1. **The phrase 'came under the legislation' in Article 42 (6) (a) of Regulation No 3 must be understood to mean that a deceased worker must not be regarded as having come under the legislation unless he has in fact satisfied the conditions under which he or his dependants may acquire the right in question;**

2. **Where an orphan permanently resides in the territory of a Member State in which the deceased worker insufficient insurance periods to acquire a right to the benefits provided for by the legislation of the country of permanent residence, the competent institution of the country from which the pension is due is required to pay the family allowances to the dependants.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 17 June 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 14 MAY 1970[1]

Mr President,
Members of the Court,

The request for a preliminary ruling made to you by the Conseil de Prud'hommes de Mons concerns the interpretation of Article 42 (6) (a) of Regulation No 3 on social security for migrant workers, as amended in accordance with Regulation No 1/64.

1. The facts are as follows:
Mr Vincenzo Beninato, an Italian national, was insured in his country of origin for eight weeks between September 1943 and July 1944. Under the Italian legislation, as under the Community regulations, this period was too short for him to acquire any rights. Article 28 (2) of Regulation No 4 provides that if the insurance periods and assimilated periods completed under the legislation of one Member State do not together total six months no benefit shall be granted under the said legislation. He then worked in the Belgian coal-fields for more than ten years until 1 June 1959, on which date he began to draw an invalidity pension which was payable solely out of Belgian insurance funds. After his death in 1962, his widow, Mrs Beninato (née Di Bella), residing in Catania, was granted a survivor's pension by the Fonds national de retraite des ouvriers mineurs. It appears that in Belgium she also received family allowances in respect of a child which she is bringing up. However, by decision notified on 31 December 1965, the Caisse de Compensation pour allocations familiales des Charbonnages du Couchant de Mons refused to continue this

1 — Translated from the French.

payment as from 1 February 1964, the date on which Article 42 (6) of Regulation No 3, as amended by Regulation No 1/64, came into force. The Caisse considered in fact that as Mr Beninato had been subject to two systems of legislation, of which one was Italian, and as his son was permanently resident in Italy, the family allowances under the amended Article were payable by the Italian institutions and in accordance with the legislation of that country (which, incidentally, replaces family allowances by increases in pension).

On appeal by Mrs Beninato, the Conseil de prud'hommes de première instance de Mons (Mons Arbitration Tribunal of first instance) upheld her application for family allowances but the higher court, the Conseil de prud'hommes d'appel, (Arbitration Appeal Tribunal) stayed the proceedings in order to request your interpretation of the phrase 'came under the legislation' appearing in Article 42 (6) (a) of Regulation No 3. The Belgian court is submitting the following two questions to you:

— 'Is this phrase to be understood to mean that a deceased worker must be regarded as having come under the legislation only if he has satisfied the conditions under which he or his dependants may acquire the right in question?'

— 'When the orphan permanently resides in the territory of a Member State in which the deceased worker has completed insufficient insurance periods to entitle him to the benefits provided for in the legislation of the country of permanent residence, is the competent institution in the country from which the pension is due required to pay the family allowances to the dependants?'

2. Let us first recall the system as provided for in the original version of Article 42.

Where — as is the case in Belgium — the legislation of the relevant country provided, in the event of the wage-earner's death, for the payment of family allowances for his children, such allowances also covered children who were permanently resident or were being brought up in the territory of another Member State. It was thus accepted that Mrs Beninato was entitled to the right which is now disputed.

However, although this principle is simple, its implementing procedures laid down in Article 69 of Regulation No 4 were so complex that they often remained a dead letter. This is why the Council thought it necessary to adopt a new scheme of responsibility for family allowances, both for those in receipt of pensions and for their orphans.

As regards the latter, when the death of the worker does not entitle his dependants to a pension in respect of an industrial accident or occupational disease, the new wording of Article 42 (6) distinguishes between two cases:

— if the deceased worker came under the legislation of a single Member State and if the orphan permanently resides in the territory of another Member State, family allowances are due in accordance with the legislation of the former State as though the orphan permanently resided in that country;

— if, on the other hand, the deceased worker came under the legislation of several Member States and if the orphan permanently resides in the territory of one of those States, family allowances are due in accordance with the legislation of that Member State.

In the case which gave rise to this reference for a preliminary ruling Mr Beninato worked in Belgium and in Italy, although in the latter country the duration of his employment was not sufficient to be taken into account. Must he nevertheless be considered to have come under the legislation of two Member States? If so, as his orphan permanently resides in Italy, the allowances would be payable in accordance with the legislation of that country, which means in fact that Mrs Beninato would not be entitled to anything. If not, the allowances would be payable by Belgium, as was decided by the Conseil de prud'hommes at first instance.

If I followed current usage and the letter of the text, I should be forced to consider that a worker *came under* legislation by the

mere fact that it was applicable to him, without needing to discover whether or not he satisfied the conditions entitling him to the rights and benefits which it was intended to confer. Moreover, the use of the words 'came under' is rather significant. The result of this in the present case would be that Mr Beninato would have been subject to two systems of legislation, Belgian and Italian, and that his widow would have no right to any allowance.

However, there are good reasons for setting aside the literal interpretation in this instance. First, the effect of the present wording of Article 42 is to deprive the worker's dependant of benefits which he would have received under the previous system; this appears contrary to the spirit and purpose of Regulation No 1/64 the aim of which was to establish a simple and more flexible system, rather than a more rigid one. Secondly, it is also contrary to the general line of interpretation which you have applied to the regulation on the basis of Articles 48 to 51 of the Treaty. The Commission has rightly reminded us of your pronouncement in the judgment in *Nonnenmacher* of 9 June 1964 (Case 92/63 [1964] ECR 281) that in case of doubt, the measures taken in implementation of these Articles must be construed so as to avoid placing migrant workers in a less favourable legal position.

The only solution which is in accordance with the spirit and objectives of the Treaty and the regulation is to accept that where an insurance period is not taken into account for the grant of a proportion of a pension under Article 28 (2) of Regulation No 4, it has not been completed in the State in question within the meaning of Article 42 (6). This is the solution which is accepted by the majority of the members of the Administrative Commission provided for in Article 43 and it is that which the Commission is proposing for the general review of Regulation No 3. If this is accepted the phrase used in the article in dispute must be interpreted to mean that a worker 'came under the legislation' only where he has satisfied the conditions under which his dependants may acquire the right in question.

Of course, this interpretation does not necessarily apply to the numerous articles Regulation No 3 in which the same phrase occurs. Unlike many terms used in the regulation this phrase had not been defined in Article 1 and it may thus be interpreted in each case in relation to its context. No doubt in most cases it would be necessary to regard it as not implying the conditions of acquisition of a right must be satisfied. The solution which I propose to you must therefore be limited to the context of Article 42 (6), which is in any case the only article upon which you are asked to pronounce.

I am therefore of the opinion that the reply to the two questions referred by the Conseil de prud'hommes d'appel de Mons must be in the affirmative.