REPORT FOR THE HEARING
in Case C-102/91 *

I — Facts and legislation

1. *Background to the dispute*

1. Miss Knoch, who is single and of German nationality, was employed from 1 October 1982 to 30 June 1983 and from 1 October 1983 to 30 June 1984 as an assistant in German language and literature at the University of Bath in the United Kingdom. When she was employed at the university she was affiliated to the social-security scheme; she also paid unemployment-insurance contributions in the United Kingdom. She obtained her post through the Deutscher Akademische Austauschdienst (German Academic Exchange Service, hereinafter 'the DAAD'). Over the period of her employment in the United Kingdom, the DAAD paid her a compensatory allowance, which she also received during the vacations from 1 July to 30 September 1983 and from 1 July to 30 September 1984. In addition, the DAAD paid her, on cessation of that compensatory allowance, an interim allowance amounting to some DM 1 500 per month until 30 November 1984.

2. Miss Knoch had rented a house in Bath but had not had her name removed from the register of residents in Bruchsal, where she was registered with the police authorities as living at her parents' address. She stayed in Bruchsal during the 1983 summer vacation and also in July 1984. At the beginning of August 1984 she left Bruchsal for three months in order to look for work in England, but was unsuccessful. In November or December 1984 she returned to Germany and in September 1985 commenced a period of practical training for secondary-school teachers.

3. Following the termination of her employment, Miss Knoch registered in Bath as unemployed and received unemployment benefit between the beginning of July and 21 August 1984. After returning to Bruchsal, she registered as unemployed on 19 December 1984 with the Bundesanstalt für Arbeit (employment office) in Karlsruhe and applied for unemployment benefit. The employment office turned her application down on the ground that she had not yet completed her qualifying period.

4. By judgment of 28 January 1987 the Sozialgericht (Social Court) set aside that decision. Subsequently, by judgment of 16 August 1988, the Landessozialgericht (Higher Social Court) dismissed the employment office's appeal, taking the view that the qualifying period required by the relevant German legislation had, by virtue of Community law, been satisfied by Miss Knoch's employment in the United Kingdom.

5. In its appeal on a point of law to the Bundessozialgericht (Federal Social Court), the employment office contended that Articles 12 and 71 of Regulation No (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) had been infringed,

* Language of the case: German.

and in particular that Article 71(1)(b) offered a choice to an employed person who was not a frontier worker: he could receive unemployment benefit either in the State in which he last worked — as the plaintiff had done in the United Kingdom — or in the State in which he resided. In any event, it argued, the overlapping of those benefits was prohibited by Article 12(1) of Regulation No 1408/71 and consequently the plaintiff could only have claimed entitlement, by virtue of Article 69 of that regulation, under the United Kingdom legislation.

2. *Legislative background*

6. Article 12 of Regulation No 1408/71 provides:

'This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Article 41, 43(2) and (3), 46, 50 and 51 or Article 60(1)(b).'

7. According to Article 67,

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

— in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.'

8. Article 71 provides:

'1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) ...

(ii) ...

(b) (i) An employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution.

(b) (ii) An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

2. An unemployed person may not claim benefits under the legislation of the Member State in whose territory he resides while he is entitled to benefits under the provisions of paragraph 1(a)(i) or (b)(i).'

II — The questions

9. By order of 21 February 1991, the Seventh Senate of the Bundessozialgericht stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1) Is an employed person, other than a frontier worker, who is wholly unemployed and resided in the territory of a Member State other than the competent one during his last employment, entitled under Article 71(1)(b)(ii) and Article 67 of Regulation (EEC) No 1408/71 to receive benefits in accordance with the legislation of the Member State in which

he resides or to which he returns, even if he has previously received unemployment insurance benefits from the institution of the competent Member State?

2) (a) Does the first sentence of Article 12(1) of Regulation No 1408/71 apply in the context of Article 71(1)(b)(ii) and Article 67 of that regulation with the result that a right to several similar benefits made on the basis of the same period of compulsory insurance can be neither conferred nor maintained under that regulation?

(b) When do unemployment benefits constitute benefits of the same kind within the meaning of the first sentence of Article 12(1) of Regulation No 1408/71?

(c) Must an institution of a Member State, under whose legislation the acquisition and duration of a right to unemployment benefit are contingent on the completion of insurance periods, in a situation under Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71, in accordance with the first sentence of Article 12(1) thereof,

take no account, with regard to the acquisition and duration of a right, of those periods of insurance which were completed as an employed person under the legislation of another Member State, in so far as such periods have already given rise to a benefit of the same kind in that other Member State,

or

must effect be given to the first sentence of Article 12(1) of Regulation No 1408/71 with regard to unemployment benefit in such a way that the periods of insurance are to be taken into account as a basis for the subsequent entitlement, without reference to the original claim, but the length of the period of entitlement subsequently acquired is reduced by the number of days for which the original benefits were received?

