legislation of the State in which they were last employed even though they are not available to the employment services of that State, Regulation No 1408/71 confers on those workers rights which they would not otherwise enjoy and which thus help to ensure freedom of movement for workers in accordance with Article 51 of the Treaty. By attaching conditions, by means of Articles 67(3) and 69(1) of the aforesaid regulation, to the rights and advantages which it accords to unemployed workers seeking employment, the Community legislature made proper use of the discretion that it has in implementing freedom of movement for workers.

REPORT FOR THE HEARING
in Case C-62/91 *

I — Facts and written procedure

1. *Legal framework*

1. Under Articles 67(1) to (3) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ L 230, p. 6),

'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.

* Language of the case: English.

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.'

According to Article 69(1) of that regulation,

'1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

(a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorize his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organized therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.'

2. Pursuant to Section 14(2)(a) of the Social Security Act 1975 a claimant must, in order to be entitled to unemployment benefit, satisfy the prescribed contribution conditions contained in paragraph 1 of Schedule 3 to that Act. The first contribution condition, specified in Paragraph 1(2) of that schedule is as follows:

'(a) The claimant must have actually paid contributions of a relevant class . . . in respect of one of the last two complete

years before the beginning of the relevant benefit year . . . and those contributions must have been paid before the relevant time'.

The relevant class of contributions for unemployment benefits is Class I (Section 13(1) of the Act).

2. *The proceedings before the national tribunal*

Mr Gray, a British subject, is married and has three children.

After working in England he went to settle, with his wife, on Grand Canary Island (Spain) in 1971, while two of his children remained in England to continue their schooling. The two children used to visit their parents during most school holidays and Mr Gray spent a month of almost every year in England, staying with friends.

On Grand Canary, Mr Gray worked as the manager of the restaurant purchased by his wife. As such, he paid social security contributions in accordance with Spanish law until 11 January 1990, when his wife sold the restaurant.

Mr Gray returned to England on 26 February 1990, after voluntarily helping the new restaurant owner to establish himself. During the period from 11 January to 26 February 1990 Mr Gray did not register as unemployed with the Spanish authorities or claim any benefit there, since he was planning to return to England as soon as possible.

On his return to England he claimed unemployment benefits on 28 February 1990; benefits were refused pursuant to Article 67(3) of Regulation No 1408/71, on the grounds that his last period of insurance had not been completed in England and that he could therefore not rely on his Spanish social security contributions. Nor could he invoke Article 69(1) of that regulation, since prior to leaving Spain he had not registered as unemployed with the Spanish employment authorities and had not made himself available to them for a period of four weeks.

Mr Gray is now in part-time employment as a petrol-pump attendant at a garage.

The Social Security Appeal Tribunal, before which the appeal against the Adjudication Officer was brought, decided unanimously that Mr Gray was not to be regarded as falling under Article 71(b)(ii) of Regulation No 1408/71. In reaching that decision the Tribunal took account in particular of the following facts: Mr Gray had not retained a home in the United Kingdom; his wife lived with him in Spain, while the children were in England; Mr Gray's employment in Spain was 'stable' (see judgment in Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315); his wife owned the business which was to support them during those years of their lives; Mr Gray's central interest during the years of

employment in Spain lay in Spain, since he earned his entire living there and also spent his social life in Spain for 11 months of almost every year.

According to the national tribunal the fact of his retaining his English domicile is relatively unimportant, because the relevant criterion is that of habitual residence. Stability of employment raises a presumption of residence in the same place (*Di Paolo* judgment, cited above), and that presumption Mr Gray has been unable to rebut. It follows that the aforesaid Article 71 is inapplicable.

The majority of the members of the Social Security Appeal Tribunal (hereinafter 'the majority') goes on to note that the provisions of Regulation No 1408/71, which was adopted in pursuance of Article 51 of the EEC Treaty, 'must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits' (preamble to the regulation). The majority maintains, however, that the term 'workers' in Article 51 must embrace persons who are not actually in work but who, being of working age, are looking for it.

