Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers;
Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, especially Article 20;
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 District Court of Breda by order of that Court dated 28 November 1972 hereby rules:

The substantive content of the direct right referred to under letter (b) of Article 52 of a Regulation No 3 of the Council of the European Communities is determined by the rules of the national law defining the source and limits of the right of compensation vested in the victim or his dependants vis-à-vis the third party responsible.

Lecourt Monaco Pescatore

Donner Kutscher Ó Dálaigh Sørensen

Delivered in open court in Luxembourg on 16 May 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 MAY 1973 [1]

Mr President,
Members of the Court,

It is necessary to know the following facts in connection with the reference for a preliminary ruling with which we are concerned today.

Mr Melsen, a Dutch citizen resident in the Netherlands, was employed in Belgium and was insured, inter alia, against accidents under Belgian social insurance law with the plaintiff in the main action. On 16 September 1965, in the Netherlands, while on his way to his

1 — Translated from the German.

place of work he was struck by a private motor car driven by the defendant in the main action and was so badly injured that he later died. By reason of this accident and in view of the deceased's former duty to maintain his dependants, the plaintiff in the main action provided certain benefits for the deceased's wife and for the child of the marriage, and apparently still does so.

Since the plaintiff in the main action was recognized by the Royal Decree (Arrêté Royal) of 20 May 1941 as an insurance company providing pensions, it has a right to the repayment of the capital sums paid out in benefits against the third party responsible for the accident under the combined provisions of Article 19 of the Belgian law of 24 December 1903 and Article 3 of the law of 16 March 1954. The insurance company wishes to avail itself of this right because the defendant in the main action, i.e. the driver of the car involved, is responsible in civil law for the accident and because the benefits paid to the deceased's surviving dependents to not amount to the value of the claim which under the general law of Belgium a victim of an accident has against the third party responsible. It therefore brought an action against the driver responsible for the accident for the payment of sums which it had paid out and which it had yet to pay. In so doing, it invoked Community law, and in particular Article 52 of Regulation No 3 on social security for migrant workers, states:

> 'If a person benefiting from payments under the legislation of a Member State for damage suffered in the territory of another State has the right, in the territory of that other state, to claim compensation from a third party for that damage, any rights which the institution liable to pay the benefits may have against the third party shall be governed as follows:
>
> (a) Where the institution liable is subrogated, under the legislation applicable to it, to the rights of the beneficiary in relation to a third party, each Member State shall recognise such subrogation;
>
> (b) Where the institution liable has a direct right against the third party, each Member State shall recognise that right.
>
> .....'

The Dutch court before which the proceedings were brought proceeds on the basis that the provisions apply in the case upon which it has to adjudicate and, although the defendant disputes that the insurance company has an independent right of action, the court recognizes it as having a direct right against the defendant under Article 19 of the Belgian law of 24 December 1903. On the other hand, it is not clear to the court under which law the content of the right is to be determined, i.e. whether Belgian law is concerned, or Dutch law which evidently in cases of this kind, attributes only a limited liability to the person responsible for the damage.

In view of the problem arising from Article 52 of Regulation No 3, the court suspended the proceedings by an order dated 28 November 1972 and referred the following question for a preliminary ruling under Article 177 of the EEC Treaty:

'Does the recognition of a "direct right" against a "third party" within the meaning of Article 52 of the above mentioned Regulation No 3 mean that the said right is to be determined in accordance with the rules which apply, in the country conferring the right, for the purpose of establishing the content of this right?'

We shall now consider how this question is to be answered.

The defendant in the main action holds the view, as you know, that Article 52 of Regulation No 3 does not alter the extent of the third party's liability. He argues that if a social security institution prosecutes a claim for compensation in place of the accident victim, liability is not determined under another legal

system but, in principle, under the rules of private international law applied in the legal system in point. The plaintiff in the main action on the other hand draws from Article 52 of Regulation No 3 the conclusion that the institution's right of action is valid in the whole Community and that in particular it is not permissible under Article 52 of Regulation No 3 to consider whether the social insurance law of the country in which the accident occurred and in which the person responsible is resident, provides smaller compensatory benefits. The Commission appears to agree with this when it says that Article 52 of Regulation No 3 is not restricted to recognizing the institution's right of action, but rather that it is possible to read it as meaning that the *content* of that right is to be determined under the legal system which applies to the institution.

