OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 27 February 2003 [1]

I — Introduction

1. By this action, the Commission seeks a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [2] (hereinafter 'the Regulation').

2. The Commission's allegations concern the refusal of Netherlands employment authorities — upheld by the highest national courts — to allow wholly unemployed frontier workers resident in the Netherlands the possibility of going to another Member State in order to seek work while retaining their entitlement to unemployment benefits.

1 — Original language: German.

2 — OJ, English Special Edition 1971 (II), p. 416.

II — Regulation No 1408/71

3. The 14th and 25th recitals in the preamble state:

'... it is necessary to lay down specific rules, in particular in the field of sickness and unemployment, for frontier workers and seasonal workers, taking account of the specific nature of their situation;

... it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject'.

Article 1 states:

'Definitions

...

(o) "competent institution" means:

...

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated,...

(q) "competent State" means the Member State in whose territory the competent institution is situated'.

Article 69(1) and (2) of the Regulation states:

'Conditions and limits for the retention of the right to benefits

1. A worker who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the conditions and within the limits hereinafter indicated:

(a) before his departure, he must have been registered with the employment services of the competent State as a person seeking work and must have remained available for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organised therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

2. 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.'

Article 70(1) states:

'In the cases referred to in Article 69(1), benefits shall be provided by the institution of each of the States to which an unemployed person goes to seek employment.

The competent institution of the Member State to whose legislation a worker was subject at the time of his last employment shall be obliged to reimburse the amount of such benefits.'

Article 71(1)(a)(ii) states:

'1. An unemployed person who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) ...

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; the institution of the place of residence shall provide such benefits at its own expense'.

III — Facts, pre-litigation procedure and judicial proceedings

4. In the Netherlands, wholly unemployed frontier workers who receive unemployment benefits (hereinafter 'benefits') because they are resident in the Netherlands are refused continued payment of these benefits for so long as they remain in another Member State in order to seek employment. This administrative practice of the Netherlands authorities has been held by the highest national court to be compatible with the Regulation.

5. As the Commission formed the view that the Regulation was not being properly applied in the Netherlands, it sent the Netherlands Government formal notice on 29 May 1998, requiring a response within two months.

6. After the Netherlands Government's response of 2 October 1998 failed — in the Commission's view — to allay suspicion that the Kingdom of the Netherlands was failing to fulfil its obligations, the Commission sent the latter a reasoned opinion on 30 July 1999, claiming that its refusal to allow wholly unemployed frontier workers in receipt of benefits due to their residence in the Netherlands to continue to receive benefits while seeking employment in other Member States was in breach of Articles 69 and 71 of the Regulation, and demanding that the Kingdom of the Netherlands adopt the necessary measures within two months. The Netherlands Government responded in writing on 8 October 1999.

7. As the Commission concluded that the Kingdom of the Netherlands had not fulfilled its obligations, it brought an action against the Kingdom of the Netherlands in accordance with Article 226 EC on 7 August 2001, the action being registered at the Court of Justice on the same day.

8. The Commission claims that the Court should:

(1) declare that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under 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,

to self-employed persons and to members of their families moving within the Community of seeking employment in one or more other Member States while retaining entitlement to unemployment benefit under the conditions laid down in that article, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the Regulation;

(2) order the Kingdom of the Netherlands to pay the costs of the proceedings.

IV — The failure to fulfil obligations

A — *Submissions of the parties*

9. The Commission takes the view that the Regulation provides for the competent institution of the State in which the worker concerned is resident (hereinafter 'the State of residence') to apply Articles 71(1)(a)(ii) and 69 of the Regulation (hereinafter 'Article 71(1)(a)(ii)' and 'Article 69') cumulatively.

10. The Commission refers first to the wording of Article 71(1)(a)(ii), from which it follows that a wholly unemployed frontier worker is fully integrated into the regime of the State of residence and has an original entitlement ('een originaire aanspraak') to benefits in that Member State. The only competent institution within the meaning of Article 1(o)(ii) of the Regulation is thus that of the State of residence. The same can also be said for the application of Article 69.

11. The Commission relies further on the wording of Article 69, which refers in paragraph (1)(a) to a 'competent State' and in paragraph 1(b) and (c) to 'the State [which] he left'. Since the State from which a wholly unemployed frontier worker has departed is the State of residence, the latter is also the competent State for the grant of rights under Article 69.

