OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 5 May 1988 *

Mr President,
Members of the Court,

1. By an order of 21 January 1987, the Bundessozialgericht asks the Court whether, for the purpose of calculating the pension of a frontier worker, the periods during which he has been in receipt of full unemployment benefit must be taken into account by the competent institution of the State of residence or by the corresponding body of the country in which the pensioner carried on his working activity.

Mr Josef Rebmann, a German citizen, has always resided in Germany. During the periods from 1 August 1959 to 30 June 1972 he worked in France as a frontier worker paying the appropriate contributions to the social security scheme of that State. In June 1972 Mr Rebmann became unemployed. He therefore registered himself at the Saarbrücken employment office and from 13 July 1972 to 31 July 1974 he was in receipt of unemployment benefit as provided for by the provisions of German law.

In 1980 Mr Rebmann retired and received a pension paid by the French social security institution In addition, by a decision of 10 December 1980, the Bundesversicherung für Angestellte in Berlin (BfA) granted him an invalidity pension on the basis of the years of work (1974-80) completed in Germany. However, the institution did not take into account, in calculating the amount of that pension, the period during which he was unemployed. In fact, under Paragraph 36 (1), points 3 and 3 (a) of the Angestelltenversicherungsgesetz (AVG), periods of unemployment may be taken into account for pension purposes only if they interrupt a working activity which was subject to insurance under German legislation. They may, it is true, be made good by German contribution periods if agreements of international treaties to which the Federal Republic of Germany is a party include provisions to this effect. But in this case that possibility is provided for neither by the Franco-German treaty in existence nor by provisions of Community law.

The complaint, action and appeal which Mr Rebmann brought against this decision were unsuccessful. In his appeal on a point of law, Mr Rebmann maintained that the aforementioned provision of the AVG is contrary to Article 71 (1) (a) (ii) of Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed and self-employed persons and their families moving within the Community (in the version published in the Official Journal L 230, 22 August 1983, p. 8).

In fact, under that provision the unemployed frontier worker must apply for appropriate benefit solely to the competent institution of the State of residence.

* Translated from the Italian.

It is beyond dispute, the plaintiff conceded, that the provision does not directly relate to this case. But it is also certain, he added, that only the application of the *lex domicilii* prevents a frontier worker from being discriminated against in relation to other migrant workers in so far as he may not be able to satisfy, either in the State of residence or in the State in which he was employed, the conditions to which national legislation subjects the recognition of periods of unemployment. In fact, as regards French law, Mr Rebmann could not prove that he had received no unemployment benefit whereas under German legislation his working activity subject to insurance would not appear to have been interrupted.

In those circumstances the Bundessozialgericht considered it appropriate to ask the Court to determine which is the competent institution under Community law for taking into account, in calculating a pension, periods of unemployment during which a frontier worker has been in receipt of relevant benefits, within the meaning of Article 71 (1) (a) (ii) of Regulation No 1408/71. The court making the reference would like to know whether:

(a) in the light of the aforementioned Community provisions, periods of unemployment must be taken into account by the State of residence, as if the worker had been subject during his last employment to the legislation of that State;

(b) on the other hand, those same periods are to be taken into consideration under the legislation relating to pension rights of the State of employment, as if he had been subject during the period of unemployment to the legislation of that State;

(c) it is for the worker concerned to choose the institution to be asked to take into account periods of unemployment.

In the proceedings before the Court, written observations were submitted by the BfA, the Italian and Netherlands Governments and the Commission of the European Communities. With the exception of the Netherlands, those parties took part in the hearing.

2. The BfA and the Italian Government point out first that the absence of a specific Community provision does not permit the interests of frontier workers to be ignored and the solution of the problem must be sought in the principles laid down in Regulation No 1408/71. In this respect they maintain that, by making the State of residence liable to pay unemployment benefit, Article 71 introduced an exception to the general rule according to which it is for the country in which the migrant worker carries on his working activities to take all social and social security measures.

Since it is in the nature of a derogation, the provision is not applicable by analogy or extension, according to the Netherlands Government, to other social benefits. This is so even for the purpose, albeit limited, of calculating the years in which the person entitled to the benefit was unemployed. Otherwise, as the BfA points out, one would arrive at a paradoxical result. Merely by virtue of having paid unemployent benefit, the State of residence would have to confer a right to an independent pension on a frontier worker who has never worked in its territory. The problem raised by the national court should be resolved by recourse to the general criterion of the State of employment.

The Commission takes the opposite view. The abovementioned criterion, it recognizes, is certainly more in conformity with the system of the regulation. It does, however, pose serious problems of coordination as between the insurance systems of the Member States and in particular as regards those which, like the French system, preclude the possibility of taking into account, for pension purposes, periods of unemployment in respect of which benefit has not been paid. Where a frontier worker has never worked in the State of residence but has spent periods of unemployment there whilst receiving unemployment benefit, the principle of the aggregation of relevant periods should be applied. By analogy with the provision of Article 48 the institutions of the State of unemployment would then be required to take into account the aforesaid periods.

3. The question referred to the Court by the Bundessozialgericht highlights the existence of a serious lacuna in Regulation No 1408/71 and it is evident that the interests of an important category of Community workers, namely frontier workers, require that it be filled.

