OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 6 May 1992 *

Mr President,
Members of the Court,

1. By order of 25 February 1991 the Bundessozialgericht (Federal Social Court) referred to the Court of Justice a number of questions for a preliminary ruling concerning the right to unemployment benefit under Regulation No 1408/71. [1]

These questions arose in a dispute between Doris Knoch and the Bundesanstalt für Arbeit (Federal Employment Office).

Background

2. Miss Knoch, single and of German nationality, was employed from 1 October 1982 to 30 June 1983 and from 1 October 1983 to 30 June 1984 as an assistant in German language and literature at the University of Bath in the United Kingdom. She obtained her post through the Deutscher Akademische Austauschdienst (German Academic Exchange Service, hereinafter 'the DAAD'). In May 1981 she took the first State examination for secondary-school teachers at the University of Heidelberg and, in June 1982, an examination for a Master's degree. During the period of her engagement in the United Kingdom, she was covered by social security and paid contributions to the United Kingdom unemployment insurance scheme. Over the same period, the DAAD paid her a compensatory allowance, which she also received during the vacations from 1 July to 30 September 1983 and from 1 July to 30 September 1984. In addition, the DAAD paid her, on cessation of that compensatory allowance, an interim allowance amounting to some DM 1 500 per month up to 30 November 1984.

Miss Knoch had rented a house in Bath but had not had her name removed from the population register in Bruchsal, where she was registered at her parents' address. She stayed in Bruchsal during the 1983 vacations and also in July 1984. At the beginning of August 1984 she left Bruchsal for three months in order to look for work in England, but was unsuccessful. In November or December 1984 she returned to Germany and in September 1985 commenced a period of practical training for secondary-school teachers, which she completed by passing the second State examination.

Following the termination of her employment, Miss Knoch registered in Bath as unemployed. She received a total of £139.76 in unemployment benefit between the beginning of July and 21 August 1984. After returning to Bruchsal, she registered as unemployed on 19 December 1984 with the employment office in Karlsruhe and applied for unemployment benefit. The employment

* Original language: Dutch.

1 — 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, in the version set out in Annex I to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

office turned her application down, on the ground that she had not completed the qualifying period and that under Community law the period spent in the United Kingdom could not be taken into account.

By judgment of 28 January 1987 the Sozialgericht (Social Court) set aside that decision and ordered the employment office to pay Miss Knoch statutory unemployment benefit as from 19 December 1984. Subsequently, by judgment of 16 August 1988, the Landessozialgericht (Higher Social Court) dismissed the employment office's appeal. The reasons it gave were that the qualifying period required by the relevant German legislation had been satisfied by Miss Knoch's employment in the United Kingdom. The employment office was obliged under Article 71(1) (b) (ii) of Regulation No 1408/71 to take account of those periods of employment.

In its appeal on a point of law, the employment office contends that Articles 12 and 71 of Regulation No 1408/71 have been infringed. In its view, Article 71(1) (b) gives an employed person who is not a frontier worker a choice: he can claim unemployment benefit either in the State in which he last worked — as Miss Knoch did in the United Kingdom — or in the State in which he resides. It follows from the prohibition on the overlapping of benefits laid down in the first sentence of Article 12(1) of Regulation No 1408/71 that Miss Knoch forfeited her entitlement to German unemployment benefit by her receipt of unemployment benefit in the United Kingdom. In accordance with Article 69 of Regulation No 1408/71, she was able to exercise her claim only under United Kingdom law.

However, Miss Knoch relies on Article 67 of that regulation (see paragraph 6 below). She claims that the employment office must take account of the periods of insurance which she completed as an employed person under United Kingdom law as though they were periods of insurance completed under German law.

3. Since it was confronted with a number of problems concerning the interpretation of Regulation No 1408/71, the Bundessozialgericht referred the following questions to the Court:

'1. Is an employed person, other than a frontier worker, who is wholly unemployed and resided in the territory of a Member State other than the competent one during his last employment, entitled under Article 71(1) (b) (ii) and Article 67 of Regulation (EEC) No 1408/71 to receive benefits in accordance with the legislation of the Member State in which he resides or to which he returns, even if he has previously received unemployment insurance benefits from the institution of the competent Member State?

2 (a) Does the first sentence of Article 12(1) of Regulation No 1408/71 apply in the context of Article 71(1) (b) (ii) and Article 67 of that regulation with the result that a right to several similar benefits made on the basis of the same period of compulsory insurance can be neither conferred nor maintained under that regulation?