12. The Commission rejects any reliance on the judgments in *Cochet* [3] and *Huijbrechts*, [4] from which the Netherlands Government concludes generally that, for wholly unemployed frontier workers, the State in which he was last employed (hereinafter 'the State of employment') remains the competent State. According to the Commission, in the cases cited the Court only established that the general rule providing for competence of the State of employment pursuant to Article 13(2)(a) of the Regulation is displaced by Article 71(1)(a)(ii), but will apply again if the wholly unemployed frontier worker subsequently settles in the State of employment. It follows from these two judgments, in conjunction with the judgments of the

3 — Case 145/84 [1985] ECR 801.
4 — Case C-131/95 [1997] ECR I-1409.

Court in *Miethe*, *De Laat*, and *Grisvard and Kreitz*, [5] that, as far as wholly unemployed frontier workers are concerned, only the State of residence is in principle responsible for providing these benefits.

13. In the opinion of the Commission, Article 71(1)(a)(ii) creates a legal fiction as to the conditions for receipt of benefits. A similar fiction is also contained in Article 67 of the Regulation, which requires periods of insurance or employment in other Member States to be taken into account. An unemployed person who receives benefits only on the basis of this fiction can, however, undoubtedly rely upon the application of Article 69. So Article 69 must also apply to benefits granted pursuant to Article 71(1)(a)(ii).

14. The Commission also relies on the 25th recital in the preamble to the Regulation and on the settled case-law [6] of the Court. In particular, the Commission argues, it follows therefrom that the Regulation prohibits interference with frontier workers' job-seeking, or their taking up of employment, on the basis of their special situation, or the application of the Regulation in such a way that frontier workers are disadvantaged.

15. In so far as the Netherlands Government argues that the institution of the State of residence thus ends up bearing the entire burden of payment of the benefits, without receiving any contributions, the Commission refers to the decision in *Van Gestel*. [7] It was found in that case that the Community legislature had deliberately structured the allocation of the burden in this way, in an effort to give the unemployed the best chance of finding employment in the State of residence.

16. As to the Commission's proposal in 1980 for the amendment of Article 69, upon which the Netherlands Government relies, the Commission states that this proposal was made more than 20 years ago, and the Court had not ruled authoritatively on the interpretation of Article 71(1)(a)(ii) at the time of the proposal. Furthermore, the proposals made at that time were withdrawn in their entirety, and the proposal to amend Article 69 to which the Netherlands Government alludes was not included in the most recent proposal for the amendment of the Regulation. [8]

17. The *Netherlands Government* is of the view that wholly unemployed frontier workers who receive benefits in the State of residence pursuant to Article 71(1)(a)(ii) cannot simultaneously invoke Article 69 in order to continue to receive benefits while seeking employment in another Member State.

5 — Case 1/85 *Miethe* [1986] ECR 1837, Case C-444/98 *De Laat* [2001] ECR I-2229 and Case C-201/91 *Grisvard and Kreitz* [1992] ECR I-5009.

6 — Case 39/76 *Mouthaan* [1976] ECR 1901, Case 227/81 *Aubin* [1982] ECR 1991, Case 92/63 *Nonnenmacher* [1964] ECR 281, Case 58/87 *Rehmann* [1988] ECR 3467, Case C-215/00 *Rydergård* [2002] ECR I-1817, *Miethe* (cited in footnote 5), *De Laat* (cited in footnote 5) and *Grisvard and Kreitz* (cited in footnote 5).

7 — Case C-454/93 [1995] ECR I-1707.

8 — CNS 96/0004 (OJ 1996 C 68, p. 11).

18. The State of residence is not the competent State for the purposes of Article 69(1). It follows from the wording of Article 71(1)(a)(ii) and the judgments in *Cochet*, *Huijbrechts*,[9] *Bonaffini and Others*[10] and *Testa and Others*[11] that the competent State before and during a period of unemployment is the State of employment alone.

19. The entitlement to benefits is not an original entitlement in the State of residence. Rather, benefits are merely calculated according to the legislation of the State of residence and provided at its expense. Such a situation is not alien to the terms of the Regulation. As the Court has already determined in its judgment in *Rebmann*,[12] it is entirely conceivable that a wholly unemployed frontier worker receiving benefits pursuant to Article 71(1)(a)(ii) should be simultaneously subject to the legislation of the State of residence and to that of the State of employment.

20. The principle of legal certainty also favours the argument that the competent State for the purposes of Article 69 is the State of employment alone. Otherwise the term 'competent State' would have different meanings within the same regulation, depending on whether it is being applied to wholly unemployed frontier workers or to wholly unemployed persons living in the State of employment.

