expired may no longer claim entitlement, by virtue of the first sentence of Article 69 (2), to benefits as against the competent State unless the said period is extended pursuant to the second sentence of Article 69 (2).

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 19 June 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 27 MARCH 1980 [1]

Mr President,
Members of the Court,

The parties to the three main actions pending before the German courts are in dispute concerning the re-granting of unemployment benefit pursuant to Article 69 of Regulation (EEC) No 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 (Official Journal, English Special Edition 1971 (II), p. 416).

According to Article 69 (1) (c) an unemployed worker who satisfies the conditions for entitlement to benefits under the legislation of a Member State and who goes to another Member State in order to seek employment there shall retain his entitlement to such benefits for a maximum period of three months from the date when he ceases to be available to the employment services of the State which he has left. Article 69 (2) is worded as follows:

"If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under paragraph (1) (c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this

1 — Translated from the German.

time limit may be extendend by the competent services or institutions."

According to Article 100 taken together with Article 103 of the German Arbeitsförderungsgesetz [Law on the promotion of employment, hereinafter referred to as "the AFG"] of 25 June 1969 (Bundesgesetzblatt I, p. 582), on the other hand, the payment of unemployment benefit is interrupted if an unemployed worker leaves the Federal Republic of Germany, thereby becoming unavailable on the German employment market. But if he returns his right is revived for the remainder of the entitlement period, which is computed in accordance with Articles 106 and 110 (3) of the AFG. Under Article 125 (2) of the AFG entitlement to unemployment benefit can no longer be claimed once three years have elapsed since it arose.

I — The following facts and circumstances of the cases must be viewed against the legal background just described.

1. After pursuing an occupation in the Federal Republic of Germany, Mr *Testa,* an Italian national from Salerno and the plaintiff in the main action in *Case 41/79,* registered as unemployed on 14 April 1975 at the Hagen Arbeitsamt [employment office]. The Arbeitsamt granted him unemployment benefit for 234 days from 12 April 1975.

At his request the Arbeitsamt issued him with certificate E 303 on 11 June 1975 for the purpose of seeking employment in Italy; the certificate certified amongst other things that the plaintiff could draw unemployment benefit from 12 July until 11 October 1975.

The plaintiff went to Italy on 12 July 1975 but did not return to the Federal Republic of Germany until 13 October 1975; he then applied to the Hagen Arbeitsamt on 14 October for the regranting of unemployment benefit. The Arbeitsamt refused on the ground that pursuant to Article 69 (2) of Regulation No 1408/71 the plaintiff had lost his residual entitlement to employment benefit because of his late return.

After his objection and application had been turned down the plaintiff appealed to the Bayerisches Landessozialgericht. The Fifth Senate of that court stayed the proceedings by an order of 15 February 1979 and submitted the following question to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling:

"Does the second half of the first sentence of Article 69 (2) of Regulation (EEC) No 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 (Official Journal, English Special Edition 1971 (II), p. 416) preclude an unemployed person from entitlement to unemployed benefits in the competent Member State if he returns to that Member State after more than 3 months, even if he still has a residual claim under the domestic legislation of that Member State?"

2. Mr *Maggio,* also an Italian national and the plaintiff in the main action in *Case 121/79* obtained unemployment benefit on 19 February 1974 for a period of 195 working days.

At his request the Karlsruhe Arbeitsamt certified on 9 May 1974 on form E 303 that for the purpose of seeking employment in Italy be would continue to receive German unemployment benefit for three months from 11 May 1974. On 11 May the plaintiff then travelled to Chioggia in Italy and without having found work in Italy returned only on 17

August 1974 to the Federal Republic of Germany where he applied for the resumption of unemployment benefit from 19 August 1974. He claimed that on 11 August 1974 he had received treatment at the District Hospital in Chioggia for an abscess on his hand; owing to blood poisoning he had also had a fever and a swelling of the lymph nodes under his arm and as a result he had been unfit to travel.

