy all of them reported sick, as indeed they had done, according to Brennet, in previous years. Each of them reported sick for a different period: 7 August to 22 September in the case of Vittorio Paletta, 27 July to 20 November in the case of his wife Raffaela, 31 July to 22 September in the case of their son Alberto and from 2 August onwards in the case of their daughter Carmela.

In accordance with the requirements of the Lohnfortzahlungsgesetz, they notified their incapacity for work immediately to the company sickness fund and their employer, and sent to the sickness fund certificates of incapacity for work *(attestati di malattia)* issued by the Unità Sanitaria Locale, Regione Calabria (Local Health Unit, Region of Calabria). They also relied on statements of their Italian doctors and of the health unit's medical examiner.

Brennet, however, refused to continue payment of their wages for the first six weeks after the onset of illness, as required by Paragraph 1 of the Lohnfortzahlungsgesetz. In its view, there are serious doubts as to the incapacity for work of the workers in question, inasmuch as they fell sick simultaneously during their holidays, which had happened previously on several occasions. In such circumstances, it says, the employer is not bound by such certificates issued abroad.

The applicants brought proceedings before the Arbeitsgericht Lörrach for the continued payment of their wages for a period of six weeks following the onset of their incapacity for work.

Having regard to the case-law of the Bundesarbeitsgericht, the national court considers that in the circumstances of this case the burden of proof of incapacity for work may be reversed so that it is for the applicant to prove his incapacity for work.

However, these national rules on the burden of proof cannot be relied on if the obligation to continue to pay wages in accordance with the Lohnfortzahlungsgesetz is a benefit which falls within the social security scheme governed by Regulation No 1408/71. In that case the applicable rules are those of the combined provisions of Articles 18 and 24 of the implementing regulation, Regulation No 574/72. As the Court of Justice has already held, exclusive evidentiary effect must be given to the declaration of the doctor consulted in the country where the worker is staying, and an employer who has doubts as to the value of the medical certificate can at most send a doctor of his choice to the country where the worker is staying in order to examine him there (judgment in Case 22/86 *Rindone* v *Allgemeine Ortskrankenkasse Bad Urach-Münsingen* [1987] ECR 1339).

The fact that in this case the benefits were paid by the employer itself and not by the competent social security institution does not, in the view of the Arbeitsgericht Lörrach, constitute an obstacle to the application of Article 18.

The national court adds that account must also be taken of the prohibition of discrimination contained in Article 48(2) of the EEC Treaty in assessing the situation of a Community national who falls ill in a Member State other than that in which he works.

Having regard to the foregoing considerations, the Arbeitsgericht Lörrach decided, by order of 31 January 1990, to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Can the principles contained in the judgment of the Third Chamber of the Court of Justice of 12 March 1987 in Case 22/86 *Rindone* regarding the interpretation of Article 18(1) and (5) of Council Regulation (EEC) No 574/72 be applied in whole or in part to cases in which payment of cash benefits in the event of illness is made by the employer and not by the social security institution, as for example under Paragraph 1 et seq. of the German Lohnfortzahlungsgesetz of 27 July 1969 (BGBl I, p. 946, as amended most recently by the Law of 20 December 1988, BGBl I, p. 2477)?

In particular:

2. Is the body responsible for continued payment of remuneration in the event of illness under the law of the Federal Republic of Germany in accordance with Paragraph 1 et seq. of the Lohnfortzahlungsgesetz required to base its decision, in fact and in law, concerning the claim for cash benefits on the findings made by the social security institution of the employee's place of residence concerning the commencement and duration of the incapacity for work?

3. If the answer to Question 1 is in the affirmative, is the answer the same if the employer, who under Paragraph 1 of the LFZG bears responsibility for continued payment of wages, has no way of checking, in fact or in law, the findings concerning the commencement of the incapacity for work other than to call upon the competent sickness insurance fund, which in this case is not primarily liable to pay the benefit, to have the employee examined by a doctor of its own choice (or its medical officer) pursuant to Article 18(5) of Regulation (EEC) No 574/72?'

3. *Procedure before the Court of Justice*

The order of the national court was lodged at the Court Registry on 21 February 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by the German Government, represented by Ernst Röder and Joachim Karl, acting as Agents, by the Netherlands Government, represented by B. R. Bot, Secretary General at the Ministry of Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by Karen Banks and Bernd Langeheine, of its Legal Service, 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 any preparatory inquiries.

