LEADING JUDGMENTS OF THE EUROPEAN COURT RELATING TO THE SOCIAL LAW OF THE COMMUNITY

by

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One of the tasks of the European Community (EEC) is to abolish, as between member-States, obstacles to the freedom of movement of workers.[1] Members have also undertaken to promote improved working-conditions and standard of living for workers, particularly in relation to labour law, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, the right of association and collective bargaining between employers of workers.[2] A European Social Fund has been created to make the employment of workers easier and 'to increase their geographical and occupational mobility within the Community'.[3] An Economic and Social Committee has been established with advisory status. It consists of representatives of the various categories of economic and social activity, in particular, producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and representatives of the general public.[4] Art. 119 provides that men and women shall receive equal pay for equal work. It appears that this social principle was first put forward by France, but lengthy negotiations were necessary before it was adopted. Although this provision raised no difficulty for those States which had ratified I.L.O. Convention No. 100 which, as the German Government pointed out in the *Bundestag*, covered essentially the same ground and, on some points, was worded in the same way as the draft article in question, three of the future member-States had not ratified that Convention because its implementation was liable to create serious difficulties in municipal law. The Convention has now been ratified by all the member-States of the EEC. The draft article also had an economic aim in that, by thwarting any attempt at 'social dumping' through the employment of female labour paid at lower rates than male labour, it furthered one of the fundamental objectives of the Common Market, namely, the setting up of a system which ensures that 'competition is

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1 E.E.C. Treaty, art. 3 (c) and art. 48.

2 Arts. 117-118.

3 Art. 123. The Fund assists with the cost of vocational retraining, resettlement allowances, and compensation for workers whose employment is reduced or temporarily suspended as a result of the conversion of an undertaking to other production: art. 125. The only case involving the European Social Fund, *Germany* v. *E.C. Commission* (2/71), was declared inadmissible: C.M.L.R. 11 (1972) 431.

4 Art. 193. The numerical composition of the Committee is set out in art. 194.

not distorted'.[5] In fact, the Belgian Government incorporated in Royal Decree No. 40 of 24 October 1967 on female employment the following s. 14: 'In accordance with article 119 of the EEC Treaty, approved by the Act of 2 December 1957, any female worker may bring before the appropriate court an action to ensure the implementation of the principle of equal remuneration of male and female workers'.

It so happened that the only case in which the Court has been asked to interpret art. 119 emanated from Belgium.[6] Miss Defrenne, an air-hostess with Sabena, was compulsorily retired on attaining the age of 40 years under a rule of the company affecting women employees. She brought an action before the labour tribunal of Brussels for unjustified dismissal and a separate action before the *Conseil d'Etat* for annulment of the Royal Decree of 3 November 1969 which lays down special rules for the pension rights of civil aircrews and discriminates against air-hostesses, basing her case on s. 14 of Royal Decree No. 40 set out above and on art. 119 of the EEC Treaty.[7] The *Conseil d'Etat* adjourned proceedings and referred the following questions to the Court under art. 177 for a preliminary ruling:

(a) Is the retirement pension granted under a social-security scheme financed by workers' and employees' contributions, as well as by State grants, an emolument indirectly paid by the employer to the worker and arising out of the latter's employment?

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5 *Cf.* arts. 117 and 118 which merely lay down general social objectives in respect of the harmonisation of municipal laws and co-operation between member-States in scme social matters such as social-security, employment and working conditions. Art. 119, on the other hand, imposes an obligation on members to apply the principle that men and women should receive equal pay for equal work. It is clear that art. 119 did confer specific rights on individual workers in member-States enforceable in their municipal courts.

6 *Defrenne* v. *Belgium* (80/70): C.M.L.R. 13 (1974) 494. See also *Defrenne* v. *Sabena* (43/75) C.M.L.R. 18 (1976) 98, in which it was held that the principle, that men and women should receive equal pay (art. 119), may be relied upon before national courts. The latter have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination originating in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether public or private. In *Defrenne* v. *Sabena* (149/77) 3 C.M.L.R. 23 (1978) 312, it was held that art. 119 did not include the requirement in general terms of equal working conditions for men and women, so that a clause bringing contracts of employment of female workers to an end when they reach the age of 40 years, where no such term affects the contracts of male workers, did not come within the provisions of art. 119. The Court said that it is clearly beyond doubt that the elimination of discrimination on grounds of sex is one of the fundamental rights which the Court must enforce. However, at the time of the facts giving rise to the main action and in respect of employment subject to national law there existed no rule of Community law prohibiting discrimination between male and female workers as regards working conditions other than the rules relating to pay in art. 119.

7 *Cf.* the position in France where air hostesses are entitled, on a footing of complete equality with other members of air crews, to both an old-age pension provided under the general social-security scheme and, from the age of 50, to a supplementary pension when they complete 15 years of service.

(b) Can the regulations prescribe different age-limits in respect of male and female members of aircrews of civil aircraft?

(c) Do air hostesses and stewards employed in civil aviation do the same work?

Under art. 119 of the Treaty, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Miss Defrenne contended that her exclusion under the Royal Decree of 3 November 1969 from the State pension rights of civil aircrews was contrary to the principle of equality in art. 119 of the Treaty because the pension forms part of the remuneration as defined in that article, the pension being an emolument indirectly payable by the employer.

The Court held, however, that,

> although payments in the nature of social security benefits are not excluded in principle from the concept of pay, it is not possible to include in this concept, as defined in art. 119, social-security schemes and benefits, especially retirement pensions, which are directly settled by law without any reference to any element of consultation within the undertaking or the industry concerned and which cover without exception all workers in general. These schemes provide workers with the advantages of a statutory system to the financing of which workers, employers and, in some cases, the authorities contribute in a manner which is determined less by relationships between employers and workers than by considerations of social policy. Consequently, the contribution falling on employers in the financing of such systems is not a direct or indirect payment to the worker. Furthermore, the latter is normally entitled to the benefits provided by law, not because of the employer's contribution but solely because of the fact that he complies with the statutory conditions required to qualify for the benefit. These characteristics are shared by special schemes which, within the framework of the statutory and general scheme of social security, cover in particular some groups of workers. It is therefore necessary to note that any discrimination that might result from the application of such a system falls outside the requirements of art. 119 of the Treaty.

In view of that reply to the first question, the other questions became irrelevant.