21. The 25th recital in the preamble to the Regulation also indicates that wholly unemployed frontier workers cannot export benefits from the State of residence when seeking employment. There is express reference to benefits which an unemployed person receives in accordance with the legislation of the Member State 'to which he was last subject', thus to benefits from the State of employment.

22. Further, there is express reference in the heading of Section 2 of Chapter 6, which includes Article 69, to unemployed persons going to a Member State other than the 'competent State'. *Cochet* and *Huijbrechts*[13] established, however, that the competent State is the State of employment.

23. Besides, the term 'competent State' is defined in Article 1(q) of the Regulation in such a way as to mean whichever Member State the competent institutions are situated in. What is a competent institution is determined not by Regulation No 1408/71

9 — Cited in footnotes 3 and 4.

10 — Case 27/75 [1975] ECR 971.

11 — Joined Cases 41/79, 121/79 and 796/79 [1980] ECR 1979.

12 — Cited in footnote 6.

13 — Cited in footnotes 3 and 4.

but by Regulation (EEC) No 574/72 [14] (hereinafter 'the Implementing Regulation'). The institution of the State of residence is, aside from provisions relating to other social security benefits, [15] expressly referred to in the Implementing Regulation as the 'competent institution' only in Article 84 in relation to unemployment benefits for wholly unemployed frontier workers. This article, however, relates only to the implementing provisions for aggregating periods of insurance (Article 80 of the Implementing Regulation on the application of Article 67 of the Regulation), thus not to the application of Article 69.

24. It follows from *Testa* [16] that Article 69 contains a special provision which gives those affected certain advantages. These advantages are the exception and may, therefore, be granted only in the strict conditions provided for in Article 69. This follows also from *Bonaffini*. [17]

25. It may, moreover, be inferred from *Bastos Moriana and Others* [18] that Article 69 can be applied only in the case of unemployed persons who can claim benefits by the direct application of national legislation, and not in the case of wholly unemployed frontier workers whose claim derives from Article 71(1)(a)(ii).

26. Nor is the inapplicability of Article 69 in the case of wholly unemployed frontier workers inconsistent with the purpose of the rules on freedom of movement (Article 39 EC et seq.).

27. For it follows from the Court's case-law that Article 71(1)(a)(ii) serves to facilitate the wholly unemployed frontier worker's search for employment in the State of residence, because this seems to have the best prospects. In exercising the rights given in Article 69, these unemployed persons would lose just those conditions which give the search for employment its best prospects.

28. In addition, those concerned would not forfeit any social security entitlement which they would have had if they had not exercised their right to freedom of movement. The Court determined in *Petroni* [19] that only the loss of benefits to which unemployed persons would be entitled

14 — Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159).

15 — Article 19a(2), the second paragraph of Article 23, Article 31(2) and Article 93(2).

16 — Cited in footnote 11.

17 — Cited in footnote 10.

18 — Case C-59/95 [1997] ECR I-1071.

19 — Case 24/75 [1975] ECR 1149.

under national law would be incompatible with the purpose of the rules on freedom of movement. Here, however, the entitlement to benefits arises under the Regulation.

29. In any event, the Commission's legal analysis is inconsistent with the second subparagraph of Article 70(1) of the Regulation. This governs the reimbursement of benefits paid to an unemployed person by the institution of the Member State in whose territory employment is being sought in exercise of the rights granted by Article 69. It is expressly laid down in this provision that reimbursement is to be made by the institution of the Member State to whose legislation the unemployed person was subject 'at the time of his last employment'. In accordance with Article 13(2) of the Regulation, this Member State is the State of employment. Otherwise the institution of the State of residence would, in the event of Article 69 being applied to wholly unemployed frontier workers, have to bear the full burden, even though the unemployed person concerned may possibly never have paid contributions to that institution.

30. Finally, the Netherlands Government refers to the historical background. No provision akin to Article 69 was included in the Regulation's predecessor, and it was introduced in 1971 only after difficult negotiations. The Commission's proposal for amendment in 1980 envisaged the addition of a new Article 69(4), which would have established that Article 69 also applies to wholly unemployed frontier workers receiving benefits in the State of residence. This means that the current version does not so provide. Subsequent amendments to the Regulation do now mean that the legislation of the State of residence is uniformly relevant, in the case of wholly unemployed frontier workers, to old-age, sickness, invalidity and family benefits. The Community legislature did not, however, add any corresponding provisions in respect of benefits to be paid pursuant to Article 69.

