1. Article 68(l) and Article 71(l)(a)(ii) of Regulation No 1408/71 are to be interpreted as meaning that, in the case of a frontier worker, within the meaning of Article 1(b) of that regulation, who is wholly unemployed, the competent institution of the State of residence, whose national legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary, must calculate those benefits taking into account the wage or salary actually received by the worker in the last employment held by him in the Member State in which he was engaged prior to his becoming unemployed. In calculating those benefits, the institution of the State of residence may not apply to the remuneration which forms the basis for calculating those benefits the rules on ceilings laid down by the legislation of the State of employment.

2. Article 107 of Regulation No 574/72 is to be interpreted as meaning that, in order to calculate the unemployment benefits of wholly unemployed frontier workers until Regulation No 1249/92 came into force, the last remuneration received in the State of employment had to be converted in accordance with the official rate of exchange on the day of payment.

# REPORT FOR THE HEARING
## in Case C-201/91 *

### I — Facts and procedure

1. *Relevant legislation*

(a) Community law

Article 68(1) of Regulation (EEC) No 1408/71, in the version in Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 6), provides as follows:

'1. The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State.'

Article 71(1)(a)(ii) of Regulation No 1408/71, in the version in Regulation No 2001/83, cited above, provides as follows:

* Language of the case: French.

'(ii) 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 while last employed; these benefits shall be provided by the institution of the place of residence at its own expense'.

Article 107 of Regulation (EEC) No 574/72, in the version in Regulation No 2001/83, cited above, provides as follows:

'1. For the purposes of implementing the following provisions:

(a) Regulation: Article 12(2), (3) and (4), the last sentence of Article 19(1)(b), the last sentence of Article 22(1)(ii), the penultimate sentence of Article 25(1)(b), Article 41(1)(c) and (d), Article 46(3) and (4), Article 50, the last sentence of Article 52(b), the last sentence of Article 55(1)(ii), the first subparagraph of Article 70(1), and the penultimate sentence of Article 71(1)(b)(ii);

(b) implementing Regulation: Articles 34(1) and 120(2);

the rate of conversion into a national currency of amounts shown in another national currency shall be the rate calculated by the Commission and based on the monthly average, during the reference period defined in paragraph 2, of the exchange rates of those currencies, which are notified to the Commission for the purposes of the European monetary system.

2. The reference period shall be:

— January for rates of conversion applicable from 1 April following,

— April for rates of conversion applicable from 1 January following,

— July for rates of conversion applicable from 1 October following,

— October for rates of conversion applicable from 1 January following.

3. The exchange rates to be used for the purposes of paragraph 1 shall be the rates notified to the Commission at the same time by the central banks for the calculation of the ECU within the framework of the European monetary system.

4. The date to be taken into account for determining the rates of conversion to be applied in the cases referred to in paragraph 1 shall be fixed by the Administrative Commission on a proposal from the Audit Board.

5. The rates of conversion to be applied in the cases referred to in paragraph 1 shall be published in the *Official Journal of the European Communities* in the course of the last month but one preceding the month from the first day of which they are to apply.

6. In cases not covered by paragraph 1, the conversion shall be made at the official rate of exchange on the day of payment both for the payment and refund of benefits.'

Article 107(1) has been amended by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2), but the change effected has no bearing on this case.

Decision No 140 of 17 October 1989 of the Administrative Commission of the European Communities on Social Security for Migrant Workers concerning the rate of conversion to be applied by the institution of a wholly unemployed frontier worker's place of residence to the last wage or salary he received in the competent State (OJ 1990 C 94, p. 4) provides as follows:

'1. For the combined application of the provisions of Articles 68(1) and 71(1)(a)(ii) of Regulation (EEC) No 1408/71 the institution of the place of residence of a frontier worker who is wholly unemployed shall convert into its currency the amount of the wage or salary received by the worker in the last employment he pursued in the competent State immediately prior to his becoming unemployed, by using the rate of conversion referred to in Article 107(1) of Regulation (EEC) No 574/72 applicable during the month in which the last wage or salary was received.'

