retirement pension, that the person concerned shall have been unemployed for a certain time and thus available to the employment bureau of the Member State in question.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 9 July 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 12 JUNE 1975 [1]

Mr President,
Members of the Court,

1. In order to establish whether an internal provision is applicable to a migrant worker the court making the reference requests the interpretation of Article 27 (1) of Regulation (EEC) No 3 of the Council and of the corresponding provision in Regulation (EEC) No 1408/71 of the Council (Article 45 (1)). The Court has on various occasions delivered rulings on those provisions, which provide for the aggregation of insurance periods and assimilated periods completed in various Member States for the acquisition of the right to social benefits by a worker who has been successively subject to the legislation of two or more Member States.

The provision of internal law in connexion with which the request for interpretation was made is Section 1248 (2) of an earlier version of the Reichsversicherungsordnung (German National Insurance Regulations). In providing that early retirement benefit may be obtained, it lays down that this old-age pension shall also be payable to an insured person who applies for it after reaching the age of sixty years provided that he has completed the minimum prescribed insurance period and that he has been unemployed for an unbroken period of at least one year.

At the time when he requested the application of the said national provision the worker concerned, the plaintiff in the main action, had reached the age of sixty,

1 — Translated from the Italian.

completed the required insurance period and moreover had been unemployed for more than one year. The difficulty for the national authorities, however, arises from the fact that during this period of unemployment the person concerned did not register himself with the German Employment Office since he was resident in France.

In its judgment, which is presently contested before the Bundessozialgericht (Federal Social Court), whereby the Landessozialgericht (Higher Social Court) declared that the worker's application was unfounded, it is asserted that neither the German legislation nor EEC Regulations Nos 3 and 1408 contain a provision providing for a period of unemployment spent in France to be treated as the equivalent of a corresponding period which according to the national legislation in question had to be completed in German territory. The Bundessozialgericht observes in its order of reference to this Court that a period of unemployment completed outside the territory of the Federal Republic is not treated either by Article 1 (r) and (s) of Regulation No 3 or by Article 1 (r) and (s) of Regulation No 1408 as an assimilated period within the meaning of those provisions. In fact it is neither part of the insurance period or assimilated period necessary for the acquisition of the right nor is it taken into consideration in calculating the benefits.

For this reason the Bundessozialgericht now asks whether under Article 27 (1) of Regulation No 3 and Article 45 (1) of Regulation No 1408, for the acquisition of the right to benefits, periods of unemployment completed in another Member State are to be considered as assimilated periods even when according to national legislation such periods are only taken into account as an additional factor, with regard to the periods necessary for the acquisition of the right to a pension, for the sole purpose of the anticipatory acquisition of a right virtually acquired and calculated without reference to this same additional period.

2. In this connexion there is no doubt that the Community legislation, the objective of which is to coordinate the social legislation of the Member States in order to abolish any inequality of treatment amongst workers on the basis of their nationality so as to provide freedom of movement for workers within the Community, tends in many respects to prevail over the principle of territoriality which characterizes the individual national legislative systems, in the sense that it treats as relevant, for the application of each such system, situations pertaining to the worker which arise in a different Member State from that whose legislation is in question. Many provisions in Community regulations refer specifically to facts and situations subsisting outside the territory of a Member State in order to attach to them legal effects for the purposes of the application of the social legilsation of that State. In its observations the Commission has quoted an entire series of examples in this connexion.

However, the question which is now raised in this case is whether, even if there is no Community provisions providing expressly that a fact occurring outside the territory of one State may be taken into account, this occurrence which has taken place in another Member State may be treated as equivalent to a corresponding fact occurring in the State in which application for the worker's benefit was made.

It would indeed be too much to assert in general terms that the principle of territoriality is superseded in every respect in connexion with the application of national social legislation to Community workers, but it is likewise inadmissible to proceed from the opposite concept that, as a general rule, for the purpose of the application of national social legislation it is impossible to take cognizance of facts occurring

