under the legislation of one Member State and accident insurance benefits paid by an insurance institution of another Member State may not be put in a worse position, for the purpose of calculating the portion of the benefit to be suspended pursuant to the legislation of the first State, than a worker who has not exercised his right of free movement and is receiving both benefits under the legislation of a single Member State. No justification for such inequality of treatment can be afforded by any practical difficulties which social security institutions may encounter when calculating entitlement to benefits.

REPORT FOR THE HEARING
in Case C-10/90 *

I — Legislative background, facts and procedure

(a) *The relevant provisions of national and Community law*

1. Paragraph 75(1) of the Reichsknappschaftsgesetz (Law on the Miners' Insurance Fund) provides as follows:

'In the event of overlapping entitlement to a miner's pension and to a pension under the statutory accident insurance scheme, payment under the miners' pension scheme shall be suspended to the extent that the miner's pension without increments or children's supplements, when added to the accident pension without children's supplements, exceeds both 95% of the annual earnings on which the accident pension is calculated and 95% of the basis of calculation of the miner's pension. Where the pension under the statutory accident insurance scheme is paid in respect of silicosis giving rise to a right to compensation under 27(a) or 27(b) of the Annex to the Fifth Order concerning the extension of accident insurance to cover occupational disease, of 26 July 1952 (*Bundesgesetzblatt* I, p. 395), on account of a loss of earning capacity of at least 60%, the beneficiary shall continue to receive each month a proportion of the surplus equal to one-thousandth of the maximum amount referred to in the latter part of Paragraph 54(1) for each one per cent of loss of earning capacity. Suspension of the miner's pension under the first sentence of this paragraph shall be limited to the amount by which the pension under the statutory accident insurance scheme and the pension under the miners' pension insurance scheme together exceed the amount which would be payable under the statutory pension scheme alone if the pension were not suspended.'

* Language of the case: German.

2. Paragraph 76a of the Reichsknappschaftsgesetz provides:

'(1) The provisions concerning overlapping entitlement to a miner's pension and to a pension under the statutory accident insurance scheme shall be applied also where a pension is paid in respect of an occupational accident or disease by an institution situated outside the territory in which this Law applies;

(2) Where a pension is paid by an institution situated outside the territory in which this Law applies, the annual earnings shall not be determined. In the case of a pension paid to a widow or widower, the amount thereof increased by two-thirds shall be deemed to constitute a full pension.'

3. Article 3(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal L 230, p. 6)) provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits as the nationals of that State.'

(b) *Summary of the facts of the case and procedure before the national courts*

1. Maria Masgio, an Italian national, was married to another Italian who worked from 1948 to 1952 in the mining industry in Belgium and who received, as from 1972, a pension for silicosis from the Belgian institution competent in matters of occupational disease. That pension was based on a loss of earning capacity of 56% as from 1977, and of 59% as from 1 December 1983. From 1 February 1983, Mrs Masgio's husband also received a Belgian old-age pension which, under Belgian law, led to a reduction in his accident pension.

2. On the basis of the periods of insurance completed by Mrs Masgio's husband in the Federal Republic of Germany between 1938 and 1983, the Bundesknappschaft (Federal Pension Fund for Miners, hereinafter referred to as 'the Fund') gave notice on 14 June 1983 of its agreement in principle to pay him an old-age pension under the German miners' scheme. The Fund fixed the amount of that pension by decision of 6 February 1984. In order to calculate the suspension of benefits, the Fund took as its basis the gross amounts of the Belgian accident pension, without regard to any annual earnings figure on which that benefit was based.

3. The objection lodged by Mrs Masgio's husband against that decision, on the ground, *inter alia*, that the calculation should have been based on the net and not the gross amount of the Belgian accident pension, was rejected by the Fund by decision of 30 May 1984.

4. By emending decisions of 13 December 1984 and 11 October 1985, the Fund recalculated, on the basis of the reduced amount of the Belgian accident pension, the amount to which suspension was to apply and consequently increased the amount of the pension paid under the German miners' scheme.

5. His appeal against the Fund's decision of 6 February 1984 was unsuccessful, so Mrs Masgio's husband brought an action before the Sozialgericht (Social Court) Duisburg against the decision fixing the amount of the pension under the German miners' scheme, but he died while the proceedings were still pending. Mrs Masgio continued the action in her capacity as widow of the plaintiff, the insured person.

