In Joined Cases 41, 121 and 796/79

REFERENCES to the Court under Article 177 of the EEC Treaty by the Bayerisches Landessozialgericht [Bavarian Higher Social Court] (Case 41/79), by the Bundessozialgericht [Federal Social Court] (Case 121/79) and by the Hessisches Landessozialgericht [Higher Social Court, Hesse] (Case 796/79) for a preliminary ruling in the actions pending before those courts between

VITTORIO TESTA, of Salerno, Italy (Case 41/79)

SALVINO MAGGIO, of Karlsruhe (Case 121/79)

CARMINE VITALE, of Cava dei Tirreni (Case 796/79)

and

BUNDESANSTALT FÜR ARBEIT [Federal Employment Office], Nuremberg,

on the interpretation of Article 69 (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT,

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. Mr *Testa*, an Italian national resident in Salerno, the plaintiff in the main action, worked in the Federal Republic of Germany and then registered at the labour office (Arbeitsamt) in Hagen on 14 April 1975. The labour office granted him unemployment benefit for 234 days from 12 April 1975.

At his request the labour office issued the plaintiff on 11 July 1975 with a certificate in accordance with Form E 303 to enable him to seek employment in Italy. The plaintiff left for Italy on 12 July 1975 and continued to receive benefits from the competent Italian institution, the Istituto Nazionale della Previdenza Sociale, under Articles 69 (1) and 70 (1) of Regulation No 1408/71 (Official Journal, English Special Edition 1971 (II), p. 416).

On 13 October 1975 the plaintiff returned from Italy to the Federal Republic of Germany and applied to the Hagen labour office to grant him once more unemployment benefit. The labour office rejected the application on the ground that the right which the plaintiff would otherwise have had to unemployment benefit was extinguished under Article 69 (2) of Regulation No 1408/71 since he had not registered at the competent office by 12 October 1975 at the latest. The objection and action brought by the plaintiff were unsuccessful.

By order dated 15 February 1979 the Bayerisches Landesozialgericht, as the court of appeal to which the plaintiff appealed, stayed the proceedings and referred the following question for a preliminary ruling under Article 177 of the EEC Treaty to the Court of Justice of the European Communities:

"Does the second half of the first sentence of Article 69 (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) preclude an unemployed person from entitlement to unemployment benefits in the competent Member State if he returns to that Member State after more than three months, even if he still has a residual claim under the domestic legislation of that Member State?."

In this respect the Bayerisches Landessozialgericht relied in particular on the judgment given by the Court of Justice on 10 July 1975 in Case 27/75 *Bonaffini* ([1975] ECR 971) to the effect, according to the German court, that failure to comply with the condition of a waiting period of four weeks under Article 69 (1) (a) of Regulation (EEC) No 1408/71 does not preclude entitlement to national benefits. The Bayerisches Landessozialgericht seeks clarification on whether failure to observe the condition in the second half of the first sentence of Article 69 (2) (return within three months to the competent Member State) rules out the residual right to unemployment benefit under the national legislation.

2. Mr *Maggio*, who had been in receipt of unemployment benefit in the Federal

Republic of Germany since 19 February 1974, left for Italy on 11 May 1974 and returned to the Federal Republic on 17 August 1974. He explained that he was delayed by illness and hospital treatment. The Bundesanstalt für Arbeit refused to grant him any further unemployment benefit since it took the view that as a result of Article 69 (2) of Regulation No 1408/71 Mr Maggio had lost his entitlement to unemployment benefit. The actions brought by Mr Maggio against this decision before the Sozialgericht Karlsruhe and the Landessozialgericht Baden-Württemberg were unsuccessful.

By order dated 19 June 1979 the Bundessozialgericht, to which the plaintiff had appealed on a point of law, stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

"Does an unemployed person who returns to the 'competent State' after the expiry of a period longer than three months lose, in pursuance of Article 69 (2) of Regulation (EEC) No 1408/71, his 'entitlement ... under the legislation of the competent State' in the sense that, regardless of the provisions of the competent State, his entitlement is in any event extinguished, that is, even if the legislation of the competent State provides for its continuation?"

