REPORT FOR THE HEARING
in Case C-302/90 *

I — Legal framework of the main proceedings

1. In the general provisions of Regulation No 36/63/EEC of 2 April 1963 concerning social security for frontier workers (Journal Officiel 1963, 62, p. 1314), the Council:

(a) defines the expression 'frontier worker' for the purpose of that regulation as

> 'an employed person or a person treated as such who, while residing on the territory of one of the Member States to which he normally returns daily or at least once a week, pursues his occupation on the territory of another Member State' (Article 1(1)(c)).

(b) specifies the scope of that regulation. In the words of Article 2(1),

> 'the provisions of this Regulation shall apply to frontier workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees, as well as to the members of their families and their survivors'.

(c) mentions, in addition the scope of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, 30, p. 561) and of Regulation No 4 of the Council of 3 December 1958 laying down implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers (Journal Officiel 1958, 30, p. 597). In the words of Article 3 of Regulation No 36/63,

> 'the provisions of Regulations No 3 and No 4 shall apply with regard to the persons to whom this Regulation applies save where the provisions of this Regulation are derogated from herein'.

The preamble to Regulation No 36/63 states, in its fourth and fifth recitals, that the general provisions of Regulations Nos 3 and 4 and the provisions thereof concerning in particular invalidity are applicable without the need for supplementary provisions. Special supplementary provisions are necessary for the determination of the legislation applicable and, in particular, for sickness.

2. Among the special provisions of Regulation No 36/63, Article 6(1) determines the

* Language of the case: French.

competent institution for cash benefits for sickness and maternity. It provides that:

'Cash benefits which a frontier worker can claim or could claim if he resided on the territory of the competent State shall be paid to him by the competent institution as if he resided on that territory.'

With regard to benefits in kind, Article 10 of Regulation No 36/63 contains a special provision concerning unemployed frontier workers, in the following terms:

'A frontier worker who pursuant to the provisions of Article 19(1) or (2) is in receipt of unemployment benefits provided for by the legislation of a Member State shall be entitled during the same period . . . to benefits in kind from the institution of his place of residence. Those benefits shall be the responsibility of the competent institution of the country which pays the unemployment benefits.'

Article 19(1) of that regulation determines the competent institution for benefits for wholly unemployed frontier workers. In the words of that article,

'A frontier worker who is wholly unemployed shall be entitled to benefits according to the provisions of the legislation of the Member State on whose territory he resides as though he had last been employed on the territory of that State . . . The benefits shall be the responsibility of the institution of the place of residence.'

3. Regulation No 3 refers in Article 17, in the special provisions concerning sickness, to the situation of workers who, having been insured in a Member State, go to another Member State. In the words of the first subparagraph of paragraph (1) of that article,

'Employed persons or those treated as such who have completed periods of insurance or periods treated as such under the legislation of one or more Member States and who move to the territory of another Member State shall be entitled, for themselves and their families, to the benefits provided for by the legislation of that Member State on the following conditions:

(i) they were fit for work when they last entered the territory of that Member State;

(ii) they were liable to pay compulsory insurance after they last entered that territory;

(iii) they satisfy the conditions required by the legislation of that Member State, with regard to the aggregation of periods referred to in the previous article.'

4. Finally, Article 39(1) to (3) of Regulation (EEC) No 1408/71 of the Council 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 amended by Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 149, p. 2), which came into force on 1 October 1972, refers to the conditions for entitlement to invalidity benefits. Pursuant to those provisions:

'1. The institution of the Member State, whose legislation was applicable at the time when incapacity for work followed by invalidity occurred, shall determine, in accordance with that legislation, whether the person concerned satisfies the conditions for entitlement to benefits, taking account, where appropriate, of the provisions of Article 38.

2. A person who satisfies the conditions referred to in paragraph 1 shall obtain the benefits exclusively from the said institution, in accordance with the provisions of the legislation which it administers.

3. A person who is not entitled to benefits under paragraph 1 shall receive the benefits to which he is still entitled under the legislation of another Member State, taking account, where appropriate, of the provisions of Article 38.'

II — Facts and procedure

5. Mrs Desse, a French national, worked in Belgium as a frontier worker between 25 February 1957 and 4 December 1970, when she was dismissed.

Between 5 December 1970 and 1 February 1971 she received unemployment benefits in France, in accordance with Article 19(1) of Regulation No 36/63, and contributed to the 'continued insurance scheme' in Belgium until 31 January 1971.

Between 2 and 21 February 1971 Mrs Desse received sickness benefits from the Belgian insurance institution, which declared her fit for work as from 22 February.