By decision of 27 February 1991 in accordance with Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Fifth Chamber.

Following the hearing on 30 April 1991 and the Opinion of the Advocate General delivered on 4 June 1991, the Fifth Chamber considered it necessary to apply Article 95(4) of the Rules of Procedure.

By decision of 9 July 1991 the Court (Fifth Chamber) referred to the case to the Full Court.

By order of 24 September 1991, after hearing the views of the Advocate General, the Court decided to re-open the oral procedure.

II — Written observations submitted to the Court

The first and second questions

1. The *German Government* argues first that an affirmative answer should be given to the first question only if the employer's obligation to continue payment of wages constitutes a 'cash benefit' within the meaning of Article 18 of Regulation No 574/72.

Article 18 applies only to the receipt of 'cash benefits under Article 19(1)(b) of the regulation [Regulation No 1408/71]', which appears in the chapter on 'sickness and maternity benefits'. These benefits fall within the scope of application of Regulation No 1408/71 in accordance with Article 4(1)(a) of that regulation; under Article 4(2) the regulation applies to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer of shipowner in respect of the benefits referred to in paragraph (1).

However, there are a number of differences between daily sickness benefits and the obligation of an employer to continue payment of wages in the event of illness.

First of all, the obligation of the employer to continue to pay wages under the conditions laid down in the Lohnfortzahlungsgesetz

consists in the continued payment of the contractual remuneration, whereas the amount of daily benefits paid under the Sozialgesetzbuch (Social Security Code) may be lower than the worker's wages.

Furthermore, whereas daily sickness benefits are financed by contributions paid by workers and employers, the continued payment of wages is borne by the employer alone. The payment of benefits is also subject to different conditions. For example, sickness benefits may be paid only for a limited period in respect of the same illness, whereas the right to the continued payment of wages may be revived several times in respect of the same illness.

Finally, sickness benefits paid by the competent sickness insurance institutions do not give rise to the payment of contributions to the sickness insurance system, unlike the payment made by the employer under its obligation to continue payment of wages in the event of illness.

As regards the answer to be given to the second question, the German Government states that in the judgment of the Court in Case 22/86 (*Rindone*, cited above), where it held that 'if the competent institution does not exercise the option provided for in paragraph (5) [Article 18(5) of Regulation No 574/72] of having the person concerned examined by a doctor of its choice, it is bound, in fact and in law, by the findings made by the institution at the place of residence as regards the commencement and duration of incapacity for work', the competent institution was a sickness fund and not the employer.

That solution cannot therefore be transposed to the case of the continued payment of wages by the employer, since the obligation to maintain payment of wages in the case of illness is not comparable to the obligation of a sickness fund to pay a benefit.

2. According to the *Netherlands Government*, too, it is necessary first to determine whether the right to continued payment of wages in the event of illness, as in this case, must be regarded as a social security benefit within the meaning of Article 4 of Regulation No 1408/71.

In its view that provision does not cover advantages governed by labour law which are part of the employment relationship.

The Netherlands Government argues that although Article 4(2) refers to the employer's obligations, it does not include in the scope of application of the regulation the advantages to which the person concerned is entitled under labour law in his capacity as a worker. That view is supported by the fact that in a situation such as this the financial burden lies entirely on the employer and it is not entitled to any refund whatsoever from any institution responsible for implementing the law.

Furthermore, the definition of the concept of 'benefit' in Article 1(t) of the regulation provides no support for the inclusion of the continued payment of wages in the event of illness. Nor do the provisions of the first chapter of Title III of the regulation, on sickness and maternity benefits, permit the inclusion of the continued payment of wages under labour law.

That conclusion is not affected by the fact that in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1) of the regulation, Article 1(o)(iv) designates either the employer or the insurer involved as the 'competent institution', since in that context only benefits in respect of which there is ultimately payment by some institution are included.

If the system established by Article 18 of Regulation No 574/72 allowed the employer only to send a doctor of its choice to examine the worker in the State where the latter is on holiday, that system could not be applied to advantages whose cost is borne definitively by the employer, because of the practical problems and expenses which such investigation abroad would entail. If it were, in practical terms the employer would always be obliged to continue to pay wages for the first six weeks after the commencement of the incapacity even it had serious doubts regarding the accuracy of the medical certificates supplied.