(b) National law

Directive No 62-87 of 7 August 1987 of Union national interprofessionnelle pour l'emploi dans l'industrie et le commerce (hereinafter 'Unedic') provides as follows:

'Henceforth, the Assedic organizations must

— take account of the gross salary received on which contributions were payable, up to the ceiling applied in the unemployment insurance system of the place of employment under the legislation of the Member State in which the frontier worker was employed'.

2. *Background to the case*

Bernard Grisvard and Georges Kreitz, the plaintiffs in the main proceedings, were in gainful employment in the Federal Republic of Germany. They were, and still are, resident in France.

Mr Grisvard's contract of employment ended on 31 December 1988. That of Mr Kreitz ended on 30 September 1987. On those dates they became unemployed.

Association pour l'emploi dans l'industrie et le commerce de la Moselle (hereinafter 'Assedic') calculated the unemployment benefits paid to the two men on the basis of the pay that they had received in Germany, but applied the ceiling of the German unemployment insurance scheme.

In so doing, Assedic applied Unedic directive No 62-87 of 7 August 1987.

Mr Grisvard and Mr Kreitz challenged in the Tribunal de Grande Instance (Regional Court), Metz, the application of the ceiling and the exchange rate applied to the last remuneration which they had received in Germany.

3. *The national court's questions*

The Tribunal de Grande Instance de Metz (première chambre civile) (Regional Court, Metz, (First Civil Chamber)) referred the following two questions to the Court of Justice for a preliminary ruling by judgment of 26 June 1991:

'1. With regard to the determination of the legislation applicable to the contribution ceiling to be applied when calculating unemployment benefit for frontier workers:

Is Unedic Directive No 62-87 of 7 August 1987 compatible with Community law?

Is the determination of that ceiling governed by Article 68(1) or Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71?

2. With regard to the currency conversion rules applicable in respect of frontier workers:

What rules should be applied by the institution of the place of residence of a frontier worker who is unemployed for the conversion of the amount of the wage or salary received by that worker in the last employment he pursued in the Member State in which he was employed immediately prior to his becoming unemployed?

Must the rate of conversion referred to in Article 107(1) of Regulation (EEC) No 574/72 be applied in such a case?'

4. *Procedure before the Court of Justice*

The national court's judgment was received at the Court on 31 July 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were lodged:

on 18 November 1991, by Mr Grisvard and Mr Kreitz, represented by Mr Welschinger, advocate with rights of audience at the Cour d'Appel (Court of Appeal), Colmar;

on 19 November 1991, by Assedic and Unedic, represented by Messrs Lafarge-Flécheux-Revuz, advocates with rights of audience at the Cour d'Appel, Paris;

on 22 November 1991, by the German Government, represented by Ernst Röder, acting as Agent;

on 13 November 1991, by the Commission of the European Communities, represented by Maria Patakia, of the Legal Service, acting as Agent.

Upon 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 and to refer the case to the First Chamber.

## II — Written observations submitted to the Court

### *The first question*

As far as the first question is concerned, *Mr Grisvard* and *Mr Kreitz*, the plaintiffs in the main proceedings, basing themselves on the Court's judgment in Case 67/79 *Fellinger* [1980] ECR 535, interpret Article 68(1) of Regulation No 1408/71 as meaning that, in the case of a worker who is wholly unemployed, benefits should be calculated on the basis of the last wage or salary received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed.

Mr Grisvard and Mr Kreitz maintain that Article 68(1) has nothing to do with the actual calculation of the benefits. The calculation is governed by Article 71(1)(a)(ii) of Regulation No 1408/71. They consider that that article covers, among the various factors used in order to calculate unemployment benefits, also the rules of the country of residence relating to ceilings. Any ceilings applied in the country of employment are therefore irrelevant.