She again received unemployment benefits in France from 24 February until 11 October 1971. Between 12 October 1971 and 30 September 1980, the date on which she retired, Mrs Desse was recognized as unfit for work by the Caisse Auxiliaire d'Assurance Maladie-Invalidité (Auxiliary Sickness and Invalidity Insurance Fund, hereinafter referred to as 'CAAMI'), a Belgian institution.

However, by a decision of 11 May 1973, CAAMI refused to grant her sickness insurance benefits. Mrs Desse appealed against that decision to the Tribunal du Travail (Labour Court), Tournai, which, by a judgment of 4 June 1976, held that benefits for initial incapacity had been due to her from 12 October 1971 and that she had been entitled to invalidity benefits from 12 October 1972.

CAAMI appealed against that judgment to the Cour du Travail (Labour Court of Appeal), Mons, and the Institut National d'Assurance Maladie-Invalidité (National Institute for Sickness and Invalidity Insurance, hereinafter referred to as 'INAMI') applied for leave to intervene in support of CAAMI's conclusions.

Mrs Desse died on 1 October 1983. Her heirs, Napoléon and Jocelyne Faux, continued the proceedings on 21 February 1989.

6. By a judgment of 28 September 1989, the Cour du Travail, Mons, decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Did a French employed person, who was resident in France and had worked exclusively in Belgium for almost 14 years as an employed person, lose her status as a frontier worker within the meaning of Article 1(1)(c) of Regulation (EEC) No 36/63 (a status which was still recognized when she was given notice on 4 December 1970)? Did she lose her status as a frontier worker by virtue of the fact that she was wholly unemployed and received benefit on that account from the French institution for her place of residence during the period from 24 February 1971 to 11 October 1971 pursuant to Article 19(1) of Regulation (EEC) No 36/63, even though it would appear from Articles 2(1) and 19(1) of that regulation that she retained that status?

2. Where she suffered illness and incapacity for work and subsequent invalidity recognized pursuant to the Belgian legislation on sickness and invalidity insurance (Law of 9 August 1963), from 12 October 1971 to retirement age (30 September 1980), can she or can she not claim benefit in respect of initial incapacity (for one year) and thereafter invalidity benefit from the competent Belgian institution pursuant to Article 6 of Regulation No 36/63?

3. Having regard to Regulation No 36/63 and the special supplementary provisions which it made necessary (see the fifth recital in the preamble to that regulation), must it be held that the period of unemployment in France, although not recognized in that country of residence as a period of insurance or a period treated as such or an equivalent period, must be accepted in Belgium, the country of the place of previous employment, as a period of insurance or a period treated as such or an equivalent period, in particular for the application of the Belgian Law of 9 August 1963 on sickness and invalidity insurance (Articles 66, 67, 68 and 75), the answer to this question being linked to Article 19(1) of Regulation No 36/63 which by implication requires frontier workers who have become wholly unemployed to avail themselves of their entitlement to unemployment benefit and consequently to register as persons seeking work in the country of their place of residence (in the present case, France), rather than in the country of the place of work and compulsory social security insurance where they lost their employment?

4. Finally, in the alternative, if the first three questions are answered in the negative and Regulation (EEC) No 3 is held to apply as from 1 October 1971 and Regulation No 1408/71 to apply as

from 1 October 1972 with reference to sickness and invalidity insurance, is the institution of the country of the place of work and compulsory social security insurance for employed persons (in this case, Belgium) obliged to treat the period of unemployment in respect of which benefit was paid in France under Article 19(1) of Regulation (EEC) No 36/63 (even though that period was not recognized in France as a period of insurance or a period treated as such or an equivalent period) as a period of insurance or a period treated as such or an equivalent period within the meaning of Articles 66 (qualifying period), 68 and 75 (by virtue of the continuing eligibility of the person entitled) of the Law of 9 August 1963 on sickness and invalidity insurance?'

7. The judgment making the reference was lodged at the Court Registry on 5 October 1990. Pursuant to Article 20 of the Protocol on the Statute of the Court, written observations were submitted by INAMI, intervening in support of the conclusions of the appellant in the main proceedings, represented by A. Wattier and J. Saint-Ghislain, of the Mons Bar, by Mr and Mrs Faux, respondents in the main proceedings, represented by Gaston Dramaix and José Chevalier, of the Mons Bar, and by the Commission of the European Communities, represented by Dimitrios Gouloussis, a member of its Legal Service, acting as Agent.

8. Upon hearing the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and assigned the case to the Fifth Chamber in accordance with Article 95(1) and (2) of the Rules of Procedure.