6. By judgment of 10 April 1986, the Sozialgericht Duisburg ordered the Fund to amend its decisions by calculating the amount of the pension paid to Mrs Masgio's husband under the German miners' scheme without taking the Belgian accident pension into account and to pay Mrs Masgio the corresponding benefits in her capacity as privileged successor.

7. By judgment of 4 June 1987 on appeal by the Fund, the Landessozialgericht (Higher Social Court) for the *Land* of Nordrhein-Westfalen quashed that decision and dismissed the action.

The Landessozialgericht considered that the Fund had correctly applied the provisions of Paragraphs 75 and 76a of the Reichsknappschaftsgesetz and that those rules concerning the suspension of benefits were not inconsistent with higher-ranking provisions of Community law.

In particular, Article 12(2) of Regulation No 1408/71, which applied only to benefits provided under that regulation and not to those paid, as in the present case, under national law alone, did not preclude a Member State from providing for suspension of a benefit provided under national law alone in the event of overlapping with another benefit provided under the law of another Member State.

Nor did the rule in the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz conflict with the right of free movement guaranteed by the EEC Treaty, since there was no apparent infringement of the right of workers to enter and remain in the territory or their right of access to the labour market. The possible disadvantages of a system of social security benefits did not constitute an objectively decisive criterion in the choice of place of employment. Nor, in the Landessozialgericht's view, did that paragraph have an indirect effect on freedom of movement since it did not make it economically necessary for workers to avoid foreign labour markets. The second sentence of Paragraph 75(1) of the Reichsknappschaftsgesetz set a limit on suspension of a pension, thus ensuring that pensions fulfilled their role of replacing salaries, and an insured person never received a benefit lower than that to which he would have been entitled under the statutory pension insurance scheme without application of the rules on suspension.

Nor did German law infringe the prohibition of discrimination laid down in the EEC Treaty, which concerned only discrimination on grounds of nationality. The first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz applied

equally, regardless of nationality, to all recipients of a miner's pension who were also paid an accident pension by an organization outside the Federal Republic of Germany.

Finally, in view of the legislature's broad discretion as regards the provision of benefits under public schemes, there was no infringement of the general principle of equal treatment laid down in Article 3 of the Grundgesetz (Basic Law of the Federal Republic of Germany). In the Landessozialgericht's view, the different treatment of recipients of foreign accident pensions was objectively justifiable on the ground that in such cases it was often impossible to determine annual earnings.

8. In her appeal on a point of law brought with the leave of the Landessozialgericht, Mrs Masgio claimed that the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz was incompatible with Articles 48 to 51 of the EEC Treaty, Article 3 of Regulation No 1408/71 and Article 3 of the Grundgesetz.

In support of her appeal, Mrs Masgio argued that when the rules governing suspension were applied foreign accident pensions should be treated in the same way as accident pensions provided under national law, so that an annual earnings figure should also be determined in the case of foreign accident pensions in order to calculate the maximum benefit which may be received before suspension operated. The annual earnings figure was generally higher than the individual basis of pension assessment, so that failure to determine annual earnings entailed suspension of a greater amount of the miner's pension than in the case of German accident pensions. Thus, a foreign accident pension could lead to the suspension of the whole of a German miner's pension, which was impossible in the case of a German accident pension. Migrant workers in receipt of accident pensions from other Member States thus suffered discrimination under the provisions of the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz. Community law prohibited not only overt discrimination on grounds of nationality but also any form of covert discrimination which, through the application of distinguishing criteria, led in fact to the same result. The fact that in the case of foreign accident pensions an annual earnings figure was often not known did not justify such discrimination, since it would be easy to calculate a notional annual earnings figure by converting the amount of the benefit into German currency. For the purposes of that calculation, the annual earnings figure would have to be determined on the basis of the unreduced amount of the gross Belgian accident pension.

9. The Fund, however, submitted that the contested judgment was correct, and sought the dismissal of the appeal.

10. The Bundessozialgericht (Federal Social Court) considered that there was in principle no legal objection to the application of the German rules concerning suspension where a foreign accident pension was paid, since the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz did not infringe the principle of equal treatment laid down in German constitutional law.

11. However, in the Bundessozialgericht's view, those rules might entail, as they did in the present case, a disadvantage for insured persons in receipt of a foreign accident pension. It was therefore necessary to determine whether the German provisions relating to the method of calculating the suspension were compatible with higher-ranking Community rules, and in particular with the principle of equal treatment embodied in Articles 7 and 48 to 51 of the EEC Treaty and Article 3 of Regulation No 1408/71.