(b) When do unemployment benefits constitute benefits of the same kind within the meaning of the first sentence of Article 12(1) of Regulation No 1408/71?

(c) Must an institution of a Member State, under whose legislation the acquisition and duration of a right to unemployment benefit are contingent on the completion of insurance periods, in a situation under Article 71(1) (b) (ii) and Article 67 of Regulation No 1408/71, in accordance with the first sentence of Article 12(1) thereof,

take no account, with regard to the acquisition and duration of a right, of those periods of insurance which were completed as an employed person under the legislation of another Member State, in so far as such periods have already given rise to a benefit of the same kind in that other Member State,

or

must effect be given to the first sentence of Article 12(1) of Regulation No 1408/71 with regard to unemployment benefit in such a way that the periods of insurance are to be taken into account as a basis for the subsequent entitlement, without reference to the original claim, but the length of the period of entitlement subsequently acquired is reduced by the number of days for which the original benefits were received?

3 (a) Is the certified statement which the competent institution for matters relating to unemployment in the Member State, to whose legislation a migrant worker was last subject, issues pursuant to Article 84(2) of Regulation (EEC) No 574/72 binding on the institution and the courts of another Member State in so far as the certified statement notes that the migrant worker has no right to benefit under Article 69 of Regulation No 1408/71?

(b) When can an unemployed person claim benefits under Article 69 of Regulation No 1408/71 pursuant to the legislation to which he was last subject, within the meaning of the third sentence of Article 71(1) (b) (ii) of that regulation, with the result that the granting of benefits under the legislation of the State in which he resides is temporarily suspended?

(c) Does the suspension, within the meaning of the third sentence of Article 71(1) (b) (ii) of Regulation No 1408/71, of receipt of benefits under the legislation of the Member State in which the unemployed person resides or to which he returns in respect of the period for which he is entitled to benefits, under Article 69 of Regulation No 1408/71, in

accordance with the legislation to which he was last subject, mean only that the unemployed person does not during this time receive benefits from the institution of the State in which he resides, but may thereafter claim such benefits for the full period, or does the suspension of benefits also have the result that the length of the period of entitlement to benefits is reduced by the number of days for which the suspension applies?'

4. In view of the technical nature of the questions, it is desirable in my view first briefly to consider the system established by Regulation No 1408/71 with regard to unemployment benefit. I shall then deal with the questions referred for a preliminary ruling in the order in which they have been submitted by the national court. Before that, I shall consider in detail the concept of 'residence' within the meaning of Article 71 of that regulation, since the French Government disputes that Miss Knoch was still resident in Germany during her stay in the United Kingdom.

The system of unemployment benefit introduced by Regulation No 1408/71

5. As we know, Regulation No 1408/71 was adopted by the Council for the implementation of Article 51 of the EEC Treaty. Its aim is the closer coordination of national social security legislation with a view to the attainment of freedom of movement for workers by guaranteeing within the Community equal treatment for all nationals of the Member States under the various national legislative systems, and social security benefits for workers and their dependants regardless of their place of employment or residence. [2] With that end in view Regulation No 1408/71 has established a scheme involving *first* aggregation of all the periods to be taken into account under the various national legislative systems for the purpose of acquiring and retaining the right to benefits and of calculating the amount thereof, *subsequently* provision of benefits for the various categories of persons covered by the regulation, regardless of their place of residence within the Community, and *finally* prevention as a result of the movement of workers and the differences between national legislation of the unjustified overlapping of benefits resulting in unequal treatment.

The last-mentioned objective is pursued by two general provisions, the first being the principle of equal treatment embodied in Article 3(1):

'Subject to the special provisions of this regulation, persons resident in the territory of one of the Member States to whom this regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

2 — See the fifth recital in the preamble to Regulation No 1408/71.

The second is the general prohibition on the overlapping of benefits embodied in the first sentence of Article 12(1):

'This regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance.'

6. With regard to *unemployment benefit*, Article 67(1) of Regulation No 1408/71 imposes on Member States which — as is the case in Germany pursuant to Paragraph 104(1) of the Arbeitsförderungsgesetz (Law on the Promotion of Employment, hereinafter referred to as 'the AFG') — make the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance, the following obligation:

'The competent institution ... 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.'

As a general rule, however, that obligation applies, according to Article 67(3), only to a State under whose legislation

'the person concerned ... completed lastly ... periods of insurance ... in accordance with the provisions of the legislation under which the benefits are claimed.'

Article 71 (1) (b) makes it possible to *depart* from that rule on certain conditions:

' (i) An employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.'