B — *Legal Assessment*

31. Although not expressly pleaded in such terms, the parties' submissions clearly take as their starting point two legal issues that must be examined consecutively: Is *Article 71(1)(a)(ii) of the Regulation* to be interpreted as meaning that the legislation of the State of residence relevant to the receipt of unemployment benefits is to be applied, rather than that of the State of employment, even if the wholly unemployed frontier worker is seeking employment in another Member State? If so, is *Article 69 of the Regulation* to be interpreted as applying also to the search for employment by wholly unemployed frontier workers, and thus superseding the legislation of the State of residence applicable under Article 71(1)(a)(ii)?

1. The question of the interpretation of Article 71(1)(a)(ii) of the Regulation

(a) General points on the competence of a Member State in respect of benefits for wholly unemployed frontier workers

32. The parties have debated the question of the interpretation of Article 71(1)(a)(ii) first of all as a problem concerning the competence of the State of residence.

33. The competence of a Member State for granting social security benefits within the scope of the Regulation is not, as the Netherlands Government argues, determined by Article 1(q) of the Regulation. For this provision merely refers to Article 1(o)(ii) of the Regulation, according to which it is the Member State in whose territory the competent institution is situated that is competent. Article 1 of the Regulation does not say which institution is the competent institution.

34. Nor is competence determined by the designation of a competent institution in the Implementing Regulation, for the Implementing Regulation simply gives concrete expression to the provisions of the Regulation.

35. The competence of a Member State is established purely through Titles II and III of the Regulation itself. These include first the general rules, followed by special provisions for the different types of social security benefit. Competence for certain special cases, such as frontier workers, is determined by the special provisions.

36. The general rule determining competence for workers is contained in Article 13(2)(a) of the Regulation. This provides that the State of employment is generally competent.

37. In relation to unemployment benefits, the rule applicable to wholly unemployed frontier workers, in the form of Article 71(1)(a)(ii), represents a departure from the general rule and provides that those concerned receive benefits only from the institution of the State of residence in accordance with the legislation of that State. This provision does not, however, refer to 'competence' of the State of residence, but to the fact that frontier workers 'shall receive benefits in accordance with the legislation of the [State of residence]'.

38. The parties have different opinions as to the function accorded to the legislation of the State of residence by Article 71(1)(a)(ii).

(b) Interpretation of Article 71(1)(a)(ii) of the Regulation in relation to the function of the legislation of the State of residence

39. The Commission is clearly of the view that the entitlement of wholly unemployed frontier workers to benefits on the basis of Article 71(1)(a)(ii) derives directly from the legislation of the State of residence. According to this view, there is thus a *change of governing law* and the legislation of the State of residence forms the legal basis for benefits and the means of determining them (hereinafter 'change of law theory').

40. The Netherlands Government, on the other hand, is of the view that wholly unemployed frontier workers are subject, in the context of the application of Article 71(1)(a)(ii), to the legislation of both the State of residence and the State of employment. According to this view, it is a case of *benefits exportation*, whereby the entitlement to benefits rests on the legislation of the State of employment, and the legislation of the State of residence is only a means of determining the benefits (hereinafter 'exportation theory').

41. It may be concluded from the parties' submissions that they attribute the following meaning to the difference of view.

42. Under the change of law theory, the legislation of the State of residence alone would apply, but would be incompatible with Article 69 which is directly applicable and takes precedence. [20]

43. Under the exportation theory, on applying Article 71(1)(a)(ii) a wholly unemployed frontier worker would be simultaneously subject to the legislation of the State of residence and to that of the State of employment. The legislation of the State of residence would, therefore, take precedence over the legislation of the State of employment merely for the purpose of granting benefits. The legislation of the State of residence would be applied only in so far as it assists the search for employment in the State of residence. If employment is sought in a Member State other than the State of residence, the reason for exportation of benefits would cease, and only the legislation of the State of employment would apply. Viewed thus, the question of applying Article 69 would no longer arise as far as the State of residence is concerned.

20 — This is the case, however, only if it cannot be concluded from Article 69 itself that that provision is not to apply to wholly unemployed frontier workers — see point 73 et seq.

(i) The interpretation of Article 71(1)(a)(ii) of the Regulation on the basis of the relevant representations of the parties

The wording of Article 71(1)(a)(ii)

44. Both parties refer first to the wording of Article 71(1)(a)(ii) in support of their respective legal views. However, the phrase '*receive* benefits *in accordance with the legislation* of the Member State in whose territory he resides *as though*' [21] constitutes only a very vague statement about the function of the legislation of the State of residence. This formulation does not show sufficiently clearly that the legislation of the State of residence provides the legal basis for the benefits, or that it is intended to be only a means of determining the benefits. Language versions of Article 71(1)(a)(ii) other than the German version, such as, for example, the version in the language of the proceedings — Dutch — as well as the English, French and Spanish versions, do not provide a clear conclusion of one sort or another.