It was to be borne in mind that a miner who was simultaneously receiving a German pension and an accident pension from another Member State might, depending on the method of calculation, be at a disadvantage in comparison with an insured person receiving both benefits from a German insurance institution, with the result that freedom of movement for workers might be impaired. However, it might be considered that the rule in the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz did not constitute an objectively decisive criterion in the choice of place of employment and that suspension never led to an insured person receiving a total of less than the amount which would have been paid to him under the statutory insurance pension alone without applying the suspension provisions. Those provisions, moreover, affected all migrant workers, whatever their nationality.

The national court went on to consider that if Community law were in this case to override the application of the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz, then Paragraph 75(1) of that law would apply without restriction, even in the event of receipt of a foreign accident pension, and it would be necessary to take into account the annual earnings on the basis of which the foreign accident pension was calculated. The decision of the Landessozialgericht would then have to be set aside and, since the annual earnings had not been determined, the case would have to be referred back to that court for further findings of fact.

12. Considering that the dispute raised a question of interpretation of Community law, the Bundessozialgericht, by decision of 14 November 1989, made an order staying the proceedings until the Court of Justice had given a preliminary ruling on the following question:

'Does the application and interpretation of Articles 7 and 48 to 51 of the EEC Treaty and Article 3 of Regulation (EEC) No 1408/71 lead to the result that insured persons who are simultaneously receiving a pension granted under national legislation and statutory accident insurance benefits paid by an insurance institution of another Member State may not be put in a worse position than insured persons receiving both benefits under national law when the calculation concerning suspension to be made pursuant to national legislation (in this case, Paragraph 76a, in conjunction with Paragraph 75, of the Reichsknappschaftsgesetz) is carried out?'

(c) *Procedure before the Court*

1. The order of the Bundessozialgericht was received at the Court Registry on 18 January 1990.

2. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 6 April 1990 by the Commission of the European Communities, represented by Maria Patakia, a member of its Legal Department, acting as Agent, assisted by Bernd Schulte, of the Max-Planck-Institut für ausländisches und internationales Sozialrecht, Munich; on 20 April 1990 by the Government of the Kingdom of Belgium, represented by Philippe Busquin, of the Ministry for Social Welfare, acting as Agent; and on 23 April 1990 by Maria Masgio, represented by Kurt Leingärtner and Gert Siller, of the Federal Law Service of the Deutscher Gewerkschaftsbund (German Trades Unions Federation), Kassel.

3. 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 inquiry.

4. Pursuant to Article 95(1) and (2) of the Rules of Procedure the Court, by decision of 20 September 1990, assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. *Maria Masgio* begins by observing that the Bundessozialgericht was right to proceed on the basis that failure to determine annual earnings in order to calculate the ceiling for suspension of benefits is likely to entail disadvantages for recipients of a foreign accident pension in comparison with those who receive an accident pension under national legislation. The disadvantages are even greater where the consequences of an accident are serious and the amount of the foreign accident pension is high.

The rule that foreign accident pensions are to be taken into account for the purpose of applying the national suspension provisions was introduced by the Law of 20 December 1982 (BGBl. I, p. 1875). However, there was nothing in the previous rules either to prevent German pension insurance institutions from extending suspension provisions to cover foreign accident pensions too; they were empowered to do so by Article 12 of Regulation No 1408/71. However, both the Bundessozialgericht and the Court of Justice of the European Communities have ruled against that interpretation on the part of the German institutions.

In Mrs Masgio's submission, the rule that annual earnings are not to be determined in the case of a foreign accident pension cannot be justified on the ground that it is impossible to determine such annual earnings. The law relating to pensions in the Federal Republic of Germany has recently changed, and the third and fourth sentences of the new Paragraph 93(4) of Book VI of the Sozialgesetzbuch (Social Law Code) take as the basis for annual earnings 18 times the monthly amount of the occupational accident or disease pension where foreign pensions are concerned. If the pension is paid for a loss of earning capacity of less than 100%, the amount which would be paid for a loss of earning capacity of 100% is to be taken. Under that formula, a foreign accident pension is treated as if it

were paid by a German institution. In the present case, under the new provision there would have been no suspension of the German miner's pension if the Belgian accident pension paid to Mr Masgio had been treated as a German accident pension; however, by its decision of 6 February 1984, the Fund suspended the German pension of DM 821.89 per month on account of the accident pension paid by the Belgian institution.