As the Court has already explained in its judgment in *Miethe*, that provision confers

on wholly unemployed persons (other than frontier workers) an *option* regarding the applicable legislation on benefits. Such persons may

'make a choice between the benefits offered by the Member State in which they were last employed and those offered by the Member State in which they reside. They exercise that option by making themselves available either to the employment services of the State in which they were last employed (Article 71(1)(b)(i)) or to those of the Member State in which they reside (Article 71(1)(b)(ii)).' [3]

The aim of that provision has already been explained by the Court — by reference to the ninth recital in the preamble to Regulation No 1408/71 — on several occasions, namely to ensure that migrant workers are able to claim unemployment benefit under the most favourable conditions for seeking new employment. [4]

As the Commission has rightly pointed out in this case — and as the Court has already expressly confirmed [5] — there is an exception not only to Article 67 but also to the principle laid down by Article 13(2) (a) of Regulation No 1408/71 that an employed person is subject to the legislation of the State on whose territory he carries on an occupation. In view of the fact that Article 71(1) (b) constitutes an exception, the Court has made the words 'Member State in which he resides' subject to certain restrictions (see paragraph 7 below).

'Residence' within the meaning of Article 71 of Regulation No 1408/71

7. The French Government disputes the national court's assertion that Miss Knoch fulfils the conditions laid down by Article 71(1)(b)(ii), in particular inasmuch as that court takes the view that Miss Knoch had retained her residence in Germany during her stay in the United Kingdom. The French Government relies on the judgment in *Reibold* in which the Court, summarizing its ruling in *Di Paolo*, [6] lays down for the determination of the concept of 'residence' within the meaning of Article 71(1)(b)(ii) the following criteria:

'that the words "the Member State in which he resides" must be limited to the State in which the worker, even though he is employed in another Member State, continues to reside habitually and in which the normal centre of his interests is also situated ... that once a worker has a fixed employment in a Member State, there is a presumption that he resides there and ... that it is necessary to consider not only the worker's domestic situation but also the reasons which induced him to move and the nature of the work ... .' [7]

From that the Court infers that

'for the purposes of applying Article 71(1) (b) (ii) of Regulation No 1408/71, account

3 — Judgment of 12 June 1986 in Case 1/85 *Miethe* v *Bundesanstalt für Arbeit* [1986] ECR 1837, at paragraph 9; see also the judgment of 27 May 1982 in Case 227/81 *Aubin* v *UNEDIC and ASSEDIC* [1982] ECR 1991, at paragraph 19.

4 — Judgment of 9 July 1975 in Case 20/75 *D'Amico* v *Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891, at paragraph 5; judgment of 15 December 1976 in Case 39/76 *Metaalnijverheid* v *Mouthaan* [1976] ECR 1901, at paragraph 13; judgment of 28 February 1980 in Case 67/79 *Fellinger* v *Bundesanstalt für Arbeit* [1980] ECR 535, at paragraph 7; judgment of 22 September 1988 in Case 236/87 *Bergemann* v *Bundesanstalt für Arbeit* [1988] ECR 5125, at paragraph 18; and judgment of 13 November 1990 in Case C-216/89 *Reibold* v *Bundesanstalt für Arbeit* [1990] ECR I-4163 (summary publication), at paragraph 10.

5 — Judgment of 29 June 1988 in Case 58/87 *Rebmann* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3467, at paragraph 13.

6 — Judgment of 17 February 1977 in Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315.

7 — Judgment in *Reibold*, cited above, at paragraph 15.

should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances'. [8]

The French Government draws attention to certain factors which, in its view, point in this case to the conclusion that Miss Knoch did not (any longer) have her residence in Germany. Over a period of two years, she spent only four months in Germany and the centre of her interests was not exclusively in Germany since she sought (but did not find) employment in the United Kingdom on the strength of a diploma enabling her to teach in secondary schools and a Master's degree. Furthermore, the French Government goes on to state, there are no grounds at all for suggesting that there may be a 'legal vacuum' with regard to Miss Knoch's position under Community law: her professional situation was fully covered by Article 3 of Regulation No 1408/71 which, as the Court decided in its judgment in *Allué and Coonan*, constitutes a specific expression of the prohibition of discrimination on grounds of nationality in relation to national social security schemes. [9] Next, the French Government finds it difficult to envisage what the status would be under the rules on freedom of movement of a resident of a Member State who has been employed in another Member State for nine months of the year and is covered by the social security scheme of that State, even though he declares that he is not resident there. If the national court's standpoint is followed, the question arises whether this constitutes a purely internal situation governed by German law. In addition, this case should be distinguished from the situation which arose in *Reibold*, since Miss Knoch had sought work in the United Kingdom and subsequently received unemployment benefit under United Kingdom legislation. Finally, the broad interpretation of the concept of 'residence' by the national court is incompatible with Community tax legislation, namely Article 7 of Directive 83/182, [10] and impairs the cohesion of Community law. The French Government therefore concludes that Miss Knoch was habitually resident in the United Kingdom and not in Germany.