Mr Grisvard and Mr Kreitz consequently argue that the first question — reformulated as necessary — should be answered as follows:

'Article 71(1)(a)(ii) of Regulation No 1408/71 must be interpreted as meaning that, in the case of a frontier worker who is wholly unemployed, the competent institution in the Member State in which he is resident should calculate his unemployment benefits in accordance with the legislation of the Member State in which he is resident, including the rules governing the ceiling to be applied to his wage or salary'.

*Assedic* and *Unedic* submitted joint observations. They begin by recalling the context in which the provisions of Regulation No 1408/71 were adopted and their legal basis, namely Articles 48 and 51 of the EEC Treaty.

Assedic and Unedic point out that Regulation No 1408/71 is intended to establish the criteria for the application of the various legal systems and to distribute the burdens between the various national systems (judgment in Case 58/87 *Rebmann* [1988] ECR 3467, paragraph 9).

In their contention, Regulation No 1408/71 should respect the integrity of national social security legislation, since Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States (judgment in Case 313/86 *Lenoir* [1988] ECR 5391).

The regulation laid down the principle that migrant workers are to be subject to the legislation of a single Member State only, namely that in which they were last in gainful employment (Article 13; judgment in Case 302/84 *Ten Holder* [1986] ECR 1821; judgment in Case 192/87 *Vanhaeren* [1988] ECR 2411, paragraphs 10 and 11). That principle also applies to migrant workers (judgment in *Rebmann*, cited above, paragraph 13).

Article 71(1)(a)(ii) constitutes an exception to that principle: unemployment benefits payable to frontier workers who are wholly unemployed are paid in the territory of the State where they reside (judgment in Case 1/85 *Miethe* [1986] ECR 1837, paragraph 8).

Assedic and Unedic go on to argue that that exception was justified by the need to put the unemployed person in the most favourable circumstances for looking for a new job by enabling him to receive the assistance for finding new employment which is provided with unemployment benefit (judgment in *Miethe*, cited above, paragraph 16). It is also explicable in terms of social considerations (it is easier for the frontier worker to make himself available to the authorities of the State in which he resides than to those of the State in which he was employed) and practical efficacy (those authorities are better placed to make sure that the person concerned fulfils the requirements for eligibility for unemployment benefit). Attachment to the State of residence therefore appeared more appropriate and more in conformity with the interests of frontier workers (judgment in *Rebmann*, cited above, paragraphs 14 and 15).

In Assedic and Unedic's view, there are, however, limits to that exception to the general rule. It is implicitly based on the assumption that an unemployed frontier worker would find the conditions most favourable to the search for new employment in the Member State in which he is resident (judgment in *Miethe*, cited above, paragraph 17).

According to them, that assumption can therefore be overturned where the frontier worker has in exceptional circumstances maintained in the State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there (judgment in *Miethe*, cited above, paragraph 18).

Assedic and Unedic consider that Article 71 of Regulation No 1408/71 is not only an exception to the general rule enshrined in that regulation, but also the last barrier to the free movement of workers in the Community where the workers concerned are unemployed. Moreover, the regulation seeks to secure mobility of labour and hence to facilitate the search for employment in the various Member States (ninth recital in the preamble). Assedic and Unedic also refer to the right which in certain circumstances a migrant worker may have to elect between the Member State of residence and the host Member State (Article 71(1)(b)(ii); judgment in Case 227/81 *Aubin* [1982] ECR 1991, paragraph 19).

Assedic and Unedic doubt that linking the frontier worker to the public services of the

Member State in which he is resident is the best means of securing his return to work.

They also express doubts about the relevance of the social considerations and the considerations of practical efficacy put forward in order to justify this limitation of frontier workers' mobility.

They point out that when frontier workers are unemployed they tend to look for jobs which afford them the same advantages as their former job — that is to say, a job in the State where they were last employed and where the majority of them have established and organized their occupational links.

Assedic and Unedic go on to express concern about the consequences of the interpretation given to the judgment in *Fellinger*, cited above. According to that judgment, unemployment benefits should be calculated on the basis of the last wage or salary actually received in the Member State in which the frontier worker was employed. The result of this is that those benefits are pitched at a level which is substantially comparable with wages and salaries in the Member State in which they are resident and the workers concerned have no incentive to look for work in that State.