3) (a) Is the certified statement which the competent institution for matters relating to unemployment in the Member State, to whose legislation a migrant worker was last subject, issues pursuant to Article 84(2) of Regulation (EEC) No 574/72 binding on the institution and the courts of another Member State in so far as the certified statement indicates that the migrant worker has no right to benefit under Article 69 of Regulation No 1408/71?

(b) When can an unemployed person claim benefits under Article 69 of Regulation No 1408/71 pursuant to the legislation to which he was last subject, within the meaning of the third sentence of Article 71(1)(b)(ii) of that regulation, with the result that the granting of benefits under the legislation of the State in which he resides is temporarily suspended?

(c) Does the suspension, within the meaning of the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, of receipt of benefits under the legislation of the Member State in which the unemployed person resides or to which he returns in respect of the period for which he is entitled to benefits, under Article 69 of Regulation No 1408/71, in accordance with the legislation to which he was last subject, mean only that the unemployed person does not during this time receive benefits from the institution of the State in which he resides, but may thereafter claim such benefits for the full period, or does the suspension of benefits also have the result that the length of the period of entitlement to benefits is reduced by the number of days for which the suspension applies?'

10. In its order for reference, the Bundessozialgericht states:

A. Under Paragraph 100 (1) of the Arbeitsförderungsgesetz (Law on the Promotion of Employment, hereinafter 'the AFG'), a claim to unemployment benefit is subject to the condition that the qualifying period has been completed. To that end, the applicant, over the three-year relevant period (Paragraph 104(3) of the AFG) which in this case ran from 19 December 1981 to 18 December 1984 (Paragraph 104(2) of the AFG), had to be engaged (Paragraph 104(1) of the AFG) for 360 calendar days in work (Paragraph 168 of the AFG) which was subject to compulsory contributions to the defendant Bundesanstalt für Arbeit. The applicant is unable to show that she completed such periods. During the relevant period, she worked only in the United Kingdom. Although her work in the United Kingdom was socially insured — in the wider sense — it was not subject to compulsory contributions to the defendant.

The applicant, however, quite correctly refers to Article 67 of Regulation No. 1408/71, which provides that the competent institution of a Member State whose legislation makes the acquisition of the right to benefits subject to the completion of insurance periods must take into account, to the extent necessary, periods of insurance which an employed person has completed under the legislation of any other Member State, as though they were periods completed under the legislation which it administers. Although the applicant did not complete lastly periods of insurance in accordance with the German legislation under which the benefits are claimed, which is a condition under Article 67 (3) of Regulation No 1408/71 in order to benefit from this provision, paragraphs 1 and 2 of Article 67 of Regulation No 1408/71 also apply to the

cases set out in Article 71 (1) (b) (ii) of that regulation. The Senate believes that the present proceedings constitute such a case.

... Although the applicant was not a frontier worker within the meaning of Article 1(b) of Regulation No 1408/71, she was an employed person who resided in the territory of a Member State or returned to that territory, as that phrase is used in the first sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, irrespective of her work in the United Kingdom and the period of residence there which was the inevitable result, because she had her place of abode in the Federal Republic of Germany and the normal centre of her interests was also situated there. The Senate believes that the Landessozialgericht was correct so to decide in accordance with criteria set out in the case-law of the Court of Justice of the European Communities.

B. Accordingly, if the applicant is entitled under the first sentence of Article 71 (1) (b) (ii) of Regulation No 1408/71 to receive benefits in accordance with the legislation of the Federal Republic of Germany, as if she were last employed in Germany, the defendant is obliged to take into account the periods of insurance completed by the applicant in the United Kingdom as if such periods of insurance had been completed in accordance with the AFG. Since the applicant completed a period of insurance of 547 days in the United Kingdom within the relevant three-year period, she would have satisfied the qualifying period for entitlement to German unemployment benefit and would, under the third sentence of Paragraph 106 (1) of the AFG (as amended by the Law accompanying the 1983 Budget of 20 December 1982, Bundesgesetzblatt [Official Gazette] I 1857) and Article 67(4) of Regulation No 1408/71, have acquired entitlement for a period of 156 days. However, since the applicant also claimed unemployment benefit from the institution of the competent State, there arises the question, which is important for a decision in this case, as to whether this fact precludes a claim against the institution of her State of residence or at least whether such a fact has to be taken into consideration when determining the length of time for which such a claim may exist. Although Article 71 of Regulation No 1408/71 is designed to ensure that a migrant worker may receive benefits under optimum conditions as regards his attempts to find work, this does not necessarily mean that a wholly unemployed migrant worker is able to claim first benefits from the competent institution and subsequently benefits from his State of residence as well, in both cases for the full period envisaged by the respective national legislation for such benefits. Preferential treatment of this kind for migrant workers who come under Article 71 of Regulation No 1408/71 cannot be justified with regard to other workers who are entitled to claim from only one institution, particularly since the migrant workers made contributions to one institution during each previous period of employment.