In its order the Bundessozialgericht based itself on the following considerations:

1. In the German legislation on the promotion of employment the word "entitlement" ("Anspruch") may have the meaning of a concrete and immediate right to benefits as well as the meaning of a right which is in the process of being acquired ("Anwartschaft"). According to the German law if the unemployed person returns to Germany after the expiry of the three months' period he first of all loses entitlement to benefits but as soon as he returns (to the Arbeitsamt) his right which is in the process of being acquired is revived. The wording of Article 69 (2) of Regulation No 1408/71 is not clear on this point.
2. If "entitlement" within the meaning of the second part of the first sentence of Article 69 (2) means also the right which is in the process of being acquired, it is not apparent whether the words "under the legislation of the competent State" are an explanation of the term entitlement (to benefits) or a reference to the conditions under which the person concerned loses his entitlement under the legislation of the competent State.
3. In the view of the Bundessozialgericht the spirit and purpose of the provision, that is the promotion of freedom of movement for European workers, seem rather to plead in favour of an interpretation to the effect that the unemployed person's entitlement (to benefit) is revived if he makes himself again available to the labour market in the competent State.
4. Any other interpretation might also be incompatible with the Basic Law of the Federal Republic of Germany. The Bundesverfassungsgericht [Federal Constitutional Court] has ruled that in so far as Community law is applied by German authorities in Germany it must be appraised in the light of the list of basic rights in the Basic Law until such time as Community law is provided with a list of basic rights established by the Parliament and put into effect. Since the plaintiff's entitlement, which is in the process of being acquired, to unemployment benefit is based on his payment of contributions, it may be regarded as an individual property right governed by public law which has characteristics of the concept of property within the meaning of Article 14 of the Basic Law. That right could be withdrawn without compensation only if it were considered that the requirement of a return from abroad within three

months constituted a restriction inherent in that kind of property.

5. Finally, it is necessary to ascertain from the point of view of constitutional law how far regard has been had to the principle of the sovereignty of the people, which under Article 79 (3) of the Basic Law is inalienable, when Community law enacted by the Council of Ministers, composed of executive bodies of the Member States, amends national law.

Finally, the Bundessozialgericht considers it necessary to point out that if the interpretation of Article 69 (2) given by the Court of Justice infringes the German Constitution, that provision must, if necessary, be referred to the Bundesverfassungsgericht.

3. Mr *Vitale*, an Italian national who had been in receipt of unemployment benefit in the Federal Republic of Germany since 2 June 1975, claimed his entitlement to benefits under Article 69 (1) of Regulation No 1408/71 for the purpose of going to Italy. On 7 July 1975 he was given a certificate on Form E 303 certifying that on the basis of that provision he could receive benefits from 12 July to 11 October 1975. Mr Vitale fell ill on 30 September 1975 in Italy where he was admitted to and remained in hospital until 19 October 1975 and he re-registered at the competent employment office in the Federal Republic of Germany on 20 October 1975.

The Bundesanstalt für Arbeit on the basis of Article 69 of Regulation No 1408/71 refused to renew his unemployment benefit. The Bundesanstalt für Arbeit considered that, on the basis of the information which it had been able to obtain, Mr Vitale had no prospects of employment at the place to which he had gone and that by extending his stay in Italy unnecessarily he was bound to run the risk of unforeseeable events preventing him from returning in time.

Mr Vitale brought an action against this decision. The Sozialgericht [Social Court] Wiesbaden set aside the decision of the Bundesanstalt für Arbeit and ordered it to pay Mr Vitale unemployment benefit for the period from 22 October 1975 to 2 November 1975, Mr Vitale having found employment again on 3 November 1975. The Sozialgericht held that since Mr Vitale had been prevented from returning in time through illness, he was not responsible for his delayed return and that the Bundesanstalt für Arbeit was therefore wrong in refusing to take into consideration the fact that his was one of the exceptional cases referred to in Article 69 (2) which justify an extension of the period of three months.

The Bundesanstalt für Arbeit appealed against this order to the Hessisches Landessozialgericht on 15 March 1977. The Landessozialgericht by an order of 30 August 1979 stayed the proceedings and referred to the Court of Justice for a preliminary ruling the following questions:

1. Does loss of "all entitlement to benefits under the legislation of the competent State" in the case of an unemployed person who does not return there before the expiry of the three month period mean that he is thereby divested of every legal right (contingent entitlement)?

2. Does this also apply to the case where the legislation of the competent State provides for the continuance of the contingent entitlement?

The national court states in the order making the reference to the Court of

Justice that it considers the appeal well founded in so far as the decision of the Bundesanstalt für Arbeit not to extend the time-limit does not seem to it to be a misuse of the discretion which it has in the application of Article 69 (2). However the court making the reference to the Court of Justice requires clarification on the extent of the loss of entitlement to benefits under Article 69 (2) caused by a delayed return of the worker.