8. I am not swayed by those arguments. When applied to this case, most of the criteria developed by the Court in its judgments in *Di Paolo* and *Reibold* point instead to the conclusion that the national court was right to consider that during her employment in the United Kingdom Miss Knoch had retained her habitual residence in Germany. The crucial factor, in my view, is that in those decisions the Court proceeds on the assumption that the worker in question is resident in the Member State in which he is employed only where he has a *fixed employment* ('un emploi stable') in that State. That was clearly not the case here since Miss Knoch was employed for two academic years as an assistant in the United Kingdom under an academic exchange programme established by the DAAD. On the expiry of that period (June 1984) her association with the United Kingdom came to an end and her efforts to find work there proved unsuccessful. It is impossible to infer the existence of a fixed employment from those circumstances.

8 — Judgment in *Reibold*, cited above, at paragraph 16; judgment in *Di Paolo*, cited above, at paragraph 22.

9 — Judgment of 30 May 1989 in Case 33/88 *Allué and Coonan* v *University of Venice* [1989] ECR 1591, at paragraph 21.

10 — Council Directive of 28 March 1983 (83/182/EEC) on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59).

Nor can the argument concerning the duration of Miss Knoch's absence from Germany be considered decisive. As the Court stated in *Reibold*, that criterion is not precisely defined anywhere, nor is it exclusive, and an excessively strict maximal provision concerning absence (for instance, four months, by analogy with the definition of 'frontier worker' in Article 1(b) of Regulation No 1408/71) would deprive Article 71 of the regulation of part of its effectiveness:

'A person other than a frontier worker may be employed for more than four months on the territory of another Member State whilst retaining the habitual centre of his interests in his country of origin. To exclude such a person would preclude, in breach of the aim pursued by those provisions, the possibility of guaranteeing him the best opportunities for re-employment. The criterion relating to the duration of absence must therefore be applied by reference to the facts of each individual case.' [11]

Furthermore, in its judgment in *Di Paolo* the Court made it clear that the addition of the words 'or who returns to that territory' in Article 71(1)(b)(ii)

'implies merely that the concept of residence, such as defined above, does not necessarily exclude *non-habitual residence* in another Member State.' [12]

Subsequently, it may be possible to infer from the *reasons for her stay abroad* and the *nature of her occupation there* that Miss Knoch was no longer residing in Germany. It is scarcely plausible for a temporary teaching post abroad under an academic exchange programme to lead of itself to a change of residence.

Finally, as regards the relationship between Miss Knoch's position and that of Miss Reibold in the judgment of the same name, I consider, unlike the French Government, that there are strong similarities between the two cases. As in the case of Miss Knoch, the DAAD arranged for Miss Reibold to spend two consecutive academic years as an assistant in the United Kingdom (totalling 21 months, that is to say the same number of months as Miss Knoch spent there); in addition, during the university vacations Miss Reibold also returned to Germany where she had retained rented premises. In my view, the fact that Miss Knoch drew unemployment benefit in the United Kingdom is not — at least so far as the assessment of the residence requirement is concerned — a crucial factor. Nor is the fact that she sought employment there, albeit unsuccessfully: this means merely that if she had found work in the United Kingdom, she *might* have transferred her residence there.

There is another point concerning the argument relating to the cohesion of Community law. The concept of 'habitual residence' applied by the Court in its aforesaid decisions has a Community dimension. In my view it is desirable in that connection that the meaning of that concept should be as

11 — Judgment in *Reibold*, cited above, at paragraph 21 *in fine*.
12 — Judgment in *Di Paolo*, cited above, at paragraph 21.

unequivocal as possible in the various areas covered by Community law. However, account must be taken of the purpose and scheme of the Community legislation in question (for instance, tax legislation or, as in this case, social legislation) which — as in Article 7 of Directive 83/182 [13] — entails as a rule a specific definition of the concept of 'normal residence'.

