In Case 92/63

Reference to the Court under Article 177 of the EEC Treaty by the Acting President of the Centrale Raad van Beroep, Utrecht, for a preliminary ruling in the action pending before that court between

MRS M. TH. NONNENMACHER, WIDOW OF H. E. MOEBS, resident at Drusenheim (France),

appellant,

and

BESTUUR DER SOCIALE VERZEKERINGSBANK, Amsterdam,

respondent,

on the interpretation of Article 12 of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561);

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux, R. Rossi, R. Lecourt and W. Strauß (Rapporteur), Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

I—Issues of fact and of law

1. By an order of 16 October 1963 the Netherlands court decided that the case before it raised a question envisaged by Article 177 of the EEC Treaty, making necessary a preliminary ruling of the Court of Justice of the European Communities, and that for this purpose the file of the case should be sent to the acting President of the Netherlands court.

2. By a letter of the same date the acting President in carrying out this order asked the Court of Justice to give a preliminary ruling on the following question:

'Must Article 12 of Regulation No 3 be construed as meaning that the persons to whom it refers are subject

only to the legislation of the Member State in whose territory they are employed, irrespective of whether the persons concerned can in fact assert any rights on the basis of such legislation?'

3. The acting President pointed out in particular:

In accordance with Article 53 of the 'Algemene Weduwen- en Wezenwet', (General Widows' and Orphans' Law; hereinafter referred to as the AWW), the Netherlands court is competent to decide appeals in cases relating to the application of that Law.

The husband of the appellant in the main action, Mr Moebs, died on 21 October 1959. It is established that until 1 September 1959 he lived in the Netherlands and that after that date until his death he worked in France. It must be remembered that at the time of his death Mr Moebs was still resident in the Netherlands.

The appellant considers that under Article 7 of the above-mentioned Law she is entitled to a widow's pension, since her husband was insured from 1 October 1959 until his death on the basis of the AWW, and it was in fact on 1 October 1959, that according to the findings of the acting President the above-mentioned provision entered into force. Moreover, as regards the appellant's arguments the acting President refers to Schedules I and II of the letter making the reference.

On the other hand, according to the respondent, Mr Moebs was never insured on the basis of the AWW. In accordance with Article 12 of Regulation No 3, the only system of social insurance applicable to him is that of the State on the territory of which the wage-earner in question was employed, in the present case the French system. It is of little importance in this respect whether, on the basis of this law, the appellant can or cannot in fact assert rights to a widow's pension. On the other hand, as regards the arguments of the respondent, the acting President refers to the official transcript of the judgment, disputed before the reference, of the Raad van Beroep, Amsterdam, which shares the view of the respondent, as well as to Schedule IV to the reference, from which it appears that the payment office of the French social security service rejected the request of the appellant for the payment of a widow's pension.

4. In her notice of appeal as well as in a further pleading of 5 June 1961, the appellant in the main action also provides the following information:

From 1956 she lived in the Netherlands with her husband who had French nationality. She has had by her marriage eight children still living, of whom the eldest was born in 1949 and the youngest in 1959. Since 1 July 1960 she has lived in France.

Since 1959, in order to assert her rights she has instituted several administrative and judicial proceedings, based on paragraphs 1 (a) and 4 of Article 7 of the AWW as well as on paragraphs 1 (a) and 1 (g) of Article 2 of the Royal Decree of 10 July 1959 (Staatsblad, p. 230) issued to give effect to this Law. On several occasions the Raad van Beroep, 's-Hertogenbosch, has annulled decisions of administrative courts which had dismissed applications by the appellant, including a decision of the Raad van Arbeid, 's-Hertogenbosch, which based its decision for the first time on Article 12 of Regulation No 3, and sent the case back to the administrative authorities. By decision of 15 September 1963 the respondent in the main action refused to allow the claim of the appellant in the main action; the appeal against this decision was dismissed as unfounded by the decision of 19 March 1963 of the Raad van Beroep, Amsterdam; it is against this judgment that the further appeal was instituted.

The appellant has, in addition, put before the Court the following documents:

(a) A note from the Caisse primaire de

sécurité sociale de Haguenau (France), which explains in particular that, according to French law (Code de sécurité sociale, Article L. 323), the widow of a member of the social insurance scheme who has not retired has no right to a pension as long as she is not suffering from a permanent incapacity to work;

(b) A medical certificate according to which the appellant in the main action is able to work.