In the opinion of the majority, the requirement under Article 67(3) of Regulation No 1408/71 that the last period of insurance shall have been completed in the country of claim, and the requirement under Article 69(1) thereof of four weeks' registration as unemployed in the last country of employment both militate against the free movement of those seeking work. Thus a person whose work overseas ends and who does not have work awaiting him in the United Kingdom is at a financial disadvantage if he comes to look for work in the United Kingdom straight away, since he is obliged to remain in the country of last employment for the requisite time in order to receive benefits there should he need the assistance of State funds before gaining remuneration.

The President of the Social Security Appeal Tribunal (hereinafter 'the President'), on the other hand, takes the view that the question falls to be considered at the date of the move. When Mr Gray left Spain he was not entitled to Spanish benefits because he was not available for new work. Nor was he entitled ° albeit for different reasons ° to receive benefits in England. It follows, according to the President, that there is no question of a restriction on freedom of movement since his position was no worse than it had been in Spain.

In the President's view Regulation No 1408/71 reflects what has been considered necessary by the Commission (which proposed it) and the Council (which adopted it unanimously) in the field of social security, to provide freedom of movement for workers. The President adds that no question as to the validity of the provisions can arise unless those provisions have totally failed to attain the aim of freedom of movement, and this he denies.

The President considers that 'worker' means prima facie those in work, and that a

distinction is to be drawn between a worker in that sense and an 'unemployed worker', a term used elsewhere in the preamble ('whereas it is . . . particularly appropriate . . . to grant an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject').

The President further notes that the inability of a person having left one Member State without receiving unemployment benefits there successfully to claim unemployment benefits on arrival in another Member State is not contrary to Article 48 of the EEC Treaty, which confers on unemployed persons no more than the right 'to remain in the territory of a Member State after having been employed in that State' (Article 48(3)(d]).

In that connection the President states that Article 67 of Regulation No 1408/71 protects the entitlement to unemployment benefits of persons in that situation, whereas Article 69 confers on those coming to a Member State not as workers but as persons in search of work a continuation of their benefits for up to three months (the expense being passed on to the State from which they have departed).

He maintains that the requirement under Article 69 of four weeks' registration as a person seeking work in the competent State stems from the dictates of policy. The policy is that the person seeking to export unemployment benefits must, in the competent State, have endeavoured for a period of four weeks to find work, and this in the President's view is consistent with Article 48 of the EEC Treaty, which does not expressly set out a right of movement to find work. The most important point, in the President's opinion, is the freedom of movement for actual workers as opposed to those seeking work, who also enjoy benefits but subject to the limitation that they shall first establish that status under the law of the competent State.

The President concludes that to accept Mr Gray's contentions would be tantamount to granting unemployed persons from one Member State immediate access to the funds of another Member State, thereby placing an unacceptable burden on that State. Such right of access is not to be inferred from Article 51 of the Treaty.

Nevertheless, in view of the doubts expressed by the majority as to the validity of the Community provisions at issue, the Social Security Appeal Tribunal, Bognor Regis, by decision of 25 January 1991, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'Are Article 67(3) and Article 69(1) of Regulation (EEC) No 1408/71 invalid in the sense that they derogate from the provisions of Article 51 of the Treaty whereby "the Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers"?

If so, what is the effect of such invalidity on Mr Gray's claim?'

3. *Procedure before the Court*

The decision of the Social Security Appeal Tribunal, Bognor Regis, was lodged at the Court Registry on 14 February 1991.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 27 May 1991 by the Council of the European Communities, represented by Jill Aussant and Chiara Zilioli, of its Legal Service, acting as Agents, and by the Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as Agent, on 30 May 1991 by the German Government, represented by Ernst Röder and Joachim Karl, acting as Agents, and on 5 June 1991 by the United Kingdom, represented by H. A. Kaya, acting as Agent.

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.

By decision of 8 October 1991 the Court assigned the case to the Third Chamber.