Article 48 of the Treaty — Free Movement of Workers

This article provides for the freedom of movement of workers within the Community and for the abolition of any discrimination based on

nationality between workers of the member-States as regards employment, remuneration and other conditions of work and employment.[8]

The Court held in *Ugliola* (15/69)[9] that a migrant worker, who is a national of one member-State and who has had to interrupt his employment in another member-State in order to do national military-service in his country of origin, is entitled to have the period of his military service taken into account in the calculation of his seniority in that employment to the extent that periods of military service spent in the country of employment are also taken into account for the benefit of national workers. In *Marsman* (44/72)[10] the question was whether a Dutch metal-worker, employed by a firm situated in the Federal Republic of Germany about 20 kms from his home, who met with an industrial accident which reduced his earning capacity by 60 *per cent*, could benefit from the special protection against termination of employment under s. 14 of the *Serious Injuries Act* 1953 (F.D.R.) when all the requirements for such protection were met save that of residence in the Federal Republic, this last condition being directed only at foreign workers and not German nationals. The Court held that art. 48 is,

> subject only to those reservations exhaustively enumerated in para. 3 concerning public order, safety and health. Community social law relies on the principle that each member-State must by law accord to all nationals of other member-States employed in its territory the same legal benefits as it accords to its own nationals. Thus, the prohibition of discrimination in art. 48 equally covers the special protection which, for social reasons, the legislature of a member-State accords to specific categories of workers.[11]

In *French Merchant Seamen: E.C. Commission* v. *France* (167/73)[12] it was held that by failing to repeal s. 3 of the Merchant Seamen Code 1926, which reserves certain kinds of employment on French ships to French citizens, even although administrative directions had been issued to disregard the provision in the case of Community nationals, France had failed to fulfil its obligations under art. 48. 'It follows from the general character of the prohibition on discrimination in art. 48 that discrimination is prohibited even if it constitutes only an obstacle of

8 Art. 48 (3) provides that the freedom of movement for workers 'shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of member-States for this purpose; (c) to stay in a member-State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a member-State after having been employed in that State, subject to conditions which shall be embodied in implementing Regulations to be drawn up by the Commission. The provisions of this article shall not apply to employment in the public service.' In *Sotgiu* (152/73), European Court Reports 20 (1974) 153, it was held that the exception in favour of employment in the public service applied equally whether the contract entered into by the public authority in question was governed by public law (civil servants) or private law.

9 C.M.L.R. 9 (1970) 194.

10 C.M.L.R. 12 (1973) 501.

11 Ibid, at p. 506.

12 C.M.L.R. 14 (1974) 216.

secondary importance as regards the equality of access to employment and other conditions of work.'[13]

Michel Scutari (76/72)[14] was somewhat similar. In 1957 an Italian worker and his family went to live in Belgium. He had a son, born in 1954, who suffered from severe mental-deficiency, apparently of congenital origin. A Belgian Law of 16 April 1963 created a National Fund for Social Rehabilitation of the Handicapped and a Royal Decree of 29 May 1968 extended the benefit of this law to foreign nationals on condition, *inter alia*, that they had established normal residence in Belgium before their disablement was first diagnosed. In March 1970 the father applied to the Fund for financial assistance in respect of physiotherapy and specialized occupational-training on behalf of his handicapped son and asked that suitable employment be found for him. However, the Fund rejected this application on the ground that the boy's mental incapacity must have been noticed before the migration to Belgium. His parents appealed to the Brussels Labour court invoking the Community law relating to the freedom of movement for workers and equality of entitlement to social benefits. The Labour court thereupon sought a ruling from the European Court on the following question: 'Do the benefits provided for by the Belgian Law of 16 April 1963 on the rehabilitation of the handicapped constitute social benefits within the meaning of art. 7 of EEC Regulation 1612/68?' The Court replied to this question in the affirmative and pointed out that the circumstances of the case were also within the ambit of art. 12 of that Regulation.[15]

The plaintiff in *Casagrande* v. *Munich* (9/74)[16] was an Italian national, the son of Italian parents living at the time of his birth in Munich, where his father was a 'guest-worker'. The family remained in Munich and the plaintiff attended a local secondary-school up to class 10. He applied to the municipal authority for an educational grant under the Bavarian Promotion of Education Act but this was refused on the ground that he did not come within any of the categories of persons mentioned in s. 3 of that statute.[17] Because of this refusal he had to leave school. The Administrative court in Munich, before whom the case was brought,

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13 Ibid, at p. 230.

14 European Court Reports, 19 (1973) 457. In *Fiorini* v. *S.N.C.F.* (32/75) C.M.L.R. 17 (1976) 573, it was held that art. 7 (2) of Regulation 1612/68 must be interpreted as meaning that the social advantages referred to by that provision include fares reduction cards issued by a national railway authority to large families and that this applies, even if the said advantage is only sought after the worker's death, to the benefit of his family remaining in the same member-State.

15 Art. 12 of Regulation 1612/68 provides that 'the children of a national of a member-State who is or has been employed within the territory of another member-State shall be eligible for courses of general education, apprenticeship and occupational training, under the same conditions as the nationals of the latter State, if these children reside within its territory', and that member-States should encourage 'schemes enabling such children to attend the above-mentioned courses under the most favourable conditions.'

16 C.M.L.R. 14 (1974) 423.

17 Sec. 3 confined the grants to German nationals, stateless persons and aliens who had been given political asylum.

requested the European Court to rule whether s. 3 of the Act in question was compatible with art. 12 (1) of EEC Regulation 1612/68 dealing with the free movement of labour within the Community.[18] The question was whether art. 12 related only to the actual access of the children of migrant workers to schools *etc.* in the host State or was to be interpreted more widely so as to include all the advantages afforded to its own nationals in the field of education, such as financial grants. The importance of the case was undoubted since, although the plaintiff's claim was relatively small, there are so many children of migrant workers in Bavaria in a similar situation that a decision in his favour would entail expenditure for that State running into millions of *Deutschmark*.[19] The main argument for the defendants was that education and cultural matters are not within the scope of the EEC Treaty. The Court observed that the preamble to Regulation 1612/68 recites that 'in order that the right to free movement can be observed according to objective standards of freedom and human dignity... all obstacles must be removed which stand in the way of the mobility of labour, in particular in relation to the right of the worker to have his family join him and to the conditions for the integration of his family in the host country'. This integration presupposes that the privileges provided for the promotion of education are open to the child of a foreign worker who wishes to attend a secondary school on the same terms as to native-born children. Article 12 of that Regulation has in mind not only the conditions of admission but also the general measures designed to facilitate participation in education. The Court said that, although educational policy does not as such belong to the matters which the Treaty has placed within the jurisdiction of the Community organs, it does not follow that the exercise of the powers transferred to the Community is in any way restricted if it is capable of affecting measures which have been taken for the implementation of, say, educational policy. Since, moreover, under art. 189 of the Treaty, regulations possess general validity, are binding in all their parts and apply directly in every member-State, it does not matter whether the conditions in question are laid down by the central power, by organs of a constituent part of a federal State or of other territorial bodies.

18 Art. 12 of Regulation 1612/68 provides that, 'children of a national of a member-State who is or has been employed in the territory of another member-State shall be admitted to that State's general educational, apprenticeship and vocational training-courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member-States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

19 It was pointed out that the assimilation of children of migrant workers to nationals of the host State in the matter of educational grants varied among the member-States. In Italy, for example, it obtained while in Germany Federal grants are payable for an alien child only if he has resided in the Republic for a qualifying period of five years or if one of his parents has resided there for at least three years. In Belgium there is a similar qualifying period of five years and, in addition, a requirement of reciprocity. In France discrimination only operates at the level of university and other higher education.

