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 by the Bundessozialgericht by order of that Court dated 20 October 1972, hereby rules:

Article 22 of Regulation No 3 of the Council concerning social security for migrant workers is to be interpreted as meaning that the State where he is resident does not have to issue benefits in kind to a pensioner who is entitled to draw pensions under the legislation of serveral Member States and is resident in one of them, where this is not provided for by the law of that State.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 11 October 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 SEPTEMBER 1973 [1]

Mr President,
Members of the Court,

By order dated 20 October 1972 the Bundessozialgericht referred for a preliminary ruling a question on the interpretation of Regulation No 3 concerning social security for migrant workers. The following are the significant facts.

Mr Kunz, the respondent in the appeal in the main action, a Dutch citizen resident in The Netherlands, has been since February 1965 (i.e. since attaining 65 years of age) in receipt of an old age pension under the Dutch General Old Age Law. Moreover, by reason of the fact that before his flight to The Netherlands he was employed in Germany between the years 1921-1938,

1 — Translated from the German.

he has since 1 February 1965 been in receipt of an old age pension under Article 25 (1) of the Angestelltenversicherungsgesetzes (Employees' Insurance Law) from the defendant, the appellant in the main action.

As a self-employed person, Mr Kunz in 1955 voluntarily insured himself against sickness with a Dutch insurance society ('Amsterdams Onderling Ziekenfonds'). He retained this insurance as a pensioner, because the Dutch General Old Age Pension is not linked with compulsory sickness insurance. The monthly insurance premium in 1971 amounted to 48·75 Dutch florins.

Under German law, more precisely under Article 381 (4) of the Reichsversicherungsordnung (Imperial Insurance Ordinance), pensioners receive *inter alia* an allowance for contributions from the statutory insurance for employees if they do not belong to the class of persons for whom sickness insurance as pensioners is compulsory and they are insured against sickness with a private society. Since Mr Kunz, because he is not permanently resident in the Federal Republic, does not, under Article 165, Reichsversicherungsordnung, come within the class of persons for whom the sickness insurance for pensioners is compulsory, he sought, as a pensioner entitled under German law, such an allowance from the commencement of his pension. This he did by application made in August 1969.

The defendant, however, rejected the application. It gave as its reason that an allowance for a contribution could be made only if a person is subject to the German sickness insurance. This could not be said to be so in the case of the applicant, because Article 22 of Regulation No 3 concerning social security for migrant workers contains an exclusive scheme relating to the affiliation of pensioners to sickness insurance. From this it follows that the sickness insurance of a pensioner during his stay in The Netherlands is to be borne by the Dutch insurance institution.

It is true that this view was rejected by the Sozialgericht Berlin as a result of the summons brought by Mr Kunz. Subsequently the Landessozialgericht Berlin took the same view, that Article 22 of Regulation No 3 was no basis for rejecting the allowance for a contribution. In truth this provision contains no general obligation on the part of the State of residence to bear the sickness insurance of a pensioner. The defendant, nevertheless, maintained its view and accordingly brought the matter on appeal on a point of law before the Bundessozialgericht.

The Bundessozialgericht is obviously inclined to declare the claim for an allowance for the contribution valid according to German law. This is having regard to the fact that the Dutch voluntary insurance provides benefits which correspond to full insurance cover against the costs of sickness. At least this is the basic view underlying the consistent case law of the Bundessozialgericht, according to which a claim lies under Article 381 (4), Reichsversicherungsordnung, even in an case of foreign residence and where the private insurance has been concluded abroad, provided only that the insurance cover is comparable to that of a pensioner living in the Republic insured in the German statutory sickness insurance scheme. However, the Bundessozialgericht did not feel able to declare obviously wrong the objections based on the provision in Article 22 of Regulation No 3 for pensioners drawing several pensions. Therefore it has referred a question on the interpretation of Article 22 of Regulation No 3 to the Court. By this question clarification is sought as to whether 'Article 22 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (is) to be interpreted as meaning that the State where he is resident must issue benefits in kind under pensioners' sickness insurance to a pensioner who is entitled to draw pensions under the legislation of several Member States and is resident in one of them, even though

this is not provided for by the law of that State, whereas another Member State, under whose legislation the pensioner is also entitled to a pension, would have had to issue such benefits'.

I now wish to examine how this question, on which the defendant in the main action and the Commission of the European Communities have submitted observations, should be answered.

Article 22 (1) of Regulation No 3, upon which, on the facts in the main action, everything seems mainly to depend (pensions payable under the legislation of several States, residence in one of the States in which a pension is payable) provides:

'Where a pensioner entitled to draw pensions under the legislation of several Member States is permanently resident in the territory of a Member State in which one of the institutions liable for payment of his pension is situated, and he is entitled to benefits in kind under the legislation of that State, the benefits in kind shall be issued to him and the members of his family by the institution of his place of permanent residence, as though he were a pensioner whose pension was payable solely under the legislation of his country of permanent residence. The cost of such benefits shall be borne by the institution of the country of permanent residence'.

From the wording of this provision it is clear that in the case of a pensioner entitled to draw pensions under the legislation of several Member States benefits in kind are to be issued by the institution of the place of residence in the event of illness only if a claim lies under the *national* law of the said institution. Community law does not thereby impose on the State of residence an obligation to provide benefits in kind, but, according to Community law, such a claim is clearly dependent on the conditions of the national law of the State of residence being complied with. If the matter is seen in this light, there can indeed be no question of the said provision being the basis of ascribing the sickness insurance to the State of residence with the effect that the insurance law of other Member States (in the present case: that of the Federal Republic of Germany) is displaced.

