the competent State in no way alters the fact that the submission of that claim has the same effect as if it had been submitted direct to the competent authority of the State of origin.

3. **Article 10 (1) of Regulation No 3 of the Council of the EEC of 25 September 1958 must be interpreted as meaning that the insurance institution of the State of origin is not permitted to apply to invalidity benefits the principle of territoriality to which the national court refers.**

Due Chloros Grévisse

Delivered in open court in Luxembourg on 10 June 1982.

For the Registrar

H. A. Rühl
Principal Administrator

O. Due
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 28 JANUARY 1982 [1]

Mr President,
Members of the Court,

1. Introduction

Mrs Caracciolo was declared unfit for work in Belgium on 12 July 1965. On 9 November of that year she was authorized by the medical officer of her insurance institution, the Union Nationale des Mutualités Socialistes [National Union of Socialist Mutual Associations], to stay in Italy from 15 November to 14 December. However, she did not return from that stay. After failing to comply with a summons to attend a medical examination in Belgium, she was examined by the competent Italian insurance institution under the terms of

1 — Translated from the Dutch.

a bilateral administrative arrangement between Belgium and Italy of 1950. As a result of that examination Mrs Caracciolo was declared fit to resume work on 5 January 1966 and at the same time payment of her benefit was stopped. On 31 January 1966 she submitted an application for an invalidity pension to the Institut National d'Assurance Maladie-Invalidité (National Sickness and Invalidity Insurance Institution] (hereinafter referred to as "the Belgian institution") through the intermediary of the Italian institution concerned. It appears that that application was made on account of her lack of knowledge of the means available to her of challenging the above-mentioned decision to discontinue payment of her benefits. On 26 November of that year a declaration of her invalidity was made in Italy. On 31 May 1968 her application to the Belgian institution for an invalidity pension was rejected, although it later appeared that this was on the basis of an incomplete file. On 12 May 1969 a fresh rejection followed, this time on the ground that she had neither applied for nor was in receipt of sickness benefit. The Belgian Law of 1963 provides for the grant of invalidity benefit only where payment of sickness benefit has been made for one year. After the case had been brought before various courts, the Cour du Travail [Labour Court], Brussels, dismissed the claim on 24 November 1977. Following an appeal in cassation, the Cour de Cassation [Court of Cassation] on 6 April 1981 referred to the Court a number of questions for a preliminary ruling.

2. The questions submitted for a preliminary ruling and their background

The questions submitted read as follows:

1. Where a worker in receipt of sickness and invalidity insurance benefits in cash in a Member State of the European Community, who has been authorized to stay in another Member State in order to receive treatment there, has remained in that other State after the expiry of the prescribed period and on conditions which are irregular under the legislation of the State of origin and under an administrative arrangement concluded between the two States which has remained applicable under Regulations Nos 3 and 4 concerning social security for migrant workers, must Article 83 of Regulation No 4 be interpreted to mean that that provision determines not only the date on which a declaration or an appeal shall be deemed to have been made to the authority, institution or agency competent to take cognizance thereof but also the validity of the claim when it is addressed to an authority, institution or agency of a Member State other than that of the State whose authority, institution or agency is competent to take cognizance thereof?

2. If the answer to the first question is in the affirmative, must that provision be interpreted to mean that a claim which is submitted in the circumstances which have just been related must be considered valid although under the legislation of the State of the competent authority the claimant's residence in the other State was irregular?

3. Likewise, do the provisions of Article 10 (1) of Regulation No 3 concerning social security for migrant workers preclude the application by the insurance institution of the Member State of origin of the principle of the

territoriality of benefits laid down by national legislation, in this case by Article 70 (1) of the Belgian Law of 9 August 1963?

Those questions must be seen against the background of the judgment of the Cour du Travail, Brussels, finding that on 31 January 1966, the date on which the application for an invalidity pension was submitted, the appellant was still covered by Belgian insurance. As has already been stated, under Belgian law the appellant's right to such a pension depends on the answer to the question whether she was entitled to sickness benefit. If the application for the invalidity pension is interpreted as an appeal against the declaration of 5 January 1966 that the appellant was fit for work, Article 83 of Regulation No 4 of the Council of the EEC (Journal Officiel 1958 No 30, p. 597) is relevant and in so far as is important here it reads as follows: "The date of submission of ... appeals to an authority ... of another Member State shall be deemed to be the date of submission thereof to the competent authority ...". The same applies if the claim of the appellant in the main action is in fact regarded as an application for an invalidity pension.

If that article were applied by treating the claim as an appeal, this would mean that the requirement under the Belgian law that an appeal should be made within 30 days would have been complied with. However, the Belgian institution takes the view that that provision applies only to applications which are properly made. Since in its opinion Mrs Caracciolo's application was irregular on account of her unauthorized stay in Italy, Article 83 is inapplicable. The practical consequence is thus the inadmissibility of the application for an invalidity pension if it is regarded as an appeal, with the result that the precondition that the appellant must be entitled to sickness benefit is not met.

