Regulation, there must be understood, in the case of a business representative pursuing the kind of working activities above described, the place in which he has established the permanent centre of his interests and to which he returns in the intervals between his tours.

Lecourt Monaco Pescatore

Donner Mertens de Wilmars Ó Dálaigh Sørensen

Delivered in open court in Luxembourg on 12 July 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 4 JULY 1973 [1]

Mr President,
Members of the Court,

In this case, as already in many others concerned with interpretation of the provisions of Regulation No 3 on social security for migrant workers, the problem facing the national court and on which we are now called upon to give guidance, is that of determining what legislation to apply to the migrant worker. What, on the basis of Regulation No 3, particularly Articles 12 and 13, has to be decided is whether the manner of the defendant's employment *before* Regulation No 24/64 of 10 March 1964, amending Article 13 of Regulation 3, came into effect makes him subject to French legislation in the field of social security as the Court of Appeal has decided, or whether, concurrently or exclusively, other legislations apply.

That is the point which the first two questions of the French Cour de Cassation are intended to clarify. The object of the third question, however, is simply to submit the same question to examination in the light of the new text of Article 13 (c) as embodied in the abovementioned Regulation No 24/64/EEC of the Council.

Before looking at the two questions in the light of national legislation applicable up to 1964, it is perhaps worthwhile recalling that the judgment of the Paris Court of Appeal in the case now pending before the Court de

1 — Translated from the Italian.

Cassation seems to have its origin in the idea that, by virtue of Regulation No 3, French legislation was applicable to the person concerned from 1950, when he began work as a representative of French firms in Germany. It should be noted, however, that the Regulation which came into force on 1 January 1959 does not have any retrospective effect on the criteria previously applied by domestic law or by current international agreements to determine the social legislation which should apply to migrant workers before its entry into force.

In the first question, the French Court asks the Court to pronounce on the meaning of the word 'employed' in Article 12 of Regulation No 3. The object is to establish whether a business representative who makes continuous canvassing tours for nine months in the year in one Member State, but who works in the territory of another Member State, where the undertaking which employs him has its registered office and to which he returns for consultation, should be regarded as 'employed' in each of the States, or only in the first. The question also asks whether principal employment in the territory of a Member State is enough to bring him within Article 12.

This Article lays down the general principle for determining which social security legislation applies to the migrant worker. It provides that wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if they permanently reside in the territory of another Member State or if their employer or the registered office of the undertaking which employs them is situated in the territory of another Member State.

It has now to be seen whether a business representative in the same postition as Mr Hakenberg should, within the meaning of Article 12, be treated as employed in both States or only in the one where he works for the greater part of the time. In the situation described by the Cour de Cassation, in which work carried out in the territory of the State where the employer is situated possesses features which, even though on a purely administrative level, are an extension of the work carried out abroad, there seems to me to be doubt that the person concerned must be regarded as working in both Member States.

The last part of the first question, concerning the concept of 'principal employment', which is not expressly provided for in Article 12, seems to imply the suggestion, which runs through the submissions of the undertakings employing the worker concerned that, in cases where work carried out for most of the time in one State is extended into a second State, the legislation of the State in which the individual does most of his work must prevail, and not the appropriate legislation for each period in each State. The idea in a case like the present of having regard to 'principal employment' over a quick and regularly recurring succession of periods lasting some time, in which the worker stays in two different States in the course of the same employment, would clearly have the advantage of avoiding having to apply the social legislation of different States in rapid succession to each other. However, the meaning we have given above to the word 'employed' in the territory of a Member State does not permit such an interpretation of Article 12; moreover, it would today be at odds with the provison in article 13 (c) which, in determining which legislation is applicable to workers who normally work in the territory of several States, takes residence, not principal employment, as the criterion.