This judgment was followed in *Alaimo* v. *Prefect of the Rhône* (68/74)[20] in which the Prefect had refused the plaintiff, an Italian national working in France, an educational grant in respect of his daughter on the ground that 'the Rhône County Council has decided, because of the large number of applications each year, to reserve its financial assistance to pupils solely of French nationality'. The Court again held that art. 12 of Regulation 1612/68 should be interpreted as guaranteeing to the children referred to therein an equality of status with regard to the whole of the rights arising out of admission.

The case of *van Duyn* v. *Home Office* (41/74)[21] aroused widespread interest, not only for its association with scientology, but because it was the first time that a United Kingdom court had requested the European Court to interpret the Treaty. The Government regarded scientology as socially harmful and its tenets contrary to public policy. It was therefore decided that work permits would not be issued to foreign nationals for work at a scientology establishment. Miss van Duyn, a Dutch national, arrived at Gatwick airport with the intention of taking up employment as a secretary with the Church of Scientology at its college in East Grinstead. The immigration officer refused leave to enter the country. It appeared that she had worked in a scientology establishment in Amsterdam and that she had studied and practised the subject. The European Court was asked, *inter alia*, the following question:

> Whether upon the proper interpretasion of art. 48 of the EEC Treaty and of art. 3 of Directive 64/221[22] a member-State in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct (a) the fact that the individual is or has been associated with some body or organisation the activities of which the member-State considers contrary to the public good but which are not unlawful in that State, and (b) the fact that the individual intends to take employment in the member-State with such a body or organisation it being the case that no restrictions are placed upon nationals of the member-State who wish to take similar employment with such a body or organisation. The Court held that the aforementioned articles must be interpreted as meaning that a member-State, in imposing restrictions justified on grounds of public policy, is entitled to take into account as a matter of personal conduct of the individual concerned the fact that the individual is associated with some body or organisation the activities of which the member-State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction

20 Ibid., 15 (1975) 263. But in *Kuyken* (66/77) 2 C.M.L.R. 22 (1978) 304, it was held that a person who has gone to another member-State in order to follow a course of study and who, during that period, was not insured under a social-security scheme set up for the benefit of employed persons, does not come within the scope of the provisions of arts. 48 to 51 of the Treaty.

21 Ibid., 15 (1975) 1.

22 Art. 3 (1) of Directive 64/221 provides that 'measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned'.

is placed upon nationals of the said member-State who wish to take similar employment with the same body or organisation.[23]

It has been suggested that the judgment in *van Duyn* must now be seen in the light of *Bonsignore* (67/74)[24] in which an Italian national residing in the Federal Republic of Germany appealed against a decision to deport him taken by the Aliens authority following his conviction for an offence against the Firearms Act and for negligently causing the death of his brother. The European Court said that 'departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed'. The concept of 'personal conduct' in art. 3 of Directive 64/221 expresses the requirement that a deportation order may only be made for breaches of the peace and public security which are committed by the individual in question. On the other hand, deportation is not justified for the purpose of deterring other aliens, namely, if it is based on reasons of a 'general preventive nature'.

Article 51 of the Treaty — Social Security for Migrant Workers

In *Vaassen* (61/65),[25] the plaintiff was the widow of a Dutch mineworker who received a pension from the funds of *B.F.M.* a Dutch private social-security institution. She also became affiliated by this institution to the sickness fund for *B.F.M.* pensions. In 1963 Mrs Vaassen went to live in Germany and was thereupon informed by *B.F.M.* that she automatically ceased to be affiliated to the sickness fund since only pensioners residing in Holland were entitled, according to *B.F.M.* regulations, to benefit. The European Court was asked to say whether those regulations constituted a 'law' (*législation*) within the meaning of art. 1 of EEC Regulation 3. It held that the expression 'enforceable provisions' in that article clearly covers social-security schemes, run by institutions other than public authorities, which often comprise an important sector of social security. Once the existence of a special scheme has been verified Regulations 3 and 4 apply to it in

23 C.M.L.R. 15 (1975) 19.

24 Ibid., 472. See also *Rutili* v. *Minister of the Interior* (36/75), C.M.L.R. 17 (1976) 140, in which it was held that the expression 'subject to limitations justified on grounds of public policy' in art. 48 of the Treaty concerns not only the legislative provisions adopted by each member-State affecting freedom of movement and residence, but includes individual administrative decisions made under such legislation. In particular, measures restricting the right of residence to part only of the national territory may not be imposed on nationals of other member-States except in circumstances in which such measures may be applied to nationals of the State concerned. But Community law has not excluded the power of member-States to adopt measures enabling the national authorities to have an exact knowledge of population movements in their territory and to impose reasonable penalties for breach of such measures: *Watson* (118/75), C.M.L.R. 18 (1976) 552. However, the mere failure by a national of a member-State to complete the legal formalities concerning access, movement and residence of aliens does not justify a decision ordering expulsion or temporary imprisonment; and such conduct cannot be regarded as constituting in itself a breach of *ordre public* or public security: *Royer* (48/75), C.M.L.R. 18 (1976) 619. See also *Sagulo, Brenca and Bakhouche* (877) 2 C.M.L.R. 20 (1977) 585; *Regina* v. *Bouchereau* (30/77) 2 C.M.L.R. 20 (1977) 800.

25 Ibid., 15 (1975) 508.

their totality, including any provisions there may be concerning the voluntary and optional affiliation of insured persons and their survivors. The Court also held that arts. 4 and 22 of Regulation 3 are not limited to workers or their survivors who have been employed in several member-States or who are, or have been, employed in one State while residing or having resided in another. The Regulation thus applies even when the transfer of residence to another member-State is made not by the worker himself but by his survivor.

The plaintiff in *Heinze* (14/72)[26] was a German citizen employed in the Federal Republic for 36 months from 1950 to 1953 and in the Grand Duchy of Luxembourg for 84 months from 1953 to 1960. During the whole of that period he was subject to a system of compulsory pension-insurance. In 1966 his wife and son became ill with active tuberculosis, but the authorities in Düsseldorf rejected his claim for medical treatment on the ground that the periods of insurance which Heinze had completed in Germany did not fulfil the general condition laid down in the Ordnance (*RVO*) for disablement pensions, namely completion of an insurance period of 60 months. However, Heinze's appeal in the Social Security courts was upheld. Before the Federal Supreme Social Security Court the defendant insurance authority submitted that periods of insurance completed abroad could only be brought into the calculation if the benefits related to the insurance incidents of disablement, old age or death, none of which cover the medical treatment of active tuberculosis. On reference to the European Court it was held that national provisions providing for the assistance of tuberculosis sufferers through the social-welfare authorities, while linking entitlement to such assistance to membership of a public-pension insurance scheme, are covered by the legal rules on social security mentioned in art. 2 (1) of EEC Regulation 3. Social security benefits which are not related to the insured person's 'ability to earn', which are also granted to his dependants and which provide mainly for the curing of the sick person as well as for the protection of those around him, are to be regarded as sickness benefits under art. 2 (1) (a) of Regulation 3. The aggregation of periods of insurance completed in the individual member-States is thus determined, for the acquisition of the right to such benefits, in accordance with arts. 16 *et seq*. of Regulation 3. However, the social-security authorities of the member-States are not obliged to take account of periods of insurance completed in non-member States for the purpose of acquisition of a right to social security benefit.