1. According to the case-law of the Court of Justice, Article 71(1)(b)(ii) of Regulation No 1408/71 offers a choice. An unemployed person may apply to the unemployment benefit scheme in the State in which he was last employed or claim benefit in the State where

he resides or to which he returns (judgment of 27 May 1982 in Case 227/81, *Aubin* [1982] ECR 1991, SozR 6050 Article 71 No 6). By claiming benefits in the United Kingdom, the applicant first applied to the benefit scheme in the State in which she last worked. The defendant deduces from the abovementioned judgment of the Court of Justice that if unemployment benefit has been claimed under the law of the competent State, an unemployed person cannot subsequently make a claim against the institution of the State in which he resides.

The Senate does not share the defendant's view. It is, however, correct that a wholly unemployed person who claims benefit from the institution of the competent State and subsequently intends to seek work in his State of residence and to draw unemployment benefit there, will initially have to rely on the benefits of the competent institution. If the unemployed person has already received benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he receives, pursuant to the second sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, benefits under the provisions of Article 69 of that regulation. If those benefits, however, have already expired, for example, following a claim covering the full period provided by the relevant national law for entitlement to benefit, or on expiry of the three months for which entitlement to benefit continues under Article 69(1)(c) of Regulation No 1408/71 to be enforceable in a Member State other than the competent Member State, a claim against the institution of the State of residence is not excluded under the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, since the suspension provided for in that third sentence relates only to the period during which the unemployed person is entitled to claim benefits under Article 69 of Regulation No 1408/71. Since the legal consequences of the first sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 correspond essentially to the application of Article 67 thereof, the second and third sentences of Article 71(1)(b)(ii) cover precisely the case in which an unemployed person acquires a claim under Articles 71 and 67 of Regulation No 1408/71 against the institution of his State of residence, even though he has also made a claim against the competent institution of the Member State to whose legislation he was last subject.

While the Senate is unable, for the above reasons, to agree with the view taken by the defendant, the answer to the question raised is none the less uncertain, as the defendant institution's appeal submissions make clear. It must for this reason be determined by the Court of Justice, which has jurisdiction in this matter.

2. If the making of a claim for unemployment benefit from the institution of the State in which a person has worked does not automatically preclude the acquisition of a right to benefits exercisable against the institution of the State of residence in the case of the first sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, it is in the present case legally relevant and necessary to decide what consequences may arise under the first sentence of Article 12(1) of Regulation No 1408/71 with regard to the acquisition and

duration of any claim the applicant may have against the institution of her State of residence, which is the defendant in the present case. Under the latter provision, one and the same period of compulsory insurance can neither confer nor maintain the right to several benefits of the same kind. The second set of questions, which require to be addressed only if the first question is given an affirmative answer which benefits the wholly unemployed person, concerns therefore: (a) the relationship between Article 12 and Article 71 of Regulation No 1408/71; (b) the concepts used in the first sentence of Article 12(1) of Regulation No 1408/71; and (c) the application of those concepts to unemployment benefits.

(a) The first question which arises is whether the first sentence of Article 12(1) of Regulation No 1408/71 is applicable at all in the context of Article 71(1)(b)(ii) of that regulation. The Senate believes that this question should be answered in the affirmative. It takes the view that the second and third sentences of Article 71(1)(b)(ii) of Regulation No 1408/71 do not stand in the way of such a finding, since those provisions are primarily designed to refer the worker to benefits paid by the competent institution of the Member State and to prevent him receiving benefits of the same kind at the same time, and in no way relate to the manner in which rights to benefits of the same kind are acquired or maintained.

(b) The application of the first sentence of Article 12(1) of Regulation No 1408/71 presupposes that there exist benefits of the same kind. It is for that reason necessary to examine whether the claim to German unemployment benefit and the benefits which the applicant received in the United Kingdom are of the same kind. Benefits are of the same kind when their purpose and object together with the basis on which they are calculated and the conditions for granting them are identical (Court of Justice, SozR 6050 Article 12 No 16; judgment of 5 May 1983 in Case 238/81, *Van der Bunt Craig* [1983] ECR 1385, SozR 6050 Article 46 No 19; judgment of 5 July 1983 in Case 171/82, *Valentini* [1983] ECR 2157, SozR 6050 Article 46 No 20). There is no doubt here as to the criteria of purpose and object. However, the question does arise as to when the basis on which unemployment benefits are calculated and the conditions for granting such benefits are identical. So far as the Senate can ascertain, the Court of Justice has not yet ruled on this matter.