In a case of the kind before us, application of Article 12 would result in the social legislation of two different nations being applied to the same worker within each period of twelve months: German legislation for about nine months and French for about three months in the year, and so on for many years. In order to avoid the

inconvenience of applying in constant succession to each other different national legislative measures to the same worker, Article 13 creates some exceptions to the general principle embodied in Article 12. The French court's second question turns on the first of these exceptions. On this point Article 13 (a) in the original text provided that 'the principle stated in the preceding Article shall be subject to the following exceptions: wage-earners and assimilated workers whose permanent residence is in the territory of one Member State and who are employed in the territory of another State by an undertaking, having in the territory of the former State an establishment to which they are normally attached, shall be subject to the legislation of the former State as though they were employed in its territory, in so far as the probable duration of their employment in the territory of the latter State does not exceed 12 months; is such employment continues beyond 12 months, the legislation of the former State shall continue to apply for a further period of not more than 12 months, on condition that the competent authority of the latter State, or the agency designated by it, has given consent thereto before the end of the first 12-month period'.

I refer, of course, to the text in force previously to the above quoted Regulation No 24/64/EEC of the Council of 10 March 1964.

In this connection, the French courts asks us to define the meaning of the phrase 'does not exceed 12 months' with the object of establishing whether a worker is subject to the abovementioned provisions when employed for a mumber of years in the territory of a Member State by an undertaking with its registered office in the territory of another Member State, over a succession of annual periods lasting nine months in the first State alternating with three months in the second State.

When, in Article 13 (a), the Community legislature drafted the exception to Article 12, we can be sure that it gave not the slightest· thought to the possibility of workers periodically carrying out their work in more than one Member State but, later, in the amendments to Article 13 contained in Regulation No 24/64, this possibility was expressly covered in a new provision added to the Article itself, the present paragraph (c) the interpretation of which is the subject of the third question.

This new provison is accompanied by an amendment of paragraph (a) of Article 13 restricting its scope and referring no longer to the probable duration of 'employment' in the territory of the second State but to the foreseeable duration of the 'work' which the worker has to carry out there. The Commission believes that, on the basis of this, it can build an argument justifying the application of the old paragraph (a) to the case under consideration, each time the person concerned stayed in Germany being regarded as a period of secondment separate from previous ones. It does not seem reasonable to me, however, to interpret the expression 'does not exceed twelve months' in a sense which, as in essence the Commission is suggesting, restricts it to a *continous period* of twelve months; in which case, the calculation of the twelve months would have to start afresh every time there was a break, however short, in the period during which the worker stayed in the State where he was not resident. The fact that reference is expressly made to the *probable duration* of his stay in the second State excludes the possibility that the provision covers a worker who on each occasion completes a period of only nine months in the second State, and who therefore faces the prospect — and this would be known in advance — of saying and working in the second State for this period each year over a succession of years, and, moreover, continuing to do so indefinitely so long as he remains in the service of the undertaking which has its registered office in the first State or, to be more specific, so long as he continues to work

as the representative of French undertakings in Germany.

According to the information provided for us by the Commission, the reason for changing the wording of Article 13 (a) was the need to stop the abuses to which it had given rise, especially the practice where certain undertakings, who continually operate in other Member States, regularly rotate workers who are nationals of the State in which the undertakings have their registered offices in order that they may be at all times subject to less onerous social legislation. The case under consideration in these proceedings does not, of course, contain this element of abuse. The individual's periodic return to France was in fact due to no other reason than requirements connected with his work. Seen from this point of view, there would, in principle therefore, be no justification for giving a preliminary ruling against an attempt to widen the application of the rule under review. Such an attempt could represent the need, already recognised by this Court and by the exceptions to Article 12 set out in Article 13 designed to meet it, to remove obstacles which could interfere with or impede the free movement of workers; it could also represent the need to promote economic inter-penetration by undertakings sparing workers and social security institutions from complicated administrative procedures, such as would arise in cases of the kind to which the French court refers (see Judgment in Case 35/70, Sàrl Manpower, Rec. 1970, p. 1256).

It is essential to try to give a ruling on interpretation in order that the exception in Article 13 (a) can be applied to cases like the one pending before the French Cour de Cassation. In addition to furthering the general objectives referred to, it is even more essential in this specific case in view of the fact that, as the Commission informed us at the hearing, if the exception to Article 13 (a) and, consequently, French social security legislation, do not apply to the individual concerned, he will be deprived of any benefit to which he may be entitled under social security legislation. This is because German Law does not enable a non-wage-earning business representative to contribute to the general social security scheme. However, we are dealing with a particular contingency which, however unpleasant, could not justify an interpretation of Community law, and one which would, therefore, be of general application, if it is clearly at odds with its tenor and terminology.