26 Ibid., 16 (1975) 96. See also *Biason* (24/74), ibid., 15 (1975) 59.

In *Frilli* (1/72)[27] the plaintiff, an Italian national born in 1908, was employed in Belgium between 1966 and 1967 and continued to live there. That short period of employment entitled her to a small old-age pension of 350 Belgian francs a month. In 1969 she applied to the Ministry of Social Security for the 'guaranteed income for old persons' instituted by a Belgian Act of the same year. However, her application was rejected on the ground that 'beneficiaries must be either Belgians or nationals of a country with which Belgium has concluded a reciprocal agreement on this subject'. Italy had entered into no such agreement. The Labour court in Brussels, to whom Mrs. Frilli had appealed, asked the European Court whether the guaranteed income, as a non-contributory social benefit granted by the State to old people under the Act of 1969, was an old-age benefit within the meaning of art. 2 (1) of EEC Regulation 3 or is it a social assistance benefit under art. 2 (3) of that Regulation. The Court observed that, in some of its features, legislation on a guaranteed income is akin to social assistance, especially when need is the essential criterion in its implementation and there are no conditions as to periods of employment, of affiliation and contributions; but it is nevertheless close to social security in that, by not considering each case on its merits, it gives all beneficiaries a legally-defined position and the right to a benefit similar to old-age pensions mentioned in art. 2 of Regulation 3. In view of the wide definition of the people entitled to benefit, such legislation fulfils a double function which is, on the one hand, to guarantee a minimum income to persons who are entirely outside the social security system and, on the other hand, to provide supplementary means to persons whose social security benefits are insufficient. Thus, as regards an employee or a person assimilated thereto, who has performed periods of work in a member-State, permanently resides there and is entitled to a pension, the legislative provision conferring on all elderly inhabitants a right to a legally-protected minimum falls, so far as those workers are concerned, within the field of social security mentioned in art. 51 of the Treaty and of the Regulations made in pursuance thereof, even if such legislation might fall outside this field so far as concerns another category of bene-

27 Ibid., 12 (1973) 386. Under a combined sickness/invalidity insurance scheme, cash benefits paid as invalidity benefits, however designated, must be regarded as pensions within the meaning of art. 42 of E.E.C. Regulation 3: *Anselmetti* (17/75) C.M.L.R. 18 (1976) 350. The principle of the equal treatment of workers laid down by arts. 48 to 51 of the Treaty implies that national law cannot be applied against a worker who, while residing in France, is a national of another member-State, where its effect is to deprive such a worker of a benefit awarded to French workers as regards the taking into account, in calculating the old-age pension, of insurance periods completed in Algeria: *Hirardin* (112/75) ibid., 374.

ficiaries.[28] The Court held, therefore, that the guaranteed income granted by the Belgian Act was to be regarded, so far as concerns employees and persons assimilated thereto within the meaning of Regulation 3 who are entitled in that State to a pension, as an 'old-age benefit' within the meaning of art. 2 (1) (c) of that Regulation. The award of such a benefit to a foreign worker who fulfils those requirements may not be made conditional on the existence of a reciprocal agreement with the member-State of which that worker is a national. A condition of that kind is incompatible with the rule of equality of treatment, which is one of the fundamental principles of Community law embodied in art. 8 of Regulation 3.

The case of *Janssen* (23/71)[29] involved the interpretation of the term 'assimilated worker' in EEC Regulations 3 and 4. Janssen, a Belgian national living in that country, had been employed in France as an agricultural worker from 1967 to 1969. During that period he was affiliated to an agricultural insurance society. In January 1970 he left France and worked as a 'helper' on his father's agricultural holding in Belgium, becoming affiliated as an independent worker to a Belgian insurance company. During that same month his wife went into hospital for the birth of a baby. Mr. Janssen claimed from the insurance company repayment of the appropriate costs, but it was rejected on the ground that he had not completed the waiting period of six months laid down in a Belgian royal decree of 1964 dealing with sickness insurance of independent workers. The Labour court, to which the dispute was taken, referred to the European Court, the question whether the notion of 'assimilated worker' in Regulation 3 and 4 could apply to 'helpers', regarded as independent workers by the Belgian law on sickness-disability insurance. The Court pointed out that arts. 48-51 of the Treaty, by instituting the free circulation of workers, conferred on the notion

28 Ibid., 12 (1973) 407. See also *Callemeyn* v. *Belgium* (187/73), European Court Reports (1974) 553, in which it was held that: (a) the benefits mentioned in art. 4 (1) (b) of E.E.C. Regulation 1408 of 14 June 1971 include those provided by national provisions granting benefits to the handicapped to the extent that those provisions concern workers within the meaning of art. 1 (a) of that Regulation and confer on the latter a legally protected right to the grant of those benefits; (b) within its field of application to persons and to matters covered, Regulation 1408 takes precedence over the European Interim Agreement on Social Security Schemes in respect of old age, invalidity and survivors, signed in Paris on 11 December 1953 and referred to in art. 7 (1) (b) of the Regulation, to the extent that the Regulation is more favourable than the said Agreement for those entitled. And in *Costa v. Belgium* (39/74), E.C.R. (1974) 1251, it was held that 'a national legislation granting a legally protected right to a benefit for the handicapped falls, as regards the persons referred to by E.E.C. Regulation 3, within the ambit of social security under art. 51 of the Treaty and of the Regulations thereunder'. Regulation 1408/71 may cover members of the worker's family such as a child handicapped from birth: *Fracas* v. *Belgium* (7/75), C.M.L.R. 16 (1975) 442. But the mere fact that a particular benefit is contained in a social security Code is not conclusive as to its character as a social security benefit. Thus, the French provisions entitling certain ex-prisoners of war to early pension privileges do not confer social security benefit within the meaning of art. 4 (1) of Regulation 1408/71: *Gillard* (9/78) 3 C.M.L.R. 23 (1978) 554.

29 Ibid., 11 (1972) 13.

of worker a Community dimension. The expression 'wage-earners or assimilated workers' in Regulation 3 covers, in the express words of art. 4 (1) of that Regulation, not only those who are subject to the laws of one or more member-States but also those who 'have been' subject to such laws. The aim of arts. 48 to 51 would not be attained if the periods of insurance acquired by a worker under the laws of one member-State had to be lost to him when, taking advantage of the free circulation guaranteed to him, he changed his place of work and became subject to a social security system of another member-State.[30] The Court held that the notion of 'assimilated' worker in Regulations 3 and 4 includes a 'helper' as understood by Belgian law, as an independent worker, in so far as under that law the benefit of the social-security system organized for the main body of wage-earners against one or more risks is applied to him, if such application gives him, in relation to the risk in question, a protection comparable to that provided in the general scheme. Secondly, when the law of a member-State on the benefit to be paid to independent workers permits, in order to qualify for benefit, the taking into account of periods of insurance completed by the insured under the social-security system for wage-earners, the periods of insurance completed under the social-security system of another member-State as wage-earner should be taken into account for the application of that law.