In view of this disagreement it seems appropriate to look at the previous decisions of the Court of Justice in order to see what light they may shed on the problem before us.

Doing this, one finds — and this is significant — that in the judgment in Case 33/64 the victim's right is first looked at for the purposes of Article 52 of Regulation No 3 and that it is regarded as the essential starting point. This is to be found in the passage which states that under Article 52 it is necessary 'that the person affected should receive benefits under the legislation of a Member State in respect of damage suffered in the territory of another State and should be entitled to claim compensation for such damage from a third party in another State's territory'. Similar passages are to be found in the judgment in Case 27/69 in which we read 'Under Article 52 the institution liable to pay benefits can only bring claims against the third party responsible for the damage, if the beneficiary in the territory of the State in which the damage occurred is entitled to claim compensation against the third party'.

However, although some basic guidelines for solving the problem before us may be obtained by concentrating on the wording of Article 52 of Regulation No 3 in this way, there is particularly clear guidance to be found in the judgment in Case 44/65. In that case my colleague Mr Gand emphasized that Article 52 did not alter national legislation of an earlier date. It established a 'principle of law which bound Member States to recognize, not only subrogations arising from their own legal systems, but also those based on the legal systems of the other Member States . . .' Mr Gand drew attention especially to the following: 'Although . . . the subrogation has the effect of substituting the German institution for the injured party as regards the latter's rights, it leaves the civil liability of the person who caused the injury, which continues to be governed by French law, unaffected in its scope and content'. The Court of Justice followed this when it declared 'Article 52 of the Regulation in no way changes the facts upon which the origin and scope of non-contractual liability depends; these facts are, now as before, governed solely by national law. The Article does no more than provide for the succession in law of the institution from which benefits are due to any rights which the beneficiary may have against a third party responsible; in other words, it merely permits a new creditor to be substituted for the previous one.' Lastly, it is worth recalling one other sentence in the judgment in Case 27/69 in this connection (although its bearing on the present problem is not so clear) when it states: 'The intention of Article 52 as a whole is to achieve the recognition by each Member State of all rights which the other States acknowledge those liable to pay benefits as having, by way of subrogation or by means of some other legal artifice'.

What may we conclude from this? I do not think that the defendant in the main action can be said to be unreasonable in believing that behind these propositions

there is to be found a legal viewpoint according to which the intention of Article 52 is to link the law governing the institution to the right which the victim has against the third party responsible, in so far as that claim is founded upon private international law, but on the other hand it is not the purpose of the Article to alter the legal content of the right and to determine that content under the law governing the institution instead of the lex loci delicti. The previous decisions of the Court of Justice provide substantial grounds for answering the question submitted in the manner proposed by the defendant in the main action.

Moreover, support for the correctness of this view is to be found not only in the fact that it is one advanced by legal writers on the subject (see Lyon-Caen, Droit social européen 1969, p. 364) but also in the following considerations.

As the defendant in the main action has rightly pointed out, the interpretation of Article 52 of Regulation No 3 must proceed from the wording of that provision. In this connection it must not be overlooked that, as regards the first alternative in paragraph (a), — i.e. relating to the subrogation of the institution to a beneficiary's rights against a third party — the paragraph only speaks of the *recognition of such subrogation,* but not of any more extensive legal consequences. In this case, which seems to be the rule in Member States and which is also the only one provided for under Belgian law (see judgment of the Belgian Cour de Cassation of 17 May 1958, p. 1958 I 893), Regulation No 3 thus ensures that a subrogation, in the form required by the law governing the institution, to the victim's original right cannot be called in question in the other Member States under their private international law. This appeared to be a necessary corollary to the fact that the institution's obligations to pay benefits extended to facts arising outside its own country. The rule was also necessary because formerly it was not everywhere, quite obviously, (see e.g. under German law — judgment of BGH (Bundesgerichtshof) in NJW 1620) that a 'cessio legis' in the form required by a foreign law was recognized, and because certain national laws created difficulties by asserting that the law governing the claim also governs the subrogation to the right to make it (see e.g. the judgment of a court in Besançon of 14 May 1959, cited by Lyon-Caen in Droit social européen, p. 364, judgment of the 's Hertogenbosch Appeal Court of 2 and 9 April 1957 cited in Wussow (die Legalzession in internationalen Privatrecht — Neue Juristische Wochenschrift 1964, p. 2325). The recognition of subrogations is accordingly the only aspect of private international law contained in Article 52 (a) of Regulation No 3. There is no indication in the Article of any more extensive legal consequences of a kind which would alter the *content* of the right and which are intended to separate the law governing the institution from the law governing the beneficiary's right. It may simply be said that there is no justification arising from the meaning and purpose of Regulation No 3 for such a far-reaching encroachment upon the national laws on liability with their different structures. It is rather the case that bilateral agreements mentioned in the second paragraph of Article 52 may possibly reserve alterations of this nature, should the individual Member States consider them appropriate.

