wage-earner or assimilated worker subject to the legislation of the State of his permanent residence, who is occasionally employed in the territory of another Member State, the social security institution of the latter State, as the institution of the place where the worker is, is only obliged, under Article 29 (1) of Regulation No 3, should the occasion arise, to issue benefits in kind provided for by its own legislation at the expense of the institution of the competent State.

In Case 8/75

Reference to the Court under Article 177 of the EEC Treaty by the Cour de Cassation of France, Social Chamber, for a preliminary ruling in the case pending before that court between

CAISSE PRIMAIRE D'ASSURANCE MALADIE DE SÉLESTAT

and

ASSOCIATION DU FOOT-BALL CLUB D'ANDLAU

on the interpretation of certain provisions of Regulations Nos 3 and 4 of the Council determining the legislation applicable,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart (Presidents of Chambers), A. M. Donner, R. Monaco (Rapporteur), P. Pescatore, H. Kutscher, M. Sørensen and A. O'Keeffe, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. In order to provide music for three dances organized by it on 14 February, 11 April and 17 May 1970, the Association du Foot-ball Club d'Andlau (hereinafter referred to as 'the Association') called upon the services of a band composed of five musicians of German nationality, ordinarily resident in the Federal Republic of Germany. Andlau is a commune situated in the Département of Bas-Rhin. The musician responsible for the leadership of the group was affiliated to a recognized private fund, called 'Kaufmännische Krankenkasse Halle' in Freiburg.

The Caisse Primaire d'Assurance Maladie de Sélestat (hereinafter referred to as 'the Caisse') considered that the German musicians should have been subject to the general French scheme which provides for the compulsory affiliation to social insurance schemes of public performers whatever their nationality. It therefore proceeded to claim payment of the contributions due from the employer and took out three distraint orders against the association, to which a defence was entered.

The Commission de Première Instance du Contentieux de la Sécurité Sociale du Bas-Rhin, by a decision of 15 November 1972, annulled these distraint orders on the ground that the musicians were not subject to the French legislation under the first sentence of Article 13 (1) (c) (as amended) of Regulation No 3 of the Council concerning social security for migrant workers and of Article 11 (2) of the implementing Regulation No 4. Under these provisions:

The first sentence of Article 13 (1) (c) (as amended) of Regulation No 3

'Wage-earners and assimilated workers, other than those covered by paragraph (b), whose employment is normally carried on in the territory of more than one Member State, shall be subject to the legislation of that Member State in whose territory they have their permanent residence.'

Article 11 (2) (as amended) of Regulation No 4

'Where, by virtue of Article 13 (b) or (c) of the Regulation, German legislation is applicable to a worker whose employer is not located within the territory of the Federal Republic of Germany, that legislation shall be applied as if that worker were employed in the place of his permanent residence.'

The Caisse appealed against this decision, chiefly on the ground that it misrepresented the scope of the second and third sentences of the said Article 13 (1) (c) of Regulation No 3 according to which:

'If they have no permanent residence in the territory of any of the Member States where they carry on their employment, they shall be subject to the legislation of that Member State in whose territory the employer(s) or the registered office of the undertaking(s) employing them is situated. If such workers, having their permanent residence in the territory of a Member State where they carry on no employment, are attached to two or more employers situated in the territory of different Member States or to two or more undertakings having their registered office in the territory of different Member States, they shall be subject to the legislation of the Member State in whose territory they have their permanent residence'.

The Caisse further maintains that the decision fails to take into account the fact that the charge for the service had been shared equally between all the members of the orchestra and that it was expressly contested that the leader of the band was a trader.

The Cour de Cassation, which heard the appeal, decided that a question of the

interpretation of Community law was involved, and by an order of 4 December 1974, which reached the Court on 29 January 1975, it decided to stay proceedings and to refer the following questions to the Court for a ruling:

'— whether German social security legislation is applicable to a German musician, resident in Germany, whether or not affiliated in the Federal Republic of Germany to a social security institution, either as an employee or as an independent worker, who occasionally appears as a public performer in France where such performances would normally entail his being subject to the French social security system for wage-earners and assimilated workers;

— if so, whether the application of the Community regulations has the effect of exempting a French employer from the contributions which would normally be due from him to the French social security institutions in respect of the employment in France of public performers and of making it more advantageous to him to employ German musicians than French musicians;

— whether or not, in the case of an accident at work or on the way to or from work, in France, the French social security institutions would not have to pay benefits to German musicians.'

