OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 3 MAY 1979 [1]

Mr President,
Members of the Court,

1. In the two joined cases to which this opinion relates the Court of Justice is asked to settle a problem of the interpretation of Article 30 (1) of Regulation No 3 of 1958 on social security for migrant workers and of the corresponding Article 61 (5) of Regulation No 1408/71 of 1971.

The first of those provisions, the text of which is reproduced in the second provision without significant alteration, provides that where the legislation of a Member State expressly or by implication provides that accidents at work or occupational diseases which have occurred *previously* shall be taken into consideration in order to assess the degree of incapacity due to an accident at work or an occupational disease, accidents at work or occupational diseases which have occurred previously under the legislation of another Member State shall also be taken into consideration, as if they had occurred under the legislation of the first Member State.

The events which gave rise to the two cases may be summarized as follows:

(a) With regard to Case 173/78

In September 1969 Mr Villano, an Italian national, suffered an accident at work in the Federal Republic of Germany. In respect of the after-effects of that accident he obtained a partial invalidity pension from the competent German institution; however, in November 1970 that pension was withdrawn on the ground that his degree of incapacity for work no longer corresponded to the minimum percentage prescribed by German legislation for entitlement to an invalidity pension (cf. Article 581 (3) of the Reichsversicherungsordnung (National Social Insurance Regulations, hereinafter referred to as "the RVO") as amended by the UVNG of 30 April 1963, Bundesgesetzblatt I, p. 241). Shortly afterwards, on 11 December 1970, he suffered another accident at work in Italy in respect of which the Italian insurance institution (the INAIL) found that he had a 17% incapacity for work and awarded him a pension on that basis.

On 22 June 1972 Mr Villano requested the competent German institution, the Nordwestliche Eisen- und Stahl-Berufsgenossenschaft, to award him a further pension in respect of the accident of 6 September 1969, taking into consideration the later accident in 1970. That request was refused. The plaintiff instituted proceedings against that refusal, first before the Sozialgericht [Social Court] Hannover and thereafter before the Landessozialgericht [District Social Court] Niedersachsen, but without success. He then appealed against the latter judgment to the Bundessozialgericht [Federal Social Court] and in the context of the latter procedure the present preliminary question was referred to the Court of Justice.

(b) With regard to Case 174/78

In 1942 Mr Barion, an Italian national, suffered an accident at work on German territory. He obtained for the partial

1 — Translated from the Italian.

invalidity resulting therefrom a pension corresponding to a reduction in capacity for work of 25% from the Tiefbau-Berufsgenossenschaft, Munich. In November 1955 payment of that pension was discontinued on the ground that the worker's state of health had improved in the meantime and the degree of incapacity had diminished to less than the minimum prescribed by the German pensions legislation. However, on 5 April 1966 Mr Barion suffered a second accident at work, in Italy, in respect of which the INAIL found an incapacity of 14% and awarded him a pension on that basis.

On 14 February 1973 Mr Barion requested the German insurance institution to award him a further pension in respect of the accident in 1942, taking into consideration the second accident in 1966. His request was refused. He appealed against that decision to the Sozialgericht München which, by judgment of 10 March 1975, held that the German insurance institution was bound, under the provisions of Article 61 (5) of Regulation No 1408/71 and Article 72 of Regulation No 574/72, to take into consideration the accident at work which had occurred subsequently in Italy in order to assess the plaintiff's degree of incapacity in the aggregate. Accordingly, it found him entitled to the pension (since his incapacity was more than 20% in the aggregate) and ordered the German insurance institution to pay him a pension corresponding to a rate of 15% residual invalidity attributable to the accident which occurred in Germany in 1942. However, when the unsuccessful insurance institution appealed the Bayerisches Landessozialgericht, by judgment of 28 October 1975, annulled the former judgment. The plaintiff appealed against that judgment to the Bundessozialgericht.