II — Written observations submitted to the Court

The *German Government* takes the view that the provisions in question are compatible with the EEC Treaty. It argues that, as a matter of principle, Articles 48 and 51 of the Treaty apply only to workers, that is to say persons in active employment, whereas persons who move in search of employment enjoy freedom of movement pursuant to Article 48(3)(a) and (b) of the Treaty and the regulations adopted in pursuance thereof, but only as regards access to employment (see, on that point, the judgment in Case 316/85 *Centre Public d'Aide Sociale de Courcelles* v *Lebon* [1987] ECR 2811, paragraph 26).

The German Government notes in that connection that, in implementation of Article 51 of the Treaty, Regulation 1408/71 provides that unemployed workers are for a limited period to be granted unemployment benefits under the legislation of the Member State to which they were last subject (ninth recital of the preamble to Regulation No 1408/71 and Article 69 thereof). Article 67 of the regulation — likewise in implementation of Article 51 of the Treaty — enables workers who have already been employed in the Member State to which they have transferred their place of residence to claim unemployment benefits taking into account the periods of employment or insurance completed in the previous country of employment.

The German Government maintains that Article 51 of the EEC Treaty does not require that unemployed persons who transfer their place of residence to another Member State should have an unconditional claim to unemployment benefits in the new Member State. In its view, Article 51 requires the Council merely to adopt such

measures in the field of social security as are necessary to provide freedom of movement for workers. For the specific purpose of giving unemployed persons access to new employment, Articles 67 and 69 contain the requisite measures for enabling unemployed persons effectively to exercise their right of access to new employment.

According to the German Government an unrestricted right to claim unemployment benefits in the new country of residence would be justified, at most, if there were a common labour market and if the competent employment office were able to relieve itself of the obligation to pay benefits to a claimant by offering him employment in other Member States instead (on that point, see the judgment in Case C-228/88 *Bronzino* v *Kindergeldkasse* [1990] ECR 1-531, paragraph 13 et seq.). The German Government concludes, however, that a market such as that, although a political objective, has not as yet come into being.

With particular reference to Article 51 of the EEC Treaty, the *United Kingdom* observes that it mandates the Council to adopt such measures in the field of social security as are 'necessary' to provide freedom of movement for workers, of which the two categories of measures set out in that Article do not constitute an exhaustive list. In its contention, the point is borne out *inter alia* by the wording used in the French, German, Italian and Dutch texts of that Article. Since the precise scope and content of the measures needed cannot be inferred from Article 51 itself, the Council must necessarily enjoy a certain margin of discretion in its choice of means to attain the desired objectives.

The United Kingdom admits that the Court has previously had cause to hold that specific provisions of Regulation No 1408/71 were incompatible with Article 51 of the Treaty. Thus, a limitation on the overlapping of benefits which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone is incompatible with that Article (see judgments in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, paragraph 21, Case 100/78 *Rossi* v *Caisse de Compensation* [1979] ECR 831, paragraphs 14 and 16, and Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205, paragraphs 6 and 7). None the less, the United Kingdom contends that in the present case the person concerned has no entitlement to unemployment benefit under purely national law, so that the question is whether he can successfully argue that the express provisions of Community law which also bar his access to unemployment benefit in the United Kingdom are themselves incompatible with Article 51.

As the Court held in Case 19/76 (*Triches* v *Caisse de Compensation* [1976] ECR 1243), although the measures taken by the Council pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked, none of the aforementioned provisions of the Treaty (Articles 3, 48, 51 and 117) restricts the freedom conferred on the Council by Article 51 to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising from disparities between the national schemes in question.

According to the United Kingdom the Council's margin of discretion in the choice of means is sufficiently wide to maintain the compatibility of the contested articles of Regulation 1408/71 with Article 51 of the Treaty even where the system adopted does not eliminate all possibility of inequality between workers.

In that connection, the United Kingdom recalls that the regulations adopted pursuant to Article 51 'did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law (see judgment in Case 100/78 *Rossi*, cited above, paragraph 13). Article 51 'provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article 51 leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 of the Treaty' (judgment in Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 20). The sole objective of Regulation No 1408/71 is to coordinate the national legal systems of social security (see judgment in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, paragraph 6).