4. The orders making the references to the Court of Justice were received at the Registry on 12 March 1979 (Case 41/79), 31 July 1979 (Case 121/79) and 8 November 1979 (Case 769/79) respectively.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Mr Testa, represented by Helga Niesel, Advocate of the Munich Bar, the Bundesanstalt für Arbeit, represented by Mr Müller, the Government of the Federal Republic of Germany, represented by Martin Seidel, the Government of the Italian Republic, represented by its Agent, Adolfo Maresca, assisted by Franco Favara, Avvocato dello Stato, and the Commission of the European Communities, represented by its Legal Adviser, Norbert Koch.

By order of the Court of 21 November 1979 Cases 41/79 and 121/79 were joined for the purposes of the oral procedure and judgment. By order of the Court of 27 March 1980 Case 796/79 was joined for the purposes of judgment to Joined Cases 41 and 121/79.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by Mr Testa

Mr Testa observes that German law contains various sanctions where an unemployed person does not comply with his obligation to attend at the appropriate labour exchange or to return from another Member State within a period of three months. One such sanction is that during a certain time the unemployed person shall not draw any benefit ("Sperrfrist"). This would be quite sufficient in the present case. Complete extinction of entitlement is not necessary. In the view of the plaintiff in the main action Article 69 Regulation No 1408/71 is not intended at all to provide for the complete extinction of entitlement to unemployment benefit. Otherwise a regulation of the European Communities would be abolishing a right under national law, contrary to the established case-law of the Court.

Three periods may usefully be distinguished where the unemployed person returns after the expiry of the period of three months.

1. Until the expiry of the period of three months the benefits provided for by Article 69 (1) of Regulation No 1408/71 are undoubtedly due if the conditions required are fulfilled.

2. After re-registering in the competent State the conditions must be judged solely according to *municipal* law.

3. There is no entitlement during the period between the date of expiry of the period of three months and that of re-registration since even under municipal (German) law the conditions are not fulfilled.

Mr Testa observes that the complete loss of an acquired right under Article 69 (2) is out of all proportion and has no justification in municipal German law. The complete abolition of a benefit is a violation of the guarantee of property contained in the German Basic Law. The position is the same in Community law.

B — Observations submitted by the Bundesanstalt für Arbeit

In the view of the defendant in the main action the question raised has already been answered by implication by the judgment of the Court of 20 March 1979 in Case 139/78 *Coccioli* v *Bundesanstalt für Arbeit* [1979] ECR 991. If the Court of Justice had been of the opinion that the second part of the first sentence of Article 69 (2) of Regulation No 1408/71 had no effect, it would not have been necessary to consider the terms on which the legal consequences of such forfeiture could be escaped, in the particular case by a subsequent prolongation of the period for returning.

The position of the unemployed person is to a certain extent comparable with that of a worker to whom his employer grants paid leave for the purpose of studying abroad for three months. If at the expiry of the leave the worker does not return to his employment the employer may terminate the employment without prior notice. If at the beginning he were to contemplate that the worker might not return, he would make the grant of leave subject to a clause to the effect that the employment would automatically cease if at the expiry of the period agreed the worker did not return to work.

All the Member States have provisions in their insurance against unemployment to the effect that any failure on the part of the unemployed person to make himself available to the competent body adversely affects his entitlement to benefit. Thus under German law (Article 119 (3) of the Arbeitsförderungsgesetz [law on the promotion of employment]) entitlement to benefit is lost on the second occasion that the unemployed person causes a temporary suspension of benefit (Sperrzeit) for four weeks. From this point of view the legal consequence provided in the second part af the first sentence of Article 69 (2) is thus in line with the logic of the system.

C — Observations submitted by the Government of the Italian Republic

In the view of the Government of the Italian Republic a Community regulation which aims as a whole "to provide freedom of movement for workers" (Article 51 of the EEC Treaty) and in particular to ensure in all circumstances that benefits due under the legislation of the competent State are paid, cannot contain a provision introducing a term, which is not provided for by the legislation of the competent State, whereby a social security benefit is lost.

The Court has already had occasion to find in the judgments in *Petroni* [1975] ECR 1149 and *Manzoni* [1977] ECR 1647 that the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them by the legislation of a Member State. The principle laid down by the Court in the two other aforementioned cases is also applicable in the present case.

Article 69 (2) of Regulation No 1408/71 must therefore be interpreted as meaning that the period of three months provided in Article 69 (1) (c) is the maximum period (subject to any extension) during which the unemployed person may continue to be entitled to unemployment benefits without being "available to the employment services of the [competent] State". The Government of the Italian Republic considers that if the provision in question were interpreted as meaning that all entitlement to benefits is lost after the expiry of the period of three months, this would make the provision invalid.

