under national law which are given effect by increasing the value of the payment which would otherwise be made to the recipient.

Lecourt Donner Sørensen

Monaco Mertens de Wilmars Pescatore Ó Dálaigh

Delivered in open court in Luxembourg on 7 November 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 24 OCTOBER 1973 [1]

Mr President,
Members of the Court,

The national court which has referred to us the questions of interpretation in the present proceedings has to decide whether a German citizen, resident in the Federal Republic at the time when she attained the age of 65 years, and still residing there, has, under Community legislation on social security for migrant workers, a right to benefit under the transitional provisions of Article 43 of the Netherlands General Old-age Insurance Law (AOW) of 31 May 1956. Under this enactment, anyone who, before Article 6 of the said Law came into force, was over 15 years of age but under 65, and who, with or without interruption, had resided in the Kingdom of the Netherlands for six years after completion of his 59th year, is for the purposes of the AOW treated as having been insured during the period between his 15th year and the entry into force of the Law.

However, Article 44 of the same Law lays down that only persons of Dutch nationality and who, moreover, have their residence in the Kingdom are entitled to the benefits provided under Article 43.

The Dutch insurance institution ('Sociale Verzekeringsbank'), which at first denied that Article 43 was applicable to Miss Smieja, subsequently changed its mind, having reached the conclusion that, under Articles 8 and 10 of Regulation No 3 of the Council, she was entitled to benefit under the said transitional provisions.

On the other hand, the Raad van Beroep of Amsterdam has refused to accept that Article 43 applies to her and, in appeal proceedings instituted by the insurance institution against this refusal, the Centrale Raad van Beroep, acting under Article 177 of the EEC Treaty, referred

1 — Translated from the Italian.

certain questions on the interpretation of Articles 8 and 10 of Regulation No 3 and of the corresponding provisions in Articles 3 and 10 of Regulation No 1408/71/EEC of the Council, which amended and coordinated the measures adopted for implementing Article 51 of the Treaty in the interests of workers.

The questions referred by the Dutch Court are as follows:

1. (a) Do the words 'the social security legislation of any Member State' in Article 8 of Regulation No 3, or the words 'the legislation of any Member State' in Article 3 (1) of Regulation No 1408/71, mean the national legislation as it is after the rules of Community law have been incorporated in it, or the national legislation as formulated, without taking any account of the material changes brought about by the provisions of the Regulations, namely those contained in Article 10 (1) of both the abovementioned Regulations?

   (b) Do the words 'under the legislation of one or more Member States' in Article 10 (1) of Regulation No 3, or the words 'under the legislation of one or more Member States' in Article 10 (1) of Regulation No 1408/71, mean under the national legislation as it is after the rules of Community law have been incorporated in it, or under the national legislation as formulated, without taking any account of the material change brought about by the provisions of the Regulations, namely those contained in Article 8 of Regulation No 3 or Article 3 (1) of Regulation No 1408/71?

   (c) In other words, do Articles 8 and 10 (1) of Regulation No 3, or Articles 3 (1) and 10 (1) of Regulation No 1408/71, complement each other in such a way that these provisions considered together broaden the requirements of nationality and residence into the citizenship and territory of the Community, or are these provisions entirely independent of each other?

2. What is the meaning of the word 'acquired' in Article 10 (1) of Regulations No 3 and No 1408/71, viewed against the background of the manifold legal and factual situations created by the national legislation of the various Member States.

So that the problems of interpretation of Community law raised by the Dutch court may be fully understood, these questions, not in themselves exactly crystal clear, must be considered alongside the judgment of the Raad van Beroep against which the appellant in the main action is appealing.

It must also be borne in mind that these questions were submitted as they stand to the Centrale Raad, which then referred them to this Court, by the insurance institution itself as appellant, with the object of obtaining an interpretation of the provisions of Articles 8 and 10 of Regulation No 3 which would support its case against the judgment of the court of first instance.

It is clear from that judgment that the Raad van Beroep accepts that Miss Smieja satisfies all the conditions under Article 43 of the AOW, including, in particular, under national rules assimilating residence in Germany with residence in the Netherlands, that of residence after 59 years of age, as required by the Law to create an entitlement to the transitional benefits for which it provides. On the other hand, the Raad van Beroep does not regard the two conditions required under Article 44 of the AOW, i.e. those relating to nationality and residence in the State, as having been satisfied. The Dutch court held that the social security rules of the Community have not the slightest effect, in the respondent's case, on the applicability, in their entirety, of the conditions laid down in Article 44 of

the AOW. According to the judgment referred to, it therefore follows that Miss Smieja, not being a Dutch national or at present resident in the Netherlands, is unable to draw the pension 'which the plaintiff has acquired under the legislation in force in the Netherlands'. To reach the different conclusion urged by the insurance institution it would (according to the Raad van Beroep) be necessary to take the unwarranted step of substituting the provisions of Regulation No 3 for the rule in Article 44 of the AOW.

It is not very clear whether, in the view of the Raad van Beroep, the conditions regarding nationality and residence laid down in Article 44 together constitute an insurmountable obstacle or whether the main obstacle is residence; nor is it clear whether the court regards them as requirements for the right to pension, for keeping the right itself alive or simply for the right to actual payment of the pension acquired. Nor do we know the view taken on this point by the appellate court which put the questions of interpretation. However that may be, whether the Dutch court has started off on the basis that the conditions contained in Article 44 have to be satisfied in order to create entitlement to the additional transitional benefit provided for in Article 43, or, as seems more likely, on the basis that they relate to keeping the entitlement alive, it is difficult to see how there can be any longer any doubt about the nationality qualification, given the clear terms of Article 8 of Regulation No 3 and the previous finding of this Court in a preliminary ruling (Judgment of 22 June 1972 in Case 1/72, *Frilli,* Rec. 1972, p. 465).