outside the territory of the State, unless there is express provision to the contrary. The case-law of the Court shows us how facts occurring outside the territory of a specific Member State must be treated, even in the absence of specific provisions to this effect, as equivalent to corresponding facts which the national legislation considers as relevant only if they occur on the national territory: in this connexion the judgment in Case 15/69 *(Ugliola,* [1969] ECR 363) should be borne in mind. Referring to the general principles governing the matter, the Court considered as equivalent to military service performed in Germany a corresponding period of military service performed by an Italian migrant worker in his own country. If it was possible to prevail over the territorial connexion with regard to an activity so closely connected with the State as the performance of military service in its armed forces, and if in this regard it was possible to consider the advantage in terms of the worker's seniority attached to such service by the national legislation, there is all the more reason for the application of the same criterion of assimilation to a period of unemployment, which concerns the worker in his capacity as such much more directly than his period of military service. Although the localization on the national territory of the unemployment, and its formal outcome through the registration of the worker in the appropriate register of the employment offices of the State in question, may in principle be relevant in granting him the benefits provided in this connexion, they carry no weight whatsoever, either for practical, or for any other reasons, in considering a period of unemployment solely for the acquisition of the right to an old-age pension, especially since the period of unemployment is not taken into account in quantifying the pension itself but is only demanded as an additional requirement for the early enjoyment of a right already acquired on the basis of insurance periods already completed.

In this connexion it should be recalled that Article 51 (a) of the EEC Treaty provides for the benefit of workers not only aggregation of insurance periods and assimilated periods but aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'.

Although calculation of the period of unemployment after the worker's sixtieth year is unnecessary for the purpose of acquiring the pension right, it is however necessary for the acquisition of the right to obtain the actual benefit in advance of the time normally laid down. In this respect it may be considered that such a period should be taken into account under the provision, widely interpreted, of Article 51, to which the Community legislature refers in the sixth recital of Regulation No 1408 in connexion with the attainment of the objectives of freedom of movement for workers and of their equality of treatment, in particular with regard to social security benefits, 'regardless of their place of employment or of residence'.

Failure to take into account a period of unemployment completed in another Member State may also constitute a covert discrimination which, as the Court has stated in its judgment in Case 152/73 *(Sotgiu,* [1974] ECR 164), is prohibited by Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers.

The judgment in Case 2/72 *(Murru,* Rec. 1972, p. 333) has established that if, on the basis of its internal social legislation, a Member State treats a period of unemployment as equivalent to an insurance period, the other Member States must consider the period of unemployment completed by a worker in the first State as an insurance period. In the observations which it has submitted in these proceedings the Italian Government observes that if the States are thus obliged to observe a legal fiction in treating the period of unemployment

as equivalent to an insurance period, there are even stronger grounds for requiring them to take into account the real factor of unemployment when it is simply taken into consideration as an actual fact *per se* under national legislation.

Besides, if account is taken of the workers' freedom of movement within the entire Community, it is incontestable that, in whatever State it occurs, unemployment emerges as a problem of common interest in relation to the life of the worker in all the Member States; it is thus a fact which assumes economic and social importance for the Community and there is consequently reason to derive legal consequences from it. This consideration serves to support the conclusion reached on the basis of the cases and in the light of the general principles with regard to the importance conferred in a Member State, in accordance with Article 27 (1) of Regulation No 3 and of Article 45 (1) of Regulation No 1408, on a period of unemployment completed in another Member State, for the early enjoyment of the right to an old-age pension.

I do not consider that the Court can admit the contrary argument to which the Bundessozialgericht refers in its order making the reference, to the effect that when Article 27 refers to the acquisition, maintenance/retention or recovery of the right to benefit it does not relate to periods of unemployment which the national law requires neither for the recognition of a right to a pension nor for calculation of its amount, but only for its early enjoyment. A provision providing for the aggregation of insurance periods or assimilated periods for the acquisition of a right and which in this connexion, as has already been stated, indeed obliges the Member States on certain conditions to assimilate periods of unemployment completed in other Member States to insurance periods, must *a fortiori* sanction taking into account an objectively certain fact such as unemployment proved by the registration of the worker in the appropriate register of the State in which he resides, for the sole purpose of admitting him to early enjoyment of a pension right.

I recognize that from the point of view of the national authorities it may be unsatisfactory to have to take into account a period of unemployment completed in another Member State, if during the same period that worker could easily have found employment if he had been registered as unemployed in the former State. However, apart from the fact that we are not here concerned with the grant of unemployment benefit, and apart from the fact that no unemployed worker may be forced to accept the first offer of employment made to him, it is to be noted that problems of this nature could be eliminated through improving the cooperation between the national employment offices. Consequently this consideration does not appear capable of weakening the conclusion reached.

I am therefore of the view that the Court should reply to the question of the Bundessozialgericht as follows:

In accordance with Article 27 (1) of Regulation (EEC) No 3 of the Council and of Article 45 (1) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, for the application of a national provision rendering the grant of early retirement benefit subject to the additional condition of completing a minimum period of unemployment within the territory of the State, a period of unemployment completed under corresponding conditions on the territory of another Member State must be regarded as producing the same effects, even though the period is reckonable neither towards the acquisition of the right nor in calculating the benefits.