First of all a general remark. In the 'determination of the legislation applicable', the Council provided that employed persons not residing in the State of employment (which naturally includes frontier workers) shall be subject to the legislation of that State (Article 13 (2) (a)). Moreover, the principle thus laid down is not without exceptions. In particular, the criterion of the *lex domicilii* is the determining factor in the case of (a) Article 25 (2) and (3) as regards sickness and maternity benefits to which an unemployed frontier worker is entitled; (b) Article 39 (5) as regards invalidity and (c) Article 71 (1) (a) (ii) aforesaid. The latter provision states that 'a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation whilst last employed'.

The reason for that provision is plain. Being unemployed, so the Community legislature considered, the frontier worker may be better and more easily assisted by the authorities of the country of residence where he has obviously maintained more stable family and social connections. That aspect is very well illuminated by the case-law of the Court. As it held in its judgment of 12 June 1986 in Case 1/85 *Miethe* [1986] ECR 1837, 'Article 71 . . . is intended to ensure that migrant workers receive unempoyment benefit in the conditions most favourable to the search for new employment. That benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them' (see paragraph 16 of the judgment and the decisions mentioned therein).

Having said that, let me examine which of the solutions proposed by the national court accords most closely with the spirit which informed the Council when it enacted the provisions relating to the status of the frontier worker.

The last hypothesis put forward by the Bundessozialgericht may be rejected straight away. Allowing frontier workers the option of choosing would run counter to the letter of Article 71, which, as we have seen, enables workers to apply solely to the authorities of the State of residence, and 'would disregard the scope of Regulation No 1408/71 which . . . is intended to coordinate

national systems of social security legislation within the framework of freedom of movement for workers who are nationals of Member States' (see the *Miethe* judgment mentioned above, at pargraph 11).

On the other hand, the second solution proposed has at least two advantages; it is in conformity with the rule laid down in Article 13 of the regulation and the objectives pursued by Article 51 of the Treaty, and it ensures that periods of unemployment supplement, without any break in continuity, contribution periods completed by the frontier workers under the pension scheme of the State of employment. Thus when the worker finds fresh employment in that State, the latter's authorities, which are competent to pay his pension, would also take account of the years during which he was unable to work.

But, as the Commission has shown, that solution gives rise to serious coordination problems as between the provisions of the State of employment as regards the calculation of pension and the provisions of the State of residence which is responsible for prescribing the rules as regards the payment of unemployment benefit. And that is not all. The solution loses all practical utility where the frontier worker finds employment in his State of origin thanks to the efforts of the employment services to which he reported pursuant to Article 71. In such a case, for the reasons which I explained when examining the contrary hypothesis, it seems more logical to confer on the authorities of the State of residence the responsibility for taking unemployment periods into account when they pay the pension. Allow me to add that the paradox alluded to by the BfA is scarcely plausible. A frontier worker who has never worked in his State of residence cannot, by virtue of that fact alone, acquire there any right to a pension on termination of his employment.

In the result, the point of view put forward by the BfA and the Italian Government seems no more favourable to the interests of the frontier worker than that which was advanced by the Netherlands. Certainly, like any provision of an exceptional nature, Article 71 must be viewed solely in the context of the situation for which it was enacted. I am however convinced that this provision is not confined to introducing a derogation from the general criterion of the *lex loci laboris* but constitutes, together with Article 25 (2), a set of rules intended specifically to apply to frontier workers and distinct from those which apply to other workers. We have seen in fact that the criterion of the *lex domicilii* corresponds in this particular case to an essential objective, namely that of enabling a person who daily crosses a border in order to work 'on the other side' to find, after unemployment, fresh employment in the country in which he lives.

Thus, under Regulation No 1408/71 the unemployment of a frontier worker, as a situation amenable to legal protection, is subject to a special regime, connected to the criterion of the *lex domicilii* and parallel to that of the *lex loci laboris*, governing all (but also solely) the rights and duties of the frontier worker from the day he becomes unemployed until the moment when he finds fresh employment. On the other hand, the periods preceding and following that interval are clearly covered by the general regime, that is to say the system under which it is solely for the State of employment to assume liability for social security benefits in favour of a non-resident worker. On the other hand, this interpretative criterion has specifically led the Court to affirm that, in accordance with Article 13 (2) (a) aforesaid, 'a worker who ceases to carry on an activity in the territory of a Member State and who has not gone to work in the territory of another Member State continues to be subject to the legislation of the Member State in which he was last employed regardless of the length of

time which has elapsed since the termination of the activities in question and the end of the employment relationship.' Thus 'only the legislation of that Member State' applies to him (judgment of 12 June 1986 in Case 302/84 *Ten Holder* [1986] ECR 1827, paragraphs 1 and 2 of the operative part).

The difficulties of coordination alluded to by the Commission must be overcome by recourse to the criterion of the place of employment. In truth, removing the frontier worker from the application of the *lex loci laboris* would impede the uninterrupted aggregation of his pension rights and would be incompatible with the objectives of the Treaty. Allow me to point out in this respect that Article 51 seeks 'to secure for migrant workers and their dependants . . . aggregation, for the purpose of acquiring and retaining the right to benefit and *of calculating the amount of benefit*, of all periods taken into account under the laws of the several countries' (emphasis added).

4. In the light of the foregoing considerations, I suggest that the Court reply as follows to the question put by the Bundessozialgericht by order of 21 January 1987 in the proceedings pending before it between Mr Josef Rebmann and the Bundesversicherungsanstalt für Angestellte:

'For the purposes of Article 13 (2) (a) of Regulation No 1408/71 and in the absence of a specific Community provision, periods of full unemployment completed by a frontier worker in the State of residence must be taken into account, for the purpose of calculating his pension, by the legislation of the State in which he was last employed.'