In addition to certain requirements relating to registration and application and the requirement that the person be unemployed, German law makes entitlement to German unemployment benefit subject to the condition that the unemployed person is available for work to the employment services and has completed a qualifying period (Paragraph 100 (1) of the AFG). For the purposes of the qualifying period, account is taken of the duration of the work subject to compulsory contributions in reference periods prior to unemployment, and this period also forms the basis of the duration of the period of entitlement to German unemployment benefit (Paragraphs 104 and 106 of the AFG). The law of the United Kingdom also requires periods of compulsory insurance, but its criterion is more that the total of contributions reach a certain level, which means that higher wage earners qualify for unemployment benefit within a shorter period of time. As a rule a worker acquires the right to draw unemployment benefit if payments equivalent in total to 25 minimum contribu-

tions have been made to the social security scheme during any tax year and if contributions equivalent in total to 50 minimum contributions have been paid or credited during the tax year (6 April to 5 April of the following year) which precedes the year in respect of which benefit is claimed (first Sunday in January to the first Saturday of the following year) (see Werner, *Mitteilungen aus der Arbeitsmarkt-und Berufsforschung* 1984, 511, 517 et seq.). Whereas the period of entitlement under German law is dependent on the duration of work subject to compulsory contributions in the years prior to unemployment, entitlement to unemployment benefit in the United Kingdom is generally paid for a fixed period of practically one year (Werner, loc. cit.).

There are also differences in the level of benefits. Unemployment benefit in the United Kingdom is granted to an applicant and a spouse required to look after the children in fixed basic amounts, the level of which varies depending on whether or not retirement age has been reached (Werner, loc. cit.). German unemployment benefit, on the other hand, amounts to 63% of the previous net wage on the prescribed scale and in certain cases of the net wage that could have been obtained under a collective agreement (Paragraphs 111 and 112 of the AFG). In the case of unemployed persons with children, the net wage compensatory amount is equal to 68% (Paragraph 111(1) of the AFG).

Question 2(b) therefore concerns the criteria by which one can decide when the basis on which unemployment insurance is calculated and the conditions under which it may be granted are identical within the meaning of the case-law of the Court of Justice. In this connection, the Senate does not believe that they have to be completely identical, because otherwise the principle contained in the first sentence of Article 12(1) of Regulation No 1408/71 could never be applied. It must therefore suffice if unemployment, availability for work and the completion of periods of insurance are the relevant conditions both in the United Kingdom and the Federal Republic of Germany and both benefits are designed to meet maintenance needs rather than to compensate for loss of wages as a result of unemployment.

(c) Finally, the question arises as to how effect may be given to the first sentence of Article 12(1) of Regulation No 1408/71 which does not set out in express terms how the prohibition of the acquisition and maintenance of several benefits of the same kind for the same periods of compulsory insurance is to be implemented.

In the first place, there is no rule which stipulates which of several similar benefits may no longer be drawn on the basis of a certain period of compulsory insurance. In the opinion of the Senate, the decisive factor under Article 71(1)(b)(ii) of Regulation No 1408/71 is the date on which entitlement arises and, in the event of any subsequent entitlement, account must be taken of the fact that periods of compulsory insurance have already been 'used up' in respect of an earlier entitlement.

Secondly, the question arises as to how account can be taken of such 'used' periods of insurance. The wording of the first sentence of Article 12(1) of Regulation

No 1408/71 would suggest that periods of insurance which have already formed the basis of the first claim may not be relied on for a second time. In the present case this would mean that the periods of insurance which formed the basis of the applicant's claim to unemployment benefit under United Kingdom law could not also be relied on as a qualifying period for the purposes of claiming German unemployment benefit from the defendant Bundesanstalt für Arbeit. Depending on the length of the periods of insurance which were in fact necessary to form the basis for a claim to unemployment benefit under United Kingdom law, the remaining 'unused' periods of insurance might not (or might no longer) be sufficient to constitute the qualifying period for German unemployment benefit or at least for entitlement over 156 days (see Article 67(4) of Regulation No 1408/71).

It would, however, also be possible to implement the prohibition of the acquisition and maintenance of several benefits of the same kind resulting from the same periods of insurance solely by subtracting from the duration of the subsequent entitlement the number of days for which payment was received in respect of the first claim. This is the basis on which the defendant institution proceeds. It sets off the period for which benefits were received in another Member State against the duration of the German entitlement (Service Circular 31/90 of 12 March 1990, No 1.5). This procedure is certainly more practical than that suggested by the text of the regulation, since it saves the institution of the State of residence from having to determine the periods of compulsory insurance on which the foreign claim was based or maintained. The result of the defendant's procedure in the present case is that, while the applicant had become entitled to German unemployment benefit for 156 weekdays, there had to be reckoned against that figure the weekdays (approximately 40) up to 21 August 1984 during which the applicant received unemployment benefit from the competent institution.

3. If the answers by the Court of Justice to the abovementioned questions are to the effect that the applicant is in principle entitled to receive German unemployment benefit under the first sentence of Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71, it is still legally relevant to a decision in the case, and therefore necessary to examine what are the legal consequences of such an entitlement under the second and third sentences of Article 71(1)(b)(ii) of that regulation.

Under the second sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, an unemployed person is to receive benefits under the provisions of Article 69, if he has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject. Since that is the case here, the point to be determined is whether the conditions set out in Article 69 of the regulation have been satisfied. According to Form E 301 issued by the competent British institution, they have not; according to that certified statement the applicant was not entitled to benefits under Article 69 of Regulation No 1408/71 because she had no entitlement to benefits under the law of that institution. The certified state-

ment does not reveal why the applicant is not entitled to benefits under the law of that institution. Since the period for which unemployment benefit may be drawn in the United Kingdom is generally 312 days, the conditions set out in Article 69(1)(a) and (b) of Regulation No 1408/71 have been satisfied and those set out in subparagraph (c) could have been satisfied, in view of the fact that, according to the findings of the Landessozialgericht, the applicant had been looking for work in the United Kingdom from August to November, it would appear to be worth examining whether the certified statement is substantively correct.