The Caisse, represented by Mr Claude Peignot, Advocate at the Conseil d'Etat and at the Cour de Cassation, the Association, represented by Mr Jean Guillaume Nicolas, Advocate at the Conseil d'Etat and at the Cour de Cassation, and the Commission of the European Communities, represented by its Legal Adviser Mademoiselle Marie-José Jonczy, acting as Agent, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral proceedings without holding a preparatory inquiry.

II — Written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the Caisse

The Caisse recalls that under the provisions of Article L 242-1 of the French Social Security Code:

'Public performers ... who are regarded as subject to Articles 29 (s) and 29 (t) of the First Book of the Code du Travail shall be compulsorily affiliated to social insurance schemes whatever their nationality.

The obligations of an employer shall be assumed in respect of the public performers ... referred to in the previous subparagraph, by undertakings, institutions, services, associations, groups or persons who call upon their services, even if only occasionally.'

Article 29 (s) of the First Book of the Code du Travail establishes a presumption of a contract of employment in respect of the contract engaging an artiste or of a musician which can only be rebutted by proof that the party concerned is a trader. Applying these provisions, the Caisse decided that there was a contract of work between the Association and the members of the German band and that therefore the said Association was liable to pay the contributions relating to the employment of these people. The contrary view, which was upheld by the Commission de Première Instance, would result in a flagrant breach of Regulation No 3 and

also of Regulation No 4. These regulations have been adopted in order to enable wage-earners working in more than one Member State to aggregate periods of affiliation to the social security schemes of these States for the acquisition or for the calculation of their rights to benefits. It is not possible to maintain on the basis of Article 13 (1) (c) (as amended) of Regulation No 3 and 11 (2) (as amended) of Regulation No 4 that the French employer is not obliged to make contributions when employing foreign workers with their permanent residence on French territory: these provisions merely provide that, for the acquisition of rights to benefits, reference should be made to the legislation of the State of permanent residence. The view upheld by the Commission de Première Instance can only be justified if the leader of the band was an impresario, a trader affiliated as an employer to a German social security body and paying the contributions relating to the employment of his musicians.

The Caisse therefore believes that the question put by the court making the reference requires an affirmative answer only if the leader of the orchestra and his musicians are affiliated to a German social security body as an employer and as independent workers or as wage-earners respectively. The answer to the second and third questions is dependent on the one given to the first question.

B — Observations submitted by the Association

The Association maintains that since Community regulations are directly applicable in Member States and take precedence over national law, any conflict between the regulations and the national law is resolved by the non-application of the latter. The Association recalls the text of Article 13 (1) (c) (as amended) of Regulation No 3 and observes that it is clear from the use of the words 'applicable legislation' that its scope is not restricted to 'benefits' and that it also applies to contributions. Therefore, since in the present case:

— the musicians concerned are, because of their nationality, subject to Community law and have their permanent residence in the Federal Republic of Germany,

— by virtue of Article 11 (2) of Regulation No 4 whereby the worker is presumed to be employed in the place of his permanent residence, the competent social institution is the 'Kaufmännische Krankenkasse Halle' in the Federal Republic of Germany,

the application of the French social security legislation is excluded by Community law.

Finally the Association proposes the following answers to the questions referred:

'1 — the German social security legislation is applicable to a German musician, having his permanent residence in Germany, who is affiliated in the Federal Republic of Germany to a social security institution either as an employee or as an independent worker and who occasionally appears as a public performer in France where such performances would normally entail his being subject to the French social security system for wage-earners and assimilated workers;

2 — the application of the Community regulations has the effect of exempting a French employer from the contributions which would normally be due from him to the French social security institutions in respect of the employment in France of public performers;

3 — in the case of an accident at work or on the way to or from work, in France, the French social security institutions do not have to pay benefits to German musicians'.