21 — Emphasis added.

The wording of other provisions in the Regulation

45. The Netherlands Government relies also on the wording of the second subparagraph of Article 70(1), which places the financial burden of applying Article 69 on the 'competent institution of the Member State to whose legislation a worker was subject at the time of his last employment'. This wording appears to confirm the exportation theory put forward by the Netherlands Government in so far as it provides for the legislation of the State of employment to be applied when employment is being sought in another Member State, and thus also in the case of wholly unemployed frontier workers.

46. The second subparagraph of Article 70(1), however, only determines which Member State's institution should ultimately bear the cost of benefits during the search for work in another Member State. [22] It is not possible to draw from that provision general conclusions about the function of the legislation of the State of residence in connection with Article 71(1)(a)(ii).

22 — The provision does not, however, govern the obligations of Member States under Article 69 towards unemployed persons (e.g. the issue of the necessary E303/0 — E303/5 certificates in accordance with Article 83 of the Implementing Regulation).

47. Nor is it possible, in my view, to draw any conclusion as to the question in issue here from the wording of the heading for Article 69 et seq. of the Regulation, which reads: 'Unemployed persons going to a Member State other than the competent State'. The State of residence would be the 'competent State' only if it could be considered that Article 71(1)(a)(ii) of the Regulation is to be understood in terms of the change of law theory,[23] which is precisely what is in issue.

48. To support the exportation theory, the Netherlands Government refers finally to the wording of the 25th recital in the preamble to the Regulation, which explains the purpose of Article 69. However, this recital too does not indicate a solution to the question of what Article 71(1)(a)(ii) states with regard to the function of the legislation of the State of residence. For the 25th recital refers only in general terms to the grant to unemployed persons of benefits 'provided for by the legislation of the Member State to which [the unemployed worker] was last subject'. This could, however, mean the legislation of the State of employment which applied during the last period of employment and the legislation of the State of residence which applied after the unemployment began — immediately before the search for work in a Member State other than the State of residence. Thus, it is impossible to conclude from the 25th recital that the Community legislature would have considered — in accordance with the exportation theory — that only the legislation of the State of employment would be applicable in the case of search for work in a Member State other than the State of residence.

The proposals to amend the Regulation

49. In so far as the Netherlands Government relies, in relation to Article 71(1)(a)(ii) and in support of its exportation theory, on the history of the Regulation, on the amendment proposal of the Commission in 1980 which is no longer applicable and on the last amendment proposal of 1996,[24] the following must be stated by way of response. The introduction of Article 69 may indeed have been contentious as between Member States. However, given the broad wording of the 25th recital referred to above, it appears that it cannot be concluded that the Community legislature proceeded on the basis that Article 69 of the Regulation was not to be applied to benefits for wholly unemployed frontier workers.

50. The provision expressly applying Article 69 to benefits for wholly unemployed frontier workers, which was included in the amendment proposal in 1980, but not in the latest amendment proposal, could perhaps have been

23 — See point 39 above.

24 — Cited in footnote 8.

intended simply for clarification purposes. Without further information about the Commission's reasons for putting forward the proposal in 1980 and its withdrawal, this, by itself, cannot be used to support the exportation theory. That aside, the content of Commission amendment proposals no doubt cannot, by itself, have any significance, as a matter of principle, for the interpretation of the wording of a regulation decided on by the Council.

The case-law of the Court

51. The focal point of the legal dispute is the interpretation of the judgments of the Court in *Cochet* and *Huijbrechts*.[25] Both cases concerned wholly unemployed frontier workers who moved to what had previously been the State of employment after starting to receive benefits in the State of residence. In these cases, the Court determined that it was only the legislation of the State of employment that applied to the continued receipt of benefits, because 'Article 71(1)(a)(ii)... does not relieve the State where [the person concerned] was last employed... of its competence in principle'[26] and that 'those provisions of Article 71 do not affect the principle that the competent State is the State where that person was last employed'.[27]

52. The Court thus refers to the 'principle' of the competence of the State of employment. However, this already follows from the fact that the competence of the State of residence in accordance with Article 71(1)(a)(ii) is undoubtedly a special rule as opposed to the general competence of the State of employment under Article 13(2)(a) of the Regulation. A special statutory rule only ever takes precedence, however, if all the statutory preconditions laid down are met. This was not so (any longer) in either of the cases cited because the State of residence had been left. At the relevant time, it was only the 'general competence' of the State of employment that (still) obtained, as the State of residence and the State in which the frontier workers concerned were last employed had (again) become one and the same.