(a) Such an examination, however, is not permissible if the certified statement issued under Article 84(2) of Regulation (EEC) No 574/72 is binding on the institutions and courts of the other Member States in a legal dispute brought against such an institution, in so far as such a certified statement indicates that a migrant worker has no right to benefits under the law of the institution issuing it (and for that reason the question of entitlement under Article 69 of Regulation No 1408/71 does not arise). The Senate, however, does not believe that this is the case. There is no provision to the effect that certified statements under Articles 80 or 84 of Regulation No 574/72 are binding. To judge from their nature, they would appear merely to be an aid provided by the last competent institution for the institutions of the other Member States (and if necessary also for their courts), in order to enable the latter by a simplified procedure to take an appropriate decision on a claim to entitlement made to an institution in another Member State. This does not exclude the possibility that the institution of the other Member State against which the claim is made or the court may carry out its own independent examination. Nevertheless, the question of binding effect is open to doubt, as is shown by judicial practice, and consequently it is advisable to obtain clarification from the Court of Justice.

(b) If the certified statement is binding, in so far as it precludes any entitlement under Article 69 of Regulation No 1408/71, or if it should transpire that the statement issued by the British institution is correct, for instance, because the applicant has forfeited her entitlement to benefit because she failed to comply with registration requirements, the question arises whether the third sentence of Article 71(1)(b)(ii) is applicable.

According to that provision, receipt of benefits under the legislation of the State in which the worker resides is to be suspended for any period during which he may, under Article 69, make a claim for benefits under the legislation to which he was last subject. It is unclear whether such a case may arise only if all the conditions of entitlement set out in Article 69 of Regulation No 1408/71 for the transfer to another Member State of a claim against the competent institution are met, or whether it is sufficient that the worker could have satisfied the conditions set out in

Article 69 of Regulation No 1408/71 without prejudicing his rights under Article 71(1)(b)(ii) of that regulation, but in fact failed to do so. That would be the case, for example, if the applicant, although continuing to seek work in the United Kingdom, had forfeited her entitlement to benefit there by failing to comply with registration requirements.

(c) If the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 is applicable, the final question on which the decision in this case turns is what are the legal consequences of the suspension — pursuant to that provision — of receipt of benefits under the legislation of the State in which the unemployed person resides. Does suspension merely mean that the unemployed person may not receive benefits in his State of residence for that period, but may thereafter claim benefits from the institution of his State of residence for the full period, or is the duration of entitlement also reduced by the number of days of suspension? The opinion of the Senate on this matter is that no reduction in the duration of entitlement against the institution of the State of residence can be justified if such a claim is based on periods of insurance which are entirely separate from those which formed the basis of the claim against the institution in the competent State. The same is true if the first sentence of Article 12(1) of Regulation No 1408/71 is applicable, and account is taken of 'used' periods of insurance or the length of time during which benefits were provided by the first institution for purposes of the subsequent benefits (see above). However, if the first sentence of Article 12(1) of Regulation No 1408/71 does not in principle apply in the context of Article 71(1)(b)(ii) of that regulation, some reduction would appear to be indispensable in order to avoid unjustifiably benefitting migrant workers and consequently burdening all the institutions. If a migrant worker in the context of Article 71(1)(b)(ii) of Regulation No 1408/71 does not forfeit his right to choose as soon as he first claims benefits, if the first sentence of Article 12(1) is not applicable, and if benefits paid under Article 69 of Regulation No 1408/71 also do not reduce the duration of the benefits of the Member State which have to be suspended, a migrant worker could claim the full entitlement from the institution of the competent State and subsequently also from the institution of his State of residence, even though in each case he made contributions only to one institution.

III — Procedure

The order from the Bundessozialgericht was received at the Court Registry on 2 April 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the German Government, represented by E. Röder, by the French Government, represented by P. Pouzoulet and C. Chavance, and by the Commission of the European Communities, represented by P. Patakia, of its Legal Service, acting as Agent, assisted by B. Schulte.

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 and to assign the case to the Fourth Chamber.

IV — Summary of the observations submitted to the Court

1. *The observations of the German Government*

The German Government proposes, for the reasons set out by the Bundessozialgericht, that the first question be answered in the affirmative.