They contest the idea that the Member State in which the frontier worker is resident is the best placed to pay unemployment benefits (judgment in *Rebmann*, cited above, paragraph 14), in view of the difficulties involved in integrating parts of one set of legislation into another.

They point to the Court's case-law according to which Regulation No 1408/71 aims to subject migrant workers to the social security system of one Member State alone in order to *prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation* (judgment in *Ten Holder*, cited above, paragraph 19). The complete system of conflict rules laid down by that regulation divests the legislature in each Member State of the power to determine the ambit of its national legislation (*loc. cit.*, paragraph 21).

They argue that the Court has therefore decided, on the basis of Article 13 of Regulation No 1408/71, that a worker who ceases to carry on an activity in one 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 (judgment in *Ten Holder*, cited above).

Assedic and Unedic maintain that Article 13 is a provision of general scope which also applies to unemployment benefits. The connection with the Member State in which the frontier worker was employed must continue to exist where the activity or the employment relationship comes to an end.

They maintain that the Bundesversicherungsanstalt für Angestellte (Federal German insurance institution for employees) and the Commission share this view. They refer in this connection to the Report for the Hearing in *Rebmann* [1988] ECR 3471, at 3473, and to the operative part of the judgment in that case, where the Court held that the frontier worker should be subject to the legislation of the Member State in which he was last employed.

However, a frontier worker is sometimes subject at the same time to the legislation of the Member State in which he is resident when he ceases his activity, especially as regards unemployment benefits, when the period of unemployment is directly linked to the preceding period of activity. Assedic and Unedic criticize that ancillary connection with the Member State of residence; it results in the payment of unemployment benefits being dissociated from taking into account periods of unemployment for the purpose of calculating pension rights (which falls to the Member State of employment), while disregarding completely frontier workers' economic and social rights.

Assedic and Unedic therefore challenge the idea that the attachment to the Member State of residence in accordance with Article 71(1)(a)(ii) is more appropriate and more in conformity with frontier workers' interests. In their view, that solution is not consistent with the aims of Articles 48 and 51 of the EEC Treaty.

Assedic and Unedic consequently propose that the national court's first question be answered as follows:

'So long as Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71 remains as a provision derogating from the general rule governing competence laid down by Article 13(2)(a) of that regulation, reference should be made, as regards the methods for calculating unemployment benefits, to the literal interpretation of the — also derogating — provisions of Article 68(1)'.

According to the *German Government*, unemployment benefits paid to frontier workers should be calculated on the basis of the ceilings applied in the Member State in which the frontier worker is resident and not on the basis of those in which was employed.

It points out that, by virtue of Article 13(2)(a) of Regulation No 1408/71, the legislation of the State in which the worker was employed is applicable to migrant workers. Article 68 applies that principle to unemployment benefits (judgment in Case 145/84 *Cochet* [1985] ECR 801, paragraphs 13 and 14).

In contrast, Article 71(1)(a)(ii) of Regulation No 1408/71 is an exception to the principle applicable to unemployed frontier workers whereby reference is made to the legislation of the Member State of residence for the purpose of calculating benefits (see, as regards Article 71(1)(b)(ii), the judgment in Case 39/76 Mouthaan [1976] ECR 1901, paragraphs 12 to 15).

Use of the ceilings of the State of residence rather than those of the State of employment is necessary, in the German Government's view, because Article 71 does not lay down any limitation to reference to the legislation of the State of residence. That interpretation, it maintains, is consonant with the aims of that provision: frontier workers are to be treated in the same way as workers who reside and work in the State of residence. Each Member State is — subject to the exception covered by the judgment in *Miethe*, cited above, — to be responsible for the unemployed resident in its territory, irrespective as to whether they carried out their last activity in the Member State in question

or, as frontier workers, in a neighbouring State.

In the German Government's view, Article 68(1) does not derogate from that rule as regards the wage or salary on which the benefits are based: the benefits are to be calculated on the basis of the wage or salary received in the Member State of employment, without having regard to any ceiling applied in that State.