53. Those wholly unemployed frontier workers whose rights are in issue in the present infringement proceedings, however, remain resident in the State of residence, whose legislation is thus undoubtedly applicable in accordance with Article 71(1)(a)(ii). Thus the question remains open whether the function of the legislation of the State of residence under Article 71(1)(a)(ii) is to be interpreted in accordance with the change of law theory or the exportation theory, notwithstanding the judgments given in the cases referred to above.

54. Similar considerations apply in so far as the Netherlands Government relies on the

25 — Cited in footnotes 3 and 4.
26 — Cited in footnote 4, paragraph 26.
27 — Cited in footnote 3, paragraph 15.

judgments of the Court in *Bonaffini* and *Testa*.[28] Neither case concerned frontier workers, so that the interpretation of Article 71(1)(a)(ii), in so far as it is in issue in this case, was not the subject of those proceedings.

55. The Netherlands Government refers also to the judgment in *Rebmann*,[29] in which, in the Netherlands Government's view, the Court confirmed that, in the context of Article 71(1)(a)(ii) — in accordance with the exportation theory — wholly unemployed frontier workers may be simultaneously subject to the legislation of the State of residence and to that of the State of employment.

56. That case concerned the question of whether the legislation of the State of employment in relation to old-age benefits is overridden by the application of Article 71(1)(a)(ii), which, however, relates exclusively to unemployment benefits. The Court answered in the negative, on the basis that it is not possible to extend the special rules for frontier workers regarding unemployment benefits to the rules relating to benefits in other areas of social security, in that case to old-age benefits. In such cases, the national legislation of two Member States therefore applies simultaneously; they are not, however, comparable with the legal situation in issue here.[30]

57. The Commission relies on the judgments in *Miethe*, *De Laat* and *Grisvard and Kreitz*[31] in support of its (change of law) theory. In this regard, it must be stated that the Court did not have to consider the function of the legislation of the State of residence in relation to the application of Article 71(1)(a)(ii) of the Regulation in these three cases either.

58. In *Miethe* and *De Laat*, the only matter in issue was which provision of Article 71(1) should apply (Article 71(1)(a) or (b) and Article 71(1)(a)(i) or (ii)) and not the substance of Article 71(1)(a)(ii).

59. Grisvard and Kreitz concerned the calculation of benefits pursuant to Article 68 of the Regulation. Here the Court found:[32] 'Under the terms of Article 71(1)(a)(ii)... that article clearly requires the legislation of the Member State of residence alone to be applied and not, therefore, the legislation of the State of employment, including any rules it lays

28 — Cited in footnotes 10 and 11.

29 — Cited in footnote 6.

30 — Furthermore, it is apparent from the Regulation itself that it fundamentally allows for the possibility of exportation of benefits, resulting in the simultaneous application of two national legal orders. One example of this is how Article 69 normally applies. The legislation of the State which the worker leaves provides the legal basis for benefits, while the legislation of the Member State in which the worker seeks employment governs, to a certain extent, their determination.

31 — All cited in footnote 5.

32 — Cited in footnote 5, paragraph 16.

down on ceilings.' However, this passage of the judgment supports the change of law theory only ostensibly. The judgment must be seen in the particular context of the main proceedings, in which the calculation of the amount of benefits was in issue. *Grisvard and Kreitz* concerned the question whether, building on the judgment in *Fellinger*, [33] the legislation of the State of employment is also to be applied in relation to possible maxima for the salary to be taken into account. It was only in this respect that the Court found that Article 71(1)(a)(ii) 'clearly requires the legislation of the Member State of residence alone to be applied'. [34]

Interim conclusion

60. Since neither the wording of the relevant provisions of the Regulation, nor the Commission's amendment proposals, nor the case-law of the Court to which reference has been made provide sufficient clarity as to the interpretation of Article 71(1)(a)(ii) with regard to the function of the legislation of the State of residence, both interpretation theories must now be examined by reference to the purpose of the Regulation, in particular of the provision concerning frontier workers.