The new rules relating to the determination of annual earnings from a foreign accident pension do not, however, apply in the present case. The transitional provision in Paragraph 311(7) of Book VI of the Sozialgesetzbuch explicitly stipulates that in the case of pensions to which an entitlement already existed on 31 December 1991, annual earnings are not to be determined for foreign pensions. In the case of foreign pensions, therefore, annual earnings are to be calculated only for benefits to which entitlement arises after 31 December 1991. The question raised by the national court is therefore still relevant for the settlement of the dispute in the main proceedings.

Mrs Masgio further submits that as a result of the provisions of the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz migrant workers in receipt of a foreign accident pension suffer discrimination in comparison with those insured under the national system who receive an accident pension from a German institution. In the application of the suspension provisions, the possibility of calculation based on annual earnings is available to workers who have been employed solely in the Federal Republic of Germany and who can thus only have acquired pension and compensation rights under German law, and in most cases that constitutes an advantage for those concerned. Workers who have exercised their right of free movement and who receive a pension in another Member State of the Community in respect of an occupational accident or disease are, however, treated less favourably than nationals if the German suspension provisions are applied, inasmuch as annual earnings are not to be determined for such workers for the purpose of applying the suspension. In Mrs Masgio's submission, that situation involves at least covert discrimination as defined in the case-law of the Court of Justice, which has held that the principle of equal treatment prohibits not merely overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result (Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805).

It appears, moreover, from a letter of 3 March 1989 from the Commission of the European Communities to the Deutscher Gewerkschaftsbund that the German authorities, apparently aware that the suspension rule applicable in the main proceedings is inconsistent with Community law, have stated that the introduction of a system applying in the same way to German and foreign accident pensions is planned as part of the pension reform. Although Paragraph 93(4) of Book VI of the Sozialgesetzbuch as amended by the new Pension Reform Law

no longer entails any discrimination, that is not the case, however, with the transitional provision in Paragraph 311(7) of Book VI of the Sozialgesetzbuch, which abolishes discrimination only as regards benefits to which entitlement arises after 31 December 1991.

In conclusion, Mrs Masgio submits that the question raised by the national court should be answered as follows:

'The application and interpretation of Articles 7 and 48 to 51 of the EEC Treaty and Article 3 of Regulation (EEC) No 1408/71 lead to the result that insured persons who are simultaneously receiving a pension granted under national legislation and statutory accident insurance benefits paid by an insurance institution of another Member State may not be put in a worse position than insured persons receiving both benefits under national law when the calculation concerning suspension to be made pursuant to national legislation (in this case, Paragraph 76a, in conjunction with Paragraph 75, of the Reichsknappschaftsgesetz) is carried out.'

2. The *Government of the Kingdom of Belgium* considers that under the provisions of Articles 75 and 76a of the Reichsknappschaftsgesetz in the event of overlapping entitlement to German occupational accident or disease benefits and a German miner's pension, the recipient of the pension may choose, for the purpose of determining the maximum extent of that overlapping, between the basis of calculation of the pension and the annual earnings on which the occupational accident or disease benefits are calculated, whereas that choice is not available to retired miners who have an overlapping entitlement to Belgian occupational accident or disease benefits and a German miner's pension. Since the amount up to which overlapping is permitted is generally lower in their case, such a system could operate to the disadvantage of the latter category of persons and thus constitute a barrier to freedom of movement for workers. Migrant workers having suffered occupational accidents or diseases in Belgium would lose the above choice, unlike their colleagues continuing to work in the Federal Republic of Germany. The German legislation in question is therefore discriminatory.

3. The *Commission* begins by stating that the provisions of Paragraph 76a were introduced by the Haushaltsbegleitgesetz (Law accompanying the Budget) of 20 December 1982. Since that law came into force on 1 January 1983, the provisions of Paragraphs 75 and 76a of the Reichsknappschaftsgesetz have extended to foreign accident pensions. Similar rules have been laid down for pension insurance for manual workers (Paragraph 1279a of the Reichsversicherungsordnung (National Insurance Ordinance)) and for non-manual workers (Paragraph 56a of the Angestelltenversicherungsgesetz (Law on insurance for non-manual workers)). Those provisions lay down special rules for recipients of foreign accident pensions, inasmuch as in their case the annual earnings on which the foreign accident pension is based are not to be taken into account when determining the maximum amount of the pension.