Article 12 of EEC Regulation 3 provides that 'wage-earners or assimilated workers employed in the territory of one member-State shall be subject to the legislation of that State even if they permanently reside in the territory of another member-State or their employer or the registered office of the undertaking which employs them is situated in the territory of another member-State'. In *Moebs* (92/63)[31] the deceased, a French national, had worked successively in Luxembourg, France and from 1955 until 1 September 1959 in the Netherlands. Although retaining his permanent residence there he then obtained a job in France

30 Ibid., 19. See also art. 9 (1) of Regulation 3 in relation to compulsory insurance.

31 Ibid., 338. In *Caisse Primaire d'Assurance etc.* v. *Assoc. Football Club d'Andlau* (8/75), C.M.L.R. 16 (1975) 383, it was held that, under art. 13 of Regulation 3, a worker having his permanent residence in one State who occasionally pursues his activity in another member-State is subject to the legislation of the State of his residence in so far as he is affiliated as a wage-earner to the social-security scheme of that State. If he is not so affiliated he is subject to the social-security legislation of the member-State in which he occasionally works. An employer established in a member-State other than the one whose social-security legislation is applicable to the worker, who is not bound to pay contributions to the social-security authorities of his own State, is obliged to pay those laid down by the legislation which is applicable to the worker. who is not bound to pay contributions to the social-security authorities of his own State, is obliged to pay those laid down by the legislation which is applicable to the worker. See also *Perenboom* (102/76) E.C.R. (1977) 815. *Jansen* (104/76) E.C.R. (1977) 829 is concerned with the effect of Community regulations on the reimbursement of social-security contributions upon termination of compulsory insurance. And see *Paolo* (76/76) 2 C.M.L.R. 19 (1977) 59 for an interpretation of art. 71 of Regulation 1408/71 relating to entitlement to unemployment benefit based on place of habitual residence.

which he held until his death. Mrs. Moebs went to live in France on 1 July 1960. Mr. Moebs was, by virtue of his employment, subject to French social-security legislation under which Mrs. Moebs was not entitled to a widow's pension, because the widow of an insured person who dies before the age of retirement is not so entitled if she is capable of working. However, the question was whether Mrs. Moebs could claim a pension under the Netherlands 'General Widows and Orphans' insurance scheme (*AWW*) if, as was the case, her late husband was a member of it.

The European Court was asked to say whether art. 12 of Regulation 3 should be interpreted to mean that the persons affected by it are subject only to the legislation of the member-State on whose territory they are in gainful employment. In other words, does the legislation of the employing country by itself *exclude* the application of any other legislation, in particular that of the country of permanent residence.

The Court observed that the measures in question should be interpreted with the aim of ensuring that the migrant worker should not be placed in a disadvantageous legal position in the matter of social security. Furthermore, there is nothing in those provisions to prohibit a member-State from passing legislation to give supplementary social protection to migrant workers. In the absence of specific provisions there is nothing against a plurality of benefits under two national laws. This is even more the case when one of those laws, far from being confined to workers, is applicable to the whole population and the only qualification is residence and not the exercise of gainful activities. It follows that art. 12 of Regulation 3 does not prohibit the application of the law of a member-State other than the one on whose territory the person concerned works, unless it should compel him to contribute to the financing of a social-security scheme which does not prevent any extra benefits for the same risk and the same period.

Under this article, the Council, acting unanimously on a proposal from the Commission, undertook to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. To that end, it would make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of member-States.

In *Unger* (75/63)[32] the plaintiff, Mrs. Unger, was compulsorily insured against sickness under her contract of employment in the Netherlands. On the termination of the contract, she was accepted into a voluntary insurance scheme which allowed such continuation 'when the persons in question carry on or are about to carry on a profession or an independent occupation, or when it is reasonable to suppose that they

32 C.M.L.R. 3 (1964) 319.

will accept a new contract of work should the opportunity arise'. One month later, while staying with her parents in Germany, Mrs. Unger fell ill and had to receive medical treatment. On returning to the Netherlands, she claimed reimbursement of the cost of her illness, but this was refused because of a regulation which stated that voluntarily insured persons did not have the right to such reimbursement 'unless they have been allowed to stay abroad in order to convalesce', and no such authorisation had been given. She thereupon took action in the social court relying, in particular, on art. 19 (1) of EEC Regulation 3 of 1958 concerning social security for migrant workers which provides: 'A wage-earner or assimilated worker, affiliated to an institution in one member-State and permanently resident in the territory of the said State, shall receive benefits during temporary residence in the territory of another member-State if his state of health necessitates immediate medical care, including hospital treatment. The foregoing shall also apply to a worker who, although not affiliated to the said institution, is entitled to benefit from that institution or would be so entitled if he were in the former State's territory.'

The European Court was requested to say whether the concept of 'wage-earner or assimilated worker' in art. 19 is defined by the laws of each member-State or by Community law in a supranational sense. It replied that,

> the concept in question has a Community meaning, implying all those who are covered under whatever description by the different national systems of social security... It follows both from the Treaty and from Regulation 3 that the protected 'worker' is not exclusively the one who holds a job at that very moment but logically includes one who, having left his job, is capable of taking another. When internal law offers to individuals, who have been deprived of their jobs, the opportunity of voluntarily joining the social security system of wage-earners, this measure can be considered, in certain circumstances, as intended to protect the persons in their capacity as 'workers' within the meaning of the Treaty and confer on this protection the guarantees of Regulation 3. The concept of 'worker' contained in arts. 48-51 of the EEC Treaty arises not from internal law but from Community law. Art. 19 (1) is contrary to any rule of internal law subjecting the grant of the payments in question, in the case of such residence, to conditions more burdensome than those which would be applicable if the person had fallen ill on the territory of the State to which the insurer belongs.[33]

33 Ibid., 330-333 *passim.* In E.E.C. Regulation 1408/71 the term 'worker' is narrowly defined and the words 'assimilated workers', which had appeared in Regulation 3, are omitted. Nevertheless, in *Brack* v. *Insurance Office* (17/76), C.M.L.R. 18 (1976) 592, it was held that under the British social security scheme for the whole working population the term 'worker' covered a British national, a self-employed accountant, who became ill while on holiday in France. He had been classified and paid contributions as a self-employed person for the preceding 18 years, prior to which period he had been classified as employed for 9 years.

In *Van der Veen* (100/63),[34] involving ten similar actions before a Dutch court, pensions had been granted to the widows of workers who had been employed successively in Holland and the Federal Republic of Germany. The case turned on the interpretation of art. 28 of Regulation 3 relating to what was called the 'apportionment' (*proratisation*) of the various periods of insurance completed by the workers in those two countries. The widows were entitled to claim pensions under both Dutch and German law. However, applying arts. 27 and 28 of Regulation 3, the authorities in those countries granted to the widows only a reduced pension calculated in proportion to the period of affiliation to the respective insurance scheme in each country. The Dutch legislation (*AWW*) was concerned with a system of insurance based on risk, in which the amount of the benefit was fixed and independent of the duration of the insurance. The widows contended that art. 28 was not applicable to a pension scheme which did not involve 'insurance periods' and that they were therefore entitled to the full amount of the Dutch pension.