The Government of the Italian Republic accordingly concludes:

"Article 69 (2) of Regulation (EEC) No 1408/71 must be interpreted as meaning that an unemployed person who goes to another Member State retains his individual right to unemployment benefits under the legislation of the competent State for a maximum period of three months without his having to remain available to the employment services of the competent State and in any event during the time that he is available to the employment services of the competent State or when, after the expiry of the aforementioned period, he once again makes himself so available.

If Article 69 (2) of Regulation (EEC) No 1408/71 is interpreted as meaning that all entitlement to benefits is irrevocably lost simply as a result of the expiry of the period provided in Article 69 (1) (c), it is invalid".

D — Observations submitted by the Government of the Federal Republic of Germany

The Government of the Federal Republic of Germany is of the opinion that the questions put call for an answer in the affirmative. The aforementioned Article 69 (2) of Regulation No 1408/71 must be interpreted as meaning that after the expiry of the period of three months provided for therein all entitlement to unemployment benefits from the competent Member State is lost and this is so independently of the question how such a case should be judged with regard to the national provisions of the State concerned.

Article 69 is a special provision of Community law going beyond the simple co-ordination of national legislation. The exception to the obligation to be available to the employment services of the competent State provided for in Article 69 must be regarded as a radical innovation in the social law of all Member States. Since it is an independent rule of Community law, Article 69 must be binding in its entirety in the same way for the Member States. This means in particular that the rules providing for penalties, which are an integral part of the measure, must be uniformly interpreted in the Community, that is to say their legal effect must be

the same for all Member States. This is why it is impossible to adopt the opinion put forward in the order making the reference to the effect that the second part of the first sentence of Article 69 (2) refers to the terms of municipal law.

The interpretation favoured by the Federal Government is likewise the only one which accords with the purpose of Article 69 (2). Only a sufficiently serious penalty such as the loss of "all" entitlement is capable of encouraging the unemployed person to return to the competent State on the expiry of the period of three months. This must be so in the view of the Federal Government, which stresses that if such aim were not guaranteed all the rules in Article 69 would be undermined.

The aim of the obligation to return is to allow the re-integration of the unemployed person by measures promoting employment (offers of work, retraining and so forth). Such measures can be taken only in respect of workers resident in the country. An unlimited extension of the opportunity provided for in Article 69 would considerably increase the costs of unemployment insurance without the Member State in question being able to terminate its burden by taking policy measures in relation to the labour market.

Such interpretation is also the only one consistent with the origin of Article 69. That provision, which was not contained in Regulation No 3, was proposed by the Council Secretariat on 29 April 1969. The Member States which had a large percentage of migrant workers expressed reservations because of the considerable risk of abuse. The solution ultimately adopted was the result of a proposal by the French Delegation which made the following suggestion on 29 May 1969:

> The country in which the person was last employed should pay unemployment benefit for three months; once that period has expired the worker will no longer have any entitlement in the country where he was last employed (cf. Council Document No 916/69 (Soc. 83) of 27 June 1969 — Annex 4).

In its present form Article 69 (2) is the implementation of that decision by the legislative draftsman. In order to make clear that entitlement to the benefits in question takes effect as against the country of employment there were added in the final version the words "under the legislation of the competent State".

On the question of the compatibility of Article 69 (2) with Article 51 of the Treaty the Federal Government adopts the arguments put forward by the Commission. It adds that, contrary to the position in the case of *Petroni* ([1975] ECR 1149), Article 69 is not an unlawful restriction on the free movement of workers. The whole system relating to the retention of entitlement to benefits, of which the second sentence of Article 69 (2) is an integral part, is directly intended to ensure freedom of movement for workers. That constitutes a considerable advantage, unknown until Regulation No 1408/71 was adopted, in the interests of freedom of movement for workers within the Community (cf. the judgment of the Court of 20 March 1979 in Case 139/78 at paragraph 7). The duration and extent of that advantage is restricted by the second part of the first sentence of Article 69 (2). There is no cause to see in this an infringement of

Article 51 of the EEC Treaty. Article 51 does not require the Community legislature to grant unrestricted facilities in respect of freedom of movement for workers.

The interpretation favoured by the Federal Government is also compatible with higher-ranking rules of Community law.

In the opinion of the Federal Government it is unnecessary to answer the question whether and how far entitlement to social security benefits, and in particular the contingent entitlement, which is at issue here, relating to unemployment benefits, are covered by the protection of property guaranteed by Community law. In any event, it is not possible to regard the restriction which the Community legislature adopted in the second part of the first sentence of Article 69 (2) as adversely affecting pre-existing property rights. Rights arising from insurance against unemployment are possible only within the limits provided by the social security legislation. In place of the requirement of availability to the employment services of the competent State, which is the condition for the retention of the entitlement to benefit normally laid down in municipal law, the Community legislature has substituted another requirement, namely return to the competent State within the period provided for. That provision does not lead to the abolition of any property right.