The Arbeitsamt refused to resume payment of unemployment benefit on the ground that under Article 69 (2) of Regulation No 1408/71 Mr Maggio had lost all entitlement to unemployment benefit. His objection against this refusal, his application to the Sozialgericht Karlsruhe and his appeal to the Landessozialgericht Baden-Württemberg all failed. The Landessozialgericht paid particular attention to the fact that under Article 69 (2) of Regulation No 1408/71 an extension of the period of entitlement falls within the discretion of the defendant and no misuse of that discretion was to be found. According to the meaning and purpose of Article 69 the unemployed person may use up all of the period only for the purpose of seeking employment when there are good prospects of finding a job. Should he however remain in a country where he is seeking work right up to the end of the period, he must bear the entire risk of his return being delayed until after the expiry of the period because of unforeseeable circumstances. However, the local employment exchange in Chioggia responsible for the applicant's case had informed him as soon as he registered as unemployed there that there were no prospects of finding work within three months; nor did the prospects of finding work appreciably improve in the following weeks.

The Seventh Senate of the Bundessozialgericht before which the plaintiff appealed on a point of law stayed the proceedings by an order of 19 June 1979 and referred the following question to the Court of Justice for a preliminary ruling:

"Does an unemployed person who returns the 'competent State' after the expiry of a period longer than three months lose, in pursuance of Article 69 (2) of Regulation (EEC) No 1408/71, his 'entitlement ... under the legislation of the competent State' in the sense that, regardless of the provisions of the competent State, his entitlement is in any event extinguished, that is, even if the legislation of the competent State provides for its continuation?"

3. Finally, Mr *Vitale*, another Italian national and the applicant in the main action which led to *Case 796/79*, was granted unemployment benefit on 2 June 1975 by the employment authority for a period of 306 working days. On 7 July 1975 he was issued with form E 303 stating that in accordance with Article 69 of Regulation No 1408/71 and for the purpose of seeking employment in Italy he would continue to receive German unemployed benefit from 12 July 1975 to 11 October 1975. The plaintiff thereupon went to Cava dei Tirreni in Italy where he fell ill on 30 September 1975. On 20 October 1975 he returned to the Federal Republic of Germany and on the same day registered as unemployed at the competent Arbeitsamt and applied for the resumption of unemployment benefit.

However, the Bundesanstalt für Arbeit [Federal Employment Office] refused to grant unemployment benefit on the ground that the three month period laid down by Article 69 (1) (c) of Regulation No 1408/71 had been exceeded, since,

from information obtained at the place where Mr Vitale stayed, there had been no prospect of employment. After his objection had been refused Mr Vitale brought an action in the Sozialgericht [Social Court] Wiesbaden which set aside the decision to disallow the objection and ordered the defendant to pay the plaintiff unemployment benefit for the period from 22 October until 2 November 1975 (the plaintiff had started a new job on 3 November 1975). The Sozialgericht took the view that in spite of his late return to the Federal Republic of Germany the plaintiff had not lost his entitlement to unemployment benefit because the exception contained in the second sentence of Article 69 (2) of the said regulation applied. The refusal to extend the three month period was an error of discretion since the unemployed person is in principle entitled to use up the whole of the period allowed. The plaintiff, innocently prevented from returning home because of illness, did return to the Federal Republic of Germany, however, immediately he was able to do so.

On appeal against that judgment the defendant contended that an exceptional case within the meaning of the said provision arises only when an unemployed person is prevented from returning in the time allowed by circumstances of *force majeure* and when his stay in the country where he was looking for employment was justified until the obstacle arose by a search for work which stood a chance of success. By staying on when there is no prospect of securing work the unemployed person must bear the risk of returning late.

By an order of 30 August 1979 the court seised of the appeal, the First Senate of the Hessisches Landessozialgericht, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Does the loss of 'all entitlement to benefits under the legislation of the competent State' in the case of an unemployed person who does not return there before the expiry of the three-month period mean that he is thereby divested of every legal right (contingent entitlement)?

2. Does this also apply to the case where the legislation of the competent State provides for the continuance of the contingent entitlement?"

II — The common factors in the cases which I have described and which gave rise to the questions for a preliminary ruling with which I shall deal hereafter are that the unemployed persons returned to the Federal Republic of Germany from looking for work in another Member State *after* the three month period laid down in Article 69 (1) (c) of Regulation No 1408/71 had expired and that the German employment authorities refused to resume payment of unemployment benefit as requested in reliance on the second half of the first sentence of paragraph (2) of that provision. The provision in question provides that the unemployed person concerned shall lose "all entitlement to benefits under the legislation of the competent State if he does not return there [that is, to the Member State responsible for payment of benefits] before the expiry of that period."