The first question

9. In its first question the national court seeks to ascertain whether a wholly unemployed person such as Miss Knoch is still entitled under Regulation No 1408/71 to receive unemployment benefit in the Member State in which she resides or to which she returns even if she has previously received unemployment benefit from the institution of the competent Member State, in this case the United Kingdom. According to the national court, the German Government and the Commission, that question should be answered in the affirmative.

The German Government endorses the reasoning of the national court. The latter considers that even if a wholly unemployed person first received unemployment benefit in the Member State to whose legislation he was last subject, this does not mean that once the benefit has been discontinued (for instance, after the duration of entitlement to benefits under the applicable national legislation has expired or the three-month period referred to in Article 69(1) (c) of Regulation No 1408/71 has elapsed) he is no longer entitled to draw benefits from the institution of the State in which he resides. Since the legal effect of the first sentence of Article 71(1)(b)(ii) is essentially to bring into operation Article 67 of that regulation, the second and third sentences relate, according to the national court, specifically to an unemployed person who acquires entitlement on the basis of Articles 71 and 67 as against the institution of the State in which he resides, even though he has also claimed benefits from the competent institution of the Member State to whose legislation he was last subject.

According to the Commission, there is nothing in Regulation No 1408/71 to suggest that once an unemployed person has made a choice, he is bound by it, that is to say after claiming benefits under the legislation of the State in which he was last employed, he no longer qualifies for unemployment benefit under the scheme of the Member State in which he resides. The Commission considers it possible to infer, on the other hand, from the favourable treatment accorded to such persons by the regulation that it is quite possible for an unemployed person first to claim benefits in the State of employment and subsequently — if it appears to be more advantageous for him to do so — to avail himself of the possibility offered to him by Article 71 of drawing unemployment benefit in the State in which he resides. According to the Commission, that follows from the third sentence of Article 71(1) (b) (ii). The fact that benefits may be suspended under that provision means, according to the Commission, that it is possible for an unemployed person first to apply for benefits in the State in which he was last employed and subsequently to do so in the State in which he resides.

13 — An identical definition is given in Article 6 of Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (OJ 1983 L 105, p. 64).

The French Government, on the other hand, takes the view that Article 67 of Regulation No 1408/71 does not allow for that possibility of drawing consecutive benefits. In that regard, it relies on the rule laid down by Article 13(1) of Regulation No 1408/71 concerning the unity of the applicable legislation, which Article 67 is designed to strengthen, and on the general rule against the overlapping of benefits set out in Article 12 of the regulation (see paragraph 5 above). For the sake of clarity, Article 13(1) is set out below:

'Subject to Article 14c, persons to whom this regulation applies shall be subject to the legislation of a single Member State only. The legislation shall be determined in accordance with the provisions of this title.'

10. I share the view expressed by the national court, the German Government and the Commission that it is quite possible to claim consecutive benefits, first in the Member State to whose legislation the person concerned was last subject (in this case, the United Kingdom) and subsequently in the Member State in which he resides. As noted earlier (paragraph 6), that preferential system must enable a migrant worker to claim unemployment benefit in conditions which are most favourable to the search for employment. That aim would not be achieved if the choice initially made by the person concerned in favour of benefits in the Member State to whose legislation he was last subject were to deprive him of entitlement to benefits under the scheme of the Member State in which he resides. The suspension, provided for in the third sentence of Article 71(1)(b)(ii), of entitlement to benefits in the last-mentioned State during the period in which benefits may be claimed under the legislation of the first-mentioned State would otherwise serve no purpose.

That the French Government's argument cannot be upheld is also apparent from the point made earlier (paragraph 6) to the effect that this constitutes an exception — which must admittedly be applied strictly — to the 'unity rule' in Article 13 of Regulation No 1408/71.

The second question

11. The second question concerns the application of the first sentence of Article 12(1) of Regulation No 1408/71 in the context of Article 71(1)(b)(ii) of the same regulation. I shall consider, in turn, whether that provision is applicable here, when unemployment benefits constitute benefits 'of the same kind', and how that provision is to be applied in the circumstances of the case.

12. The applicability of Article 12 in the context of Article 71(1)(b)(ii) and Article 67 can scarcely be doubted. As stated earlier (paragraph 5), Article 12 is designed to prevent the unjustified overlapping of social security benefits in the context of Regulation No 1408/71. The prohibition on overlapping, which is reinforced by that provision, is of general application, with the result that it also applies to unemployment benefit. Only the benefits expressly referred to in the second sentence of Article 12(1) (invalidity,

old age, death (pensions) and occupational disease) do not fall within the scope of that prohibition.