In the United Kingdom's submission, Articles 67(3) and 69(1) of Regulation No 1408/71 represent a policy choice by the legislature, both to place the primary burden of paying unemployment benefits on the Member State to which the person concerned has recently been paying contributions and to encourage unemployed persons to look first for work in the Member State in which they were most recently employed.

The United Kingdom believes that it is helpful to point out the aims of the provisions at issue. Whereas Article 67 protects the position of workers who move to another State to take up employment, Article 69 is concerned with the position of work seekers, placing them in a position of financial security while they look for work in another Member State, provided that certain conditions are met. In that connection the United Kingdom notes that the Court has recently held that, in the context of work seekers as distinct from workers, reasonable restrictions are not incompatible with the principle of the free movement of workers (judgment in Case C-292/89 *The Queen* v *Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745).

Turning specifically to Article 67 of Regulation No 1408/71, the United Kingdom observes that since, under the relevant United Kingdom legislation, a prerequisite for the grant of unemployment benefits is the completion of periods of insurance, the Adjudication Officer had to have regard to the terms of that Article. Given the terms of Article 67(3), Mr Gray did not qualify for unemployment benefit under that heading, because his last periods of insurance were in Spain and the claim was made in the United Kingdom.

The United Kingdom contends that, in making entitlement to the benefit of the aggregation rules subject to the proviso that the person concerned shall have 'completed lastly' periods of insurance or employment in accordance with the provisions of the legislation under which the benefits are claimed, Article 67(3) is eminently reasonable. In its opinion, that proviso represents the economic link which the person concerned will, under normal circumstances, already have established with the Member State under whose system he now wishes to claim unemployment benefits. Since Regulation No 1408/71 coordinates rather that harmonizes national provisions on social security, Article 67(3) seems entirely compatible with Article 51 of the Treaty.

The United Kingdom further recalls that in Case C-272/90 (*Van Noorden* v *ASSEDIC* [1991] ECR I-2543) the Court had to give a ruling as to whether the aforesaid Article 67 (amongst other provisions) was to be interpreted as allowing a Member State not to grant unemployment benefit to a Community national for longer than the three month period specified in Article 69(1)(c) of that regulation when the person concerned had not 'completed lastly' a period of employment or insurance in the Member State concerned, as is required if he is to benefit from the aggregation provisions contained in Article 67. The Court held that, in such a case, the person concerned may claim unemployment benefits only under Article 69, and dismissed the arguments that Article 67 was incompatible with Articles 7 and 58 to 66 of the Treaty.

The United Kingdom submits that the fact that in the present case — unlike the *Van Noorden* case — the person concerned was initially subject to the social security legislation of the United Kingdom before he left the United Kingdom does not warrant arriving at a different result.

The United Kingdom contends that on a literal reading of Article 67 Mr Gray is clearly ineligible for unemployment benefits in the United Kingdom and that a purposive interpretation of Article 67 leads to the conclusion that the Council wished to establish, as a normal rule, that a person should have some economic link with the Member State in which he is claiming benefit before he can require that Member State to take into account periods of employment or insurance in other Member States. The Court itself appears, in its abovementioned *Di Paolo* judgment (paragraph 9), to have accepted without question the proviso contained in Article 67(3).

In its view, it is also apparent from Article 67 that exceptional situations must be dealt with by reference to Article 71(1)(a)(ii) and (b)(ii) of the regulation.

The United Kingdom further submits that Article 67(3) does no more than apply the status quo under domestic legislation to all unemployed persons, irrespective of their Member State of origin; that is consistent with the principle approved by the Court in Case 302/84 (*Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821), that it is the competent

Member State rather than the Member State of residence which bears the burden of paying benefits. The exception to that principle, which is inapplicable in the present case, is where the economic ties with the Member State of residence are such that it is expedient to require it to be liable for the payment of benefit (see Article 71 of the regulation).

