OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 8 NOVEMBER 1967[1]

Mr President,
Members of the Court,

The facts behind the question submitted to you by the Bundessozialgericht are so simple that the reply to be given to that court may appear delicate.

Let us recall how the problem arose.

Mr Welchner was enlisted in the German army in March 1942 without previously having been insured; he was taken prisoner in France and was employed in that country as a free worker from May 1947 to February 1951, that is 45 months during which he was compulsorily affiliated to the French insurance scheme. He subsequently returned to Germany where he worked, paying contributions until 1961 when he became ill. From this point until his recovery he received a pension in both Germany and France.

But, in calculating his pension rights, the German institution refused to take account of the period from 1942 to 1947 (his military service and captivity), on the ground that the German legislation makes consideration of such services as substitute periods (Ersatzzeiten) dependent upon satisfying one of the two following conditions: either having previously been insured, or commencing within three years following those services a compulsorily insurable occupation *in Germany*. Mr Welchner maintains on the other hand that this provision must be interpreted to refer also to an occupation carried on within the same period within another Member State. As we know, since the end of his captivity in May 1947, he was compulsorily insured in France.

The question at issue does not in this case influence the conferment of a right to a pension in Germany, since, taking account only of the periods in that country before 1951, the person concerned satisfied the qualifying condition of sixty months prescribed by the legislation. On the other hand, it affects the amount of the invalidity pension, which is proportional to the length of the insurance: it depends upon whether the French period—taken into account in France for the pension in that country—may be used to 'validate' as a German period the period of enlistment and captivity, and thus increase the length of the services taken into account in calculating the German pension.

Mr Welchner's application against the decision of Landesversicherungsanstalt was dismissed by the Sozialgericht, Freiburg, but he obtained a favourable decision before the appeal court. On the basis of a previous judgment of its XIIth Senate, the Bundessozialgericht applied *mutatis mutandis* Annex G (I) (B) to (D) of Regulation No 3 which lays down rules for the implementation of German legislation.

When the social security agency appealed to it, the IVth Senate of the Bundessozialgericht plainly hesitated to adopt the decision of the XIIth Senate. It therefore referred the following question to you:

'Must Article 28 (1) (b) of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers, or Annex G (I) (B) to (D) to that Regulation, or those provisions read together, be interpreted to mean that, in determining whether substitute periods must be taken into account under German legislation, the contributions paid under the provisions in force in another Member State of the EEC are equivalent to those provided for by the German legislation?'

1 — Translated from the French.

The question is thus clearly put, subject to the following reservation: instead of referring to the 'contributions paid', it would have been more correct to ask whether a compulsorily insurable employment in another Member State may be assimilated to a compulsorily insurable employment under German legislation and consequently whether account might be taken of it in order to validate the substitute or replacement periods (Ersatzzeiten) provided for by German legislation.

You will recall that at the hearing and in their written observations the representative of the Federal Republic and the representative of the Commission set out diametrically opposite points of view; the former considered that the question should receive a negative response and the second on the contrary supported the solution of the judgment of the XIIth Senate of the Bundessozialgericht, but for reasons based more on Articles 27 and 28 of Regulation No 3 than on Annex G. As we shall see, there are indeed sound arguments in favour of both views, as the first is without doubt closer to the actual provisions of the regulation, whilst the second may owe something to the rather wide interpretation, mindful of the interests of migrant workers, which has been given by your case-law.

Let us consider the provisions first of all.

Articles 27 and 28 of the regulation indicate the periods which must be taken into account for acquiring the right and calculating the benefit; these are more particularly the assimilated periods and it is not disputed that the 'Ersatzzeiten' of German legislation are assimilated periods. But these articles also describe how the periods shall be calculated in the Member States. Article 27 (1) mentions the 'insurance periods and assimilated periods completed *under the legislation of each of the Member States*', and it is known that the term 'legislation' means 'all laws ... present and future of each Member State'. Article 28, which governs the calculation of the amount of benefit, refers several times to the method of calculating the periods prescribed by Article 27: paragraph (1) (a) states 'taking into account the aggregation of periods, as set out in the preceding Article ', and paragraph 1 (b) states 'if all insurance periods or assimilated periods, aggregated in accordance with the procedures set out in the preceding Article ...'. The Government of the Federal Republic considers this to mean that the account to be taken of the periods must be appraised in terms of the legislation of the State under whose authority they were completed.

Dealing more particularly with assimilated periods, Article 1 (r) of the regulation provides a definition. It considers them 'as periods treated as insurance periods or, where applicable, as periods of employment, *as defined in the legislation under which they were completed, in so far as they are regarded by the said legislation as being equivalent to insurance periods or periods of employment*'. Thus an assimilated period can only be regarded as such and taken into account under Articles 27 and 28 of the regulation in accordance with the criteria and under the conditions of the national law. If they are considered in isolation, the provisions of the regulation thus lead to a negative reply's being given to the question posed.