However, if this is true in respect of what is the rule in the case of subrogations, it is difficult to accept that it would be permissible to sanction a different and wider interpretation as regards the alternative provided in paragraph (b) of Article 52 (that 'other legal structure' as it is called in Judgment 27/69), i.e. in respect of an institution's direct right of action. Furthermore, even in this case, the decisive connecting factor — properly understood — is the beneficiary's right under general law (in any event — according to what we have heard —

Dutch law clearly proceeds in this way and recognizes the institution as having a direct right of action). On the other hand with reference to the problem now to be solved we must, in my opinion, proceed on the basis that the interpretation of Article 52 must be consistent. Otherwise it would depend upon the structure of the institution's right of action, which is a matter for national law, whether a radical alteration of the national laws of other Member States governing the question of liability was involved. Thus, in interpreting Article 52 as a whole, the view of the law advanced by the defendant in the main action should be followed.

Let me conclude by saying that confirmation of the correctness of this view is to be found particularly in certain provisions of Regulation No 1408/71 of the Council of 14 June 1971 and Regulation 574/72 of the Council of 21 March 1972 which some time ago replaced Regulations Nos 3 and 4.

Article 93 (1) of the first mentioned Regulation contains rules which were formerly found in Article 52 (1) of Regulation No 3. In addition, a new paragraph (2) provides: 'If a person receives benefits under the legislation of one Member State in respect of an injury resulting from an occurrence in the territory of another Member State, the provisions of the said legislation which determine in which cases the civil liability of employers or of their employees is to be excluded shall apply to the said person or to the institution responsible for benefits'. This additional provision with its reference to the legislation of the country of the institution is deserving of attention. As the defendant rightly points out, it would not be necessary if the institution's right of action were in any event determined exclusively under the law of its own country. Article 93 (2) of Regulation No 1408 clarifies beyond doubt both paragraph (1) of the same Article which essentially corresponds with Article 52 (1) of Regulation No 3 and, in so doing, the question with which we are concerned.

On the other hand Article 111 of Regulation No 574/72 should be noted. It contains certain provisions for cases where excess benefits are awarded and where assistance is granted. For this purpose it provides in particular a right for an institution paying benefits to make deductions from and to receive transfers of benefits vis-à-vis institutions of other Member States from which the recipient of benefits is simultaneously obtaining benefits. In this connection it is interesting that, as regards conditions and limits, this right is not only determined under the legislation which applies to the institution entitled to a refund, but, in the case of the institution paying benefits which has to deduct the corresponding amount, reference is also made, as regards conditions and limits, to the legislation *which applies to that institution.* If, however, the law governing the body entitled to compensation does not 'ipso facto' apply to the legal relations between institutions of various Member States, then, one may safely say, there is great difficulty in accepting that only the system of law governing an institution is to be decisive as regards scope and content in the case of a right of action under Article 52 of Regulation No 3 (or under Article 93 of Regulation No 1408) in relation to a third party responsible under general law.

In view of these considerations, and especially having regard to the purpose and wording of Regulation No 3, to the previous decisions of the Court, and following the principle that an alteration of national laws on liability could only be accepted if it were unequivocally expressed, the question posed by the court making the reference can be answered as follows:

It does not follow from a subrogation to a right against a third party responsible in favour of a Belgian social security institution, which is effected in the form required by Belgian law, and which must be recognized by other Member States under the provisions of Article 52 of Regulation No 3, that the extent of liability is to be determined under Belgian law, if that liability, on the basis of private international law, is to be assessed under the legal system of another Member State.