1. The doubts felt by the courts referring the questions are understandable once one knows that the German legislature uses the word entitlement [Anspruch] in the law on the promotion of employment in two senses, first, in the sense of an immediate and concrete right to benefit, but then also in the sense of a right arising from the fulfilment of the qualifying period in accordance with the first sentence of Article 104 (1) of the AFG, which is called a "contingent entitlement" [Anwartschaft].

In refusing to continue to pay to the applicants in the main action after their return to the Federal Republic of Germany unemployment benefit for the remainder of the time for which they would still have been entitled, the defendant employment office is clearly interpreting Article 69 (2) of Regulation No 1408/71 to mean that that provision is intended to extinguish not only the immediate entitlement but also the contingent entitlement or any residual entitlement still remaining. However, in the view of the courts making the reference the wording of the provision in question is not clear in this respect, since it is not certain whether the contingent entitlement is also to be understood by "entitlement". It is further unclear, particularly in the view of the Bundessozialgericht, whether the words "under the legislation of the competent State" are meant to qualify the word "entitlement" or are a reference to the provisions of the law of the competent State which stipulate when entitlement shall be lost.

To the Bundessozialgericht and the Hessisches Landessozialgericht the meaning and purpose of the provision, namely the promotion of freedom of movement, seem to support the view that the entitlement of unemployed persons revives when they are once again available for work on the employment market of the competent State and national law provides for the revival of entitlement. According to this view Article 69 (2) is to be understood to mean that after the three month period has expired only the advantage granted by Article 69 (1) of the regulation, of being able to claim entitlement to unemployment benefit even during a stay in another Member State, is lost. The plaintiff in Case 41/79 and the Government of the Italian Republic also eventually come to the same conclusion, likewise deducing from the purpose of Article 51 of the EEC Treaty, on which the regulation in question is based, that it is intended that entitlement should be lost only during the time by which the period is exceeded, in other words, from the day when the period expires until the day on which the unemployed person once again registers at the competent employment office. From the day of re-registration further entitlement or contingent entitlement depends not on Article 69 of the regulation in question but solely on the relevant domestic law. In regard to this point the Court of Justice has already emphasized in the *Petroni* case (Case 24/75, judgment of 21 October 1975, [1975] ECR 1149) and in the *Manzoni* case (Case 112/76, judgment of 13 October 1977, [1977] ECR 1647), that the aim of Article 48 *et seq.* of the EEC Treaty would not be attained if, having exercised their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them by the laws of the Member States. That principle must therefore be applicable in the present case.

However, it seems to me that the very wording and structure of the provision in question militates against that interpretation. As we have seen, Article 69 (2) of the regulation guarantees to the unemployed person, who returns from his search for work in another Member State before the three month period has expired, resumption of entitlement to benefits under the legislation of the competent State. Member States may not therefore refuse to resume benefits on the ground that the unemployed person was previously absent from their territory. In other words, Community law provides that in regard to his entitlement to benefits the unemployed person returning in good time is to be

placed in the same position as if he had been continuously available to the competent employment authority. If he does not return to the competent State within good time, one might, as the Commission for one emphasizes, come to the opposite conclusion, that the competent State's duty under Community law to continue payment of benefits no longer exists and in this respect it is left to domestic law to determine whether it will grant the unemployed person benefits or not. However, in order to avoid that conclusion, which would lead to differing solutions, the second half of the first sentence of the second paragraph makes it clear that the unemployed person loses *all* entitlement (tout droit, jeden Anspruch, ongi diritto) if he does not return before the three month period has expired. But the wording and the structure of that paragraph would be difficult to understand if the authors of the regulation had intended entitlement under Article 69 (2) to be lost only during the interval between the expiry of the period and re-registration with the competent employment authorities. As the Commission points out, if that were to be the case it would have been sufficient to provide that from the time of his return to the competent State the unemployed person was to continue to be entitled to receive benefits under the provisions of that State.

Nor, as the Commission and the Government of the Federal Republic of Germany correctly emphasize, can a different interpretation be derived from the fact that according to its wording the rule refers in each case to entitlement to benefits "under the legislation of the competent State". If one were in fact to read into this reference to the provisions of the competent State a so-called "reference to the legal consequences" [Rechtsfolgenverweisung], then in the final analysis this would mean that both the first half and the second half of the sentence mean that continued entitlement depends in each case on national law, irrespective of whether the unemployed person returns before or after the three month period has expired. The distinction made by the Community legislature would be meaningless if this were the interpretation adopted. A more correct view therefore is that the reference merely serves to identify more closely the rights which the unemployed person shall forfeit by not returning in time, namely those which he enjoys as against the competent State under its legal provisions. The added phrase "under the legislation of the competent State" therefore simply makes it clear that any other rights, for example those which might exist according to the legal provisions of the country in which work is sought, are not excluded by the provision.