C — Observations submitted by the Commission of the European Communities

The Commission maintains that the provision of Community law which the Cour de Cassation seeks to have interpreted is mainly Article 13 (1) (c) (as amended) of Regulation No 3. Article 11 (2) (as amended) of Regulation No 4 of the Council contains nothing enabling the applicable national legislation to be determined, but presupposes that this has already been determined by application of Article 13 (1) (b) or (c). In view of this, the questions referred should be read as follows:

1. In order to determine the applicable legislation, must Article 13 (1) (c) (as amended) of Regulation No 3 of the Council concerning social security for migrant workers be interpreted as meaning that the social security legislation of the Member State, in the territory of which a worker has his permanent residence, is applicable to him whether or not he is affiliated in that State to a social security institution, either as an employee or as an independent worker, if he occasionally carries out on the territory of another Member State an activity which would normally entail his being subject to the social security scheme for wage-earners and assimilated workers of the latter State?
2. Does the expression 'subject to the legislation' in the said Article 13 (1) (c) of Regulation No 3 only refer to the right to benefits, or all the conditions giving rise to acquisition of the right to benefits, including contributions?
3. Does the application of the said Article 13 (1) (c) imply obligations on the part of the social security institutions in the country of employment where the worker has no permanent residence in the case of an accident at work or on the way to or from work in the territory of that country of employment?'

Taking each question on its merits, the Commission makes the following observations:

(a) The first question

It follows from Articles 12 to 15 of Regulation No 3, especially Article 12, that the criterion determining which social security legislation is applicable is as a general rule that of the place of work of the worker, irrespective of the place of his permanent residence or where his employer or the registered office of the undertaking which employs him is situated. Nevertheless Article 13 (1) provides certain exceptions to this principle in specific cases where by virtue of the nature of the occupation of the worker or of the situation of the undertaking it appears unjustifiable or impossible to apply such a principle, especially where the worker carries out his activity in the territory of more than one Member State. In such a case it is either the place of permanent residence of the worker or the place where the employer is situated or where the registered office of the undertaking is situated which serves as the criterion for determining the legislation applicable.

The fact that the musicians also carried out their activity in Germany in this case is the determining factor which is capable of excluding the application of Article 12 and, in respect of their appearances in France, places these musicians under the provisions of the first sentence of Article 13 (1) (c).
Nevertheless Article 13 (1) (c) provides that for the purposes of its application the insured:

— shall be a salaried worker or assimilated worker,
— shall 'normally' work in the territory of more than one Member State.

In respect of the first condition, since Regulation No 3 is only applicable to wage-earners or assimilated workers it follows that its actual scope is restricted to systems of legislation covering

wage-earners or assimilated workers. Therefore the musicians cannot claim the applicability of German legislation in respect of their appearances in France unless in Germany they are subject to legislation covering wage-earners or assimilated workers. Whilst it is quite clear from the facts submitted that the leader of the orchestra is affiliated to a recognized German private fund this nevertheless does not enable the position of the parties in respect of the German social security legislation to be determined.

As to the second condition, on the assumption that it is not complied with in this case, the provisions applicable are those of Article 13 (1) (a) which require *inter alia* that the employee temporarily working in the territory of another Member State should there carry out his activity on behalf of the undertaking or the employer to which he is normally attached. This would mean in the present case that since the appearances by these musicians in France were occasional, they could only be subject to the German legislation in respect of those appearances if they made them on behalf of an employer established in Germany. If the employer is in this case the leader of the band, the fact that the said musicians come under Article 13 (1) (a) would still not result in the leader of the band himself being subject to the general French scheme.

(b) The second question

The interpretation put forward by the Caisse finds no legal support in the text of the various provisions of Head II of Regulation No 3 nor in the other provisions of the same regulation. The term 'legislation' is defined in Article 1 (b) which contains no limitation of this kind. That interpretation will in any case be contrary not only to the text of Article 8, but also to the sense of Article 51 of Regulation No 3 and to the general philosophy behind this regulation.

If these musicians therefore are subject to the German legislation by virtue of Article 13 (1) (c) it would follow that the Association as employer is obliged to pay the contributions due by applying the German legislation.

(c) The third question

The answer to the question regarding accidents at work is to be found in Article 29 of Regulation No 3 especially paragraphs (1) and (7) from which it follows that in case of an accident at work which occurs in France the German musicians subject to German legislation shall be entitled to receive, 'at the expense of the German institution', benefits in kind provided for by the French legislation and the cash benefits provided by the German legislation.