II—Procedure

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, the request for a preliminary ruling was notified to the parties concerned as well as to the Member States, the Commission and the Council of the European Economic Community. Only the Commission submitted observations within the prescribed time-limit. The appellant in the main action referred to her notice of appeal as well as to her 'pleadings' of 5 June 1961.

Upon hearing the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to commence the oral procedure without any preparatory inquiry. Nevertheless it requested the Registrar to ask the parties which had expressed opinions in respect of Regulation No 3 to produce all the administrative and judicial decisions concerning the appellant in the main action.

At the hearing on 17 March 1964 the Court heard the Commission of the EEC and the opinion of the Advocate-General.

III—Legal arguments of the parties to the proceedings

1. In her notice of appeal and in her further pleading the appellant in the main action makes the following observations:

She explains in particular the reasons why she believes she is able to base her right to a widow's pension on Netherlands law. In this respect, she argues first of all that, from the entry into force of the AWW until his death, her husband was insured under that Law and paid the maximum contribution for which it made provision. The Netherlands Law on the matter must be construed in such a manner that the applications to the social insurance offices must not be refused only because the person insured belongs to the social security system of another State; on the contrary, it was also necessary for him to be effectively insured according to that Law. For, as the legal system in question makes no payment to the person concerned for certain risks, it is not possible to say that he has been 'insured' under that Law against those risks.

On the basis of information obtained in France, the appellant in the main action explains in detail why the French social security system does not confer upon her any right which she can plead in the present appeal. She states that the single payment of a maximum of three months' basic wages to a widow still does not amount to a payment equivalent to those provided by the AWW. Her husband was certainly insured with the 'Caisse interprofessionnelle de prévoyance des cadres' in Paris, but that was a matter of a voluntary insurance which is not to be taken into account in the present case.

Article 12 of Regulation No 3 has not an exclusive effect in the sense that the possible application of a foreign system of social security would exclude *ipso jure* the application of the AWW. That could at most be the case if the laws of the States concerned were mutually incompatible but not if they are complementary. That is especially true in cases where, like the present one, the law of one State (France) does not include provisions applying to the facts in dispute, while this is the case as regards

the law of another State (Netherlands).

2. The arguments of the *respondent* in the main action (and those of the Raad van Beroep, Amsterdam, which in essence shares the point of view of the former) may be summarized as follows: Article 12 of Regulation No 3 should be construed as meaning that wage-earners resident in a Member State and employed in another Member State are exclusively subject to the law of the latter. This argument is confirmed by Article 13 of the Regulation and in particular by paragraph (a); it has also appeared in certain international conventions. It is, furthermore, the only one which is reasonable, since the simultaneous application of different legal systems is likely to lead to inconsistencies such, for example, as double contributions. It is true that this argument does not fail to involve certain disadvantages for those concerned, particularly when the provisions of the State in which they work are less favourable than those of their State of origin. Nevertheless this is a normal consequence of the decision to go and work abroad. In accordance with all that has been said, it is clear that Mr Moebs was not insured within the meaning of the AWW, so that the appellant in the main action cannot assert rights based on this Law.

IV — Observations of the Commission of the EEC

Only the Commission of the EEC has made observations. It considers that Article 12 of the Regulation ought to be construed as follows:

— it requires the exclusive application of the legislation of the country of employment when all the legal systems provide for compulsory insurance based on the exercise of an occupation;

— as against this, it still allows for the possibility of a simultaneous application, on the one hand, of provisions for compulsory insurance and, on the other hand, of provisions for voluntary or optional continued insurance, since in this case the payment of two contributions is not obligatory; the worker alone, and not the employer, has to pay two contributions, one of them of his own free will;

— it also allows for the simultaneous application of two schemes, one of which calls for compulsory membership based on the exercise of a working activity, the other being applicable to the whole population with residence as the sole qualification, on condition, however, that membership of the latter scheme does not involve any obligation to participate in its financing by a specific contribution.

The Commission bases its argument on the following considerations:

(a) First, it discusses the content of the AWW and points out in particular that this Law does not require for its application the exercise of any economic activity whatever, but that it applies equally and in a general manner to the whole population resident in the Netherlands. The Royal Decree of 10 July 1959 excludes the application of the AWW where the person concerned is employed in another country and 'is insured' in accordance with the law of such country against premature death. According to Netherlands law this expression must be understood as meaning that the only important factor is whether the person concerned is employed in another country and 'is insured' in accordance with the law of such country against premature death. According to Netherlands law this expression must be understood as meaning that the only important factor is whether the person concerned has been insured in the State where he was employed, but not if he in fact receives benefit there.