The judgment in Case 19/67 (Rec. 1967, p. 420) declares that the expression 'the probable duration of their employment' in the first version of Article 13 (a) refers to the duration of a single service agreement and not to the time the work will take to complete. Viewed in the light of the express reference made in the same clause to the *'probable duration'*, this criterion would preclude the exception from being applied to a worker whose service agreement on the kind of work in which he was continually engaged committed him to regular employment for nine months each year in the territory of a State other than the one in which the undertaking for which he works has its registered office.

The object of the time-limit, which is to prevent abuse arising from making the most of the principle in Article 12, militates against this provision being applied to a situation like the one under review even though it is clearly free from any suggestion of abuse; this would also be the case if, to take a purely hypothetical example which I shall discuss in connection with the third question, a worker in the position of Mr Hakenberg were able to go on regarding himself as 'resident' in France within the meaning of Regulation No 3.

Doubts could arise from the reference made in the Regulation to the concept of a worker's permanent residence in the Member State in which his employer or the establishment to which he is attached are situated. One wonders indeed how it is possible to regard as permanently resident in the territory of a Member

State a person who is employed in the territory of another Member State for a period, which can be as long as two years without interruption, whereas Article 1 (h) of Regulation No 3 declares that the term 'permanent residence' means the place where a person habitually resides — a condition which, for the worker concerned, appears to be fulfilled for these two years in the territory of the second State. However, it must be pointed out that the probable duration of employment in the second Member State ought not, as a matter of principle, to exceed twelve months and that, as we are dealing with a relatively short period, the legislature insisted on continuing to treat the place where a person habitually resides as that of the State of origin, specifically because of the wholly transitory and strictly temporary nature of the worker's employment in the second State. In this connection, the reference in the rule contained in the old Article 13 to the residential position of the worker in the territory of the first State confirms the interpretation suggested above of the words 'does not exceed twelve months'. In general terms, it would in fact be difficult, in the context of work associated with a particular place, to imagine a worker who was employed over a number of years for, let us say, eleven months of the year in the second State and one month of the year in the first, being able to go on considering himself as permanently resident in the territory of the first State within the meaning of Regulation 3. This confirms that the provision under review was designed to cover a period of employment of limited duration, even a stay lasting some time but a specific period, and not regular and repeated stays.

I therefore maintain that the factors in this case are insufficient to justify the interpretation suggested by the Commission.

Moreover, in answer to a written question from a member of the European Parliament, the Commission itself, referring specifically to the position of business representatives working in the territory of more than one Member State as it was before the advent of Regulation No 24/64, had declared: 'Application of the principle quoted meant that they were subject to the systems of these different States. This led the Commission to submit to the Council a draft Regulation creating exceptions to the principle in order to ensure that the workers concerned are covered by a single system of legislation and their position simplified in social security matters'. (OJ 1964, p. 1839), the Social Commission of the European Parliament being duly informed of this by the president of the Social Affairs Group in the European Parliament.

The Council also refers to this idea in the second recital in the preamble to Regulation No 24/64.

The answer to the second question must therefore be in the negative, which means that the general rule in Article 12 of Regulation No 3 must be strictly applied in this case.

In its third question, the French Cour de Cassation asks us to determine the meaning of the provisions of Article 1 (h) of Regulation No 3, under which the words 'permanent residence' must be construed as 'the place where a person habitually resides'. The object of the question is to establish whether, in all its forms, 'habitual residence' covers residence in the territory of a Member State, even when it is not for a definite term and consists of caravan trips to explore the market; or whether, on the other hand, to bring it within the meaning of the provision, habitual residence must have a certain degree of permanence and a fixed location and, consequently, can subsist only in the Member State to which the worker returns in the intervalls between one business trip and another, in which he has a fixed abode, and in which the undertakings by whom he is employed have their registered offices.