Consequently, the Netherlands Government submits that Article 4(2) of Regulation No 1408/71 applies only to employer's obligations in respect of specific benefits under a social security scheme which are paid through the employer, the costs associated with those obligations being repaid to the employer by a social security fund or institution. Regulation No 1408/71 is not applicable to other obligations of the employer, such as that in issue in this case, and it is not therefore necessary to examine the possible application of Article 18 of the implementing regulation, Regulation No 574/72.

The Netherlands Government therefore proposes the following answers to the first two questions:

'1. The obligation of an employer to continue payment of wages in the event of illness under Paragraph 1 of the German Lohnfortzahlungsgesetz is not a social security benefit within the meaning of Article 4(1) of Regulation (EEC) No 1408/71.

2. Consequently, in a situation such as this Article 18 of Regulation (EEC) No 574/72 and the principles set out in the judgment of the Court of 12 March 1987 in Case 22/86 are not applicable to the obligation of an employer to continue payment of wages in the event of the illness of a worker.

3. The *Commission* submits that the principles set out in the abovementioned judgment of the Court in *Rindone* can be applied in interpreting Article 18 of Regulation No 574/72 only if the benefits at issue in the main proceedings fall within the scope of application of Regulation No 1408/71.'

In German law the benefits provided for by the Lohnfortzahlungsgesetz are not regarded as social security benefits, first because they are not defined as such in the law itself, secondly because Paragraph 44 of Book 5 of the Sozialgesetzbuch (Social Security Code SGB V of 20 December 1988, BGBl. I p. 2482) provides expressly that the right to continued payment of wages in question is governed by the provisions of labour law and finally because disputes concerning that right must be brought not before social courts but before labour courts. Furthermore, it is apparent from the first sentence of Paragraph 1 of the Lohnfortzahlungsgesetz that the obligation which it imposes on the employer consists in the payment to the worker, for a restricted period, of the sum agreed in the contract of employment, and that contract thus constitutes the legal basis for such payments.

In that regard it is interesting to draw the comparison with the rules for the continued payment of salary to clerical staff under Paragraph 616 of the Bürgerliches Gesetzbuch (Civil Code), which applied well before the entry into force of the Lohnfortzahlungsgsetz in 1969. It may be inferred from that provision that the continued payment of salary does not constitute an independent financial benefit of a different nature. The fact that the legislature preferred to provide for the case of workers by new legislation and not by an amendment to the Bürgerliches Gesetzbuch in no way affects the legal nature of the continued payment of remuneration as a benefit arising out of a contract of employment.

Paragraph 2 of the Lohnfortzahlungsgesetz also emphasizes the classification of the right to continued payment of wages as an aspect of remuneration. Under that provision, the worker receives his entire remuneration with the exception of sums intended to compensate for expenses actually incurred.

The Commission adds that it is clear from the case-law of the Bundesarbeitsgericht that the right to continued payment of wages 'is nothing other than the continued right to wages, and it has the same legal nature and is dealt with by the law in the same way in every respect' (judgment of the Bundesarbeitsgericht of 26 October 1971, Neue Juristische Wochenschrift 1972, pages 702 and 703). Accordingly, remuneration paid under the Lohnfortzahlungsgesetz is subject to tax and to the rules governing social security contributions.

It can thus be concluded that the compensation paid under the Lohnfortzahlungsgesetz in the event of illness constitutes wages. In the Commission's view that is also consistent with the judgment of the Court in Case 171/88 (*Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743), where the Court held expressly that the continued payment of wages in the event of illness under the Lohnfortzahlungsgesetz falls within the concept of 'pay' within the meaning of Article 119 of the Treaty (at paragraphs 7 and 10).

However, the Commission considers that the form of the scheme chosen by the legislature is not decisive in determining whether or not a benefit falls within the scope of application of Regulation No 1408/71; what are important are instead the characteristics of the benefit and more particularly its purpose and the conditions governing its payment (judgments in Case 1/72 *Frilli* v *Belgium* [1972] ECR 457 and Case 9/78 *Directeur Regional de la Securité Sociale de Nancy* v *Gillard* [1978] ECR 1661).

Having regard to the objectives of the legislation in question, benefits payable under the Lohnfortzahlungsgesetz fulfill in practice the function of daily sickness benefits.