Article 8, which provides that persons resident in the territory of one of the Member States and coming within the ambit of Regulation No 3, shall be subject to the obligations and the benefits of the social security legislation of each Member State *on the same conditions as the nationals of the State concerned,* has, in regard to persons to whom the provisions of Regulation No 3 apply, the clear purpose and effect of excluding the application of any nationality qualification required under the social security legislation of a Member State. This does not mean that Community law is in this way substituting itself in principle for the national law governing citizenship, as stated in the Raad van Beroep judgment; it is only one of many examples of an instrument of Community law reconciling, in this case by a restriction on Article 44 of the AOW, national legislation with the requirements and terms of Articles 48 and 51 of the Treaty establishing the European Economic Community, with effects which are accordingly confined to those entitled to benefit under the social security legislation of the Community.

As follows from the judgment in Case 1/72 *Frilli,* removal of the nationality qualification also affects the overal structure of social security schemes where the subject-matter is legislation which not merely provides for relief in case of need, but has an insurance aspect as well.

The transitional nature of Article 43 and of the special benefits it provides could not justify excluding from its operation the workers to whom reference is made in Article 8 of Regulation No 3 and the corresponding Article 3 of Regulation No 1408/71. As the Sociale Verzekeringsbank points out, a benefit of this kind, which is based on the principle of 'retrospective credit', cannot be compared with public assistance, and this is borne out by its transferability, in favour of Dutch citizens resident abroad, under the Royal Decree of 20 December 1956, based on Article 45 of the AOW, on condition that they have qualified for a pension in the Netherlands and have resided there for six years after their 59th year.

Therefore, as regards persons coming under the social security legislation of the Community, there does not appear

to be any reason for recognizing the condition of nationality as a relevant qualification for the benefit provided for under Article 43 of the AOW.

If elimination of nationality as a qualification holds good for the acquisition of a social security entitlement, it must *a fortiori* do so as regards payment of the appropriate benefits.

As for the requirement, in Article 44, of current residence in the Netherlands, as soon as it is applied as a qualification, not for entitlement to the benefit provided for under Article 43 (which itself lays down the required period of residence), but for entitlement to be paid in cash the appropriate benefits, it becomes apparent that Article 10 of Regulation No 3 and Article 10 of Regulation No 1408/71 exclude the possibility that, subject to the exceptions specified in paragraph 2 of those Articles, pensions acquired under the legislation of a Member State may be subject to any reduction, modification, suspension, withdrawal or confiscation because the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

The only exceptions to this rule which are recognized in the case law of the Court are those for which express provision has been made by Community legislation in Article 10 (2) (Judgements in Case 4/66 (*Hagenbeek,* Rec. 1966, p. 579), in Case 3/70 (*Di Bella,* Rec. 1970, p. 415), and in Case 61/65 (*Vaassen-Goebbels,* Rec. 1966, p. 407).

The Netherlands Government further maintains that the word 'acquired' within the meaning of Article 10 (1) of the Regulations refers exclusively to pensions and benefits provided for thereunder and not to the transitional benefits provided for under Article 43 of the AOW as well.

I cannot see how it is possible to justify this restriction on the scope of a Community rule concerning a benefit which, though provided for under a transitional measure, produces a pension or at least an enhancement of the pension to which the beneficiary would otherwise be entitled and which, in this context, becomes a constituent part of the pension itself. A gloss of this kind would, moreover, conflict with the intention of the Community legislature which, in order to exclude the application of the general rule in Article 10 (1) to that part of the pension which is covered by Article 43 of the AOW, had considered it necessary to make an express reference to the subject in Annex E of Regulation No 3, to which Article 10 (2) specifically refers. This restriction on the transferability abroad of pensions under Article 43 of the AOW was removed in 1966 (OJ No 93 of 25 May 1966).

Incidentally, it should be noted that, quite apart from the general tenor of the AOW, the provisions referring to it in the Agreement between the Netherlands and the Federal Republic of Germany on the subject of its application to German citizens are quite incapable of operating so as to place a German citizen at a disadvantage compared with the citizens of Member States which have not concluded similar agreements with the Netherlands. Moreover, these provisions of the Agreement do not appear in Annex II of Regulation No 1408/71 listing the provisions of social security conventions remaining applicable notwithstanding Article 6 of the Regulation.

What has been said so far is, in my view, sufficient answer to enable the Netherlands court to resolve its doubts concerning the interpretation of Article 8 and 10 of Regulation No 3 and the corresponding provisions of Articles 3 and 10 of Regulation No 1408/71.

As regards question I (c), however, it must not be concluded from the foregoing comments that it was necessary for the provisions of Community legislation on social security for workers to supplement the residential conditions required by

national social security legislation in order to ensure that in all cases residence in another Member-State was assimilated to that required under such legislation.

Although, because differences in treatment based on nationality are, as a general rule, in conflict with the objective of free movement of workers, which the Community legislation referred to seeks to achieve, and with the fundamental prohibition contained in Article 7 of the Treaty, assimilation on such a broad basis can apply on the subject of nationality, the same cannot be said of the requirement concerning residence in the state, where this is prescribed as a condition for acquiring (as opposed to keeping alive) a social security entitlement provided for under a national law, on the assumption, of course, that it does not create, either technically speaking or in actual fact, any discriminations between nationals and foreigners to whom the social security legislation of the Community applies.

Any problems or anomalies which may in general arise following application of these principles to comprehensive legislative measures on social security should be resolved by adoption of appropriate legislative provisions.

I therefore conclude by proposing that the questions from the Netherlands court be answered on the basis of the foregoing comments.