What then of Annex G (I) (B) to (D)? This provision, which establishes the special procedures for the implementation of legislation of certain Member States, forms, as do all the other annexes, an integral part of the regulation as Article 50 thereof states, and you have considered that implementing provisions cannot derogate from the principal provisions which they are intended to supplement (Case 4/66, *Labots, née Hagenbeek*, Rec. 1966; p. 626).

In those of its provisions which concern us, Annex G provides under what conditions, where German legislation must be applied, certain assimilated periods must be calculated. More precisely, it is a question of so-called 'supplementary' periods (Zurechnungszeiten) and 'periods of interruption' (Ausfallzeiten), during which no contribution is paid, but of which account is taken by German legislation, provided that when the risk materializes the person concerned has paid a minimum number of contributions to a German insurance institution.

Annex G states that 'In determining whether periods which under German legislation constitute periods of interruption or supplementary periods must be taken into account as such, the contributions paid under the legislation of another Member State and affiliation to the pension insurance scheme of another Member State shall be assimilated to the contributions paid under German legislation and affiliation to the German pension insurance scheme'.

The Government of the Federal Republic states that this provision would be superfluous if, by the sole fact of Articles 27 and 28 of the regulation, contributions paid in other Member States had the same effect as contributions to German pension insurance. Annex G contains no provision of the same type with regard to the substitute periods (Ersatzzeiten) in dispute. This did not prevent the XIIth Senate of the Bundessozialgericht from giving them the benefit of the same provisions on the basis of an argument by analogy, and on the supposition that the omission of those periods constituted a mere oversight. The IVth Senate of the same court did not conceal the doubts which it had over this solution, and those doubts appear to me to be well founded. The original wording of Annex G in fact only refers to supplementary periods and it was on the initiative of the Government of the Federal Republic that Regulation No 130/63 added periods of interruption. Thus consideration has twice been given to the question of the extent to which account must also be taken of periods completed in other Member States in calculating assimilated periods in Germany. The omission of substitute periods therefore cannot be an oversight and arises from a deliberate intention.

Indeed I agree with the Commission that as an implementing provision Annex G cannot derogate from the principal provision which it is intended to supplement and to clarify. By itself, the provision of which I have just spoken is insufficient to preclude the possibility of validating the 'Ersatzzeiten' through services completed in another Member State, if this were possible under Article 28. On the other hand, if it must be admitted that this Article should be interpreted as not prescribing that power, the wording of Annex G can only corroborate this interpretation.

If one confines oneself to the wording of the regulation and of the annex, one is thus induced to give a negative reply to the question put by the Bundessozialgericht. Other considerations may, however, give grounds for hesitation.

Is not this interpretation contrary to the spirit of the regulation? As you have recalled on many occasions, the social security regulations have as 'their basis, their framework and their bounds' (Case 1/67, *Ciechelski*, 5 July 1967. [1967] E.C.R.) Article 51 of the Treaty, and this article must therefore be taken as the point of departure. Although it is true that it entrusts the Council with making arrangements to secure for migrant workers and their dependants aggregation of all periods taken into account *under the laws of the several countries*, which seems to me to imply a reference to those national laws and to the conditions which they prescribe for so taking them into account.

But it is also true that the aim of those arrangements is to provide freedom of movement for workers; thus you dismiss any interpretation of different articles of the regulation which would result in discrimination against migrant workers in comparison with other workers by reason of the exercise of their right of freedom of movement.

The Commission remarks that of two German workers, both of whom completed periods of German war service and of captivity from 1942 to 1947 with the same German insurance period from 1951 to 1961, the one who worked and paid contributions in France from 1947 to 1951 will receive a lower German invalidity pension than the one who was employed in Germany for the same period. The amount of the pension thus varies exclusively in terms of the country in which the person concerned was employed for those three years. The fact is incontestable, but does this really constitute discrimination contrary to the regulation and to Article 51, having regard to the wording of those provisions which broadly refer to national law? For my part I am reluctant to say so.

For the reasons which I have indicated above, I am thus of the opinion that the reply to the Bundessozialgericht should be as follows:

Neither the provisions of Article 28 (1) (b) of Regulation No 3 nor those contained in Annex G (I) (B) to (D) thereto, considered separately or in conjunction with one another, imply that, in determining whether substitute periods must be taken into account under German law, contributions paid under the legislation of another Member State must be assimilated to those paid under German legislation or that compulsorily insurable employment in one Member State must be assimilated to compulsorily insurable employment under German legislation. I am further of the view that the Bundessozialgericht should rule on the costs of the present case.