Let me say immediately in this connexion that the question whether, for example, the non-observance of the conditions contained in Article 69 of Regulation No 1408/71 excludes a worker from entitlement to unemployment benefit as against an insurance institution in the State to which that unemployed person has gone to look for work was the subject matter of the judgment of the Court of Justice of 10 July 1975 in Case 27/75 (*Gaetano Bonaffini and Others* v *Istituto Nazionale della Previdenza Soziale*, [1975] ECR 971) on which the Bayerisches Landessozialgericht relied in its order making the reference. The Court of Justice made it clear in that case that rights which exist under the legal provisions of the country in which work is sought are neither directly nor indirectly governed by Article 69. In view of that distinction in relation to other rights the Court of Justice therefore emphasized that Article 69 "does not affect any rights which the worker may

possibly claim under the legislation of the Member State to which he has gone".

2. I can now turn to the next question, namely whether the meaning and purpose of the provision require that it be given another meaning going further than the interpretation propounded here. In this regard the Commission and the Government of the Federal Republic of Germany correctly point out that the provision in question represents an important innovation in the field of social law in comparison both with the previously applicable Regulation No 3 of the Council on social security for migrant workers of 25 September 1958 (Journal Officiel 1958, p. 561), which did not provide for any possibility of benefits accompanying an unemployed person into another Member State to assist him in his search for work, and with the corresponding rules in the Member States. The latter rules basically make the granting of unemployment benefits dependent upon the presence of the unemployed person at the place where the competent employment authority is situated, his availability to take up work and his being subject to supervision by the competent authorities. This close connexion between the granting of unemployment benefit and the duty to keep oneself available to the competent employment services was also noted in particular in the judgment of the Court of Justice of 20 March 1979 in Case 139/78 *(Giovanni Coccioli* v *Bundesanstalt für Arbeit* [1979] ECR at p. 999) in which the Court of Justice stressed that the duty to keep oneself available to the employment services of the competent State and to be subject to their supervision is the counterpart to the grant of unemployment benefits. The exception created by Article 69 therefore constitutes an *independent rule* which goes further than simply co-ordinating national provisions. For the duration of the three month period the Member States competent to grant benefits waive the conditions concerning availability and supervision. Because of the different conditions prevailing on the respective labour markets the supervision over the unemployed person in the State where he seeks work is necessarily no proper substitute for keeping the unemployed person available to the employment office in the competent State. The unemployed person is given the opportunity to go to another Member State for a stipulated period in search of work while still being able to draw unemployment benefit without being available to the competent institution. Furthermore, his entitlement to the resumption of payment of unemployment benefit on his punctual return to the competent Member State is laid down in Community law in such form that entitlement even exists where, for example, under domestic law there would be no such entitlement on account of the interruption in the drawing of unemployment benefit occasioned by the absence of the person concerned in another State.

It follows from this advantage, which is available uniformly within the Community, that the legal effects of late return contemplated in the second half of the first sentence of Article 69 (2) are also to be uniform throughout the Community, so that on a proper view no reference to national law for the purpose of establishing legal effect is to be read into the wording in question.

For the purposes of a uniform interpretation it must, however, be borne in mind that by its very nature unemployment benefit is dependent on the unemployed person's being available to and subject to the supervision of the competent auth-

ority. Therefore Article 69 (1) (c) limits the right to receive benefit while in another Member State to a maximum period of three months during which a job may ordinarily be found for the unemployed person. If no job is found for him during this period it is obvious that the Member States which undertook to continue payment of benefits have a legitimate interest in an immediate return to the country of employment so that the authorities of the country of employment may then take the necessary steps to bring the unemployed person on to the labour market and other measures of employment policy intended to reduce unemployment. Moreover, as the Federal Government points out, the reassimilation of the unemployed person into working life would be made much more difficult after a longer period of unemployment.

Finally, another point to be borne in mind is that during the three month period the right to receive benefit while in another Member State is not in principle dependent on the likelihood of the search for work in another Member State being successful. It need hardly be emphasized that there is a risk of such a provision being abused. The obligation to return no later than three months afterwards is therefore also aimed at preventing abuse of the rules once the stipulated period has expired.