In the Commission's view, those rules could put the persons concerned at a disadvantage

if their annual earnings calculated in accordance with German law were higher than the basis of calculation of their pension. If the calculation of annual earnings were taken as a basis, the ceiling would be higher and the suspension commensurately less. The decision not to take the annual earnings on which the foreign accident pension is calculated into account was taken on the ground that such annual earnings are often difficult to determine.

As regards the question whether under Community law it is compulsory to take the notional annual earnings calculated in accordance with German law into account, the Commission observes that any difference, whether direct or indirect, between the treatment of nationals of one Member State and the treatment of those of the other Member States is prohibited under Article 3(1) of Regulation No 1408/71.

That prohibition meets the general aims of the EEC Treaty with regard to equal treatment, namely to secure freedom of movement for persons by abolishing any discrimination as regards employment, remuneration and other conditions of work and employment. Differences in treatment as a result of differences between the legal systems of the Member States are therefore acceptable only in so far as they are applied on the basis of objective criteria, irrespective of nationality.

The provisions of Article 3 of Regulation No 1408/71 give expression to the prohibition of discrimination laid down in Article 48(2) of the EEC Treaty, which itself constitutes a specific rule within the general prohibition of discrimination in the first paragraph of Article 7 of the EEC Treaty. That prohibition of discrimination, which is one of the fundamental principles of Community law, is binding on both the Community institutions and the Member States.

The Court of Justice has consistently held that the prohibition covers not merely direct inequality of treatment based on nationality but all forms of indirect inequality of treatment which, although not based on nationality, in fact achieve the same result in the form of a disguised inequality of treatment (Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1; *Roviello*, cited above).

More specifically, it appears from the first sentence of Paragraph 76a(2) of the Reichsknappschaftsgesetz that the foreign accident pensions are to be taken into account in a miner's pension in such a way that, in contrast to the situation under the rules relating to the treatment of German accident pensions, the competent German institution does not have to determine any annual earnings for the benefit paid by the foreign institution. Thus, in the event of overlapping with a foreign accident pension, the pension paid by the German statutory insurance scheme is suspended as soon as it exceeds the percentage determining the personal basis of calculation under the scheme, whereas if it overlaps with a German accident pension suspension occurs only if the two pensions together exceed both the percentage of the personal basis of calculation and that of the annual earnings

on the basis of which the accident pension is calculated. Recipients of national accident pensions and recipients of foreign accident pensions are therefore not treated in the same way inasmuch as suspension takes effect earlier in the case of the latter.

The fact that the German legislation in issue does not take account of annual earnings in its treatment of foreign accident pensions constitutes indirect discrimination in so far as the rules, even though they apply without regard to nationality and thus in the same way to both German and foreign recipients of foreign accident pensions, nevertheless in practice affect first and foremost recipients of benefits who have exercised their right of free movement, since such persons are those who most frequently receive benefits from several Member States and thus also foreign accident pensions. Such persons receive less favourable treatment in terms of social security rights since in their case the German miner's pension could be suspended as from a lower level than in the case of persons who have always worked in the Federal Republic of Germany and who thus receive a miner's pension and an accident pension in that country.

In the Commission's view, unequal treatment of that kind cannot be justified on objective grounds, particularly by the alleged difficulty of determining annual earnings in the case of foreign accident pensions. The provision in the new Paragraph 93(4) of Book VI of the Sozialgesetzbuch that where a person is in receipt of a foreign accident pension the ceiling is to be calculated on the basis of a notional annual earnings figure demonstrates that it is possible to determine an annual earnings figure. Moreover, practical difficulties of a general kind cannot justify different treatment for national and for migrant workers. The Commission adds that an exception to the prohibition of discrimination can no more be justified on grounds of procedural delays and inaccuracies in the determination of the factors necessary for the calculation than it can by the fact that the number of cases in which discrimination is found to exist is small and the disadvantages suffered by those concerned is slight.

The Commission concludes by proposing that the question raised by the national court should be answered as follows:

'Articles 7 and 48 to 51 of the EEC Treaty and Article 3 of Regulation (EEC) No 1408/71 are to be interpreted as meaning that a migrant worker who is simultaneously receiving a pension granted under the national legislation of a Member State and statutory accident insurance benefits from another Member State may not be put in a worse position than an insured person receiving both benefits under the national law of a single Member State when the calculation concerning suspension to be made pursuant to national legislation is carried out.'

F. A. Schockweiler
Judge-Rapporteur