The European Court held that art. 28 applied to legislation of the member-States in which the amount of social security benefit depends upon the duration of the insurance equally with legislation in which the benefit is based solely on risk. But art. 28 was applicable only if it conferred on the insured person benefits at least equivalent in total to those payable to them under national legislation, irrespective of Regulation 3.

Ciechelski (1/67)[35] was representative of numerous similar cases referred to the Court by member-States relating to the interpretation of arts. 27 and 28 of Regulation 3. The question was whether those articles could, in effect, deprive a worker of part of the rights acquired by him in one of the member-States. It is a characteristic of the various insurance schemes subject to qualifying periods that in one State the financial benefit may be acquired by virtue of the national law alone, while in another State the entitlement can arise only by adding together all the qualifying periods provided for in art. 51 of the Treaty and art. 27 of Regulation 3. Such systems can, therefore, operate to the disadvantage of the beneficiary. In the first place, the application by the former State of arts. 27 and 28 of the Regulations could result in the reduction of the entitlement arising from the provisions of the national law alone while, on the other hand, the entitlement would not be related to the qualifying periods in respect of which the claimant could equally obtain an entitlement from the latter State. Thus, it had to be decided whether a State paying a pension arising by virtue only of its national law can apply arts. 27 and 28 for the calculation known as 'apportionment' in respect of every assured person having been 'subject successive-

34 Ibid., 3 (1964) 548.

35 Ibid., 6 (1967) 192. As to the validity of art. 42 (2) of Regulation 3, see *Triches* (19/76) C.M.L.R. 19 (1977) 213. See *Saieva* (32/76) 2 C.M.L.R. 19 (1977) 26 for an interpretation of art. 42 (5) of Regulation 3.

ly or alternately to the law of two or more member-States as well as to the authority of each of those member-States'.

The Court took the view that the totalling and apportionment of qualifying periods have no place in respect of a member-State in which the result sought to be achieved by art. 51 of the Treaty has already been attained under the national law alone. However, that principle cannot be considered an absolute rule. In particular, it is valid only in so far as its application does not result in the payment of benefits in excess of those expressly provided for by art. 51 of the Treaty or the Regulations made in implementation of it. In other words, art. 51 seeks to take account of qualifying periods which would otherwise be imperative but does not allow the assured to claim from different member-States benefits relating to one and the same period. In *Ciechelski*, calculation of the entitlement was based on entirely distinct periods. The Court, therefore, held that a State in which the assured can qualify for benefits without resorting to qualifying periods completed under the law of another member-State cannot apply arts. 27 and 28 of Regulation 3 with a view to reducing the benefits which it is obliged to pay under its own law.[36]

The case of *Bertholet* (31/64)[37] concerned an accident which took place near the Belgian-Dutch border when a motor-lorry, belonging to Bertholet, collided with a scooter on the back seat of which a Mr. De Ronchi was passenger. The latter sustained injuries for which the lorry-driver, an employee of Bertholet, was responsible. The European Court was requested to rule whether or not art. 52 (1) of Regulation 3 applied where the accident has occurred in the territory of a member-State whose frontier the injured worker crosses on his way to or from his place of employment, although his place of residence and his place of employment are both situated in the territory of another member-State. The Court held that the only requirements under art. 52 of Regulation 3 are that the injured party' is in receipt of benefits under the legislation of one member-State in respect of an injury sustained in the territory of another State' and that he 'is entitled to claim compensation for that injury from a third party in the latter State's territory... Regulation 3 is not restricted to workers who have been employed in more than one member-State while permanently resident in another member-State or to workers who are or have been employed in one member-State while permanently resident in another member-State'.[38]

36 In *De Cicco* (19/68) C.M.L.R. 8 (1969) 67, it was held that social-security schemes providing for workers in general also covered self-employed artisans whose contributions to artisans' insurance are treated as 'periods of insurance' within the meaning of arts. 1 (p), 24, 27 *et seq.* of E.E.C. Regulation 3. In *Torrekens* (28/68) ibid., 377 it was held that the system of totalisation set out in art. 27 (1) of Regulation 3 also applies to the legislation mentioned in Annex B whether or not the social-security scheme is a contributory one.

37 Ibid., 5 (1966) 191.

38 Ibid., 204-205.

Hessische Knappschaft v. *Maison Singer* (44/65)[39] was also concerned with art. 52 of Regulation 3. Mr. Gassner, a miner of German nationality, was killed while on holiday in France following a collision between his motorcycle and a cattle-truck belonging to Maison Singer and driven by Mr. Stadelweiser, a servant of that firm. Hessische Knappschaft, a German social security organisation, paid pension benefits to the successors of the victim for which it now claimed repayment from Maison Singer on the ground that it had been subrogated to the heirs under both German law and art. 52 of Regulation 3. The French court of first instance dismissed the action on the ground, *inter alia*, that, in its opinion, Regulation 3 related only to migrant workers. The Court of Appeal in Colmar requested the European Court for a ruling. The latter followed its judgment in *Van Dijk* (33/64)[40] in which it was held that the provisions of art. 52 'are applicable to the case in which a worker who, under the laws of one member-State, receives one of the forms of benefit envisaged in art. 2 of Regulation 3 for an injury occurring in the territory of another member-State, whether or not the injury has any link with his work, has in the latter State the right to claim from a third party damages for that injury'.

Caisse de Maladie CFL (27/69)[41] arose from an action in the Luxembourg courts brought against a Belgian insurance firm by the Luxembourg railway-company (*CFL*) and its medical fund on behalf of an employee, Mr. Simon, who had been killed in a motor-accident in Belgium. The deceased was being driven by a friend on a pleasure trip. Both were nationals of Luxembourg and lived there. The plaintiffs claimed reimbursement of widows' and orphans' pensions and the funeral grant. They were rejected on the ground that according to the *lex loci delicti*, namely Belgian law, the basis of liability was not the fault of the third party, but that compensation was paid under certain statutory provisions. The European Court was asked for an interpretation of art. 52 of Regulation 3 in relation to the facts. It held that art. 52 applies to the case of a salaried or assimilated worker whose place of work and residence are in the same member-State and who has been the victim of a traffic accident in the territory of another member-State, whatever may have been the reason for his journey. In addition, the plaintiffs were not bound to take action under art. 52 solely before the courts of the State in which the accident took place provided the injured person has, 'on the territory of the State where the damage occurred' the right to claim reparation from a third party. Each member-State must recognize in favour of debtor institutions such as employers and insurance companies any right of action instituted by other persons against the responsible third party either by subrogation or by

39 Ibid., 82.

40 Ibid., 191.

41 Ibid., 9 (1970) 243. And see *Töpfer* (72/76) 2 C.M.L.R. 19 (1977) 121 concerning the right, under art. 52 of Regulation 3, of a social-security institution to be subrogated in respect of an accident in the territory of another member-State involving a person insured with such institution.

any other means. This right can be invoked even in the absence of a bilateral agreement referred to in the second paragraph of art. 52.

Article 52 of the Treaty — Right of Establishment

Article 52 provides for the progressive abolition of restrictions on the freedom of establishment of nationals of a member-State in the territory of another member-State. Under art. 55 such provision shall not apply to activities which in the member-State concerned are connected, even occasionally, with the exercise of official authority.