For these reasons it is necessary that Community law should provide a legal consequence as a counterpart to the advantage under Article 69 (1) which is such as to compel an unemployed person who is unsuccessful in finding work in another Member State to return to the country of employment no later than the end of the three-month period. The threat of losing all further entitlements because of late return should certainly do this.

On the other hand, a less stringent arrangement, such as the mere suspension of current payment of unemployment benefit during the time that an unemployed person remains in another Member State, is, contrary to the opinion of the Italian Government and of the plaintiff Testa, not an adequate way of achieving the aim of ensuring that the period spent abroad is restricted in time. In particular, if unemployed persons return to their home countries to seek work there, the amount of unemployment benefit should, as the Federal Government rightly points out, be sufficient in many cases to pay for stays abroad which are longer than three months. It is therefore open to them to take advantage of the opportunities granted by Article 69 of Regulation No 1408/71 without having to incur substantial disadvantages through exceeding the period to a greater or lesser extent.

In conclusion, it should be noted that the interpretation propounded here accords with the history of the origin of Article 69. In my view it can clearly be seen from documents submitted by the Council that when debating the provision in question the authors of the regulation proceeded on the basis that the unemployed person should lose all entitlement to benefits in the country of his last employment if he remained in the second country for longer than the stipulated maximum period.

III — I can now turn to the next question raised by the courts making the reference and by the parties engaged in the proceedings, which concerns the compatibility of the rules in question, as

interpreted here, with higher-ranking Community law.

1. The Bundessozialgericht, the plaintiff Testa and the Italian Government first express doubts as to whether Article 69, interpreted as described, is compatible with Article 51 of the EEC Treaty and capable of being valid. In their view, it is incompatible with the meaning and purpose of Article 51 of the EEC Treaty which is to promote freedom of movement for workers, for the contingent entitlement acquired by reason of contributions to be extinguished irrespective of national rules, because a worker has exercised his rights to freedom of movement for a period of longer than three months. This consideration is said to emerge from the settled case-law of the Court of Justice, especially in Cases 24/75 *(Petroni)* and 112/76 *(Manzoni)*, in which it was made clear that a migrant worker who exercises his right to freedom of movement should not lose the social security advantages which he has under the rules of a single Member State. Moreover, if the rules were to stipulate that national entitlements or contingent entitlements should be extinguished, a migrant worker would in fact be treated less favourably when going to another Member State in order to look for work than if he went to a non-member State, since in the latter case his national entitlement would revive on his return. In the opinion of the Italian Government the requirement that a worker must "return" within a short time and for good not only deliberately conflicts with the general structure of Regulation No 1408/71 and with the principle that the place of residence plays no part; the requirement to return, taken in this sense, also recreates the very discrimination between national and migrant workers which the EEC Treaty was intended to abolish.

On the other hand, the Federal Government and the Commission in particular take the view that the rules in question, which enable unemployment benefits to be "exported" into another Member State, are to be understood not simply as the fulfilment of the binding duty to legislate imposed on the Commission and the Council by the Treaty in Article 51 (b), but as a further step left to the discretion of the Community institutions under Article 51 towards creating freedom of movement for workers in the field of social security. The new rules contain an important extension together with a restriction, which are mutually dependent and can only be seen *as a whole*. If one judges them as a consistent whole one must acknowledge that none of the advantages granted by the rules of the Member States have been curtailed.

When considering this argument one should not overlook the fact that Regulation No 1408/71 was adopted in implementation of Articles 48 to 51 of the EEC Treaty and is therefore also to be judged in the light of those provisions. As I have already stated, Article 69 of the regulation constitutes a special rule which, as such, does not curtail but neither increases freedom of movement by enabling unemployment benefits, which by their nature are not usually amenable to exportation, to be "carried away" into another Member State for certain periods of time, in the interests of freedom of movement. The Court of Justice made this point succinctly in Case 139/78 *(Coccioli)* when it stated:

"Article 69 ... confers on a person who avails himself of that provision an advantage as compared with a person who remains in the competent State in as much as, by the effect of Article 69, he is freed for a period of three months of the duty ... to keep himself available to the employment services of the competent State and to be subject to the control procedure organized therein."

