OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 7 March 1990 *

Mr President,
Members of the Court,

A — Facts

1. The cour du travail, Liège, has referred to the Court the question whether under Article 69(4) of Regulation (EEC) No 1408/71 [1] an unemployed migrant worker who has interrupted his stay in Belgium for more than three months automatically requalifies for benefit in Belgium as soon as he has been employed there for at least three months or whether in addition he must complete the qualifying period under Belgium law, namely 300 working days or reckonable days [2] in the reference period of 18 months.

2. The appellant, the Office national de l'emploi, takes the latter view. In its written observations the Commission advocated the first-mentioned view. The respondent, Mr Di Conti, is of the opinion that he requalifies if he has interrupted his insurance cover for more than three months but less than three years. At the hearing the Commission also adopted this last-mentioned view.

3. Reference is made to the Report for the Hearing for a fuller account of the facts of the case and in particular for a summary of the legal background. The facts will be discussed hereinafter only in so far as is necessary as a basis for this Opinion.

B — Analysis

4. The view originally put forward by the Commission must be rejected. Although it takes account of the wording of Article 69(4), namely 'requalifying' for benefits, it places no limits on such requalification so that under the Belgian social security scheme a migrant worker would requalify even after 10 or 20 years if he worked for only three months after his return whereas in all other Member States after loss of his entitlement under Article 69(2) he would have to fulfil the conditions for a fresh entitlement to unemployment benefit. That interpretation would actually penalize Belgium for its generous legislation and would do so as a result of a proviso which was intended to take account of the particular legal situation in Belgium but which on this interpretation would have the contrary effect.

5. Such an unreasonable result cannot be the object of Article 69(4).

* Original language: German

1 — As amended by Regulation (EEC) No 2001/83 (OJ 1983, L 230, p. 39).

2 — Articles 118 to 122 of the Royal Decree of 20 December 1963 on employment and unemployment.

6. Nor can I endorse the view of the Office national de l'emploi. First of all, it conflicts with the wording of the provision in question. The term used there is 'requalify' and not 'reacquire'. According to the interpretation of the Office national de l'emploi however it would be necessary to satisfy the conditions for the reacquisition of entitlement, namely a minimum period of three months employment. If that had been intended, it would be difficult to understand why 'requalify' is used instead of 'reacquire'.

7. Furthermore such an interpretation would contradict the object of Article 69. That provision is intended to give an advantage to a migrant worker who returns within the three-month period under Article 69(2), namely the continuance of his entitlement although he is not available to the employment services of the competent State.

8. According to the case-law of the Court,[3] he loses entitlement to benefit if he does not return before the expiry of the three months but that does not mean that he should be in a worse position than if he had not claimed the benefit of Article 69(2). Such an interpretation is contrary to the object of Regulation No 1408/71 which is not intended to place obstacles in the way of mobility in the Community but to facilitate it so that the migrant worker should not be at a disadvantage.

9. The only interpretation that is in accordance with the wording and purpose of that regulation is that put forward by Mr Di Conti, at first alone, but at the Hearing also with the support of the Commission. In their view a migrant worker requalifies for unemployment benefit if he returns to Belgium after three months but before the expiry of three years[4] and is first employed for three months. That interpretation takes account of the wording of Article 69(4) and a migrant worker thereby requalifies for entitlement as the provision intends.

10. Furthermore it becomes more difficult to take advantage of the generous Belgian rule[5] in so far as it is necessary to comply not only with the three-year period under Belgian law but also the period of three months' employment under Article 69(4).

11. That disadvantage, we were told, is intended to compensate for the advantage which an unemployed migrant worker draws from the fact that he can maintain his entitlement for three months without making himself available to the employment market of the competent State. That consideration, it was said, was the reason for the inclusion of paragraph 4 in Article 69. Thus that interpretation is consistent with the legislative history of the provision.

12. Finally it is also compatible with the judgment of the Court in the *Testa* case in which it is stated that Article 69 establishes an independent body of rules which constitute an exception to national legal rules.

3 — Judgment of 19 June 1990 in Joined Cases 41/79, 121/79 and 796/79 *Testa* v *Bundesanstalt für Arbeit* [1980] ECR 1979.

4 — See Article 123(1) of the Royal Decree of 20 December 1963 as amended by the Royal Decree of 12 April 1983.

5 — See the Report for the Hearing, p. I-1833.

13. There is, however, nothing in that judgment to suggest that Article 69 also establishes an independent body of rules regarding the substantive conditions for qualification for entitlement for in principle that is not covered by Community law. It cannot therefore be assumed that Article 69(4) contains definitive rules for Belgium in that respect.

C — Conclusion

14. In view of the foregoing I propose that the following answer should be given to the cour du travail, Liège:

'Article 69(4) of Regulation (EEC) No 1408/71 contains a special provision adopted having regard to Article 123 of the Royal Decree of 20 December 1963. Where the appropriate factual conditions are met, it makes requalification for unemployment benefit, which has been lost under Article 69(2) because of belated return from another Member State, only dependent on having been employed for at least three months'.