On the other hand, as regards accidents on the way to or from work it follows, in particular from the case-law of the Court, that by virtue of Article 12 of Regulation No 3 the worker remains subject to the legislation of the country of employment, that is, to that of the competent State. This general principle, established in respect of Article 12, must also apply in cases where the social security legislation is determined by the application of Article 13: To distinguish between the two parts of the journey, when the legislation applicable under the regulations is not that of the country where the worker is employed, would indeed be contrary to the spirit of Regulation No 3. It follows therefore that the German legislation remains applicable, in cases of accidents on the way to or from work which occur in France, where by virtue of the Community regulations, the worker is subject to this legislation.

On the basis of these observations therefore, the Commission proposes the following answers to the questions referred:

'1. The social security legislation of a Member State in the territory of

which a worker has his permanent residence is only applicable to him under the first sentence of Article 13 (1) (c) (as amended) of Regulation No 3, if he also works in the territory of a Member State other than that of his permanent residence and if he is regarded as a wage-earner or assimilated worker in the State of his permanent residence, and if he works in the territory of the other Member State habitually rather than occasionally.

2. The expression "subject to the legislation" in the first sentence of the said Article 13 (1) (c) of Regulation No 3 not only implies the right to benefits provided by the legislation of the Member State concerned, but also all the obligations which this social security legislation imposes in the same circumstances on nationals of this State.

3. A wage-earner or assimilated worker who is subject to the legislation of a Member State by virtue of the first sentence of the said Article 13 (1) (c) of Regulation No 3 and who is the victim of an accident at work in the territory of another Member State where he carries out part of his work, shall, at the expense of the competent institution of the first Member State, in accordance with Article 29 (1) and (7) of Regulation No 3, receive the benefits in kind provided for by the legislation of the second State, and the cash benefits provided by the legislation applied by the competent institution. An accident on the way to or from work which occurs in the territory of a Member State other than the competent Member State shall be considered as occurring in the territory of the competent State.'

III — Oral procedure

The Caisse Primaire d'Assurance Maladie de Sélestat and the Commission of the European Communities submitted their oral observations at the hearing on 15 May 1975.

The Advocate-General delivered his opinion at the hearing on 10 June 1975.

Grounds of judgment

1 By an order dated 4 December 1974, which reached the Court Registry on 29 January 1975, the Cour de Cassation of France referred to the Court, pursuant to Article 177 of the EEC Treaty, questions relating to the interpretation of certain provisions of Regulation No 3 of the Council concerning social security for migrant workers and its implementing Regulation No 4.

2 These questions were raised in the course of a case brought before that court relating to a demand for social security contributions under the French general social security scheme made to the French employer of five musicians of German nationality, having their permanent residence in the Federal Republic of Germany, and who made appearances in France in 1970 at three balls organized by the Association du Foot-Ball Club d'Andlau.

The first question

3 The first question asks whether 'German social security legislation is applicable to a German musician, resident in Germany, whether or not affiliated in the Federal Republic of Germany to a social security institution, either as an employee or as an independent worker, who occasionally appears as a public performer in France where such performances would normally entail his being subject to the French social security system for wage-earners and assimilated workers'.

4 Article 12 (1) (as amended) of Regulation No 3 provides: 'Wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if... their employer or the registered office of the undertaking which employs them is situated in the territory of another Member State.'

5 Article 13 (1) of the same regulation provides some exceptions to this principle, particularly in cases where, by reason of the place where the registered office of the undertaking or his employer is situated, it is impossible or unjustifiable to subject the worker to the legislation of the State where he is working temporarily.

6 The first sentence of Article 13 (1) (c) (as amended) provides that: 'Wage-earners and assimilated workers... who normally work in the territory of more than one Member State, shall be subject to the legislation of the Member State in the territory of which they have their permanent residence.'

7 This provision is mainly aimed at avoiding the overlapping of several national systems of legislation where a worker who is affiliated to the social security scheme of the Member State where he is permanently resident, travels temporarily in other Member States by reason of his work, whilst not changing his permanent residence.

8 Therefore a prerequisite for the application of this provision is that the worker is affiliated to a social security institution in the State where he has his permanent residence.

9 If there is no such affiliation, the applicable legislation is determined in accordance with the general principle of Article 12 of Regulation No 3 in so far as the worker satisfies by reason of his work the conditions for affiliation set out by the social security legislation of the country where he is employed.