13. Less obvious is the answer to the question whether German unemployment benefit and the benefits which Miss Knoch received in the United Kingdom are to be regarded as 'benefits of the same kind' within the meaning of Article 12. In that regard the national court rightly refers to the judgment in *Valentini*, in which the Court considered that:

'According to the established case-law of the Court, social security benefits must be regarded, irrespective of characteristics peculiar to the various national laws, as being of the same kind when their purpose and object together with the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.' [14]

So far as the criteria relating to purpose and object are concerned, no problem arises in this case since they are in fact the same. The national court's doubts stem from the requirement that the basis on which the benefits are calculated and the conditions for granting them must be identical. On that point, there are differences between the German and the United Kingdom schemes, in particular as regards the length of the qualifying period and the duration and amount of the benefit.

One of the conditions for entitlement to unemployment benefit laid down by German law is that an unemployed person must be at the disposal of the employment services and have completed a qualifying period. [15] With regard to the *qualifying period*, account must be taken of the duration of the employment subject to compulsory insurance contributions in the three-year period prior to unemployment, on which the duration of entitlement to unemployment benefit also depends. [16] Admittedly the United Kingdom also requires completion of compulsory insurance periods but takes greater account of the amount of contributions with the result that higher wage earners acquire entitlement to unemployment benefit sooner. In contrast to Germany, where the *duration of the benefit* is dependent on the duration of the employment subject to compulsory insurance contributions in the years prior to unemployment, in the United Kingdom unemployment benefit is generally paid for a fixed period of practically one year (312 days). Finally, there are also a number of *differences concerning the amount of the benefit*. Whereas in the United Kingdom the benefit is equal to fixed basic amounts which differ according to whether the pensionable age has been attained, German unemployment benefit amounts to 63% of the previous net wage on the prescribed scale or the available net standard wage. [17]

14. The question is whether it follows from those differences that the benefits are not of the same kind within the meaning of Article 12 of Regulation No 1408/71. In my view, that question must be answered in the negative. Given the numerous differences on that point between the national social security

14 — Judgement of 5 July 1983 in Case 171/82 *Valentini* v *ASSEDIC* [1983] ECR 2157, at paragraph 13.

15 — Paragraph 100(1) of the Arbeitsförderungsgesetz.

16 — Paragraphs 104 and 106 of the Arbeitsförderungsgesetz.

17 — Paragraphs 111 and 112 of the Arbeitsförderungsgesetz. In the case of unemployed persons with children the net wage compensatory amount is 68% (Paragraph 111(1) of the Arbeitsförderungsgesetz).

schemes, to require the basis on which the benefits are calculated and the conditions for granting them to be absolutely identical would mean that the prohibition in Article 12 on the overlapping of benefits would virtually never apply to unemployment benefit. It would thus be possible for benefits to overlap without restriction once the legislation of the Member State concerned differed in any way as regards the basis on which they are calculated and the conditions for granting them. This clearly runs counter to one of the fundamental aims of Regulation No 1408/71, namely the prevention of the unjustified overlapping of benefits and the unequal treatment resulting therefrom on account of differences between national legislation (see paragraph 5, above).

In this case as well, the differences between the two legislative systems affect the basis on which unemployment benefit is calculated and the conditions for granting it. However, the fact that the two procedures are not identical is not, as is apparent from the judgment in *Valentini*, an obstacle to the application of Article 12 *in so far as* the differences in question are connected with characteristics which are peculiar to the various national statutory schemes or are of a purely formal nature. It seems to me that this is a case of the former: we have just established that the peculiarity of the German statutory scheme as opposed to that of the United Kingdom with regard to unemployment benefit seems to lie primarily in the function of the qualifying period and the determination of the duration of the benefit which is connected therewith. Furthermore, I consider that in examining the particular features of the national systems in question it is impermissible to focus exclusively on a comparison between the two benefit schemes *as such*: instead, they must be viewed in the context of the general social security scheme that is in force in a given Member State. Thus, for instance, it is well known that classic 'contributory schemes', including unemployment benefit schemes, in the United Kingdom are increasingly supplemented by social assistance schemes based on the calculation of the financial means of those concerned (and known as 'means-tested schemes'). On the basis of that analysis it should be possible to explain *inter alia* the differences between Germany and the United Kingdom with regard to the level of unemployment benefit.