III — Summary of the written observations submitted to the Court

9. On the first question, *INAMI* contends that, for entitlement to cash benefits for incapacity for work, it is necessary to satisfy the definition of frontier worker within the meaning of Article 1(1)(c) of Regulation No 36/63, that is to say to reside on the territory of one Member State and pursue an occupation on the territory of another Member State. However, the last condition is not satisfied where the worker is wholly unemployed.

In support of its argument, INAMI refers to the interpretation of the words 'pursues his occupation' in the abovementioned provision of Regulation No 36/63 given by the Administrative Commission established by Article 43 of Regulation No 3.

That commission stated that that expression had a very wide scope, including 'workers partially or intermittently unemployed covered by Article 19(2) of Regulation No 36/63'. On the contrary, therefore, according to INAMI, workers who are fully unemployed are excluded.

With regard to the second question, INAMI claims that the situation of a wholly unemployed frontier worker who became unfit for work on 12 October 1971 is not envisaged by Article 6 of Regulation No 36/63, since under that article it is not possible to determine which institution is responsible for sickness benefits in such a case.

Recourse must therefore be had under Article 3 of Regulation No 36/63 to Regulations Nos 3 and 4. In accordance with Article 17 of Regulation No 3, sickness benefits are to be borne by the Member State to which the worker goes. In this case, accordingly, those benefits are payable by the French authorities.

With regard to the invalidity which commenced on 12 October 1972, INAMI stresses that the system applicable is determined by Regulation No 1408/71, which came into force on 1 October 1972. Pursuant to Article 39 of that regulation, it is the Member State whose legislation was applicable at the time when incapacity for work occurred which is to bear the burden of the invalidity. In the case in the main proceedings, that State is also France.

With regard to the third question INAMI stresses that both Regulation No 3 and Regulation No 1408/71 define 'insurance periods' as contribution periods or periods of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed, together with all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.

That principle has been confirmed by the Court on a number of occasions (judgments in Case 14/67 *Landesversicherungsanstalt Rheinland-Pfalz* v *Welchner* [1967] ECR 331, Case 2/72 *Murru* v *Caisse Régionale d'Assurance Maladie de Paris* [1972] ECR 333 and Case C-324/88 *Vella* v *Alliance Nationale des Mutualités Chrétiennes* [1990] ECR I-257).

Consequently, and notwithstanding the terms of Article 19(1) of Regulation No 36/63, the period of unemployment completed by Mrs Desse in France, which the French legislation in force at the time did not regard as a period of insurance, could not be accepted as an insurance period or a period treated as such or an equivalent period in Belgium.

With regard to the final question, INAMI points out first of all that pursuant to Article 17 of Regulation No 3 and Article 39 of Regulation No 1408/71, responsibility for benefits was borne by the French institution.

It next points out that, if the respondent is not entitled to invalidity benefit under the French legislation, she could claim entitlement to those benefits in Belgium, pursuant to Article 39(3) of Regulation No 1408/71.

INAMI points out, however, that that provision refers to Article 38 of the same regulation concerning the aggregation of periods of insurance, which, as INAMI has already explained, must be taken into account in accordance with the legislation under which those periods were completed.

INAMI concludes that, in so far as a period of unemployment completed in France is not recognized as a period of insurance in the eyes of the French legislation, it cannot be treated as a valid period of insurance giving rise to entitlement to Belgian benefits.

10. Mr and Mrs *Faux* state first of all that the situation of Mrs Desse falls under freedom of movement for workers and point out that the Court has consistently held in that respect that the regulations in matters of social security must be interpreted in the light of the aims pursued by Articles 48 to 51 of the Treaty.

In that respect, they emphasize that the Court has stated, first, that the provisions of the regulations implementing that freedom must be interpreted widely, while the exceptions to and derogations from those provisions must be interpreted restrictively (judgment in Case 242/83 *Caisse de Compensation pour Allocations Familiales* v *Patteri* [1984] ECR 3171) and, secondly, that the objectives of Articles 48 to 51 would not be achieved if, after exercising their right of free movement, workers were to lose social security advantages which they were guaranteed solely under the legislation of one Member State (judgment in Case 9/67 *Colditz* v *Caisse d'Assurance Vieillesse des Travailleurs Salariés de Paris* [1967] ECR 229).

Mr and Mrs Faux infer therefrom that any barrier created by provisions of national social security legislation must be set aside in favour of the principle of freedom of movement for workers.