However, if the Council confers entitlements on migrant workers in its directives which they would not otherwise have, then it must also be empowered, within its legislative discretion, to determine the extent and duration of those advantages in the light of the specific features of national social security schemes and the way in which they work. As a result the Court of Justice concluded in its judgment in the *Coccioli* case that the three month period, which restricts only the right to benefits anchored in Community law, is lawful.

On the other hand, in the *Petroni* and *Manzoni* cases, the Court of Justice held that certain applications of the provisions in Article 46 (3) of Regulation No 1408/71 against the overlapping of benefits conflict with Article 51 of the EEC Treaty because they deprive a worker who has exercised his right to freedom of movement of social security advantages which he is already guaranteed *solely* by virtue of the legislation of *a single Member State* and because this would fail to achieve the objective of Articles 48 to 51 of the EEC Treaty. Unlike the measures held invalid in those cases, the rule in Article 69 (2) does not, however, affect rights acquired by an individual under national law, provided that the person looking for work returns in good time to the country of employment. An unemployed person who avails himself of the rule, returning to the country of employment in good time, is therefore not worse off but better off than the person who goes to a non-member State, since his entitlement to benefits is maintained during the three month absence. In this respect he is also basically at an advantage in comparison with workers from non-member States who cannot avail themselves of that rule. In conclusion, let it be said to the objection of the Italian Government that the rule also applies to German unemployed persons who go to another Member State to look for work and in that respect it is not an infringement of the prohibition on discrimination contained in Article 48 et seq. of the EEC Treaty.

Of course it cannot be denied that, in the event of late return, the second half of the first sentence of Article 69 (2) as interpreted here extinguishes rights which, were it not for the rule of Community law, the unemployed person would not have lost after returning from a stay abroad. However, in my view such interference with these rights acquired by the individual under national law is justified by the following considerations: First, as I have already explained, one must not forget that even paragraph (2) of Article 69 serves to improve freedom of movement for workers because without it the rule in paragraph (1) would not be possible. Next, and this seems an essential aspect to me, wholly unemployed workers from the Member States are not forced to have recourse to Article 69 of Regulation No 1408/71 when seeking employment in another Member State. Instead they can go to another Community country without

availing themselves of that provision and forfeit their entitlement to unemployment benefit during their absence but, where national law so provides, they can continue to draw it upon their return. However, if they opt for the more advantageous rule in Article 69 which, upon the conditions contained therein, provides for entitlement to benefit to be maintained for a maximum period of three months, they thereby also accept as it were the "encumbrance" attaching to that rule, namely the loss of all entitlement to benefits in the event of late return. In notice E 303/5 the attention of unemployed persons is drawn to the close relationship between the opportunity created by Community law to continue to be entitled to benefits whilst being unavailable to the competent institution and the concommitant risk of losing that continued entitlement in the event of late return; the notice specifically states that if the unemployed person's search for work outside the country of last employment continues for more than three months any remaining rights to employment benefits in that country of last employment *are extinguished* at the end of that period.

Finally, I have already pointed out in my Opinion in the *Coccioli* case that by providing for the possibility of an extension of the period the hardship clause in the second sentence of Article 69 (2) offers a remedy for the solution of cases where the complete loss of further entitlement after the expiry of the period would be a breach of the principle of proportionality. The Court of Justice has therefore decided that Article 69 (2) of Regulation No 1408/71 does not restrict the power of the competent services and institutions of the Member States to take into consideration, with a view to deciding upon any extension of the period laid down by the regulation, *all* factors which they regard as relevant and which relate either to the *individual situation of the workers* concerned or to the exercise of effective control.

However, these cases present the opportunity of further defining the limit to the discretion which emerges from the meaning and purpose of that provision. It should be clearly emphasized, particularly in regard to the main proceedings in the *Vitale* case, that in *each individual case* the competent services or institutions in the Member States *must* decide, when exercising their discretion as they are bound to do, whether the facts set out in an application for an extension of the period laid down in Article 69 (2) of Regulation No 1408/71 constitute an "exceptional case" which justifies an exception being made to the rule. In the exercise of that discretion, which is *conditioned* by the meaning and purpose of the provision in question, particular consideration must be given to the length of time by which the three month period has been exceeded, the reason for the late return, and also, and this seems to me to be of particular importance, the seriousness of the legal consequences in the event of late return.