The loss of rights as a result of Article 69 (2) does not violate the principle of proportionality. The period prescribed by the legislature is not unreasonable, for it may be thought that it would generally have been possible to find the unemployed person other employment within that period if he had been available to the competent employment services. Further, in special circumstances the period of three months may be extended at the request of the unemployed person by the appropriate authorities.

In consequence the Government of the Federal Republic of Germany proposes that the question put by the Bundessozialgericht should be answered as follows:

"Article 69 (2) of Regulation (EEC) No 1408/71 must be interpreted as meaning that the unemployed person who returns to the 'competent State' after a period of more than three months loses all entitlement to benefits of the kind referred to in the first sentence of Article 69 (1)."

E — Observations submitted by the Commission

The observations submitted by the Commission may be divided into four parts:

(1) Interpretation of the second part of the first sentence of Article 69 (2) of Regulation No 1408/71

The Commission observes in this respect that Article 69 (2) of Regulation No 1408/71 guarantees to the unemployed person who returns to the competent State at the end of a stay in another Member State for the purpose of looking for work the right to continue to receive benefits under the national legislation of the competent State. The obligation to continue to provide benefits exists nevertheless only in respect of the unemployed person who returns before the expiry of the period during which he is entitled to benefits under Article 69 (1) (c). Consequently, the unemployed person must return to the competent State before the expiry of the period of three months laid down by that provision.

If the unemployed person returns late, the competent State is no longer bound to continue to pay him benefits. This clearly appears from the wording of the *first* part of the first sentence of Article 69 (2), to the effect that the return of the unemployed person within the prescribed period is a necessary condition for him to continue to be entitled to the benefits.

The fist part of the sentence may nevertheless leave doubts on the question whether the loss of entitlement relates solely to the period of absence exceeding the prescribed period or to the whole of the time during which the legislation of the competent State recognizes that he is entitled to benefits. In so far as there may be any doubt it is removed by the second part of the first sentence of Article 69 (2), to the effect that the unemployed person who does not return before the expiry of the period stipulated in the first part of the said sentence loses all entitlement to benefits.

The question put to the Court should therefore be answered in the negative.

This interpretation does not conflict with the judgment given by the Court on 10 July 1975 in Case 27/75 *Bonaffini* ([1977] ECR 97) cited by the Bayerisches Landessozialgericht. That case related to entitlement to unemployment benefit claimed against an insurance institution of the State to which the unemployed person had gone to find work. Such entitlement is not governed either directly or indirectly by Article 69. Initial entitlement, its maintenance or recovery depend *directly* on the legislation of the State where the unemployed person has gone to find work. The fact that the conditions stipulated in Article 69 are not fulfilled cannot therefore affect the application of such national provisions.

(2) The compatibility of the second part of the first sentence of Article 69 (2) of Regulation No 1408/71 with Article 51 of the EEC Treaty

Although this question has not been raised by the courts making the references the Commission considers next how far the fact that the effect of the provisions of Regulation No 1408/71 may stand in the way of benefits provided for by municipal law in relation to social security may be regarded as incompatible with Article 51 of the EEC Treaty.

In the view of the Commission the answer to this question must decidedly depend on the answer to the question whether the rules contained in Article 69 (2) on residual rights are to be considered separately or in conjunction with the other provisions of that article. If Article 69 is regarded as a whole it is apparent that the first two paragraphs form a coherent unit. In order to help him to find employment in other Member States Article 69 (1) allows the unemployed person to retain certain benefits payable by the competent State without having to make himself available to the employment services of that State or to submit himself to their control.

To this extent Article 69 of Regulation No 1408/71 is an innovation which goes beyond the co-ordination of national social security systems and was enacted to encourage the free movement of workers. The question of the loss of residual entitlement in the event of returning late cannot be considered outside this context. If the advantages and disadvantages of the rules in question were balanced the conclusion would be reached that the penalty for returning late is sometimes likely to have serious consequences. It is also necessary to be aware of the fact that the

possibility created by Article 69 may easily be abused in that the unemployed person may not use the opportunity to look for work. Further, by giving an opportunity to extend the prescribed period the second sentence of Article 69 (2) offers a remedy where the complete loss of entitlement after the expiry of the period would be unreasonable.

In the Commission's view the above considerations reveal no ground likely to make the first sentence of Article 69 (2) of Regulation No 1408/71 incompatible with Articles 48 to 51 of the EEC Treaty.