(ii) The interpretation of Article 71(1)(a)(ii) by reference to the purpose of the Regulation

61. Both parties recognise that the Regulation serves generally to facilitate the exercise by workers of the right to freedom of movement and cannot, therefore, be interpreted in such a way as to make the receipt of social security benefits more difficult or to result even in the loss of entitlement which workers would have but for application of provisions of the Regulation. [35] The main issue in these proceedings does not, in my view, require any detailed discussion of the parties' submissions in this regard. The interpretation of Article 71(1)(a)(ii) with regard to the function of the legislation of the State of residence cannot be resolved simply by reference to the avoidance of prejudice or the facilitation of freedom of movement.

62. Article 71(1)(a)(ii) thus cannot generally be seen simply as a provision of a social nature. Rather, the provision reflects the balancing by the Community legislature

33 — Case 67/79 [1980] ECR 535. In its judgment, the Court determined that for wholly unemployed frontier workers whose entitlement is ascertained by aggregating periods of insurance or of employment in accordance with Article 67 of the Regulation the assessment of benefits is to be based, in derogation from Article 68 of the Regulation, on the last salary paid in the State of employment.

34 — *Grisvard and Kreitz* cited in footnote 5, paragraph 16.

35 — *Petroni* (cited in footnote 19) and *Bastos Moriana* (cited in footnote 18).

of several interests (of wholly unemployed frontier workers, of the institutions concerned, and of the various national employment markets of Member States).

63. It is true that Article 71(1)(a)(ii) — as the Court too has already stated [36] — is also designed to make it *easier* for wholly unemployed frontier workers to find employment, in that the opportunities for doing so would generally seem to be greatest in the State of residence.

64. However, the associated obligation to make oneself exclusively [37] subject to the employment service of the State of residence during the search for work can be explained thereby only partly. Wholly unemployed frontier workers are essentially obliged, initially, to make themselves available to the employment service in the State of residence, even if the search for work has little prospect of success [38] given the state of the employment market in the State of residence. This means that the *employment market in the State of residence* in any event has first 'go' in relation to those seeking employment. Conversely, the worker cannot necessarily choose the employment service with the best prospects.

65. The rule concerning allocation of the burden of payment of benefits in Article 71(1)(a)(ii) doubtless also cannot be explained solely on the basis that workers' freedom of movement is to be promoted or prejudice avoided. It should normally be irrelevant for workers who exercise or have exercised freedom of movement who is to bear the burden of paying benefits in the event of unemployment. Besides allocation of the burden in individual cases is — as the Court has stated [39] — in the discretion of the Community legislature.

66. If it follows that the purpose of Article 71(1)(a)(ii) is to balance different interests, the question arises as to which of these interests militate in favour of the change of law theory, and which the exportation theory.

67. It is obvious that the advantage of the change of law theory is clarity of legal

36 — *Mouthaan* (cited in footnote 6).

37 — Unlike the 'genuine' frontier workers in this case, wholly unemployed 'non-genuine' frontier workers have a right of election in this respect (Article 71(1)(b)(ii) of the Regulation and *Miethe* (cited in footnote 5)).

38 — It is assumed that, as a rule, workers become frontier workers when the overseas employment market generally seems more attractive.

39 — *Van Gestel* (cited in footnote 7), paragraph 26: 'However, that is a consequence intended by the Community legislature which meant to ensure that workers were given the best chance of finding new employment.'

interpretation, which would benefit both wholly unemployed frontier workers and the institutions responsible for payment.

68. The exportation theory, on the other hand, appears only to serve the interests of the institutions in the State of residence, in that it calls into question the application of Article 69 by these institutions to wholly unemployed frontier workers (administrative processing, burden of payment of benefits). Article 69 admittedly concerns only exceptional circumstances (seeking work in another Member State), but it cannot be ruled out that the exportation theory in itself would affect the interpretation of Article 71(1)(a)(ii) as a whole. In applying this theory, the question could arise generally for wholly unemployed frontier workers whether certain social benefits which under national law are linked to drawing unemployment benefit under national legislation (e.g. housing benefit, local travel subsidies) are available to them. Since entitlement to benefits does not, under the exportation theory, depend on the legislation of the State of residence, but on that of the State of employment, it may not be clear whether the conditions for entitlement to such social benefits have been satisfied under national law. This legal uncertainty, to the detriment of wholly unemployed frontier workers, cannot be justified in my view, if only because of the balance of interests referred to.

69. Thus, there appear to be no grounds clearly supporting the exportation theory advocated by the Netherlands Government. The change of law theory advocated by the Commission, on the other hand, has the benefits of simplicity and legal certainty.