The Cour de Cassation divided that issue into two questions:

(1) Does Article 83 provide merely for the assimilation of dates or does it also have a bearing on whether the application is irregular or not,

and

(2) if the latter part of that question is answered in the affirmative, is an application such as that made by Mrs Caracciolo to be regarded as properly made?

The third question relates to another obstacle to the grant of the invalidity pension. Article 70 (1) of the Belgian Law provides *inter alia* that presence on Belgian territory is a condition of eligibility for such a benefit.

3. The first question

The Cour de Cassation's first question raises the problem whether Article 83 of Regulation No 4 and the related provision contained in Article 47 of Regulation No 3 must be interpreted as meaning that substantive requirements may also be made with regard to the claims for social security benefits referred to therein. In its judgment in Case 40/74 *Kingdom of Belgium, Costers and Vounckx* v *Berufsgenossenschaft der Feinmechanik und Elektrotechnik* [1974] ECR 1323, the Court considered (at p. 1329) that those provisions sought primarily to protect the parties involved against the consequences of the different systems of social security and that they should be interpreted on the basis of "taking into account the particular difficulties encountered by workers residing in another Member State and possibly unaware of these rules as to competence". Whilst it may be inferred

from that statement alone that the provisions concerned are of administrative significance only, that was stated even more clearly by the Court in its judgment in Case 108/75 *Balsamo* v *Institut National d'Assurance Maladie-Invalidité* [1976] ECR 375. There the Court stated that all the conditions concerning the making of an application are satisfied as soon as the application is properly made in accordance with the procedure laid down by the legislation of the country of permanent residence. Therefore Article 83 is a provision which relates solely to the assimilation of dates.

Accordingly, I propose that the Cour de Cassation's first question should be answered as follows:

"Article 83 of Regulation No 4 relates solely to the date of submission of the claims or appeals referred to in that provision to the authority of the other Member State."

4. The second question

Although the second question is put only in the event of the first question's being answered in the affirmative, it none the less retains its importance in relation to the answer which I have proposed to the first question, provided that the comparison of the relevant national law with Community law is extended to provisions other than Article 83 of Regulation No 4. The question then resolves itself into an inquiry by the court making the reference as to the provisions of Community law which relate to the regularity of a claim or appeal such as the one in question.

As in the case of the subsequent regulation, No 1408/71, the scheme of Regulations Nos 3 and 4 is such that, unless otherwise provided, those measures replace any prior bilateral and multilateral arrangements in the field of social security. So far as implementing provisions are concerned, Article 6 of Regulation No 4 provides that they are to continue to apply only if they are listed in Annex D. The Belgo-Italian Administrative Arrangement of 1950 is named therein only in so far as it relates to agricultural workers. Since it does not appear that that description was applicable to the appellant, the question of the legality of her extended stay in Italy should be determined exclusively on the basis of the provisions of Regulation Nos 3 and 4. I agree with the Commission that the only provision which may be relevant to this case is that contained in Article 19 (2) of Regulation No 3, which reads as follows:

"(2) A wage-earner or assimilated worker, *admitted* to benefits chargeable to an institution of one Member State, who permanently resides in the territory of the said State, shall retain his right to such benefits when he transfers his permanent residence to the territory of another Member State; provided that the said person shall, before the transfer, obtain the authorization of the competent institution, which shall take due account of the reasons for the transfer."

However, I should like to point out emphatically that the foregoing in no way implies that Article 19 (2) is actually applicable to this case. The decision on that matter is reserved to the national court. Whether that provision is applicable will in particular depend on whether there may be said to be a vested right to benefits chargeable to the Belgian institution. The latter answers that question in the negative, since on 5 January Mrs Caracciolo was declared to be fit to resume work. As appears from its written observations and oral argument, the Commission assumes that this case concerns a claim for sickness benefit or an appeal against the refusal to award or continue payment of such benefit, and it accordingly comes to a different conclusion.

However, the fact that it is a matter for the national court to decide whether or not Article 19 (2) is applicable does not mean, as the Belgian institution contended at the hearing, that the Court may not make any statement at all concerning that provision because the Cour de Cassation has not submitted any question relating to it. Clearly, the Court's freedom in this regard is not unlimited. As Mr Advocate General Warner observed in his opinion in Case 22/79 *Greenwich Film Production* v *SACEM* [1979] ECR 3275, at p. 3295, the Court may not rule on questions which have been referred to it. That does not mean, however, that the Court may not advert to a provision of Community law which, on the facts, clearly may be applicable. The Court has already stated, in its judgment in Case 16/65 *Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877 (at p. 886), that it is appropriate for the Court to inform the national court at once of its view "without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure under Article 177 and would be contrary to its very nature".

Assuming that Article 19 (2) might be considered by the national court to be applicable, I do not agree with the Commission's interpretation of that provision.