— That is so in the first place, in the Commission's view, because of the German legislation on long-term illness, which establishes a general scheme of financial protection in the event of illness. It provides that for the first six weeks of incapacity for work, during which benefits are paid under the Lohnfortzahlungsgesetz, the right to daily sickness benefits is suspended (SGB V, Paragraph 49(1)) and that for the following 72 weeks daily sickness benefits amounting to 80% of the person's wages may be paid (SGB V, Paragraph 47);

— Secondly, there is also a link in the financing of the two benefits. Although the scheme introduced by the Lohnfortzahlungsgesetz results in a significant increase in salary costs for employers, their expenses in respect of statutory sickness insurance are reduced, since their contributions are fixed in such a manner as to cover costs, so that a reduction of costs in the area of daily sickness benefits is reflected in the amount of the contributions. Furthermore, the financial burden of the sickness funds has now been significantly reduced by the fact that statutory sickness insurance contributions are also levied on the wages which continue to be paid.

— Finally, the Lohnfortzahlungsgesetz contains provisions which make it similar to social security systems: under Article 10 of the Lohnfortzahlungsgesetz, an employer who does not normally employ more than 20 persons is entitled to a refund from the sickness insurance fund of 80% of the wages which continue to be paid, that is to say the amount of the daily sickness benefit which must normally be paid by the sickness insurance institution; under Paragraph 14, the funds necessary for that are raised by means of a contribution payable by employers covered by Paragraph 10; pursuant to Paragraph 19, undertakings which employ more than 20 workers may establish a voluntary compensation procedure within a particular branch of the economy, by establishing institutions to carry out that function. For employers who avail themselves of that possibility the continued payment of wages takes on the nature of an insurance system financed exclusively by them. Finally, under Paragraph 17 of the Lohnfortzahlungsgesetz,

the provisions applicable to the statutory sickness insurance scheme apply by analogy where the Lohnfortzahlungsgesetz does not provide otherwise.

The Commission thus considers that the benefits provided by the Lohnfortzahlungsgesetz have a dual character. From a formal point of view, they form part of the remuneration for work. On the other hand, in practice they perform the function of protection against the financial consequences of illness. Without the scheme established by the Lohnfortzahlungsgesetz, the employer would not be obliged to continue payment of wages and the worker would be obliged right away to have recourse to the statutory sickness insurance scheme. The obligation to maintain payment of wages is thus closely related to one of the risks expressly mentioned in Article 4 of Regulation No 1408/71, that is to say sickness, which justifies its inclusion in the scope of application of the regulation (see the judgments in Case 294/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn* [1985] ECR 973 and Case 122/84 *Scrivner* v *Centre Public d'Aide Social de Chastre* [1985] ECR 1027).

Furthermore, although the Court considered in the *Rinner-Kühn* case that continued payment of wages must be regarded as remuneration within the meaning of Article 119 of the EEC Treaty, that does not mean that that obligation cannot at the same time, because of its dual character, be regarded as a benefit which the employer is obliged to provide in order to protect the worker in the event of sickness.

Moreover, Article 4(2) of Regulation No 1408/71, which refers to 'schemes concerning the liability of an employer ... in respect of the benefits referred to in paragraph 1' (in this case, sickness benefits), shows that the question whether the worker may rely on the regulation must not depend on the legal structure of social security schemes.

The Commission further considers that Article 1(e) of Regulation No 1408/71, which is based on a very broad conception of benefits, does not preclude benefits paid under the Lohnfortzahlungsgesetz from falling within the scope of application of the regulation.

It adds that Article 1(o)(iv) of Regulation No 1408/71 expressly provides that the employer may be regarded as a 'competent institution' for the purposes of the regulation 'in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1).' This is thus a case of the kind referred to in the first sentence of Article 22(1)(a)(ii) of Regulation No 1408/71 (stay in the territory of a Member State other than the competent State), to which, by virtue of the first sentence of Article 24 of Regulation No 574/72, the provisions of Article 18 of the latter regulation are applicable by analogy.

It follows that the principles laid down in the *Rindone* judgment to the effect that if the competent institution does not exercise its right to have the person concerned examined by a doctor of its choice, it is bound, in fact and in law, by the findings made by the institution at the place of residence as regards the commencement and duration of incapacity

or work are equally applicable to rights under the Lohnfortzahlungsgesetz to the continued payment of wages by the employer in the event of incapacity for work.

The Commission therefore proposes the following replies to the first two questions:

'Article 18(1) to (4) of Regulation No 574/72 must be interpreted as meaning that if the competent institution does not exercise the option provided for in Paragraph (5) of having the person concerned examined by a doctor of its own choice, it is bound, in fact and in law, by the findings made by the institution at the place of residence as regards the commencement and duration of incapacity for work, even where the employer is the competent institution for sickness benefits.'