More specifically, Mr and Mrs Faux consider that, by the questions which it has submitted, the national court is essentially seeking to know, first of all, whether Mrs Desse could retain her status as a frontier worker while receiving full unemployment benefit from France and, secondly, whether or not the period of unemployment constitutes an insurance period which must be taken into account in order to give rise to entitlement to benefits in Belgium after aggregation of the insurance periods.

On the first point, Mr and Mrs Faux point out that it was always in her capacity as a frontier worker that Mrs Desse received unemployment benefit from 5 December 1970 then from 24 February until 12 October 1971, and then from 1 to 21 February 1971 benefits in respect of incapacity. The status of frontier worker must therefore be assessed at the time when the entitlement arises, namely, in the case in the main proceedings, on 4 December 1970, when the person concerned was dismissed.

Mr and Mrs Faux add that the situation of a wholly unemployed worker is contemplated in the very terms of Article 19(1) of Regulation No 36/63. The scope of that provision cannot therefore be invalidated by a strict interpretation of the words 'pursues his occupation' in Article 1(1)(c) of that regulation. According to Mr and Mrs Faux, such an interpretation would have the effect of restricting, at Community level, a right possessed by the worker under national legislation and would be contrary to the interpretation of the Community regulations which the Court has adopted in the light of the principle of the free movement of workers.

With regard to ascertaining whether or not the period during which Mrs Desse was wholly unemployed at France's expense constitutes a period of insurance to be taken into account in order to give rise to entitlement to benefits in Belgium after aggregation of the periods of insurance, Mr and Mrs Faux criticize first of all the interpretation suggested by INAMI on the ground that that interpretation is based on Regulations No 3 and No 4 whereas the special provisions of Regulation No 36/63 are the only ones applicable to frontier workers.

Mr and Mrs Faux then point out that, because of the fact that Mrs Desse was obliged to register as a person seeking employment in France, pursuant to Article 19(1) of Regulation No 36/63, and because she received benefits in kind in France, pursuant to Article 10 of that regulation, the period of supervised unemployment in France must be treated as a period of unemployment supervised in Belgium within the meaning of Article 21(3) of the Belgian Law of 9 August 1963.

Finally, Mr and Mrs Faux consider that whilst indeed Mrs Desse was not subject to French social security, her entitlement to unemployment benefits in France derived from a Community regulation and not from whether she was subject to that social security system.

Mr and Mrs Faux state that all that must be taken into account is the definition, within the meaning of the French legislation, of the period of insurance or the period treated as such and that within the meaning of that legislation the period of supervised unemployment is treated as a period of insurance.

11. On the first question, the *Commission* points out that the Court, when interpreting a provision of Regulation No 1408/71 that is almost identical to Article 19(1) of Regulation No 36/63, declared that a wholly unemployed frontier worker may claim benefit only from the Member State in which he resides (judgment in Case 1/85 *Miethe* v *Bundesanstalt für Arbeit* [1986] ECR 1837). It follows, according to the Commission, that Article 19(1) of Regulation No 36/63 does not grant frontier workers the right to choose between the legislation of the Member State of residence and that of the State of employment.

Therefore, a frontier worker must be considered to lose that status not by virtue of the fact that he is wholly unemployed but only if he takes up another activity and thereby does not fulfil the conditions laid down by Article 1(1)(c) of Regulation No 36/63.

The Commission considers that, in its second question, the national court is seeking essentially to ascertain whether a wholly unemployed frontier worker may claim benefit for initial incapacity then for invalidity on the basis of Article 6 of Regulation No 36/63.

As far as allowances for sickness, and thus initial incapacity, are concerned, the Commission points out that that provision expressly provides that they must be paid by the competent institution of the Member State of employment.

As regards invalidity benefits, the Commission points out that the new paragraph (5) of Article 39, introduced into Regulation No 1408/71 by Council Regulation (EEC) No 2793/81 of 17 September 1981 amending 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 and Council Regulation (EEC) No 574/72 of 21 March 1972 laying down detailed rules for the application of Regulation (EEC) No 1408/71 (Official Journal 1981 L 275, p. 1) makes those benefits the responsibility of the competent institution of the Member State of residence. It points out, however, that that provision is not applicable to the case in the main proceedings, since it entered into force after the period during which Mrs Desse was unfit for work had expired.

Reference must, therefore, be made to paragraphs (1) and (2) of that article, which alone are applicable in this case, in order to conclude that it is the competent institution of the Member State in which the incapacity occurred, in this case the State of employment, which determines whether the frontier worker satisfies all the conditions giving rise to entitlement to invalidity benefit.

The Commission considers that the answers given to the first two questions make it unnecessary to answer the third and fourth questions.

G. C. Rodríguez Iglesias
Judge-Rapporteur