In conclusion, therefore, I consider that unemployment benefits constitute benefits of the same kind within the meaning of Article 12(1) of Regulation No 1408/71 when they are intended, in order to provide for a person's maintenance, to make up for loss of earnings as a result of unemployment and the differences between those benefits, including differences concerning the basis on which they are calculated and the conditions for their grant, arise purely from structural differences between the national schemes in question or are of a purely formal nature.

15. The question remains, in the event of the application of Article 12 in the context of Article 71(1) (b) (ii) and Article 67, what specific action must be taken by the institution of a Member State which, like Germany, makes the acquisition of entitlement to unemployment benefit and the duration thereof contingent on the completion of insurance periods. In that regard, the national court suggests two approaches (see paragraph 3 above). The first involves the literal application of Article 12: periods of insurance which have already served as a basis for the first claim may not be relied

upon for a second time, which in the circumstances means that the periods of insurance which formed the basis of the claim to unemployment benefit under United Kingdom legislation cannot serve at the same time as a qualifying period for the purposes of claiming entitlement to unemployment benefit in Germany. By contrast, there is the alternative possibility of taking into account periods of insurance without reference to the first claim, whilst reducing the length of the period of entitlement which has arisen in Germany by the number of days in respect of which the first claim to have arisen was acquired. I agree with the position taken by the national court, the German Government and the Commission, to the effect that the latter approach is the most appropriate. It is more advantageous to the unemployed person in question inasmuch as he has to satisfy a qualifying period to a lesser extent, or not at all, in the Member State in which he resides, which makes it easier for him, in accordance with the purpose of Article 71(1)(b), to seek employment upon his return. Moreover, as the national court points out, that method is more practical from the point of view of the institution of the country of residence, which does not therefore repeatedly have to ascertain the periods of insurance on the basis of which the foreign claim has been acquired or maintained.

The third question

16. The first part of the third question concerns the interpretation of Article 84(2) of Regulation No 574/72 ('the implementing regulation'). [18] For the purposes of the application of Article 71 of Regulation No 1408/71, Article 84(2) provides as follows:

'In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the implementing regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the regulation.'

The competent United Kingdom institution issued Miss Knoch with a certified statement to the effect that the conditions laid down by Article 69 of Regulation No 1408/71 were not fulfilled. Since the national court is uncertain whether the contents of that statement are correct, it wishes to ascertain whether it is binding on the institution and the courts of another Member State.

17. I shall be brief in my answer. The certified statement provided for in Article 84(2) of the implementing regulation is intended merely as an aid to the competent institution of the Member State in which the person concerned resides or to its courts in making it easier for them to make a proper assessment of the claim asserted against the competent institution of the Member State of employment. It is a standard form drawn up by the Administrative Commission on Social Security for Migrant Workers referred to in Articles 80 and 81 of Regulation No 1408/71. As the Court reaffirmed in its judgment in *Romano*, that Commission is not empowered to adopt acts having the force of law, nor can it require national institutions to use certain methods or adopt

18 — Regulation (EEC) No 574/72 laying down the procedure for implementing 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, in the version set out in Annex II to Council Regulation (EEC) 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86).

certain interpretations in applying the Community rules. [19] Nor, as the Court clearly spelt out in its judgment in *Knoeller*, do the forms drawn up by that Commission have exclusive probative value. [20] The competent institution of the Member State in which the person concerned resides or, in the context of legal proceedings, the national court, is therefore entirely at liberty to examine that statement in order to ascertain whether it is correct so as to have reasonable grounds on which to challenge it.

18. The second and third parts of the third question concern the effect of the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71, according to which the benefits payable under the legislation of the State in whose territory the employed person resides are suspended for the length of the period in which he can claim entitlement on the basis of Article 69 to benefits under the legislation to which he was last subject.

The national court is uncertain, above all, whether suspension occurs only where all the conditions in Article 69 are fulfilled or whether it is sufficient if the employed person could have fulfilled those conditions but did not do so. That would be the case, for example, if Miss Knoch, although continuing to look for work in the United Kingdom, had forfeited her entitlement to assistance there by failing to comply with registration requirements. In addition, the national court asks what the legal consequences are of the suspension pursuant to the third sentence of Article 71(1)(b)(ii) of the legislation of the Member State in whose territory the unemployed person resides.