The third question

1. According to the *German Government*, the answer to this question should be in the negative.

According to the *Rindone* judgment, the obligation to recognize the incapacity for work applies only in so far as the competent institution decides not to have the incapacity checked by a doctor of its choice. For such a decision to be made, the employer must first have been informed in good time of the commencement of the incapacity for work and have had the possibility of having the worker examined by a doctor of its choice. In a case such as the present the procedure laid down for that purpose in Article 18 of Regulation No 574/72 is not sufficient, for three reasons:

— First of all, according to the second sentence of Article 18(3) the report of the examining doctor is to be forwarded to the competent institution within three days following the date of the examination. That means that the employer will learn of the alleged incapacity only with a certain delay, and may, because of the intervening recovery of the person concerned, no longer have the possibility of exercising its right under Article 18(5) of Regulation No 574/72.

— Secondly, the question referred by the national court is based on the assumption that the employer had no possibility in fact or in law of having the incapacity for work checked, which is incorrect, because it has the right of examination under Article 18(5). However, that right is frequently of no practical value in so far as the employer, unlike sickness funds, does not know which social security institution in the State from which the worker comes it should contact. Furthermore, the employer has no legal means of requiring the social security institution to take any action.

Accordingly, the evidentiary effect of certificates of incapacity for work must be subject to strict conditions. That would achieve the balance sought by Article 18 between the binding effect of the certificate and the employer's right of examination.

— Finally, where, as in this case, there are doubts as to the correctness of the certificate of incapacity, it must be possible to challenge the evidentiary value of the certificate whether it was issued in the Federal Republic of Germany or in another Member State, regardless of whether the person concerned is a German national or a national of another Member State. In this way the equal treatment guaranteed by Article 48(2) of the EEC Treaty would be ensured.

2. The *Netherlands Government* considers that if in a case such as the present national rules and case-law are applicable, their application must not harm the worker's health. The inability of the worker to undertake the return journey to the State of employment in order to submit to a medical examination may where appropriate be established by a certificate issued by a doctor in the place where the worker is staying. In that manner the interests of both the worker and the employer would be protected; the latter has the possibility of requiring an examination by doctors who are familiar with the statutory provisions of the State of employment.

The Netherlands Government therefore proposes the following answer:

'In a case such as the present, an employer which is under an obligation to continue to pay wages in the event of a worker's illness is not bound in fact or in law by the declaration of a foreign doctor where the national rules of evidence in disputes concerning continued payment of wages contain specific contrary provisions.'

3. According to the *Commission*, the provisions of Article 18 of Regulation No 574/72 are clearly not appropriate in a case where the employer is the competent institution. Even though the employer, in its capacity as competent institution, must be accorded the same rights arising from the scheme established by Regulations No 1408/71 and No 574/72 as are normally enjoyed by the competent institution for sickness benefits, that is to say the competent sickness fund, difficulties resulting from the differences between the employer and the sickness fund may nevertheless require adjustments to the system.

These difficulties are of two kinds. First all, the employer does not have the benefit of the kind of relationship between the competent institution and the institution of the place of residence which is enjoyed by sickness insurance institutions (which also creates difficulties in respect of the application of Article 84 of Regulation No 1408/71, which governs cooperation between competent authorities and institutions). Secondly, the employer does not have the same knowledge and means as a national sickness insurance institution with regard to having the person concerned examined by a doctor of

its own choice, pursuant to Article 18(5) of Regulation No 574/72.

The Commission therefore considers that it is not appropriate in all cases to regard the examination by a doctor of the competent institution's choice provided for in Article 18(5) as the sole possibility of challenging the evidentiary value of the certificate of incapacity for work issued by the institution of the place of residence. The employer must be allowed, in individual cases, to bring evidence of exceptional circumstances which as a matter of common sense give rise with a sufficient degree of probability to serious doubts regarding the incapacity for work.

The Commission therefore proposes the following answer to the third question referred by the national court:

'The only exception is where the employer produces evidence of exceptional circumstances which, as a matter of common sense, give rise with a sufficient degree of probability to serious doubts regarding the incapacity for work found to exist by the institution of the place of residence.'

J. C. Moitinho de Almeida
Judge-Rapporteur