The United Kingdom further observes that if even a short period of employment (resulting in the actual payment of contributions to the United Kingdom social security scheme) is accomplished, the United Kingdom becomes liable under Article 67(1) and 67(3) for the payment of unemployment benefits during a subsequent period of unemployment, even though no Class I contributions have been paid in the United Kingdom in respect of either of the tax years relevant to the claim.

Turning specifically to Article 69 of Regulation No 1408/71, the United Kingdom submits that it operates so as to exclude Mr Gray from receiving benefits, because he did not register as seeking employment in Spain between the cessation of his employment upon the sale of the restaurant and his return to the United Kingdom.

In the first place, the United Kingdom considers the keynote to the system set up by Article 69 to be registration with the competent authorities, which enables them to carry out adequate controls.

The United Kingdom then recalls that the Court ruled in Joined Cases 41, 121 and 796/79 *Testa* v *Bundesanstalt für Arbeit* [1980] ECR 1979 (paragraphs 14 and 15), regarding Article 69(2) of the regulation, that Article 51 'does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto', particularly where the provision forms part of 'a special system of rules which gives rights to workers which they would not otherwise have'.

In the United Kingdom's submission the registration condition contained in Article 69(1) forms part of just such a special system; it is reasonable and proportionate, and hence compatible with Article 51 of the Treaty.

Lastly, the United Kingdom submits that the very general terms in which Article 51 is framed cannot be construed as requiring the Council to enact legislation obliging Member States to set up a system of social security entitlement which would operate to the benefit of all migrant workers forthwith and free of conditions, such as the registration requirement, enabling Member States to exercise effective control over the correct application of public funds.

In view of those observations the United Kingdom considers it unnecessary to comment on the second question.

The United Kingdom concludes that the Court should hold that an examination of Article 51 of the EEC Treaty has disclosed

no factor affecting the validity of Articles 67(3) and 69(1) of Regulation (EEC) No 1408/71.

The *Council* submits that Community law does not guarantee the freedom of movement of work-seekers in isolation but only as a necessary means of realizing, and as a complement to, the freedom of movement for workers. That is made clear by, for example, the fact that while freedom of movement for workers under Article 48 of the Treaty is not subject to limitations, the right to stay in a Member State for the purpose of seeking employment (not to mention the right to benefit from social security measures) may be subjected to temporal limitation. Consequently, national legislation which imposes temporal limits on the right to stay enjoyed by a Community national seeking employment in a Member State is not contrary to the provisions of Community law, on condition that the period prescribed is not such as to jeopardize the effective exercise of the right to free movement (judgment in Case C-292/89 *Antonissen*, cited above).

As regards the nature of Regulation No 1408/71, the Council points out that it aims at coordinating, not at harmonizing, national legislation on social security, as is clearly seen from its second, seventh and ninth recitals. Some basic rules are implemented through the regulation, although without changing the content of national legislation. The regulation also lays down rules to settle questions of choice of law and determines the competent authorities, institutions and States. In particular, Articles 67 to 71 of the regulation confer on unemployed workers certain rights to prevent them from being at a disadvantage when moving to seek work in another Member State. Under those Articles, would-be Community workers may qualify for unemployment benefits once they have established their status as unemployed under the law of the competent State.

The Council observes that the person concerned in this case did not establish his status under the law of Spain (the competent State). He was therefore unable to avail himself of the provisions of the regulation giving him a right to unemployment benefits in England, with the result that he had to rely on the provisions of national law. According to the Council, however, he was entitled to unemployment benefits neither on Grand Canary Island, not having registered with and remained available to the Spanish employment authorities, nor in England on the basis of the periods of work previously completed there.

The Council submits that, once the person concerned again becomes subject to United Kingdom legislation, then in any ensuing period of employment the period of insurance completed in Spain will be taken into account in accordance with the regulation, and this will improve his situation compared with what it would have been under the provisions of national law alone.