70. It must, therefore, be assumed that where all the relevant conditions under Article 71(1)(a)(ii) are met, an entitlement to benefits exists on the basis of the legislation of the State of residence, and these are to be provided in accordance with that legislation.

71. If, therefore, a wholly unemployed frontier worker seeking work goes to a Member State other than the State of residence, the legislation of the State of residence remains applicable to his benefits. This applies for so long as all the relevant preconditions under Article 71(1)(a)(ii) [40] are satisfied.

40 — In particular, the usual place of residence, in the sense of the focal point of one's life — see *Aubin* (cited in footnote 6).

2. The applicability of Article 69 of the Regulation to wholly unemployed frontier workers

72. If the legislation of the State of residence as a matter of principle remains applicable to wholly unemployed frontier workers even during the search for work in another Member State, the question still appears to remain as to whether *Article 69 of the Regulation* should be interpreted as applying also to the search for work by wholly unemployed frontier workers.

73. In this regard, it must first be examined whether Article 69 itself could contain possible indications of its inapplicability to wholly unemployed frontier workers. However, neither the wording of the heading of Section 2 of Chapter 6 nor the wording of Article 69(1) itself is inconsistent with the applicability of this article to wholly unemployed frontier workers.

74. Also, as has been explained, the legislation of the State of residence forms both the only legal basis for benefits and the means for determining them where Article 71(1)(a)(ii) is applied.

75. Finally, it may be assumed that Article 69 is also based on a balancing of interests of employees, of employment markets of the Member States affected and of the respective national institutions which provide unemployment benefits: [41] this balance of interests supports the application of Article 69 to wholly unemployed frontier workers.

76. First, the exercise of rights under Article 69 serves to help wholly unemployed *frontier workers* in their search for work, because it opens up additional employment opportunities, namely in another Member State. At the same time, the application of Article 69 to wholly unemployed frontier workers also serves to balance the interests of the various national *employment markets*. It is true that this balance may mean the loss of the advantage ('first go') under Article 71(1)(a)(ii) for the employment market of the State of residence as against other Member States, but, on the other hand, Article 69(1)(a) requires, as a precondition for searching for work in another Member State, that efforts to arrange employment should have been made for at least four weeks without success.

77. As far as *the allocation of the burden* is concerned, the following picture emerges: wholly unemployed frontier workers who are prevented from exercising their rights under Article 69 will tend, as a rule, not to embark on a search for work in another Member State if this means the loss of entitlement to benefits. If these unemployed

41 — See also above, point 61 et seq.

persons remain, however, in the State of residence, benefits must continue to be provided by the relevant institutions of the State of residence on the basis of the general competence under Article 71(1)(a)(ii). This means that not applying Article 69 to wholly unemployed frontier workers would hardly affect the allocation of the burden that is unfavourable to the institutions in the State of residence. On the other hand, it is precisely within the spirit of Article 69 that the duration of receipt of benefits in the competent Member State is reduced overall by extending the options for seeking work in other Member States. [42]

78. To summarise, therefore, it must be concluded that there appear to be no grounds precluding the application of Article 69 to wholly unemployed frontier workers.

V — Summary

79. Overall, it may be concluded, therefore, that on application of Article 71(1)(a)(ii) of the Regulation there is a change of governing law and the legislation of the State of residence alone forms the legal basis for, and the means of determining, unemployment benefits for wholly unemployed frontier workers. The legislation of the State of residence is thus also applicable where wholly unemployed frontier workers are temporarily resident in another Member State in order to seek work.

80. Article 69 applies to wholly unemployed frontier workers, and a Member State must support the search for work in another Member State in accordance with this provision if its preconditions are satisfied.

81. A Member State which refuses to pay unemployment benefits to wholly unemployed frontier workers who go to another Member State, in compliance with the conditions of Article 69 of the Regulation, in order to seek employment there, or whose institutions fail to take the measures necessary for the exercise of rights under Article 69 of the Regulation, is thus in breach of Article 71(1)(a)(ii) and Article 69 of the Regulation.

42 — It should also be noted that under Article 69(2) those affected lose their entire remaining entitlement to benefits if they do not make themselves available again to the employment service of the State of residence within three months.

VI — Conclusion

82. It is, therefore, recommended that the Court:

— declare that, by refusing to allow wholly unemployed frontier workers to make use of the possibility under 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, to self-employed persons and to members of their families moving within the Community of seeking employment in one or more other Member States while retaining entitlement to unemployment benefit under the conditions laid down in that article, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 69 and 71 of the Regulation;

— order the Kingdom of the Netherlands to pay the costs of the proceedings.