2. Finally, the Bundessozialgericht and the plaintiff Testa have raised the further question of the compatibility of Article 69 (2), as interpreted here, with Article 14 of the German Basic Law, whilst the Hessisches Landessozialgericht and also the Italian Government have pointed to a possible conflict with the right to property as protected by Community law. They argue that on account of his contingent entitlement to unemployment benefit a worker possibly acquires an advantage akin to a right to property which cannot be rendered nugatory by the rules in question.

However, as the Court has repeatedly stated (cf. Case 11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 17 December 1970, [1970] ECR 1125, and Case 44/79, *Hauer*, judgment of 13 December 1979), the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged *in the light of Community law itself*, since the introduction of special criteria for assessment stemming from the law of *one* particular Member State would damage the substantive unity and efficacy of Community law, thereby inevitably leading to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community. Furthermore, the Court of Justice has emphasized, notably in Cases 11/70, *Internationale Handelsgesellschaft*, 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Commission*, judgment of 14 May 1974 [1974] ECR 491, and 44/79, *Hauer*, that the observance of fundamental rights forms an integral part of the general principles of law which it is its duty to uphold. In safeguarding those rights, the Court draws inspiration from the constitutional traditions common to the Member States so that, as can be seen in particular in the *Hauer* case, it cannot uphold measures in the Community which are incompatible with fundamental rights protected by the constitutions of those States. Finally, as the Court of Justice stressed in particular in Cases 36/75, *Roland Rutili* v *Minister for the Interior*, judgment of 28 October 1975, [1975] ECR 1219, and 44/79, *Hauer*, international treaties for the protection of human rights ratified by the Member States can provide guidelines which should be followed within the framework of Community law. Against the background of these authorities the doubts expressed about the compatibility of Article 69 (2) of Regulation No 1408/71 with the provisions for the protection of fundamental rights can consequently only be understood to mean that the validity of that rule in relation to the right to property — which is, as the *Hauer* case shows, protected by Community law — is being questioned.

My opinion, which is shared by the Federal Government and by the Commission, is that it can however be left open in this case whether and to what extent entitlements to benefits under social insurance and, in particular, the contingent entitlement to unemployment benefits in question here, fall within the protection of property guaranteed by Community law. It can in fact be seen from the constitutional rules and the constitutional practice of all Member States that the legislature is permitted to regulate the use of private property in the general interests. For example, one might mention here the first sentence of Article 14 (2) of the German Basic Law, which refers to the obligations inherent in property, the second sentence of Article 14 (2) of the German Basic Law and Article 43.2.2° of the Irish Constitution, which make the use of property subject to the requirements of the common good, Article 43.2.1° of the Irish Constitution, which refers to social justice, and to Article 42 (2) of the Italian Constitution, which also contains a reference to the social function of property. Likewise in the *Nold* case, the Court of Justice established the relationship between individual interests and common requirements by stating:

"The rights thereby guaranteed [by the constitutional laws of all the Member States], far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched."

As the Court of Justice pointed out in the *Rutili* case, the concepts of the public interest and of the common good, in the sense of limitations upon fundamental rights, are themselves to be drawn from "the requirements of the law, including those contained in Community law".

It is clear from this that in the final analysis the *social function* determines the actual extent to which property is protected. In other words, the power of the legislature to determine the nature of property and the limits thereto depends on the extent to which that property has a social purpose and function. Although there is no need here to come to a final decision on whether rights or contingent entitlements to unemployment benefits have features which render them akin to property rights protected by constitutional law, they do, however, have a distinct social aspect. This is readily to be seen from the fact that they are an integral part of a benefit system which has an important social function and that, as we heard in the oral procedure, unemployment insurance is, at least in the Federal Republic of Germany, also financed in part by contributions from the State, and therefore out of public funds. When determining the nature of and the limits to the legal entitlement to unemployment benefit, the legislature must therefore in principle enjoy a wide discretion in drawing up the rules which serve to keep the system of unemployment insurance functioning efficiently in the common interest. Thus an entitlement or contingent entitlement is protected by the guarantee of property to the extent permitted *by the legal situation in each case.*