19. The answer to the first part of the question is that the benefits payable must be suspended in so far as the conditions laid down by Article 69 have actually been fulfilled and the person concerned qualified for benefits on that basis pursuant to the legislation to which he was last subject. It would run counter to the protection accorded by Regulation No 1408/71 to migrant workers to make such a person's entitlement to benefits under the legislation of his place of residence conditional on strict compliance with the conditions laid down in Article 69 for the maintenance of the right to benefit in the Member State of employment. In that connection the Court considered in its judgment in *Bonaffini* that

'Article 69 is intended only to ensure for the migrant worker the limited and conditional preservation of the unemployment benefits of the competent State, even if he goes to another Member State, and, consequently, that that other Member State cannot rely on mere failure to comply with the conditions prescribed by that article in order to deny the worker entitlement to the benefits which he may claim under the national legislation of that State.' [21]

20. So far as concerns the legal consequences of the suspension of unemployment benefit by the competent institution of the Member State in which the person concerned resides, the national court raises the question whether that suspension means merely that

19 — Judgment of 14 May 1981 in Case 98/80 *Romano* v *INAMI* [1981] ECR 1241, at paragraph 20; see my Opinion in Case C-251/89 *Athanasopoulos* v *Bundesanstalt für Arbeit*, at paragraph 13.

20 — Judgment of 11 March 1982 in Case 93/81 *INAMI* v *Knoeller* [1982] ECR 951, at paragraph 10.

21 — Judgment of 10 July 1975 in Case 27/75 *Bonaffini* v *INPS* [1975] ECR 971, at paragraph 9.

an unemployed person does not receive benefits in the State in which he resides in respect of that period but may thereafter claim benefits from that institution for the full period, or that the length of the period of entitlement to unemployment benefit is in addition reduced by the number of days for which the suspension applies.

The same answer, based on the same reasons, is as appropriate here as it was in connection with the application of Article 12 of Regulation No 1408/71 (see paragraph 15 above). The benefits payable under the legislation of the Member State in which the person concerned resides must be reduced by the benefits *actually* received in the Member State to whose legislation he was last subject. The period in which an unemployed person actually received unemployment benefit under the legislation of the last-mentioned Member State and, consequently, during which the benefit was suspended under the legislation of the State in which he resides, must be deducted from the length of the period of entitlement to unemployment benefit under the last-mentioned legislation.

Conclusion

21. I propose that the Court answer the questions submitted by the national court as follows:

1. The right provided for in Article 71(1)(b)(ii) of Regulation No 1408/71 for a wholly unemployed person to receive benefits under the legislation of the Member State in which he resides or to which he returns does not preclude such a person — other than a frontier worker — who resided in the territory of a Member State other than the competent State during his last employment from having previously received unemployment insurance benefit from the competent institution of the Member State to whose legislation he was last subject.

2. The prohibition on the overlapping of benefits imposed by Article 12(1) of Regulation No 1408/71 is applicable in the context of Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71.

3. Unemployment benefits constitute benefits of the same kind within the meaning of the first sentence of Article 12(1) of Regulation No 1408/71 when

they are intended, in order to provide for a person's maintenance, to make up for loss of earnings as a result of unemployment and the differences between those benefits, including differences concerning the basis on which they are calculated and the conditions for their grant, arise purely from structural differences between the national schemes in question or are of a purely formal nature.

4. The institution of a Member State under whose legislation the acquisition and duration of entitlement to unemployment benefit are contingent on the completion of periods of insurance must, in a situation under Article 71(1)(b)(ii) and Article 67 of Regulation No 1408/71, in accordance with the first sentence of Article 12(1) of that regulation, take account in calculating the entitlement to unemployment benefit of the periods of insurance completed under the legislation to which the unemployed person was last subject. In that regard, however, it is necessary to deduct from the length of the period of entitlement acquired to unemployment benefit the number of days in respect of which unemployment benefit was received under the said legislation.

5. The certified statement issued in accordance with Article 84(2) of Regulation No 1408/71 does not have exclusive probative value in relation to the competent institution for matters relating to unemployment or the courts of another Member State.

6. The benefits payable under the legislation of the Member State in which the unemployed person resides or to which he returns must be suspended pursuant to the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 in so far as the conditions laid down by Article 69 of that regulation have actually been fulfilled and the person concerned qualified for benefits on that basis in the Member State to whose legislation he was last subject.

7. In the event of the suspension under the third sentence of Article 71(1)(b)(ii) of Regulation No 1408/71 of the grant of benefits under the legislation of the State in which the unemployed person resides, the competent institution of that Member State must reduce the benefits payable under the legislation of that State by the benefits actually received in the Member State to whose legislation that person was last subject. The period in which an unemployed person actually received unemployment benefit under the legislation of the last-mentioned Member State must be deducted from the length of the period of entitlement to unemployment benefit under the last-mentioned legislation.