But the defendant does not seek to rely solely on Article 22 (1), for it, too, is of the opinion that thin provision does not exactly cover the present case. An examination of all the provisions of Article 22 of Regulation No 3 is necessary for an answer to the question. If one does this the following picture emerges.

Article 22 (2) deals with the case of a pensioner who is entitled to draw a pension under the legislation of one or several Member States and who resides in the territory of a Member State where none of the institutions responsible for payment of his pension is situated. For this case it is provided that the pensioner shall nevertheless receive such benefits for himself and members of his family and that they 'shall be provided by the institution of his place of residence as though he were a pensioner under the legislation of his country of residence'. Here also, of course, it is a condition that he should be entitled to such benefits under the legislation of this Member State. Moreover, it is a condition that he should be entitled to such benefits under the legislation of at least one of the other Member States by whom a pension is payable. It can therefore also be said of Article 22 (2) that it does not, qua Community law, *found* a claim to benefits in kind against the State of residence and that a general principle of ascribing sickness insurance to the State of residence, as the defendant would like to assume, cannot be derived from it any more than from Article 22 (1).

For the purposes of the present enquiry Article 22 (3) need not be considered, for it deals only with the question of the ultimate responsibility for the costs of the case provided for in Article 22 (2). The same is true of Article 22 (4). In it reference is made, only for the purposes of Article 22 (2), to Article 19 (4) and (5), i.e., special provision is made for

cases in which the State where the institution responsible for the benefits in kind is situated contains several insurance schemes and cases in which, as regards benefits in kind of substantial amount, normally the agreement of the competent institution is required.

On the other hand Article 22 (5) and (6) are of interest. Article 22 (5) deals with a case in which members of the family of a pensioner entitled to draw a pension under the legislation of one or more Member States reside in the territory of a Member State other than the one in which the pensioner resides. It is provided for this case that the members of the family shall receive benefits in kind 'as if the head of household resided in the same State'. Further, the provisions of Article 20 are stated to be applicable *mutatis mutandis*. From this it is clear that members of the family of a pensioner are entitled to benefits in kind from their State of residence, that benefits in kind are to be provided for them as though the pensioner were insured with or were entitled to benefits in kind from the institution of the place of residence of the members of the family. Here, indeed, an original obligation on the institution of the State of residence arises directly from Community law. The same is true of Article 22 (6), i.e., for the case in which a pensioner entitled to draw a pension under the legislation of one or more Member States, or a member of his family, is staying temporarily in the territory of a Member State other than the one in which he resides. Here too it is clearly provided under Community law itself that claims to benefits in kind arise against the institution in the State where the person is staying. (It is true that this paragraph goes on to say that the benefits shall be provided by the institution of the place of stay 'in accordance with the legislation which it administers', but this is in fact — as the Commission has rightly stated — simply a reference to the nature and scope of the benefits.)

The whole scheme of Article 22 and a comparison between its various paragraphs (paragraph (7), which has not been discussed, is irrelevant to the purposes of the present enquiry) therefore clearly shows that a clear distinction is made in this provision between cases in which Community law gives a rise to a claim to benefits in kind against the State of residence or stay, and others in which such claim is made to depend on whether the conditions laid down by the national law have been complied with. If the matter is looked at thus, it cannot really be said that a general principle can be derived from Article 22 to the effect that the sickness insurance of a pensioner entitled to several pensions is always to be borne by the State of residence. Rather, the scheme of Article 22 shows that as regards the most frequent case (sickness of a pensioner in the State where he resides) the institution is bound to issue benefits in kind only in so far as there are valid claims under its own law.

For the correctness of this statement reference can be made not only to the provisions of Article 24 of Regulation No 4, which provide confirmation, but also — as the Commission has likewise shown — the following two considerations may be adduced.

First, it is material that the object of Regulation No 3 is only to coordinate national insurance schemes. From this it follows that where there is any doubt one cannot proceed from the assumption that basic changes in national law were intended; at least one cannot bring about such changes by way of analogy or filling of omissions. Clear and express provision is required (which as regards claims concerning benefits in kind against the State of residence in Article 22 of Regulation No 3 just does not exist).

On the other hand, reference to Regulation No 1408/71, which replaced Regulation No 3 with effect from 1 October 1972 (that is from a date which is irrelevant for the main action) is

significant. What is important in this Regulation (Article 27 of which basically repeats Article 22 (1) of Regulation No 3) is Article 28. According to this, a pensioner who is entitled to draw a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State in whose territory he resides, shall nevertheless receive such benefits for himself and members of his family if he would be entitled thereto under the legislation of the Member State, or of at least one of the Member States, competent in respect of pensions if he were resident in the territory of such State. Thus Article 28 of Regulation 1408/71 has now provided a direct claim under Community law to benefits in kind against the State of residence. In this it is not a question only of clarifying the already existing legal position, which would justify a corresponding interpretation of Regulation No 3. Rather, we are concerned with a conscious development and improvement of Community law. This is clear from the relevant preliminary work (cf. the grounds of the proposal of the Commission of 6 November 1966 for the amendment of Regulation No 3 and likewise the report of Mr Troclet, which was made for the European Parliament in the name of the Committee for Social and Health Questions). Tantaradous also wrote in this strain in *Revue trimestrielle de Droit Européen,* 1972, page 36.

As the Commission rightly proposed in its written observations, the question put by the Bundessozialgericht can only be answered as follows:

Article 22 of Regulation No 3 concerning social security for migrant workers cannot be interpreted as meaning that the State in whose territory a pensioner, who is entitled to draw pensions under the legislation of several Member States, resides, is bound to provide the latter with benefits in kind under pensioners' sickness insurance even though its legislation does not provide for this.