Turning to the aims of Article 51 of the Treaty, the Council stresses that a certain discretion is left to it in the choice of the means to achieve the objective of providing freedom of movement for workers. It therefore claims that, in order to conclude that Articles 67(3) and 69(1) are invalid, it would be necessary to demonstrate that the

provisions do not contribute, or that they create an obstacle, to reaching that goal (see judgments in Case 24/75 *Petroni*, cited above, and Case 112/76 *Manzoni* v *FNROM* [1977] ECR 1647).

The Council takes the view that both those provisions are compatible with the Treaty, in that they do not create obstacles to the freedom of movement for workers, and, in particular, do not cause workers to lose social security advantages guaranteed to them in any event by the legislation of a single Member State. On the contrary, they vest the nationals of the Member States with rights which were not automatically granted to them before, such as the right to have taken into account, under certain conditions, periods of insurance or employment completed as an employed person under the legislation of another Member State, and the right to retain unemployment benefits whilst abroad.

The Council considers that, by making the rights that are granted conditional on the observance of certain requirements, the provisions at issue do not conflict with Article 51 of the Treaty. According to the case-law of the Court (judgment in Joined Cases 41, 121 and 796/79 *Testa*, cited above), Article 51 'does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto' (see also the *Van Noorden* judgment, cited above).

The Council argues that the imposition of the conditions in question is a deliberate policy choice, designed to avoid the exportation of unemployment. In both articles the purpose of the condition imposed is to put the burden of paying unemployment benefits on the State to which the worker has paid his or her contributions, and to encourage unemployed people to look for work first in that Member State and only later, possibly, in another Member State. The absence of those conditions would result in the exportation of unemployment to those Member States granting the highest benefits. This would impose, at least in the short term, an unacceptable burden on those Member States.

Accordingly, the Council sees no grounds for declaring Articles 67(3) and 69(1) of Regulation No 1408/71 invalid.

The *Commission* makes the preliminary remark that Mr Gray is one of the persons covered by Regulation No 1408/71, by virtue of Article 2(1) thereof.

The Commission observes that the question referred to the Court appears to be based on the assumption that the United Kingdom was the competent State under Article 67(1) and that had it not been for Article 67(3) Mr Gray's Spanish contributions would have been taken into account when he made his claim for unemployment benefits on 28 February 1990.

However, the Commission contends that the competent institution for the purposes of Article 67(1) is, in the circumstances of the case before the national tribunal, the institution of Spain. As is clear from the case-law of the Court, an unemployed

person is subject to the laws of the State in which he was last employed (judgment in Case 145/84 *Cochet* v *Bedrijfsvereniging* [1985] ECR 801). In that regard the recent judgments in Cases 140/88 *Noij* v *Staatssecretaris van Financiën* [1991] ECR I-387 and 245/88 *Daalmeijer* v *Bestuur van de Sociale Verzekeringsbank* [1991] ECR I-555 have no bearing on the question since those cases concerned persons who had definitively ceased work.

The Commission argues that the issue as to the competent State in a case such as the present one is put beyond any doubt by the Court's recent judgment in Case C-272/90 *Van Noorden* (cited above, paragraph 10), in which the Court ruled that:

'a person seeking work who has never been subject to the legislation of the Member State in which he is claiming unemployment benefits and who has thus not completed periods of insurance or employment in conformity with the legislation of that Member State, cannot obtain unemployment benefits by virtue of Article 67 of Regulation No 1408/71, but only by virtue of Article 69 of that Regulation'. [1]

The fact that Mr Gray, unlike Mr Van Noorden, had at one time been subject to the legislation of the United Kingdom does not, in the Commission's view, preclude the application of the principle set out in *Van Noorden*, because the contributions paid by Mr Gray before 1971 to the United Kingdom social security scheme could no longer be used as an argument for claiming benefits under that scheme.