2. The Bundessozialgericht took cognizance of the two cases and referred to the Court of Justice, by orders which are separate but identical as to their wording and content, the following question:

"Does the defendant German social insurance institution according to Article 30 (1) of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers and according to Article 61 (5) of Regulation (EEC) No 1408/71 of the Council of the European Communities on the application of social security schemes to employed persons and their families moving within the Community have to take into consideration an accident at work sustained by the plaintiff which occurred subsequently in Italy as if it had occurred under German legislation, if the granting of a pension to the plaintiff arising out of a previous accident at work which occurred under German legislation depends upon the percentage of the reduction in capacity for work caused by both accidents at work amounting at least to the figure 20 (First sentence of Article 581 (3) of the Reichsversicherungsordnung (National Social Insurance Regulations))?"

So that this question may be properly understood it should be explained that, according to the German legislation in force, an injured person whose capacity for work is reduced as a result of a number of accidents at work receives an invalidity pension in respect of each accident if his capacity for work is reduced in the aggregate by at least 20% (first sentence of Article 581 (3) of the RVO) and if each accident has caused a reduction in capacity for work of not less than 10% (second sentence of the said Article 581 (3)). However, the accidents which may be taken into consideration are exclusively those suffered by a person insured under German law at the time at which the accidents occurred. In the present case, according to the court

making the reference, the accidents suffered by Mr Villano and Mr Barion in Italy could not be considered relevant for the purposes of the German domestic legislation and accordingly did not entitle them to a pension under that legislation. In those circumstances the Bundessozialgericht wondered whether Community law does not require that the second accident at work, which occurred in Italy, be treated as an accident covered by the German insurance system. This led to the question submitted to the Court of Justice which is concerned to establish whether, in pursuance of Regulations Nos 3 and 1408/71, the insurance institution of a Member State must also take into consideration, in order to assess the degree of incapacity for work to be taken as the basis for the invalidity pension, those accidents at work sustained subsequently by the same worker in another Member State.

3. I have already recalled that, for the purposes of Article 30 (1) of Regulation No 3 and of Article 61 (5) of Regulation No 1408/71 the competent national institution which receives a claim for insurance benefits in connexion with an accident at work must also take into consideration, in order to assess the degree of invalidity, accidents which have occurred *previously* under the legislation of another Member State as if they had occurred under the legislation which it administers; provided, that is, that the legislation of the State to which the institution in question belongs lays down that previous accidents which have occurred within the ambit of that legislation must be taken into account.

The wording of the two provisions in question does not provide any basis for treating accidents which occur *subsequently* abroad under the laws of another Member State as equivalent to those which take place in the sphere governed by national legislation. Both provisions merely refer to "accidents at work or occupational diseases which have occurred or have been confirmed *previously*", and the adverb "previously" must be understood as referring to the time of the occurrence or confirmation of the accident (or disease) in respect of which the pension is claimed from the institution of a Member State (in the present case, the German institution). It appears to me that the word used is so decisive as to be proof against interpretative subtlety. Furthermore, it is expressly recognized both by the Agent of the Commission (cf. reply, p. 10) and in the arguments of Mr Barion (cf. his observations, p. 2) that the scope of the above-mentioned provisions cannot be extended to the point of including the hypothetical obligation on national institutions of the Member States to take into consideration "subsequent" accidents and diseases. It is significant that in order to obtain that result Barion should have relied in his arguments, as I shall subsequently relate, on other sources of Community law.

The literal interpretation is confirmed by the purpose the system created by the provisions in question. Article 30 (1) of Regulation No 3 and Article 61 (5) of Regulation No 1408/71 are undoubtedly intended to ensure that workers who are required to move within the territory of the Community by reason of their work and who have suffered two or more accidents in different Member States are accorded protection in matters of pensions equal to that provided by the legislation of a single Member State for workers who have suffered a number of accidents, all of them under the legislation of that State. However, that

purpose has been implemented by laying down the requirement that the aggregate degree of incapacity shall be assessed by the institution of the Member State which is competent in respect of the insurance benefits for the last accident (or for the last occupational disease), not by the institution of the State which is competent in respect of the first accident. To put the matter more clearly, the above-mentioned provisions entail taking as the point of reference the legislation of the Member State under which the last accident occurred (in the present case, the Italian legislation); in the first place, to ascertain whether such legislation takes previous accidents into consideration in order to assess the degree of incapacity and, if so, to treat the effects of the previous accident occurring under the legislation of another Member State as being equivalent to those which that accident would have produced had it occurred under the legislation applicable to the subsequent accident.