(3) Compatibility of the German law ratifying the EEC Treaty with Article 20 of the Basic Law

The question whether the legislative powers of the Community institutions take account of the principle of the sovereignty of the people enacted in Article 20 of the Basic Law involves the question whether Article 1 of the German Law of 27 July 1957 (Bundesgesetzblatt II p. 753) is constitutional. This is thus a question of municipal law and not Community law. In this respect the national courts do not seem completely to have recognized the importance of the case-law on this question. That case-law recognizes that by the law ratifying the EEC Treaty the German legislature opened up the domestic sphere of competence to the legislative power of the EEC in a constitutionally valid manner and this is so in so far as that power has been given to the Community institutions under the EEC Treaty. [1] Thus an independent legal order has been created which has effect within the national legal order and must be applied by the German courts. [2]

(4) Compatibility of Article 69 (2) of Regulation No 1408/71 with Article 14 of the Basic Law

In the view of the Commission the legal provisions decided by the institutions of the European Communities on the basis of the legislative powers which have been given to them cannot be examined for their compatibility with the constitutional rules of the Basic Law. Community law is an independent legal order, that is, it is independent of the national legal order and has its own institutions and system of legal remedies. In this respect it should be observed that the loss of entitlement provided for by Article 69 (2) is in any event a necessary restriction in the interests of a wider freedom of movement for workers.

The Commission also observes that it cannot be considered in the present case that there is any incompatibility with Article 14 of the German Basic Law. Articles 119 and 120 of the Arbeitsförderungsgesetz itself provides for the partial or total loss of the residual entitlement to unemployment benefit where the unemployed person does not comply with certain conditions. These include that he should make himself available to the employment services. Such restrictions can obviously not be regarded as an infringement of Article 14 of the Basic Law, for they constitute a limitation inherent in that type of property. This principle must also apply to the similar restriction contained in Article 69 (2).

In conclusion, the Commission is of the opinion that the answer to be given to

1 — Judgment of the Bundesfinanzhof of 10 July 1968 (VII/198/63) of which certain extracts have been published in the AWD des Betriebsberaters 1968, p. 397 *et seq.*

2 — Judgment of the Bundesverfassungsgericht [Federal Constitutional Court] of 9 June 1971, Entscheidungen des Bundesverfassungsgerichts Vol. 31, p. 145 *et seq:* see also judgment of the Bundesverfassungsgericht of 29 Mai 1974, Entscheidungen des Bundesverfassungsgerichts Vol. 37, p. 271 *et seq.*

the question referred for a preliminary ruling could be as follows:

"The first sentence of Article 69 (2) of Regulation No 1408/71 rules out any other entitlement to unemployment benefit under the national provisions of the competent State where the unemployed person returns to that State after the expiry of the period provided for in Article 69 (1) (c) and that period has not been or is not extended under the second sentence of Article 69 (2)."

III — Oral procedure

Mr Testa, represented by Helga Niesel, the Government of the Federal Republic of Germany, represented by Martin Seidel, and the Commission of the European Communities, represented by Norbert Koch, presented oral argument at the sitting on 22 January 1980 in Cases 41 and 121/79.

The Government of the Italian Republic, represented by M. Favara, and the Commission of the European Communities, represented by Norbert Koch, presented oral argument at the sitting on 20 March 1980 in Case 796/79.

The Advocate General delivered his opinion at the sitting on 27 March 1980.

Decision

1 By orders of 15 February, 19 June and 30 August 1979, which were received at the Registry of the Court on 12 March, 31 July and 8 November 1979 respectively, the Bayerisches Landessozialgericht (Case 41/79), the Bundessozialgericht (Case 121/79) and the Hessisches Landessozialgericht (Case 796/79) referred questions to the Court under Article 177 of the EEC Treaty on the interpretation and the validity of Article 69 (2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 Those questions arise out of disputes between the Bundesanstalt für Arbeit [Federal Employment Office], of Nuremberg, and certain unemployed workers who, having availed themselves of the opportunity offered by Article 69 (1) of Regulation No 1408/71 to go to Italy to seek employment, did not return to the Federal Republic of Germany within the period of three months laid down by that provision.

The Bundesanstalt für Arbeit refused to continue to pay unemployment benefit to the workers concerned on the basis of Article 69 (2) of the said regulation, which provides that a worker loses all entitlement to benefits

under the legislation of the competent State if he does not return there before the said three month period has expired. It likewise refused to apply in their favour the provision of the second sentence of Article 69 (2) of the said regulation which, in exceptional cases, allows the competent services or institutions to extend the period of three months to which the continuance of benefit is subject. The workers concerned then brought actions before the German courts seeking a declaration that they were entitled to continue to receive unemployment benefits.