The Commission goes on to observe that the question as to the validity of Article 69(1) appears to be based on a misapprehension as to the identity of the competent State. In the Commission's opinion, it is implicit in the Tribunal's reasoning that, were it not for the requirement that a person register for work in the competent State four weeks before departure, Mr Gray would have had an immediate right to claim unemployment benefit in accordance with United Kingdom legislation. If the Tribunal had appreciated that Spain was the competent State, then it would no doubt have accepted, the Commission argues, that entitlement to benefits in the competent State had to be established by the competent institution before a person could receive those benefits in another Member State.

The Commission concludes that the validity of Articles 67(3) and 69(1) of Regulation No 1408/71 is not at issue in this case, since the inability of Mr Gray to invoke the assistance of those provisions of Community law flows from the fact that Spain is the competent State, and not from the conditions imposed by those provisions.

In the Commission's view the question raised is of relevance only if it is read in the very widest terms, as being not merely an inquiry as to the validity of the abovementioned provisions but as an inquiry into whether Article 51 of the EEC Treaty imposes a duty on the Council to adopt legislation which enables a person in Mr Gray's situation to claim unemployment benefits under the legislation of the State in which he is currently resident.

Turning first to the compatibility between Article 67 of the regulation and Article 51

1 — Unofficial translation.

of the Treaty, the Commission contends that Mr Gray's claim to a right to unemployment benefits immediately on his return to the United Kingdom presupposes either that his acquired rights under the Spanish social security system can be relied on as against the United Kingdom authorities as the basis for claiming unemployment benefits from the United Kingdom or that the exercise of the right of free movement on his part entitles him to override national rules relating to contribution requirements. The Commission submits that it is self-evident that neither Article 51 nor any other provision of Chapter 1 of Title III of the Treaty confers a directly applicable right to abrogate national rules relating to contributions necessary for the acquisition of unemployment benefits.

The Commission notes that Article 51 of the Treaty requires the Council to adopt measures to secure the aggregation of periods taken into account in one Member State for the purposes of acquiring and retaining benefits in another Member State. Since the competent State must necessarily be the State of employment or last employment, Mr Gray cannot avail himself of Article 51 in order to claim entitlement to the contested benefits.

According to the Commission the aforesaid *Petroni* judgment of 21 October 1975 demonstrates the validity of the provisions of Regulation No 1408/71 which do not prejudice a person's rights under national law. The *Petroni* case concerned a claim for pensions in the two Member States in which the plaintiff had worked. The value of both pensions added together exceeded the amount which would have been paid had the plaintiff never exercised his right to free movement and had one competent institution reduced the amount of its pension, pursuant to Article 46(3) of Regulation 1408/71.

The Commission recalls that, the compatibility of that provision with Article 51 having been raised, the Court ruled that aggregation under that Article is a concept that can only be applied where a person has been successively or alternately insured under the laws of two or more Member States. In the present case, however, the Commission contends that there can be no question of aggregating Mr Gray's Spanish contributions, since he was not insured under the United Kingdom scheme at the material time.

The Commission takes the view that, unlike the situation in *Petroni*, the present situation is not one in which the application of Community rules deprives a person of benefits that would otherwise be available under national law.

The Commission further submits that Mr Gray's right to claim unemployment benefits in the United Kingdom is not prejudiced by the existence of Article 67(3) but is in fact enhanced, if one considers Article 67 as a whole.

Finally, the Commission submits that the fact that Article 67 does not enhance Mr Gray's rights to a sufficient degree does not imply that Article 67(3) is incompatible with Article 51 of the Treaty.

Turning next to the compatibility of Article 69(1) of Regulation No 1408/71 with

Article 51 of the Treaty, it is apparent to the Commission that the validity of the right to obtain unemployment benefits in a Member State other than the competent State is not in question but rather the qualifying condition laid down in Article 69(1)(a) that a person must have been registered for employment in the competent State for at least four weeks before his departure.

In that connection the Commission recalls that the validity of Article 69 was considered in the *Testa* judgment (Case 41/79, mentioned above). In that case a claim for payment of unemployment benefits by the competent institution in the competent State had been refused on the grounds that the claimant, having taken advantage of the right conferred by Article 69 of the regulation to be paid unemployment benefits by the competent institution in another Member State, had remained outside the competent State for longer than three months.