With respect to questions 2(a) and 2(b), the German Government observes that Article 12 of Regulation No 1408/71 does not prevent an unemployed worker from receiving benefits first from the State of his employment and subsequently from his State of residence. Those benefits are for different periods and must not be regarded as benefits of the same kind. The German Government considers that the second alternative mentioned in question 2(c) applies. Article 12 does not prevent a worker from receiving, for different periods of his unemployment, benefits under Article 71(1)(b)(i) and (ii). In the two States in question, however, the period for which unemployment benefits are granted is different, a fact which must be taken into account when it is considered whether the two benefits are benefits of the same kind within the meaning of Article 12. If, for example, in the second Member State the amount of the benefits falls progressively over the period for which they are paid, the amount of the benefits that must be paid in the second State is calculated by reference to the period for which the person concerned received benefits in the first Member State. This ensures that benefits of the same kind are not awarded twice for the same period of unemployment and that the full amount thereof is not paid twice. In the same way, it is necessary to deduct from the total period for which the insured person receives benefits under the law of the second Member State the periods for which he received benefits of the same kind from the first Member State.

With respect to question 3(a), the German Government shares the views of the Bundessozialgericht. It adds that practical reasons also militate in favour of that approach. Where such certified statements are issued, it is impossible to avoid errors. The present case provides an example of an incorrect certified statement. As regards question 3(b), the German Government observes that an unemployed worker cannot claim benefits under the legislation to which he was last subject unless all the conditions laid down by Article 69 for the export of that right are fulfilled.

As regards question 3(c), the German Government refers to its answer to question 2(c). The actual receipt of benefits under the legislation of the State of employment must in all cases be set against the duration of the entitlement to benefits in the State of residence. That view is in conformity with both

the wording and the meaning of the third sentence of Article 71(b)(ii) of Regulation No 1408/71.

2. *The observations of the French Government*

According to the French Government, the present case raises an issue of principle which calls in question the very scheme of the provisions concerning payments in respect of unemployment contained in chapter 6 of Regulation No 1408/71. It briefly describes the system and purpose of the provisions in question and maintains that it cannot be contended that Article 67 could allow one and the same period of insurance or employment to be used as a basis for rights granted by Community law to a worker seeking the application successively of the legislation of two or more Member States under which payments might be available to him. The problems inherent in the coordination of social-security systems are generally resolved by reliance on the rule that only one legislation is to apply, laid down in Article 13(1), which the principle of aggregation laid down in Article 67 is intended to reinforce, whereas Article 12 sets out in general terms the rule against overlapping benefits. Article 71 constitutes an exception to the principle laid down in Article 67(3) as well as an application of the rule prohibiting overlapping benefits.

The French Government then sets out its observations on the decision as to the plaintiff's residence made by the Landessozialgericht. It first refers to the judgment in Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315. In the French Government's opinion, the facts of the present case display certain features which make it necessary to impose certain limits upon the concept of habitual residence. As far as the plaintiff is concerned, the Landessozialgericht took the view that her 'habitual residence' continued to be in Germany. In the present case, that interpretation is open to discussion. The French Government states in that connection that in its judgment in Case 33/88 *Allué and Coonan* v *Università degli Studi di Venezia* [1989] ECR 1591, the Court held that Article 3 requires compliance with the principle of equal treatment in matters of social security. The circumstances of the plaintiff's employment were fully covered by Regulation No 1408/71. It is difficult to see how, in circumstances such as those of the present case, Community law could, in the context of freedom of movement, grant a right of residence to a non-frontier migrant worker from another Member State without his residing in the State of his employment. The French Government wonders whether the legal problems raised are not in fact confined to the sphere of German domestic law. Moreover, the present case differs from the *Reibold* case. An excessively broad interpretation of the concept of residence, based on that judgment, would be difficult to reconcile with the current Community tax provisions. In that regard, the French Government points out that in its judgment in Case C-297/89 *Ryborg* [1991] ECR I-1943 the Court gave its views on the meaning of residence for the purposes of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another. The French Government refers in particular to Article 7 of that directive. It considers that the condition as to duration of residence laid down in that directive is satisfied in the present case. With a view to ensuring consistency between the various

branches of Community law, it is necessary to conclude that the plaintiff was habitually resident in the United Kingdom and not in Germany.

As regards the right to unemployment benefit, the French Government observes that, by registering as unemployed in Bath, the plaintiff exercised the rights conferred on migrant workers and, by so doing, clearly opted for the United Kingdom scheme. Since the plaintiff received benefit, under Article 67, from the scheme of the State of her last employment, it follows that the answer to the first question must be that she could not in principle pursue any claim against the competent institution in another Member State. In accordance with the case-law of the Court, the plaintiff, on transferring her residence to Germany, could thereafter be covered only by the provisions of Article 69. Only in the event of entitlement not being exhausted could the question arise of the appropriateness or otherwise of maintaining rights acquired under the United Kingdom legislation until the definitive exhaustion of such rights or the question of new rights arising in the new State of residence. According to the French Government, no such possibility derives from the provisions in question. The questions in the present case may be important, in so far as no provision of Regulation No 1408/71 at present facilitates appraisal of the situation of unemployed persons who have received benefits in a given Member State and, on transferring their residence successively to one or more other Member States, are likely to rely on the same period of insurance under Article 67. That may apply to unemployed frontier workers covered by Article 71(1)(a)(ii) and (b)(ii), and to unemployed persons who have received benefits in a given Member State and successively transfer their residence to one or more other Member States and, after resuming work for a very short period, seek the application of Article 67. In those three situations, the same period of insurance could be taken into account successively by the competent authorities of two or more Member States in order to grant an unemployment benefit to an unemployed migrant worker who successively makes himself available to the public employment services each time that he changes residence.