As the Commission points out, this question was put in relation to the

provision in Article 13 (1) (c) which was introduced by Regulation No 24/64. In its first subparagraph, this provision lays down that (excluding those employed in the transport sector) 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 whose territory are situated their employer or employees or the registered offices of the undertaking or undertakings by whom they are employed'.

At this point, the problem becomes an extremely delicate one, because the provision of Article 1 (h) which the Community legislature intended should serve as an interpretation clause is insufficient in itself to provide a solution for a case of the kind under examination by the court who referred it to us.

In construing this interpretation clause, which the national court must apply to Article 13, we must continue to bear in mind the principle on which the Article is based and the new spirit behind the desire for the clarification which should be produced by the 1964 amendment.

The yardsticks which we must employ to identify the relevant legislation are clearly the following:

1. The general rule is that contained in Article 12 (application of *lex loci* at the worker's place of work);

2. If his place of work is in more than one State, the decisive factor is permanent residence, not the longest period of time (Article 13 (c) (i));

3. If there is no permanent residence in any of the Member States, the legislation of the employer's State applies (this a final rule providing a safeguard for the worker, Article 13 (c) (ii)).

The problem now is to see whether, in a situation such as the one we are discussing, the worker has a permanent residence and on what basis it can be identified.

Let us see, then, whether it is possible within the meaning of Regulation 3, to identify a permanent residence for a commercial traveller constantly on the move who has working assignments, of various kinds, all within the scope of a single employment, in various Member States.

What, as a yardstick unconnected with the place where he works, is the meaning of the worker's permanent residence? That it is a separate criterion, in the context of the principle laid down, emerges clearly enough from another provision of Article 13, in paragraph (b) where, after having considered further possibilities for other wage-earners, themselves also to some extent travellers, who are employed by transport undertakings, provision is made as a final possibility for the case where 'the worker is employed *wholly or mainly* in the territory af a Member State and resides *there*'. Although this refers to a situation which does not come within the possibilities we are considering, this provision justifies the conclusion that a period of work spent mainly or wholly in the territory of a State is not automatically synonymous with permanent residence.

In this context we have to consider Article 1 (h) of Regulation No 3 in which permanent residence is defined as 'the place where a person habitually resides' and the French Cour de Cassation has, with good reason, drawn attention to this point, as this definition in Article 1 requires interpretation.

Here we should try to answer a preliminary question. We are asked whether the import of this definition as 'habitual residence' must be related generally to the territory or to a more precisely identified location, such as the place where the worker usually stays.

The first thought that comes to mind is that, as we are trying to determine which State legislation is to apply, the individual's general connection with one or other State should give sufficient indication of territorial association. Let

me say at once, however, that if we had to pursue this line of thought, we could not rely on solving the problem solely on the, so to speak, quantitative, or almost physical, basis of time spent in the territory of one or other State, taking the State in which the worker spends most of his days as the one in which he is permanently resident. And we know that the individual concerned in the main action lives for about nine months in Germany and for only three months in France.

On the other hand, this does not, in my view, mean that in this case permanent residence must, generally speaking, be conceived exclusively in terms of the whole territory of the State, but to applying the law of the State on whose territory the worker *'has his permanent residence'*. In other words, assuming a given consequence, the Regulation appears to envisage a situation which bears something more than a general relationship to the confines of the State. The decision as to which national legislation should apply seems rather to be the outcome of indentifying the *place* where the worker is in a certain *de facto* position which is legally identifiable and is called permanent residence. The difference emerges clearly from other provisions in Regulation No 3 where, for example, in the case of stateless persons, the law of the State 'in which they have their permanent residence' (Article 4 (i)) is declared to apply. In this sense, permanent residence must be regarded as approaching the idea of citizenship and certainly not that of the place of work as; for example, in the case before us; here the reference is to individuals who have no connection with one State or the other, and it has been confined to the one relevant circumstance that they live in a State. To have a permanent residence in a State, or to refer to a State in which the worker has his own residence, are situations which can be held to be distinguishable from each other just as, within the jurisdication of a State, permanent residence can be distinguished from domicile or other territorial relationships.