This is also provided in Article 72 of Regulation No 574/72 of the Council (fixing the procedure for implementing Regulation No 1408/71). Article 72 (1) in fact provides that "In order to assess the degree of incapacity in the case referred to in Article 61 (5) of the regulation, a worker shall supply the competent institution of the Member State to whose legislation he was subject at the time when the accident at work was sustained ... with all information on previous accidents at work sustained ... by him when he was subject to the legislation of any other Member State ...". Article 72 (2) in its turn provides that "In accordance with the legislation which it administers in respect of the acquisition of the right to benefit, and the determination of the amount of benefit, the competent institution shall take into account the degree of incapacity caused by *those previous cases*". As we see, there is no reference to the hypothesis that the institution to which the worker applied at the time of the first accident must take into consideration the effects of the subsequent accident.

4. In order fully to clarify the scope of those provisions whose interpretation has been requested by the court making the reference I think we must ascertain the actual task assigned to the insurance institution which is competent in the last instance by the words "take into consideration [accidents at work which have occurred previously] in order to assess the aggregate degree of incapacity", which appear in both of the provisions in question.

I think that it must be recognized from the outset that those words form an element of substantive law. The general assessment undertaken, under the prescribed conditions, by the last institution does not amount to the addition of the medical and legal assessments made separately by various national institutions: it amounts rather to the individual consideration of the combined effects of the last accident and the previous accidents on the capacity for work of the insured person. The case may arise where, whilst the effects of the last accident are in themselves negligible, they take on a different aspect once they are placed in conjunction with the effects of previous accidents. Moreover, it is clear that the insurance protection must be commensurate with the actual reduction in the capacity for work: partial appraisals of the effects of individual accidents are liable to entail distortion of the general assessment. The outcome is, then, that in certain cases the entitlement to a pension can emerge only as the result of a grouping of the effects of a number of accidents, none of which, considered in isolation, would confer

entitlement to a pension. In order to substantiate this view reference may be made to the last part of the above-mentioned Article 72 (1) of Regulation No 574/72, according to which the worker is obliged to supply the last competent insurance institution with all information on previous accidents "whatever the degree of incapacity caused by those previous cases".

For the purpose of attaining such results, which are of importance from the two aspects of the existence and content of the right to a pension, it seems to me that no purpose can be served by extending the "taking into consideration" to subsequent accidents. A provision drawn up in those terms, without ultimately reserving to the institution which is competent in respect of the first accident the assessment of subsequent accidents (thereby reversing the rule contained in Article 61 (5) of Regulation No 1408/71), would risk causing administrative confusion in that the same fact would be assessed by a number of national institutions, each within the ambit of its own competence, which might result in contradictory assessments.

In addition to producing the effect in substantive law which I have mentioned the provisions in question also have an effect in a different sphere, conferring a special administrative competence on the insurance institution of last instance. The Community legislature considered that standards of proper administration required that a single national institution should be charged with assessing the aggregate degree of incapacity for work and assigned that task to the institution which is competent in respect of the last accident. That institution was considered the most suitable to accomplish the task, being the nearest, in geographical terms, to the last accident and having the most direct contact with the worker concerned. This line of interpretation, which considers the provision as having *inter alia* the purpose of simplifying the procedure for the acquisition of entitlement, is reinforced by Article 72 of Regulation No 574/72 of the Council, both in the said paragraph (1) and in paragraph (3), in which it is provided that the competent institution may "apply to any other institution which was previously competent in order to obtain any information it considers necessary".

5. It seems to me that an entirely different problem arises in establishing which insurance institution is liable to pay benefits where two or more accidents at work occur in different Member States and in fixing any criteria for apportioning that liability where it must be borne jointly by the institutions of two or more Member States.