In *Reyners* v. *Belgium* (2/74)[42] the plaintiff, a Dutch national, was educated and lived in Belgium where he qualified as an *avocat.* However the *Judicature Act* 1967 provided that no one may hold the title of *avocat* nor practise that profession unless he is a Belgian. On the advice of the governing body of the profession a Royal Decree of 24 August 1970 was issued derogating from the conditions of nationality prescribed in the *Judicature Act* in favour of a foreigner who could produce a certificate issued by his Minister for Foreign Affairs stating that the foreign law or an international agreement accords reciprocity. Unfortunately for Reyners the Dutch *Advocates Act* 1968 stipulated that an applicant for admission to the Bar must be of Dutch nationality. He therefore applied to the Belgian *Conseil d'Etat* for the annulment of the relevant section of the Royal Decree on the ground that it infringed arts. 52-57 of the EEC Treaty. The *Conseil d 'Etat* stayed the proceedings and applied to the European Court under art. 177 of the Treaty for a preliminary ruling on the following questions: first, what is to be understood by 'activities which in that State are connected, even occasionally, with the exercise of official authority' in art. 55? Must art. 55 be interpreted in such a way that within a profession like that of *avocat* only activities which are connected with the exercise of official authority are excluded from the application of Chapter II of the Treaty, or as meaning that this profession itself is to be excluded on the ground that its exercise involves activities which are connected with the exercise of official authority? Second, is art. 52, since the end of the transitional period, a 'directly applicable provision' despite, in particular, the absence of Directives as prescribed by arts. 54 (2) and 57 (1)?

The Court held, first, that the exception to freedom of establishment provided for by the first paragraph of art. 55 must be restricted to those of the activities referred to in art. 52 which in themselves involve a direct and specific connection with the exercise of official authority; it

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42 Ibid., 14 (1974) 305. See also Von *Kempis* v. *Geldof (French Cour de Cassation),* C.M.L.R. 18 (1976) 152, in which it was held that since art. 52 became directly applicable as from 1 January 1970, the provisions of French municipal law which impose on an alien wishing to farm an agricultural holding in France the duty to obtain an administrative permit have ceased to be applicable to nationals of E.E.C. member-States. In the matter of conditions imposed by a member-State upon the recognition of a driving licence issued by another member-State, see *Choquet* (16/78) C.M.L.R. See also *Thieffry* (71/76) 2 C.M.L.R. 20 (1977) 373, and *Patrick* (11/77) 2 C.M.L.R. 20 (1977) 523. Article 62 of the Lome Convention is considered in *Razanatsimba* (65/77) 1 C.M.L.R. 21 (1978) 246.

is not possible to give this description, in the context of a profession such as that of *avocat*, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of those activities is compulsory or there is a legal monopoly in respect of it. Second, since the end of the transitional period art. 52 is a directly applicable provision despite the absence of the Directives prescribed by arts. 54 (2) and 57 (1).

Article 59 of the Treaty — Freedom to Provide Services

Article 59 provides for the progressive abolition of restrictions on freedom to provide services within the Community in respect of nationals who are established in the territory of a member-State other than that of the person for whom the services are intended. Art. 60 provides that services shall be normally provided for remuneration and shall include activities of an industrial, commercial or professional character and those of craftsmen. The person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals.

In *van Binsbergen* (33/74)[43] the plaintiff, living in Holland, had authorized a Mr. Kortmann, also of Holland, to act for him in a dispute relating to unemployment insurance with the Netherlands Engineering Trade Association. Dutch legislation gives parties the right to appear either in person or to be assisted by an adviser who may represent them in the social security court. During the course of the proceedings Kortmann moved his house just across the border into Belgium. It was from his new address that he applied to the Dutch authorities for a copy of the documents in his client's file in order to prepare the oral pleadings before the Dutch court. The registry refused on the ground that the relevant Act provides that 'only persons established in Holland may act as legal representatives or advisers'. Kortmann declared that his occupation was that of legal adviser (*conseil juridique*) which in Holland is not subject to any rules or regulations nor dependent on the possession of any diplomas or on membership of any organisation or professional body. His practice consisted of clients involved in disputes relating to Dutch social or administrative law. Since living in Belgium he went to Holland only for the purpose of pleading which occurred 36 times in 1973. Kortmann therefore asked the Dutch court to regard his activity as temporarily in Holland within the meaning of art. 60. The Dutch court requested the European Court to advise whether arts. 59 and 60 have direct effect so as to create individual rights which the national courts are under a duty to protect; if the answer was affirmative, how should those provisions be interpreted?

The Court held that the first paragraph of art. 59 and the third paragraph of art. 60 had direct effect and might, therefore, be relied on before national courts, at least in so far as they seek to abolish any

43 Ibid., 15 (1975) 298.

discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member-State other than that in which the service is to be provided. Second,

> specific requirements imposed on the person providing the service cannot be considered incompatible with arts. 59 and 60 where they have as their purpose the application of professional rules justified by the general good — in particular, rules relating to organisation, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules by being established in another member-State... That cannot, however, be the case when the provision of certain services in a member-State is not subject to any sort of qualification or professional regulation and when the requirement of habitual residence is fixed by reference to the territory of the State in question. Thus, the articles in question must be interpreted as meaning that the national law of a member-State cannot, by imposing a requirement as to habitual residence within the State, deny persons established in another member-State the right to provide services where the provision of services is not subject to any special condition under the national law applicable.[44]

Walrave and Koch v. *Association Union Cycliste Internationale* (36/74)[45] was an interesting case involving the world of sport. The plaintiffs, both of whom were Dutch, offered their services for remuneration as pacemakers on motor-cycles in medium-distance bicycle races with so-called stayers, who cycle behind the motorcycle. The provided those services under agreements with the stayers, cycling associations or with outside sponsors. The plaintiffs were reputed to be among the best, perhaps the best, professional pacers in the world. They acted as pacemakers for stayers of other nationalities, in particular for Belgians and Germans. In 1970 the defendant resolved to amend its rules about the conduct of the world championships in motor-paced races by including a provision that 'as from 1973 the pacemaker must be of the same nationality as the stayer'. The defendant gave as reason for the amendment that the world championships are intended to be competi-

44 Ibid., 312-3. *Cf. Coenan* v. *Sociaal-Economische Raad* (39/75), C.M.L.R. 17 (1976) 30, concerning a Dutch national, resident in Belgium and having an office in Holland where he carried on the business of insurance broker. The Court held that although a member-State may take measures to prevent a supplier of services, residing outside its territory, from escaping 'professional' rules of conduct applying to its own residents, a requirement of residence in that State is justifiable under art. 59 only if less stringent forms of control are not available. The possession by such supplier of an office in the territory of that State will normally constitute a sufficient and less stringent form of control and the condition of private residence should not also be required. In *Koestler* (15/78), C.M.L.R. it was held that arts. 59 and 60 of the E.E.C. Treaty do not have the effect of modifying the application of legislative provisions whereby a member-State prevents certain debts, such as wagering debts and the like, from being recovered by legal action, always provided that such provisions are applied without discrimination in fact or in law in relation to the treatment applied to similar debts contracted within the territory of the member-State concerned.