The Court, answering a question on the compatibility of Article 69(2) of Regulation No 1408/71 with Articles 48 to 51 of the Treaty, ruled that Article 69

'confers on a person availing himself of that provision an advantage as compared with a person who remains in the competent State inasmuch 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 ... (paragraph 13)

The right to retain unemployment benefits conferred by Article 69 therefore contributes to ensuring freedom of movement of workers in accordance with Article 51 of the Treaty. The fact that that advantage is limited in time and subject to the observance of certain conditions is not such as to bring Article 69(2) into conflict with Article 51. The latter provision does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto' (paragraph 14).

The Commission then quotes A. Arnull's work (*The General Principles of EEC Law and the Individual*, p. 156) which, with reference to the judgments in the two cases mentioned above (*Petroni* and *Testa*), comments as follows:

'The crucial factor distinguishing the facts of *Testa* from those of *Petroni* seems to be that in the former the claimants had relied on Community law in order to claim benefit from the German authorities during the time they were in Italy: national law conferred no such entitlement. In *Petroni*, it had not been necessary for the plaintiffs to have recourse to Community law at all: they were merely seeking to enforce rights granted under national law and succeeded in persuading the Court that Community law should not have the effect of depriving them of those rights.'

The Commission, although aware of the disadvantage suffered on account of Article 69(1) of Regulation No 1408/71 by a person going to another Member State to look for work as soon as he becomes unemployed, is not of the view that the existence of that disadvantage is contrary to the Treaty, for similar reasons to those given above in relation to Article 67(3).

As the Court ruled in *Testa*, Article 69 enhances the rights of those who are unemployed, and it is not contrary to Article 51 that some conditions should be placed on the exercise of those rights. In the Commission's opinion, that judgment supports the conclusion that Article 69(1) of the regulation is valid.

Lastly, the Commission observes that, had one of its proposals on social security been adopted, Mr Gray would have been able to claim unemployment benefits on his return to the United Kingdom. Its proposal for an amendment to Regulation No 1408/71, submitted to the Council on 18 June 1980 (OJ C 169) stated in its fifth recital that 'workers who have become unemployed in a Member State should be given the opportunity of transferring their place of residence to a Member State with which they have closer ties without forfeiting their entitlement to unemployment benefits'.

The Commission explains that the proposal, which the Commission did not adopt, envisaged the insertion into the regulation of an Article 69a, which would have allowed an unemployed worker to transfer his residence to another Member State and claim unemployment benefits there as if he had been subject to the legislation of that State during his last employment; however, its existence serves to demonstrate that the regulation in its present form does not entitle Mr Gray to claim unemployment benefits in the circumstances of this case.

The Commission concludes that the Court should give a negative answer to the first question referred to it. In that case it will be unnecessary to answer the second question, which in any event goes beyond the function of the Court in preliminary rulings, in that it invites the Court to pronounce on the application of Community law to the facts of the case, which is a matter for the Tribunal (judgment in Joined Cases 28, 29 and 30/62 *Da Costa and Others* v *Nederlandse Belastingsadministratie* [1963] ECR 31, p. 38).

Should the Court nevertheless consider that an answer be given to both the express and the implied issues of Community law raised by the case, the Commission would submit that the question be answered as follows:

'The validity of Articles 67(3) and 69(1) of Regulation (EEC) No 1408/71 has no bearing on a claim for unemployment benefits where the competent institution for the payment of unemployment benefits is not the institution from which unemployment benefits are being claimed.

Since Articles 67(3) and 69(1) of Regulation (EEC) No 1408/71, as part of the system of coordination of social security systems established by that regulation, confer rights and advantages on workers exercising their right of free movement and do not diminish the benefits available under national law to such workers, they do not derogate from Article 51 of the Treaty and are therefore not invalid.'

J. C. Moitinho de Almeida
Judge-Rapporteur