The practice followed by the German authorities is moreover consonant with that interpretation: the employment offices notify to their foreign counterparts the total wage or salary, without taking account of the German ceilings. In the opposite case (that of unemployed frontier workers resident in Germany), the employment offices pay only unemployment benefits corresponding to wages and salaries to which the German ceilings have been applied.

The *Commission* first points out that the Court does not have jurisdiction to rule on provisions of national law in the light of Community law and has the power only to provide the national court with the criteria for the interpretation of the Community provisions which might be useful to it in assessing the effects of those provisions.

The Commission goes on to recall the doubts arising from the application of Article 68 to frontier workers. If Article 68 were given a literal interpretation, the result would be that the unemployment benefits paid to those workers would be calculated on the basis of the last wage or salary which they had received in the Member State of residence. As that last wage or salary might date from quite a long time ago (for example, where a frontier worker had worked in the State of residence only at the beginning of his career), that literal interpretation would have unfavourable consequences for those workers.

The Commission states that the Court rejected that literal interpretation in the judgment in *Fellinger*, cited above, when it decided that the last employment used to calculate frontier workers' unemployment benefits was that carried out in the Member State of employment. The Commission recalls the reasoning by which the Court reached that conclusion: Article 68 appears amongst the common provisions of Chapter 6 of Title III of Regulation No 1408/71 and therefore refers to the ordinary case of the worker who is employed and resident in the same State. However, by definition, that is not the case with frontier workers. Moreover, if the second sentence of Article 68(1) were to be applied to frontier workers, it would subject them to an exceptional regime which would deprive them of the benefit of unemployment benefits based on the wage or salary which they had actually received, which could run counter to the requirements of the free movement of workers.

The Commission considers that the wording of Article 71(1)(a)(ii) clearly establishes that a wholly unemployed frontier worker is entitled to benefits in accordance with the provisions of the State of residence, including the rules on ceilings applicable to wages and salaries. The wage or salary actually received in the State of employment constitutes a factual datum, which is used simply as the basis for calculating the benefits

payable to the unemployed person (which is completely irrelevant where the legislation grants flat-rate benefits).

Consequently, the Commission considers that, for the purposes of calculating unemployment benefits, the applicable legislation is that of the State of residence, including its rules on ceilings.

The Commission suggests that the reply to the first question should be as follows:

'Article 71(1)(a)(ii) of Regulation No 1408/71 should be interpreted as meaning that the calculation of unemployment benefits — including the rules on ceilings — for wholly unemployed frontier workers should be carried out exclusively in accordance with the legislation of the State in which the frontier worker is resident.

Article 68(1) of Regulation No 1408/71 relates solely to the determination of the wage or salary which has to be taken into account with a view to the calculation which has to be carried out pursuant to Article 71(1)(a)(ii) exclusively in accordance with the legislation of the State in which the frontier worker is resident.'

*The second question*

As regards the second question, *Mr Grisvard* and *Mr Kreitz* consider that the benefits payable to them should be calculated on the basis of the remuneration which they received, converted at the official exchange rate on the day of payment of the benefits.

They maintain that Decision No 140 of 17 October 1989 of the Administrative Commission of the European Communities on Social Security for Migrant Workers should be annulled for three reasons.

In the first place, the plaintiffs in the main proceedings consider that the decision does not contain a statement of reasons, which is insufficient for it to be held to be invalid.

Secondly, it conflicts with Article 107(6) of Regulation No 574/72, which expressly provides that conversion is to be effected at the official rate of exchange on the day of payment of the benefits.

Thirdly, the plaintiffs in the main proceedings consider that that conversion method conflicts with a principle of fairness enshrined in French case-law (they refer to a judgment of the French Cour de Cassation, chambre des requêtes, of 17 February 1937, *Gazette du Palais*, 1937, p. 853), according to which conversion as at the actual date of payment is the only way of satisfying the creditor's rights. In their view, that principle of fairness should be complied with *a fortiori* given that the persons to whom the sums are due are in this case wholly unemployed frontier workers.