3 The questions referred by the national courts are basically intended to establish whether Article 69 (2) of Regulation No 1408/71 deprives an unemployed worker who returns to the competent State after the three month period laid down by Article 69 (1) (c) has expired of all entitlement to unemployment benefit as against that State even where the said worker would retain a residual entitlement to benefits by virtue of the legislation of that State. In the event of that question's being answered in the affirmative, doubts as to the compatibility of Article 69 (2) with Articles 48 to 51 of the Treaty and with the requirements of the protection of fundamental rights have been expressed by the national courts in the grounds for their orders, by the plaintiff in the main action in Case 41/79 and by the Government of the Italian Republic in their observations submitted to the Court.

As to the interpretation of Article 69 (2)

4 Article 69 of Regulation No 1408/71 enables an unemployed worker to be exempt for a specific period, for the purpose of seeking employment in another Member State, from the obligation imposed by the various national laws to make himself available to the employment services of the competent State without thereby losing his entitlement to unemployment benefits as against the competent State.

5 That provision is not simply a measure to co-ordinate national laws on social security. It establishes an independent body of rules in favour of workers claiming the benefit thereof which constitute an exception to national legal rules and which must be interpreted uniformly in all the Member States

irrespective of the rules laid down in national law regarding the continuance and loss of entitlement to benefits.

6 Under paragraph (1) the right given to the worker by Article 69 is restricted to a period of three months from the date on which he ceases to be available to the employment services of the competent State.

7 Paragraph (2) of Article 69 provides that:

"If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under paragraph (1) (c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time-limit may be extended by the competent services or institutions."

8 It follows from the express terms of that provision that continued entitlement to benefits as against the competent State beyond the three-month period depends on the worker's returning to that State before that period has expired and that he "shall lose all entitlement to benefits under the legislation of the competent State" in the event of his late return. The only eventuality in which a worker may retain his entitlement to benefits as against the competent State should he return after the three month period has expired is that envisaged by the second sentence of Article 69 (2) which, in certain cases, allows the competent services or institutions to extend that period.

9 Contrary to what the plaintiffs in the main actions allege, the loss of entitlement to benefits laid down by Article 69 (2) is not restricted to the time between the expiry of the period and the moment when a worker makes himself available again to the employment services of the competent State. If that were the effect of Article 69 (2), that provision would not require the worker to return within the three month period and would not refer to the loss of "all entitlement" in the event of his returning late.

10 Nor is it possible to accept the argument that the phrase "under the legislation of the competent State" occurring in Article 69 (2) must be taken as referring to national law for the determination of the circumstances in which entitlement to benefit is lost. That phrase, which follows the words "he shall lose all entitlement to benefits", is merely intended to explain that a worker shall lose, in the event of his returning late, all entitlement to benefits as against the competent State, irrespective of any entitlement to benefits which he may have as against other Member States.

11 There are therefore grounds for replying to the questions referred to the Court that a worker who returns to the competent State after the three month period referred to in Article 69 (1) (c) has expired may no longer claim entitlement, by virtue of the first sentence of Article 69 (2), to benefits as against the competent State unless the said period is extended pursuant to the second sentence of Article 69 (2).

As to the compatibility of Article 69 (2) with Articles 48 to 51 of the Treaty

12 It has been alleged that if Article 69 (2) must be interpreted in the manner set out above it is invalid in that it is incompatible with the provisions of the Treaty on freedom of movement for workers and, in particular, with Article 51 which obliges the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.

13 As the Court has already observed in its judgment of 20 March 1979 in Case 139/78 *Coccioli* v *Bundesanstalt für Arbeit* [1979] ECR 991, in giving a worker the right to go to another Member State to seek employment there, Article 69 of Regulation No 1408/71 confers on a person availing himself of that provision an advantage as compared with a person who remains in the competent State inasmuch as, by the effect of Article 69, he is freed for a period of three months of the duty to keep himself available to the employment services of the competent State and to be subject to the control procedure organized therein, even though he must register with the employment services of the Member State to which he goes.

14 The right to retain unemployment benefits conferred by Article 69 therefore contributes to ensuring freedom of movement for workers in accordance with Article 51 of the Treaty. The fact that that advantage is limited in time and subject to the observance of certain conditions is not such as to bring Article 69 (2) into conflict with Article 51. The latter provision does not prohibit the Community legislature from attaching conditions to the rights and advantages which it accords in order to ensure freedom of movement for workers or from determining the limits thereto.

