OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 21 JUNE 1979 [1]

Mr President,
Members of the Court,

The legislation of certain Member States provides that the calculation of cash benefits subsequent to an accident at work shall be based on an average wage. This case concerns the calculation of such an average wage.

On 25 April 1969 Jean-Louis Pennartz sustained an accident at work in Cannes. He had previously worked in Belgium from August 1967 to December 1968. As a result of that accident the Caisse Primaire d'Assurance Maladie des Alpes-Maritimes [Central Sickness Insurance Fund for the Alpes-Maritimes] granted him a permanent partial invalidity pension of 4% which was subsequently increased to 6%.

That pension was calculated with reference to an average wage determined solely on the basis of the wage actually received by Mr Pennartz in the employment last held by him for 18 days in France. Mr Pennartz disputes this method of calculation and considers that account must also be taken of the wage which he received in Belgium.

His claim was dismissed on identical grounds by the Commission de Première Instance du Contentieux de la Sécurité Sociale des Alpes-Maritimes [Tribunal of First Instance for Social Security Appeals for the Alpes-Maritimes] and by the Cour d'Appel [Court of Appeal], Aix-en-Provence. These courts based their decisions in particular on Articles 18 and 30 of Regulation No 3 concerning social security for migrant workers and held that the average wage must be calculated exclusively on the basis of the remuneration received in the country in which the accident occurred.

Mr Pennartz appealed to the Cour de Cassation.

The Cour de Cassation has referred to the Court of Justice, pursuant to Article 177 of the EEC Treaty, the question whether, on the basis of the provisions in question, where the calculation of a pension for an accident at work is based on the average wage during a reference period, such average wage must be determined by taking account of all remuneration received in the course of that period in one or more Member States or whether it must be reckoned solely on the basis of the remuneration received in the State in which the claimant was working at the time of the accident, in accordance with the provisions and the method of calculation in force in that State.

The wording of this question calls for a preliminary observation.

The particular provision to be interpreted is Article 18 (1) of Regulation No 3 concerning sickness and maternity benefits to which a succinct reference is made in the analogous provision concerning accidents at work, Article 30 (2) of the same regulation. Article 18 (1) states: "Where, under the legislation of one Member State, the payment of cash benefits is related to the average wage over a given period, the average wage to be reckoned for calculation of such benefits shall be based on actual wages

1 — Translated from the French.

obtained during the period completed under the legislation of such Member State".

The concept of the wages recorded during the periods completed under the legislation of the State which is responsible for payment of the pension is not necessarily to be considered identical with that of the wages received on the territory of that State. No doubt that is usually the case since, under Article 12 of Regulation No 3, the legislation applicable is generally that of the State on whose territory the workers are employed. Nevertheless there also occur exceptional cases in which, pursuant to other provisions of Head II of the regulation, the worker is subject to the legislation of a Member State other than that in which he is employed. In such cases the legislation referred to by the provisions of Articles 30 and 18 read together is not that of the State in which the claimant was working at the time of the accident.

Subject to that reservation several considerations prompt me to uphold the second interpretation put forward by the Cour de Cassation.

Mr Pennartz claimed that Article 18 merely determines the law which applies for fixing the reference period and does not in any way prejudge the determination of the wage to be taken into consideration for calculating the pension. That interpretation appears to me to be at variance with the meaning of the words. It amounts to confusing the reference period for the calculation of the average wage with the "period completed" under the legislation of the competent Member State. Furthermore it would ultimately disregard the scope of the provisions in dispute, which are concerned exclusively to determine an average wage and not to settle what legislation is applicable. In Regulation No 3 the legislation applicable is determined solely by Head II (Articles 12 to 15).

This interpretation is sustained by the provisions which from 1 October 1972 replaced Article 30 of Regulation No 3. Article 58 (1) of Regulation No 1408/71 is in fact worded as follows:

"The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on an average wage or salary shall determine such average wage or salary exclusively by reference to wages or salaries recorded during the periods completed under the said legislation."

Furthermore it is a general rule in Community provisions on social security that, in calculating benefits on the basis of remuneration, social security institutions must take into account only remuneration relating to the periods completed under the legislation which they apply. In Regulation No 3 that method is employed in calculating old-age and death benefits (Article 28 (1) (c)) and unemployment benefits (Article 34 (1)). The similar provisions in Regulation No 1408/71 are also based on the same principles. Nevertheless with regard to unemployment benefits Article 60 (1) of that regulation provides that: "If the person concerned had been in his last employment in that territory" (that is to say, the territory of the Member State in which he was last employed) "for less than four weeks, the benefits shall be

calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State".

Finally, in view of the fact that the legislation most often applied is the legislation of the State in question, there are practical reasons for that provision. It would in fact be difficult for social security institutions to take into consideration wages recorded in other Member States. The average wage defined under one national system is only rarely the gross wage; it is very often fixed in terms of other factors which are difficult to establish relating to the facts of the situation and the law of the Member State in question. Amongst these factors it suffices to consider the system of taxation to be persuaded of the complexity of the undertaking.

In addition to this, reference should also be made — especially in a period when currencies are unstable — to the difficulties of conversion into the currency of the institution liable for payment.

For these reasons I am of the opinion that the Court should reply to the question submitted by the Cour de Cassation of France with the following ruling:

Articles 18 (1) and 30 (2) of EEC Regulation No 3 concerning social security for migrant workers must be interpreted to mean that, where a worker sustains an accident at work whilst he was subject to the legislation of a Member State in accordance with which the calculation of the pension for an accident at work must take account of the average wage for a certain period, the average wage taken into consideration in calculating the said pension must be determined exclusively in terms of the remuneration recorded during the period in the course of which the person concerned was subject to the legislation of that Member State.