The Commission, referring to the Court's judgment in Case 117/77 *Algemeen Ziekenfonds Drenthe-Platteland* v *Pierik* [1978] ECR 825, takes the view that the refusal to authorize an extension of the stay in this case encountered difficulties on account of the limitation laid down by the Court in paragraph 17 of that judgment. In my opinion, however, the last clause in Article 19 (2) of Regulation No 3 cannot simply be overlooked. As appears from the file, the appellant merely applied for and obtained authorization for temporary residence in Italy in accordance with Article 19 (1). She did not, however, request the authorization required by Article 19 (2) for the transfer of her residence to Italy. Owing to the fact that in this case it appears from the file that no such authorization was requested, this case is fundamentally different from the case cited by the Commission, in which such authorization had in fact been requested. The said requirement which the Member States may lay down is weakened by the Commission's reasoning, because it is no longer the competent institution but the applicant

himself who judges the expediency of preserving his vested rights upon transfer of his residence to another Member State. Community law makes no provision as to the legal consequences of failure to comply with the requirement that authorization for transfer of residence must be requested.

Therefore, in my opinion, the answer to the second question should be that, if the remaining conditions for the applicability of Article 19 (2) of Regulation No 3 are fulfilled, the national court should determine the consequences under national law with regard to the sickness benefits payable under that law of the failure to request authorization for transfer of residence as provided for in Article 19 (2) of Regulation No 3.

5. The third question

The third question is also put in the event of the first question's being answered in the affirmative. In view of the suggested reply to the first question, the third question therefore has no purpose. Nevertheless, I consider that, even if Article 83 of Regulation No 4 has a purely administrative significance, it is still relevant to determine whether Article 10 (1) of Regulation No 3 prevents the insurance institution of the country of origin from applying the principle of territoriality, as laid down in the legislation concerned.

I would again emphasize that the question whether or not the appellant's stay in Italy was irregular is not important for the purpose of answering the question thus re-formulated. That would constitute a second barrier to the grant of an invalidity pension, if the claim were in fact classified as an application for the grant of an invalidity pension.

Article 10 (1) of Regulation No 3 applies to the grant of "pensions or death benefits".

It is quite clear from the wording of that provision that it does not apply to sickness benefits. In paragraph 16 of its judgment in Case 41/77 *The Queen* v *National Insurance Commissioner, ex-parte Warry* [1977] ECR 2085 (at p. 2093), the Court acknowledged that the application of residence clauses in the grant and payment of sickness benefits was permissible also under Regulation No 1408/71. There may be some doubt in this regard in relation to invalidity benefits. Indeed, Article 10 (1) speaks of "pensions", and in the heading to Chapter 3 of Title III of Regulation No 3 the word "pensions" is added to the expression "old age and death", so that it might be argued, as indeed the Belgian institution argues, that a prohibition of residence clauses is inapplicable to invalidity benefits or pensions. On the other hand, it appears from Article 26 of Regulation No 3 that invalidity benefits are to a considerable extent assimilated to old-age and death benefits. Such assimilation seems, in contrast with the

case of sickness benefits, to result from the nature of the social security provisions concerned. Article 10 (1) of Regulation No 1408/71 also supports that conclusion — unlike the corresponding provision of Regulation No 3 — in expressly stating that a residence clause may not be applied to invalidity benefits. The Court gave the reason for that provision in its judgment in Case 51/73 *Bestuur der Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213 by pointing out in paragraph 15 that the aim of that provision was to guarantee to the party concerned his right to have the benefit of such payments even after taking up residence in a different Member State, for example, his country of origin. In view of this it seems justified to consider the prohibition on residence clauses contained in Article 10 (1) of Regulation No 3 to be applicable also to invalidity pensions. As appears from its observations, the Commission itself does not seem to exclude that interpretation. Unlike the Commission, however, I consider that the question concerning the application of Article 10 (1) is relevant to invalidity benefits, because my answer to the Cour de Cassation's second question does not necessarily rule out the possibility that there might in this case be a right to sickness benefit and that the necessary condition under Belgian law for grant of an invalidity pension might thereby be fulfilled. Moreover, the question is relevant if the claim must be regarded, contrary to the Commission's opinion, not as an appeal concerning the continued payment of sickness benefits but exclusively as a claim for the grant of an invalidity pension. In that connection, it also seems to me to be worth while once again to recall the Court's judgment in the above-mentioned case of *Warry*. There, the Court stated, in paragraph 29, that it would be contrary to the scheme and aims of Regulation No 1408/71 for a claim for invalidity benefit to be refused on the ground that no claim for sickness benefit had been submitted at an earlier stage. Whilst that did not happen because a residence clause applicable thereto was not complied with, it is, as appears from paragraph 30 of the same judgment, sufficient for the claim for invalidity benefit to be made correctly according to the implementing provisions through the intermediary of the competent institution in the State of residence. In the light of that judgment the failure to fulfil a residence clause and therefore to satisfy a necessary precondition for the award of invalidity benefit, namely that there must be a right to sickness benefit, may not, in this case either, constitute a ground for refusing the former benefit.

I therefore suggest that the Court de Cassation's third question should be answered as follows:

"Article 10 (1) of Regulation No 3 must be understood as meaning that it is applicable also to invalidity benefits. The failure to fulfil a residence clause and therefore to satisfy a necessary precondition for the award of invalidity benefit under the law of a Member State, namely that there must be a right to sickness benefit, does not constitute a ground for refusing the former benefit."