15 As part of a special system of rules which gives rights to workers which they would not otherwise have, Article 69 (2) cannot therefore be equated with the provisions held invalid by the Court in its judgments of 21 October 1975 in Case 24/75 *Petroni* [1975] ECR 1149 and of 13 October 1977 in Case 112/76 *Manzoni* [1977] ECR 1647, to the extent to which their effect was to cause workers to lose advantages in the field of social security guaranteed to them in any event by the legislation of a single Member State.

16 It follows that Article 69 (2) of Regulation No 1408/71 is not incompatible with the rules on freedom of movement for workers in the Community.

As to the compatibility of Article 69 (2) with basic rights guaranteed under Community law

17 In the judgments referring their questions to the Court the Bundessozialgericht and the Hessisches Landessozialgericht state that in the event that Article 69 (2) of Regulation No 1408/71 must be interpreted to mean that it deprives a worker who is late in returning to the competent State of all entitlement to unemployment benefits as against that State, that provision might be regarded as being incompatible with Article 14 of the German Basic Law in regard to the protection of the right to property.

18 As the Court has repeatedly emphasized, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself, since fundamental rights form an integral part of the general principles of the law,

the observance of which it ensures. One of the fundamental rights which is accordingly protected under Community law in accordance with the constitutional concepts common to the Member States and in the light of international treaties for the protection of human rights on which Member States have collaborated or to which they are signatories is the right to property, as the Court has recognized, notably in its judgment of 13 December 1979 in Case 44/79 *Hauer.*

19 In order to determine whether Article 69 (2) might infringe the fundamental rights guaranteed in this manner by Community law consideration should first be given to the fact that the system set up by Article 69 is an optional system which applies only to the extent to which such application is requested by a worker, who thereby foregoes his right of recourse to the general system applicable to workers in the State in which he became unemployed. The consequences laid down by Article 69 of failing to return in good time are made known to the worker, in particular by means of the explanatory sheet E 303/5 written in his own language which is handed to him by the competent employment services, and his decision to opt for the system under Article 69 is therefore made freely and with full knowledge of the consequences.

20 The penalty laid down by Article 69 (2) in the event of late return must likewise be judged in the light of the advantage granted to a worker by Article 69 (1), which has no equivalent in national law.

21 Finally, it must be emphasized that the second sentence of Article 69 (2), which provides that in exceptional cases the three month period laid down by Article 69 (1) (c) may be extended, ensures that the application of Article 69 (2) does not give rise to disproportionate results. As the Court ruled in its judgment of 20 March 1979, *Coccioli,* cited above, an extension of the period is permissible even when the request is made after that period has expired. Whilst, as the Court held in the judgment cited above, the competent services and institutions of the States enjoy a wide discretion in deciding whether to extend the period laid down by the regulation, in exercising that discretionary power they must take account of the principle of proportionality which is a general principle of Community law. In order

correctly to apply that principle in cases such as this, in each individual case the competent services and institutions must take into consideration the extent to which the period in question has been exceeded, the reason for the delay in returning and the seriousness of the legal consequences arising from such delay.

22 Consequently it is to be concluded that, even supposing that the entitlement to the social security benefits in questions may be held to be covered by the protection of the right to property, as it is guaranteed by Community law — an issue which it does not seem necessary to settle in the context of these proceedings — the rules laid down by Article 69 of Regulation No 1408/71, when interpreted in the manner indicated above, do not involve any undue restriction on the retention of entitlement to the benefits in question.

Costs

23 The costs incurred by the Government of the Italian Republic, the Government of the Federal Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main actions are concerned, in the nature of a step in the actions pending before the national courts, the decision as to costs is a matter for those courts.

On those grounds,

THE COURT

in answer to the questions referred to it by orders of 15 February, 19 June and 30 August 1979 by the Bayerisches Landessozialgericht, the Bundessozialgericht and the Hessisches Landessozialgericht, hereby rules:

A worker who returns to the competent State after the three month period referred to in Article 69 (1) (c) of Regulation No 1408/71 has

expired may no longer claim entitlement, by virtue of the first sentence of Article 69 (2), to benefits as against the competent State unless the said period is extended pursuant to the second sentence of Article 69 (2).

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 19 June 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 27 MARCH 1980 [1]

Mr President,
Members of the Court,

The parties to the three main actions pending before the German courts are in dispute concerning the re-granting of unemployment benefit pursuant to Article 69 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

According to Article 69 (1) (c) an unemployed worker who satisfies the conditions for entitlement to benefits under the legislation of a Member State and who goes to another Member State in order to seek employment there shall retain his entitlement to such benefits for a maximum period of three months from the date when he ceases to be available to the employment services of the State which he has left. Article 69 (2) is worded as follows:

"If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under paragraph (1) (c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this

1 — Translated from the German.