45 Ibid., 15 (1975) 320.

tions between national teams. The plaintiffs naturally saw in the new rule a threat to their livelihood and a severe constriction of the market in which they could sell their skill. Having failed to secure the repeal of that rule the plaintiffs commenced proceedings before a court in Utrecht claiming, first, a declaration that the amendment in question was void in respect of pacemakers and stayers who are nationals of any member-State of the EEC, and, second, an injunction requiring the defendant to allow the plaintiffs to take part in races as pacemakers for stayers of other than Dutch nationality so long as they are EEC nationals. The Dutch court thereupon referred a number of questions involving arts. 48 and 59 to the European Court. The latter held that, having regard to the objectives of the EEC, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of art. 2. When such activity has the character of gainful employment or remunerated service it comes within the scope, according to the case, of arts. 48-51 or 59-66. In this respect, the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services:

> The prohibition of discrimination based on nationality in arts. 7, 48 and 59 does not affect the composition of sports teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity. Prohibition of such discrimination does not only apply to the action of public authorities but extends to rules of any other nature aimed at collectively regulating gainful employment and services. The rule on non-discrimination applies in judging all legal relationships in so far as those relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the EEC.[46]

Having regard to the above, it is for the national court to determine the nature of the activity submitted to its judgment and to decide whether in the sport in question the pacemaker and stayer do or do not constitute a team.

Regulation 543/69 — Harmonisation of Certain Social Provisions in the Field of Road Transport

This Regulation is worthy of note if, for no other reason, than it occasioned for the first time in the life of the EEC an important domestic judicial conflict between the Commission and the Council, in the guise of *ERTA: Commission* v. *Council* (22/70).[47] Under the auspices of the UN Economic Commission for Europe, an Agreement concerning the work of crews of vehicles engaged in international road transport (ERTA) was in 1962 signed in Geneva by five of the six member-

46 Ibid., 334-5. Followed in *Dona* v. *Mantero* (13/76), C.M.L.R. 18 (1976) 578, in which it was held that a private sporting organisation may not require the possession of the nationality of the State as a condition for playing in professional football matches.

47 Ibid., 10 (1971) 335.

States of the EEC and by thirteen other European States. It never came into force owing to lack of the required number of ratifications. In 1966 the Community began to apply its mind to the problem and a draft regulation was prepared. This stimulated the erstwhile dormant negotiations in Geneva. In July 1968 the EEC Council examined a proposal for a Community Regulation submitted by the Commission and decided on methods of joint action by the six member-States in Geneva with a view to obtaining such modifications of ERTA as would permit its ratification by a sufficient number of States and bringing its provisions into line with those of the proposed Community Regulation. The latter was finally adopted by the Council in March 1969 and became Regulation 543/69, applying to transport by vehicles registered in a member-State from 1 October 1969 and to transport by vehicles registered in a non-member State from 1 October 1970. Meanwhile, the Geneva negotiations were progressing well although the EEC Commission had raised objections to the manner in which they were being conducted. It expressed the wish, for example, to be more closely associated with the negotiations and to have its own experts present in Geneva alongside those of the other States. But the Council, it seems, turned a deaf ear. The Commission renewed, even more forcefully, its objections and protested against the procedure adopted in negotiating and concluding the Agreement at a meeting of the Council on 20 March 1970, a few days before the Geneva meeting which was to decide on the final text of the modified ERTA. The minutes of that Council meeting recorded that the Commission considered the Council to have acted not in accordance with the Treaty. Nevertheless, negotiations continued in Geneva and ERTA was declared open for signature as from 1 July 1970. On 19 May 1970 the Commission commenced proceedings in the European Court seeking an annulment of the Council's discussion on 20 March 1970 regarding the negotiation and conclusion of ERTA by the member-States of the EEC.

The case raised important questions concerning the legal relationship between the two organs of the EEC and their respective functions and authority particularly in relation to the negotiation and conclusion of international treaties.

The Court observed that, under art. 210 of the Treaty, the Community is endowed with legal personality and,

> that in its external relations the Community enjoys the capacity to establish contractual links with non-member States over the whole field of objectives defined in Part One of the Treaty... Such authority may arise not only from an explicit grant by the Treaty but may equally flow from other provisions of the Treaty and from steps taken, within the framework of those provisions, by the Community institutions. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, lays down common rules, whatever form these may take, the member-States no longer have the right, acting individually or even collectively, to contract obligations towards non-member States affecting those rules... By the terms of art. 3 (c) the adop-

> tion of a common policy in the sphere of transport is specially mentioned among the aims of the Community.[48]

Where the Community has authority to negotiate and conclude a treaty in pursuance of a common policy this 'excludes the possibility of a concurrent authority on the part of the member-States, since any initiative taken outside the framework of the common institutions would be incompatible with the unity of the Common Market and the uniform application of Community law'. The Court held that,

> wherever a matter forms the subject of a common policy the member-States are bound to act jointly in defence of the interests of the Community. This requirement of joint action was in fact respected by the discussion on 20 March 1970 which cannot give rise to any criticism in this respect. Moreover, the right to conclude the Agreement belonged to the Council... In carrying on the negotiations and concluding the Agreement simultaneously in the manner decided on by the Council the member-States acted, and continue to act, in the interest and on account of the Community in accordance with the obligations imposed on them by art. 5 of the Treaty. Hence, in deciding in these circumstances on joint action by member-States, the Council has not defaulted in its obligations arising from arts. 75 and 228.[49]

The application by the Commission for annulment was, therefore, rejected.

Article 11 (2) of Regulation 543/69 provides that 'every crew-member engaged in the carriage of passengers shall have had, during the twenty-four hour period preceding any time when he is performing any activity covered by art. 14 (2) (c) or (d) ... a daily rest period of not less than ten consecutive hours, which shall not be reduced during the week'. A Belgian royal decree of 1970 implemented that Regulation. In *Cagnon and Taquet* (69/74)[50] a coach-driver, Mr. Cagnon, was prosecuted in the Mons police court for not having complied with art. 11 (2) during a trip to Germany. He did not dispute the facts, but contended that the Regulation did not involve any obligation on his part in that it was only his employer who was required to take the necessary measures to permit crew-members to have the daily rest laid down. On reference to the European Court it was pointed out that the Regulation would be of little avail if its provisions in relation to daily and weekly rest applied only to the employer running the road-transport service. In fact, art. 14 provides that crew-members shall carry an individual control-book in which such rest periods are recorded. The Court held therefore that the Regulation must be observed both by crew-members and by the employer, who is required to take the necessary measures to permit the former to have the daily rest period laid down.

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48 Ibid., 354-355.
49 Ibid., 360-362.
50 Ibid., 16 (1975) 68. As regards the duty, under art. 14 (7) and (8) of Regulation 543/69, to issue an individual control-book in the case of a driver hired out by his employer to drive a lorry owned by a construction company, see *Auditeur du Travail* v. *Dufour et al.* (76/77) 1 C.M.L.R. 21 (1978) 265.