The Commission wishes to confer on the words "take into consideration in order to assess the degree of incapacity" a wider scope than that which I have indicated, in that it considers that those words were intended to place upon the institution which is competent in respect of the last accident the entire financial responsibility for the pension corresponding to the aggregate incapacity established. However, it does not appear to me that any persuasive support for a view of this nature may be adduced from the text of those provisions, their general scheme or internal logic. With regard to the textual aspect, I must emphasize that the said provisions require previous accidents to be taken into consideration in order to assess the aggregate degree of incapacity, but they do not determine who shall bear the financial burden of the benefits. That is particularly important if it is borne in mind that, when Regulation No 1408/71 (like,

moreover, Regulation No 3) tackles the delicate matter of financial responsibility for benefits, it does so by means of clear and express provisions, frequently employing the unequivocal terms "the cost of cash benefits" (cf. Article 60 (2) (b)). Nor is a different outcome produced if Article 61 (5) of Regulation No 1408/71 is read in conjunction with Article 72 of Regulation No 574/72, since paragraph (2) of the latter merely charges the institution which is competent in the last instance to establish the aggregate degree of incapacity in so far as it affects the acquisition of the right to a pension. I do not think that it can be inferred from the words "in respect of the acquisition of the right to benefit, and the determination of the amount of benefit", contained in Article 72 (2), that the cost of the insurance benefits is the exclusive concern of the institution which undertakes the assessment. In fact, establishing the amount of benefits is quite distinct from assuming sole responsibility for their cost. With regard to the logical aspect, finally, it appears incongruous and contradictory to place the cost of the benefits exclusively on the agency which, by reason of fortuitous circumstances, has become competent in the last instance. The latter institution would bear that cost in so far as it arose from two accidents at work even where, for example, the worker had spent most of his working life in a different State, in which the first accident occurred. Furthermore, the institution which is competent in the last instance would be obliged to pay the whole pension even where the accident which occurred last was, taken in isolation, an insignificant affair whereas the pre-existing invalidity, on the other hand, was more serious. In fact the provisions in question leave open the problem of the apportionment of the costs between the insurance institutions of the two Member States in which the same worker has sustained two accidents. Furthermore, that problem exceeds the framework of the present case.

6. Once it has been decided that under the provisions of Article 30 (1) of Regulation No 3 and of the corresponding Article 61 (5) of Regulation No 1408/71 the national insurance institutions are not obliged to have regard to "subsequent" accidents and diseases it remains to be established whether that obligation follows from any other Community provision.

It was maintained on Mr Barion's behalf that the legal basis for the above-mentioned obligation is to be found in Articles 48 to 51 of the EEC Treaty. That argument which, furthermore, was advanced but not substantiated, seems to me unfounded. Articles 48 to 51 of the Treaty contain the fundamental rules concerning freedom of movement for workers; Article 51, making specific reference to insurance matters, lays down that the Council shall adopt "such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers . . .:(a) aggregation, for the purpose of acquiring . . . the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries". Regulations Nos 3 and 1408/71 give effect to the general principles embodied

in the above provision. But I do not understand how it is possible to perceive in those principles an obligation upon the insurance institution to take into account in addition subsequent accidents in order to assess the aggregate degree of incapacity. The protection of the worker in the event of the occurrence of a number of accidents or occupational diseases is in fact ensured by the obligation imposed upon the institution which is competent in the last instance to assess, provided that certain specified conditions obtain, the aggregate degree of incapacity, having regard also to *previous* accidents and diseases. The worker is thereby guaranteed, within the framework of the legal system applicable to the institution which is competent in the last instance, treatment equal to that which must be provided for workers who do not leave their country, through the fact that the insurance agency is not required to take into consideration subsequent accidents and diseases.

7. In conclusion I accordingly suggest that the Court of Justice should reply to the single question submitted by the Bundessozialgericht of the Federal Republic by two orders of 27 June 1978 with the following ruling:

"According to Article 30 (1) of Regulation No 3 of the Council of 1958 and Article 61 (5) of Regulation No 1408 of the Council of 1971 the social insurance institution of a Member State which is competent in respect of accidents at work must take into consideration in order to assess the degree of incapacity accidents which have occurred or have been confirmed previously under the legislation of another Member State, as if they had occurred or had been confirmed under the legislation which it administers, but it is not required to take into consideration accidents which have occurred or have been confirmed *subsequently* under the legislation of another Member State".