Thus the appeal could have already been dismissed on the basis of Netherlands law alone. However an examination of the content of Article 12 of Regulation

No 3 is important to the extent that, *a priori*, it is no use to keep to the contents of Netherlands law if it follows from this Article that French law alone is applicable.

The question from the Netherlands court must be interpreted in the light of the foregoing observations. The Commission is of the opinion that it matters little to the court whether Article 12 refers to the law of the country in which an insured person has been employed only when the latter can invoke it in his favour; on the contrary the court wishes to know whether the reference to the legal system of the country in which an insured person is employed *always* excludes the simultaneous application of the provisions of another country, in particular when the application of the last-mentioned provisions is not linked to the exercise of a working activity, but when it relates to the whole population which resides in the country.

(b) Article 12 is a rule concerning the conflict of laws such as must exist in a series of provisions which coordinates the social insurance laws of several countries. It must be examined in the light of the development which has become apparent since the last war in the various international conventions concerning social security. The rules governing conflict of laws in these conventions have a double purpose: first, to avoid the payment of double contributions by employers and employees; secondly, to ensure that the rules of one of the States is applicable in every case when those of the other State are not. The *exclusive* application of the legal system to which reference is made each time serves the first purpose; its *compulsory* application serves the second. In construing corresponding provisions it is necessary to distinguish between the two objectives. Reference to a legal system which is applicable exclusively is necessary only in so far as the different legal systems which may be in question provide for *compulsory* contributions by those insured or by employers, but not in other cases where, for example, one of the two laws makes provision only for voluntary insurance, or compulsory insurance without compulsory contribution.

(c) These principles are applicable also in respect of the construction of Article 12, which is based to a great extent on similar provisions in previous social security conventions.

Article 12 unequivocally provides for the *compulsory* application of the law of the State in which the insured person is employed, but has no precise provisions relating to the question of *exclusive* application. Nevertheless in certain cases Community law is by no means opposed to the simultaneous application of two systems of legal rules as appears from the sense of Regulation No 3, as well as from certain provisions of this Regulation (as for example Article 9 (1) and (2)), as well as from Regulation No 4 of the Council of the EEC 'Regulation No 4 on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers' (OJ 16 December 1958, p. 597 et seq.), and in particular Articles 8 (c), 9 (4), 13 (1) (b) and lastly, indirectly, Article 7 of Regulation No 73/63 of the Council of the EEC of 11 July 1963 (OJ 24 July 1963, p 2011).

The exclusive application of the law of the State in which the insured person is employed cannot, consequently, be inferred from Article 12 except in the cases when all the legal systems concerned make provision for compulsory insurance in respect of which the person insured or his employer must pay contributions. In this respect it must also be remembered that Community law sometimes accepts the principle of a right to *double benefits*, but that it includes no express provision directed towards avoiding *double contributions*; for this reason Article 12 must, in the first place, be regarded as being the provision in-

tended to serve this purpose.
Lastly the Commission submits more detailed observations in respect of certain French and Netherlands regulations. According to Articles 511 and 513 of the French Social Security Code, the wife of a man employed abroad has the right to family allowances for her children resident in France if she herself is not in employment. Furthermore certain Netherlands laws, among them the AWW, which is relevant in the present case, make provision for social security benefits which are not linked to the exercise of working activities. Nevertheless, unlike the provisions of French law mentioned above the Netherlands laws provide for compulsory contributions from every employed person. They belong, therefore, to those bodies of rules which cannot be applied simultaneously with the provisions of the legal system referred to in Article 12 of Regulation No 3.

Grounds of judgment

The Court has been properly seised of a request for interpretation under Article 177 of the EEC Treaty by the Centrale Raad van Beroep.

1. The question asked by the said court first requests the Court to say whether Article 12 of Regulation No 3 'must . . . be construed to mean that the persons to whom it refers are subject only to the legislation of the Member State in whose territory they are employed'.

(a) Regulation No 3 was made pursuant to Article 51 of the EEC Treaty according to which the Council 'shall . . . adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants . . . payments of benefits to persons resident in the territories of Member States'.