Mr Grisvard and Mr Kreitz therefore propose that the second question, reformulated as necessary, should be answered as follows:

'— Decision No 140 of 17 October 1989 of the Administrative Commission of the European Communities on Social Security for Migrant Workers is invalid.

— Article 107(6) of Regulation No 574/72 should be interpreted as meaning that, in the case of a wholly unemployed frontier worker, the competent institution of the Member State in which the worker is resident should calculate the benefit having regard to the official exchange rate of exchange on the day of payment of the benefits.'

*Assedic* and *Unedic* have not set out any specific arguments with a view to the answer to be given to the second question. In the alternative, they propose that it should be answered as follows:

'So long as Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71 remains, for the purposes of the combined application of Article 68(1) and Article 71(1)(a)(ii) of that regulation, the institution of the place of residence of a wholly unemployed frontier worker should convert into its currency the amount of the wage or salary received by that worker in respect of his last employment in the competent Member State before he became unemployed at the conversion rate referred to in Article 107(1) of Regulation (EEC) No 574/72 which was applicable during the month in which the last wage or salary was received.'

As far as the national court's second question is concerned, the *German Government* proposes that the rate of exchange determined by the Commission in accordance with Article 107(1) of Regulation No 74/72 should be applied. Although that provision does not refer to Article 71(1)(a) of Regulation No 1408/71, it considers that the following arguments militate in favour of applying the rate thus determined: it is published in the Official Journal in accordance with Article 107(5); it is uniformly valid in all Member States and sufficiently known; since it is valid for a three-month period, it enables unemployment benefits to be calculated and disbursed quickly.

As regards the national court's second question, the *Commission* takes the view that it essentially asks the Court to specify the terms for the application of Decision No 140 of the Administrative Commission of the European Communities on Social Security for Migrant Workers. That decision was necessitated by the judgment in *Fellinger*, cited above, which is expressly mentioned in its preamble.

With effect from that judgment, the authorities in States in which frontier workers are resident have had to calculate unemployment benefits on the basis of the last wage or salary received in the Member State in which they were employed, which was inevitably denominated in a currency other than that of

the Member State of residence. For the purposes of converting wages or salaries expressed in the currency of the State of employment, Decision No 140 provides that the rate referred to in Article 107(1) of Regulation No 574/72 should apply. That rate is the average rate for a reference month (x) published in the Official Journal in the following month (x +1) and applies for the next quarter (that is to say, months x +3, x +4 and x +5). The reference months (x) are January, April, July and October.

Decision No 140 came into force on 1 April 1990. Although it is not retroactive, the Commission considers that it should apply in this case. Article 107 of Regulation No 574/72 is intended to apply to all conversions effected in connection with Regulations Nos 1408/71 and 574/72. It is simply that the eventuality covered by the judgment in *Fellinger* had not been envisaged.

Admittedly, the Court has refused to hold that measures of the Administrative Commission are capable of having the force of law or of binding the national authorities (judgment in Case 98/80 *Romano* [1981] ECR 1241, paragraph 20 and operative part). However, in the judgment in Case 238/81 *Van der Bunt-Craig* [1983] ECR 1385, paragraph 24, the Court cited a decision of the Administrative Commission in support of its interpretation of Article 107.

Lastly, the Commission states that it is proposed to amend Article 107 in accordance with Decision No 140 so as to remedy the lacuna which the initial draftsmen of that article had overlooked (OJ 1991 C 219, p. 5).

The Commission proposes that the second question should be answered as follows:

'The conversion rate referred to in Article 107(1) of Regulation (EEC) No 574/72 applicable during the month in which the last wage or salary was received must be applied when converting the amount of the last wage or salary received by a wholly unemployed frontier worker with a view to calculating the amount of unemployment benefits within the meaning of Article 71(1)(a)(ii) of Regulation (EEC) No 1408/71.'

G. C. Rodríguez Iglesias
Judge-Rapporteur