Alternatively, the French Government states that the same period of insurance could confer entitlement under the legislation of more than one Member State. The relevant provisions of Chapter 6 of Regulation No 1408/71 cannot be dissociated from the other provisions applicable to social-security benefits as a whole, in particular Article 12(1), which prohibits the overlapping of benefits of the same kind for one and the same period of compulsory insurance. Any other interpretation would conflict with the very purpose of Regulation No 1408/71. The principle of non-discrimination as between Community nationals justifies, at the very least, the application of a rule requiring deductions from the period for which benefits are paid, in order to ensure equality of treatment for persons covered by Article 71, in so far as frontier workers covered by Article 71(1)(a)(ii) can receive benefits only from the State of residence whereas non-frontier workers covered by Article 71(1)(b)(ii) have a choice according to the case-law of the

Court of Justice. Consequently, any answer to the second question should take account of the scheme of Regulation No 1408/71 and of the purpose pursued by its provisions, which seek both to coordinate the national social-security legislation of the Member States and to preclude overlapping and duplicated benefits in the application of such legislation.

3. *The Commission's observations*

According to the Commission, Article 67(1) of Regulation No 1408/71 provides that the unemployment insurance schemes which make the acquisition of entitlement to benefits conditional upon the completion of periods of employment take account of periods of insurance or employment completed under the legislation of any other Member State. However, under Article 67(3), that obligation affects only the State under whose legislation the unemployed person completed periods that qualify for that purpose. Periods of insurance or employment are taken into consideration only where the person concerned is already a member of the scheme when the application is submitted. Article 71 of Regulation No 1408/71 provides for an exception to that rule. A non-frontier worker who does not reside in his State of employment is entitled, if he becomes wholly unemployed, to decide which legislation is to apply to his case in respect of benefits. Under Article 71(1)(b)(ii), that choice becomes exercisable by his making himself available to the employment services either of the State where he had a job or of the State where he resides. Thus, that provision derogates from Article 13(2)(a) of Regulation No 1408/71, according to which a worker is subject to the legislation of the territory in which he is employed. The Court has given a restrictive interpretation of 'Member State in which the worker resides' by limiting it to the State 'where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated' (judgment in Case 76/76 *Di Paolo*, cited above). That strict interpretation is justified, in view of the purpose of Article 71 which, by way of exception, requires, for certain categories of worker who have maintained close links with the country where they have established themselves and habitually stay, transfer of the responsibility for paying unemployment benefits from the State of last employment to the State of residence. In view of the criteria expounded in the judgments in *Di Paolo*, cited above, and Case C-216/89 *Reibold* [1990] ECR I-4163, a worker who, for the purposes of vocational training, goes, for a limited period and with the assistance of a competent authority, from his Member State of residence to another Member State to undertake an activity for a limited period, spends his holidays in his State of residence and maintains his centre of interest there may be regarded as a worker who, within the meaning of Article 71(1)(b)(ii) of Regulation No 1408/71, resides in a Member State other than his State of employment. In the Commission's view, the Community rules certainly do not suggest that once a choice has been made it becomes binding. On the contrary, the worker concerned may perfectly well first seek benefits in the State of employment and subsequently take advantage of the availability of benefits in his State of residence. That follows from Article 71(1)(b)(ii) of Regulation No 1408/71, the third sentence of which makes the position clear. The fact that under that provision the payment of benefits may be suspended implies that the unemployed person is able first to claim benefits from the State of his last employment and then from his State of residence.

The Commission proposes that it be stated in reply to the first question that an employed person other than a frontier worker who is wholly unemployed and who, when last employed, resided in a Member State other than the competent Member State, may receive the unemployment benefits provided for in Articles 71(1)(b)(ii) and 67 of Regulation No 1408/71 under the legislation of the Member State in which he resides or to which he returns, even where he previously received unemployment insurance benefits from the institution in the competent Member State.

The Commission then observes that the principle that benefits of the same kind for the same period of insurance under the legislation of two or more Member States is general in scope and thus also applies to unemployment benefits. The only benefits that are not covered by that principle are those that are paid by the institutions of two or more Member States in the cases mentioned in the second sentence of Article 12(1). According to the Commission, the German and United Kingdom unemployment benefits are similar in so far as their aim is the same, namely to provides income in the event of involuntary unemployment, subject to certain conditions as to duration and contributions. It follows from the rule against overlapping benefits in the first sentence of Article 12(1) and from the exception provided for in the second sentence of that provision that the choice offered by Article 71(1)(b)(ii) of Regulation No 1408/71 to unemployed persons residing in a Member State other than the State of employment cannot lead to any overlapping of unemployment benefits.