This payment pre-supposes membership of a social security scheme of a Member State. The Treaty has thus placed upon the Council the duty to lay down rules preventing those concerned, in the absence of legislation applying to them, from remaining without protection in the matter of social security.

With a view to achieving this object it was necessary to make provision for the mandatory application of specific legislation. Article 12 of Regulation No 3 fulfils this requirement by obliging the State in whose territory wage-earners or assimilated workers are employed to apply its legislation to them. The mandatory nature of this Article is further confirmed by the explicit terms of both Article 12 ('. . . shall be subject to the legislation of that State . . .') and the Head under which it is included ('Provisions for determining what legislation is applicable'). Taking into account the above-

mentioned provisions of Article 51 of the Treaty, this obligation must be regarded as the essential element of the said Article 12.

(b) The question submitted to the Court is directed towards clarifying whether — and, if so to what extent — the mandatory application of the legislation of the State in which the worker is employed excludes the application of the legislation of any other Member State, even of that in the territory of which he has his permanent residence.

Article 12 includes no provision prohibiting the simultaneous application of several systems of legislation. In these circumstances the intention of the authors of Regulation No 3 to impose such a restriction on the freedom of the national legislature should be presumed only to the extent that such simultaneous application is clearly contrary to the spirit of the Treaty and particularly of Articles 48 to 51.

These provisions are designed to establish the greatest possible freedom of movement for workers. This aim includes the elimination of legislative obstacles which could handicap migrant workers.

In case of doubt the abovementioned Articles and the measures taken in implementation of them must therefore be construed so as to avoid placing migrant workers in an unfavourable legal position, particularly with regard to social security. On the other hand these provisions are not opposed to legislation by the Member States designed to bring about additional protection by way of social security for the benefit of migrant workers.

If a prohibition of the simultaneous application of two national systems of legislation concerning workers cannot be established in the absence of a specific provision for that purpose, there is all the more reason why this should be so when one of the systems, far from being intended only for workers, applies without distinction to the whole population by virtue of a criterion depending not on the exercise of a wage-earning activity but on residence alone. Articles 48 to 51 of the Treaty, which are incorporated in the Chapter headed 'Workers', and which constitute the foundation, the framework and the limits of Regulation No 3, provide no authority for prohibiting a State from granting additional protection by way of social security to its whole population including those of its nationals who work in another member country.

For the foregoing reasons, Article 12 of Regulation No 3 does not prohibit the application of the legislation of a Member State other than that in which

the person concerned works, except to the extent that it requires that person to contribute to the financing of a social security institution which is unable to provide him with additional advantages in respect of the same risk and of the same period.

Consequently it is permissible for States, other than that in the territory of which the insured person is employed, to provide or not to provide for the grant of rights to benefits in favour of that person even if he enjoys, in respect of the same risk and period, similar rights under the legislation of the State in which he works.

2. The Centrale Raad asks the Court in the second part of its question to say whether, to the extent that Article 12 excludes the application of the legislation of other States, this rule is subject to an exception when in fact the person insured or his dependants cannot assert any right on the basis of the legislation of the State referred to in the said Article.

It follows from the foregoing considerations that Article 12 does not prohibit other States from allowing those concerned a right to benefits.

3. The costs incurred by the Commission of the EEC which has submitted its observations to the Court are not recoverable.

As the proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action before the Centrale Raad van Beroep it is for that court to make a decision as to costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the European Economic Community;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 48 to 51 and to Article 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), and particularly Article 12;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it for a preliminary ruling by the Centrale Raad van Beroep, forwarded by a letter of 16 October 1963 from the acting President of that Court,

hereby rules:

1. **Article 12 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.) does not prohibit Member States other than those in the territory of which wage-earners or assimilated workers are employed from applying their social security legislation to such persons.**

2. **It is otherwise only if a Member State, other than that in the territory of which the worker is employed, requires him to contribute to the financing of an institution which would not accord him supplementary protection by way of social security in respect of the same risk and of the same period.**

3. **The decision on costs is a matter for the Centrale Raad van Beroep.**

Donner Hammes Trabucchi
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 17 APRIL 1964[1]

Mr President,
Members of the Court,

For the second (and not the last) time, the Centrale Raad van Beroep refers to you for a preliminary ruling a question concerning the interpretation of Regulation No 3 concerning social

1—Translated from the French.