10 In addition, by the reference to workers who 'normally' work in more than one Member State, the first sentence of the said Article 13 (1) (c) is not intended to exclude from its scope the case of a worker who, whilst not complying with the conditions set out in Article 13 (1) (a), is employed in a Member State other than that of his place of permanent residence, not habitually but occasionally.

11 For the above reasons the answer to be given is that a worker having his permanent residence in one Member State who is occasionally employed in another Member State is, by virtue of the first sentence of the said Article 13 (1) (c) of Regulation No 3, subject to the legislation of the State of his permanent residence in so far as he is affiliated as a wage-earner or assimilated worker to the social security scheme of this State and if he is not so affiliated he is subject to the social security legislation of the Member State where he works occasionally.

The second question

12 In the second question it is asked 'whether the application of the Community regulations has the effect of exempting a French employer from the contributions which would normally be due from him to the French social security institutions in respect of the employment in France of public performers and of making it more advantageous for him to employ German musicians than French musicians.'

13 Article 8 of Regulation No 3 provides that: 'Persons permanently resident in the territory of any Member State to whom this Regulation applies shall have the same rights and obligations under the social security legislation of every other Member State as the latter's nationals.'

14 Thus it follows from the answer given to the first question that the social security relationships in question are governed by the legislation of the State

where the worker has his permanent residence if he is affiliated to a social security institution of that State.

15 Therefore the obligation to pay the contributions which are laid down by the social security legislation is also applicable to an employer established in another Member State on the territory of which the worker is temporarily employed.

16 In such a case Article 51 of this regulation provides for the recovery of contributions due to an institution of one Member State and lays down the general conditions under which this recovery may be made on the territory of the State where the worker is employed.

17 The answer to the second question should therefore be that if an employer established in a Member State other than the one whose social security legislation is applicable to the worker, is not bound to pay contributions to the social security authorities of his own State, he is obliged to pay those laid down by the legislation which is application to the worker.

The third question

18 In the third question it is asked 'whether or not, in the case of an accident at work or on the way to or from work, in France, the French social security institutions would not have to pay benefits to German musicians'.

19 Article 29 of Regulation No 3 relating to 'accidents at work and occupational diseases' provides in paragraph (1) that 'any wage-earner or assimilated worker who sustains an accident at work ... in the territory of a Member State other than that of the competent country ... shall be entitled to receive at the expense of the competent institution benefits in kind issued by the institution of the place of temporary or permanent residence'.

20 By paragraph (6) of this article the cost of the benefits 'shall be reimbursed to the institutions which issued them ..'.

21 In addition, in relation to cash benefits, paragraph (7) of this article provides that the cost 'shall be borne by the competent institution in accordance with the legislation applicable to it'.

22 In the case of a wage-earner or assimilated worker subject to the legislation of the State where he has his permanent residence who occasionally is employed in another Member State, the 'competent country' for the purposes of these provisions is the State of his permanent residence, and the 'competent institution' is that of the same State.

23 Thus the answer should be that in the case of an accident at work, including an accident on the way to or from work, which happens to a wage-earner or assimilated worker subject to the legislation of the State where he has his permanent residence, who is occasionally employed on the territory of another Member State, the social security institution of the latter State, as the institution of the place where the worker is, is only obliged, under Article 29 (1) of Regulation No 3, should the occasion arise, to issue the benefits in kind provided by its own legislation at the expense of the institution of the competent State.

Costs

24 The costs incurred by the Commission of the European Communities which submitted observations to the Court are not recoverable.

25 As these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour de Cassation of France, by its order of 4 December 1974 hereby rules:

1. **By virtue of the first sentence of Article 13 (1) (c) (as amended) of Regulation No 3, a worker having his permanent residence in one State who occasionally pursues his activity in another Member State is subject to the legislation of the State of his residence in so far as he is affiliated as a wage-earner or assimilated worker to the social security scheme of that State. If he is not so affiliated he is subject to the social security legislation of the Member State in which he occasionally pursues his activity.**

2. **In the case of an accident at work, including an accident on the way to or from work, which happens to a wage-earner or assimilated worker subject to the legislation of the State of his permanent residence, who is occasionally employed in the territory of another Member State, the social security institution of the latter State, as the institution of the place where the worker is, is only obliged, under Article 29 (1) of Regulation No 3, should the occasion arise, to issue the benefits in kind provided for by its own legislation at the expense of the institution of the competent State.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 24 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President