Article 71 of Regulation No 1408/71, which creates a special scheme applicable to unemployed persons who were employed in one Member State and reside in another, provides that a worker other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the State in which he resides, is to receive benefits in accordance with Article 69 of the regulation if he has become entitled to benefits in the Member State of his last employment. Receipt of benefits from the State in which he resides is suspended for any period during which the unemployed person may, under Article 69, make a claim for benefits from the State where he was last employed. Those rules imply that a wholly unemployed worker who has received benefits from the competent institution in the State where he was last employed continues initially, even if he makes himself available for work to the employment services in the State where he resides, to receive benefits from the State where he was last employed, under the conditions and within the limits imposed by Article 69. At the same time, the reference to that provision implies that all the conditions for the export to the State of residence of the right to claim from the competent institution in the State of last employment must be satisfied. If they are not, the precondition for the application of the second sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 is likewise not satisfied and it follows that suspension of entitlement to benefits in the State of residence cannot be envisaged.

As regards the certified statement issued by the competent institution in the State of last employment under Article 84(2) of Regulation No 574/72, the Community legislation did not provide that it was to be binding.

It follows both from Article 155 of the EEC Treaty and from the Community judicial system that a body such as the Administrative Commission on Social Security for Migrant Workers cannot be authorized by the Council to adopt measures of legislative status. In its judgment in Case 98/80 *Romano* v *INAMI* [1981] ECR 1241, the Court held that a decision of the Administrative Commission, although providing assistance to social-security institutions responsible for applying Community law in that sphere, is not of such a nature as to require those institutions to follow certain methods or to adopt certain interpretations when they come to apply Community law. The obligation of the scrutineer institution to send the form to the other institutions concerned does not mean that any other supporting documents thereby lose all probative value. According to the Court, the form is not exhaustive (judgment in Case 93/81 *INAMI* v *Knoeller* [1982] ECR 951).

Moreover, under the third sentence of Article 71(1)(b)(ii), an unemployed person can, under Article 69, receive benefits under the legislation of the Member State of his last employment, so that entitlement to benefits under the legislation of his State of residence is temporarily suspended if the conditions and time-limits laid down in the latter provision are observed. Suspension of receipt of benefits in the State of residence implies that, for so long as they are awarded under Article 69, they cannot be awarded under the legislation of the State of residence. Thereafter, the right to benefits under the legislation of the State of residence is maintained to the extent to which the relevant national provisions allow.

The Commission proposes that the questions submitted by the Seventh Senate of the Bundessozialgericht be answered in the following terms:

1 A worker, other than a frontier worker, who is wholly unemployed and resided in the territory of a Member State other than the competent one during his last employment is entitled to the unemployment benefit provided for by Article 71(1)(b)(ii) and by Article 67 of Regulation No 1408/71 in accordance with the legislation of the Member State in which he resides or to which he returns, even where he has previously received unemployment insurance benefits from the institution in the competent Member State.

2 (a) The principle laid down in the first sentence of Article 12(1) of Regulation No 1408/71, to the effect that that regulation can neither confer not maintain the right to several benefits of the same kind for one and the same period of compulsory insurance, applies in the context of Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71, in that it reflects the prohibition of overlapping benefits generally laid down in Community law.

(b) Unemployment benefits that are awarded to a person who has been insured for a given period and has paid contributions but has subsequently become unemployed and has

made himself available for work to the employment services, and that are intended to guarantee income for the unemployed person are regarded as being of the same kind within the meaning of the Community provision against overlapping benefits.

(b) Under the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, a worker who is unemployed may, pursuant to Article 69 of Regulation No 1408/71, claim benefits under the legislation to which he was last subject, with the result that the award of benefits under the legislation of the State in which he has resided is temporarily suspended, if he satisfies the conditions laid down in Article 69 of Regulation No 1408/71 in the State to whose legislation he was last subject.

(c) The institution of the Member State whose legislation makes the acquisition of entitlement to unemployment benefits and the duration thereof conditional upon the completion of insurance periods must, in cases covered by Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71, take account, in awarding unemployment benefits, of the benefits already awarded in another Member State, so that the period for which benefits were received in another Member State is deducted from the period for which benefits are paid.

(c) The fact that entitlement to benefits paid to an unemployed person under the legislation of the Member State of his residence or of the Member State to which he has returned is 'suspended' for the period during which he is entitled to benefits under the legislation to which he was last subject, pursuant to Article 69 of Regulation No 1408/71, means, for the purposes of the third sentence of Article 71(1)(b)(ii), that the duration of the entitlement to benefits from the institution in the Member State of residence is reduced by the number of days for which that payment was suspended.

3 (a) The certified statement issued in the event of unemployment by the competent institution in the Member State to whose legislation a migrant worker was last subject, pursuant to Article 84(2) of Regulation No 574/72, is not binding on the institution of another Member State or the courts of that State, if it is indicated in that statement that the migrant worker is not entitled to benefits under Article 69 of Regulation No 1408/71.

P. J. G. Kapteyn

Judge-Rapporteur