However, one of the basic requirements in all the Member States for entitlement under unemployment insurance is that the unemployed person must be available to the authorities (see, for example, Article 100 of the German Arbeitsförderungsgesetz; Article L 351/7 of the French Code du Travail as amended by Law No 79/32 of 16 January 1979 on assistance for workers without employment, Journal Officiel de la République Française of 17 January 1979, p. 143; Article 52 of the Italian Regio Decreto No 2270 of 7 December 1924; Article 57 of the Danish lovbekendtgørelse No 471 of 25 August 1978 om arbejdsformidling og arbejdsforsikring m v; Section 82 of the British Social Security Act 1975; Section 15 of the Irish Social Welfare Act 1952). As we have seen, the Community legislature has dispensed with *this* requirement in the interests of the creation of freedom of movement, one of the most important aims of the Community, and has adopted other requirements and limits which enable an unemployed person to take his entitlement with him to another Member State for a period of three months. The unemployed person may avail himself of the rule, which, I repeat, is purely to his advantage, provided he returns in time,

but he is,1 not forced to do so. If he opts for the rule in Article 69 of Regulation No 1408/71, he bears the attendant risk of completely losing any further entitlement to benefits should he not return in time. In this case the instruction to return from abroad within three months may be regarded as a limitation which arises from the social function of the legal entitlement in the interests of improving or maintaining the efficacy of unemployment insurance. Like the Federal Government, the Bundesanstalt für Arbeit and the Commission, I am therefore of the opinion that in this respect there is no denial of property rights. The loss of all further entitlement is in the public interest and, as I have already argued, accords with the principle of proportionality which must be observed. If, however, in an individual case, special circumstances prevent a return in good time and a loss of all further entitlement would, in the light of all the circumstances, be disproportionate then, as I have stated, account must be taken of the principle of proportionality by application of the hardship clause contained in the second sentence of Article 69 (2).

Finally on this point, let it also be said that the German Arbeitsförderungsgesetz provides in Articles 119 (3) and 120 that an unemployed person's residual entitlement to unemployment benefit may be extinguished under certain, albeit very stringent, conditions. As far as I am aware the constitutionality of that provision has not yet been questioned at the national level.

However, as regards whether, under what conditions and to what extent social security entitlements enjoy the protection of the guarantee of property under German law, the judgment of the First Senate of the German Bundesverfassungsgericht [Federal Constitutional Court] of 28 February 1980 — 1 BvL 17/77 *inter alia* — is of particular interest. In that judgment the Bundesverfassungsgericht decided that pension entitlements and contingent entitlements have aspects characteristic of the property protected under Article 14 of the German Basic Law. But it further ruled that those rights have a distinct social aspect with the result that the legislature is in principle allowed wide discretion to determine their nature and limits. This is particularly true of rules which serve the purpose of ensuring the functioning and efficacy of the statutory pension insurance scheme in the common interest, of improving it or adapting it to changing economic conditions. In this respect it follows from the second sentence of Article 14 (1) of the Basic Law that in principle the: legislature has the power to curtail benefits, to reduce the extent of entitlements or contingent entitlements or to modify them, provided that this serves the common interest and is in keeping with the principle of proportionality. Only to that extent are statutory pension insurance entitlements of the type under discussion protected by Article 14 (1) of the Basic Law. This contention must in my opinion also apply to the protection of property guaranteed under Community law.

3. To conclude my discussion it only remains for me to say a few words on the question raised by the Bundessozialgericht as to whether the legislative powers of the Community institutions take account of the principle of the sovereignty of the people laid down in Article 20 of the German Basic Law. As

we know, that question refers to the constitutionality of Article 1 of the German Law ratifying the EEC Treaty of 27 July 1957 (Bundesgesetzblatt II, p. 753) which has been repeatedly affirmed in the case-law of the highest German courts and on which the Court of Justice need not pronounce.

IV — Since there is no ground for placing a restrictive interpretation on the provision in question, even having regard to fundamental rights worthy of protection, I therefore propose that the questions of the national courts be answered as follows:

The first sentence of Article 69 (2) of Regulation No 1408/71 excludes all entitlement to benefits of the type described in the first sentence of Article 69 (1) if the unemployed person returns to the "competent State" only after the period laid down in paragraph (1) (c) has expired and if that period has not been extended in accordance with the second sentence of paragraph (2). Where, however, in an individual case, special circumstances prevent a person's returning before the three-month period has expired and a loss of all further entitlement would be disproportionate, account must be taken of the principle of proportionality by extending the period pursuant to the second sentence of Article 69 (2), having regard to all aspects of the case, in particular the seriousness of the legal consequences in the event of late return, the reason for the delay in returning and the length of time by which the three-month period is exceeded.