Apart from supporting evidence from the texts, the objection to the territory of a State as a general yardstick appears to be further confirmed by the fact that the legislature did not mean to differentiate solely on the basis of a purely quantitative comparison of the length of working periods in the various States but referred to a concept which usually has its own particular significance indicating a given individual's direct connection with a given place: a connection which, by definition, does not exist in the case of a person whose life is spent constantly on the move in his caravan, carrying about with him his own local base, so to speak.

For these reasons it would seem to me infinitely better to get away from the idea that the factors to be taken into account include the concept of a worker's permanent residence as a connection with a given place. On that basis, it would seem to be easy to reach a conclusion in favour of applying French law, because the traveller does not habitually reside anywhere; or, if he does, he can only have a permanent residence in the place to which he is accustomed from time to time to return, which, in Mr Hakenberg's case, is France. In the case of each of these alternatives, it would be the legislation of the French State which applied.

But, before we can offer the court referring the matter a yardstick which is valid also on the basis that permanent residence is regarded as being determined by reference to national territory as a whole, we must whether, in reverting to what is habitual, the reference in Article 1 (h) to 'where a person habitually resides' involves factors which have to be identified separately from length of time, so that account can also be taken of a customary, normal regularity of incidence. We must also see whether any element of intention enters into it. Where, in reality, there are no settled periods of stay but they are more or less

prolonged, the concept of what is habitual could have an element of relativity: less or more habitual than not at all. The fact remains, however, that the degree to which residence is habitual cannot be equated with the number of periods of stay on various occasions, without reference to the individual's basic connection with the territory as evidenced by these periods. Let me conclude by saying that the factual situation on which residence is based must have a recognizable shape and appearance on which the persons concerned and third parties can rely.

Everyone is aware of the differences in legislation and in practice, and of the uncertainties and the conflicts which arise when an individual's relationship with a territory has to be determined. Developed from the ancient 'domicilium', which was linked with the family 'sacra', but was essentially a relationship of fact and feeling as a measure of affections and interests, relationships have become more numerous and more complicated as the desire grew to make 'domicilium' the basis of a legal obligation and consequently of legal relationships. However, the practical bond between an individual and a territory is too strong to be disregarded and the *de facto* situation of which residence is the essence has, apart from any express legislative provision, consequently come to be a dominant consideration.

The ambivalence of these legal situations has its counterpart, moreover, in the consideration given to the relationship between a man and a territory. As we explained, this ambivalence gives rise to discrepancies and uncertainties: there is a *de jure* situation in which the chief consideration is identification of the individual's legal relationships with a place (domicile) and a *de facto* position in which it is his mode of life (permanent residence). In modern law, however, one notes a tendency to return to uniformity. And in fact Regulation No 3 refers to only one concept, that of permanent residence, along with place of work and location of the undertaking.

There is something of considerable interest to us in the resolution adopted by the Committee of Ministers of the Council of Europe on 18 January 1972 on the subject of bringing legal concepts of 'domicile' and 'residence' into line with each other. According to clause 9 of the resolution, in deciding whether residence is habitual, account must be taken of the length and continuity of residence in addition to other facts of a pesonal individual and his residence. According to clause 10 of the resolution, the individual's intentions are not decisive in themselves but may be taken into account in determining whether he possesses a residence or something which has the character of one.

These are criteria which must unquestionably be borne in mind both for their intrinsic value and the laudable aims which the resolution was intended to achieve.

In case law, there is an equally noticeable tendency, in determining the question of domicile, to regard an inquiry into the incidence of *de facto* residence as an inquiry into the facts, which on that account is outside the jurisdiction of the Cour de Cassation (see Mazeaud, Leçons de droit civil, 1970, vol. II. p. 583). The legal picture only acquires cohesion through the assimilation of data providing information on a number of points. If one is looking for domicile, as in French law, it is the fact of residence which can be the important factor. To find residence in cases where the link between the person's life and the territory is not clear, use must be made of yardsticks which help to identify the link over and above the purely physical factor of time if the factors of appearance, a degree of permanence, intention and so on are not also present.

Coming to my conception of 'habitual residence', it is clear that, if there is no uncertainty because the individual is in the habit of residing in a place clearly

distinguishable from all the others, since that is the place where he is, regularly returns to and leaves, so that as the ancients said, when he is away he feels like a pilgrim, it is difficult to apply the test of frequency of stay when there is more than one place involved. Should the deciding factor be length of stay or the individual's intentions! We have seen how the resolution of the Council of Europe quoted above summed up the latest effect of the doctrine that intention, while not decisive, habitually stays and, therefore, as a permanent residence.

The point which now remains to be settled is this: whether, in the relationship between person and territory, the element of intent can be important enough to override the serious disparity in time which can occur between a stay of say, three months in Paris and all the rest of the time when the individual is travelling in Germany. But from this point of view, if length of time in a given place is taken into account, the problem can only be resolved by asking: has he not a permanent residence? Because if he does not have a place to which he returns, where he has all his social connections, where he votes, where he pays taxes, and where he keeps the goods and chattels which he does not carry about with him in the caravan, he does not have a permanent residence anywhere else, even though the length of time spent away continuously on the move happens to be greater than the time spent in the place which is the centre of his existence and to which he normally returns. Actually, there is no doubt that this element of regular return is in many respects recognized as the deciding factor — take for example a worker or a student regularly returning home every weekend — even though the working days are greater in number than the days they spend in the place to which they return every week, that is the place which in the legal sense we can identify as the place where they habitually reside.

Again, as we have seen, in its original form, the wording of Article 13 itself accepts, in favour of the worker employed outside his own country, that, even if he settles down to work abroad for a period as long as two years, he continues to maintain his permanent residence in the country of origin; obviously, this could only refer to permanent residence defined on the basis that intention is a more important factor than time.

To conclude, the degree to which staying in a place is habitual under Article 1 of the Regulation which we are called upon to interpret is not arrived at by adding up the number of periods during which the individual stayed in a particular state if these were in a number of different places, but it is based on the periods of stay which bear the marks of a significant connexion with territory. This connection is like a port of arrival or departure for travellers. It can be regarded as their residence on the basis of recognition according to a required minimum of identifiable features, on the basis of continuity even if there are interruptions of some length, or on the basis of intent.

What has been said so far fits in particularly well with the concept of permanent residence as a relationship with a specific locality. But the conclusions to which we have come could be of assistance even if we had to work on the basis of relating permanent residence to the territory of the State as a whole. On that basis, in fact, it would be of no use proceeding on the basis of the individual's work or indeed of greater length of time on one territory or the other or, consequently, on the basis of the physical fact that he spends most of his days in one State or the other, unless other factors were present to provide evidence of connexion between the territory and the individual concerned.

I am of the opinion, therefore, that:

1. A wage-earner or assimilated worker who normally carries out the commercial part of his work for about nine months a year in the territory of a Member State, and the administrative part of his work for the rest of the time in the territory of another Member State, in which the undertaking which employs him is situated, must be regarded as 'employed' in both States within the meaning of Article 12 of Regulation No 3 of the Council concerning social security for migrant workers.

2. The provisions of Article 13 (a) of the Regulation, as it appeared prior to Regulation No 24/64/EEC of the Council of 10 March 1964, restricting the exception it introduced into the rule contained in Article 12 of the original Regulation to, in principle, twelve months, does not apply to a worker who, for some years, has for nine months a year normally been employed on the territory of a Member State which is not the one in which the undertaking which employs him is situated or in which he works for the rest of the time.

3. The concept of permanent residence as 'the place where a person habitually resides' within the meaning of Article 1 (h) of Regulation No 3 is not confined to relevant information about the individual's periods of stay, but embraces other considerations of fact which establish a recognizable connection between the person himself and the territory. The importance of these considerations, such as degree of permanence, continuity despite periodic interruptions, intentions, and external appearances, will be assessed from time to time in order to determine the extent to which the territorial connection is the rule, due attention being paid to the kind of work performed by the person concerned.