that in which the establishment to which he is normally attached is situated, in so far as the probable duration of his employment in the territory of the former State does not exceed twelve months;

5. **The expression 'the probable duration of their employment' used in Article 13 (a), as worded prior to the introduction of Regulation No 24/64, refers to the duration of the employment of each individual worker;**

6. **The decision as to costs is a matter for the Centrale Raad van Beroep.**

Lecourt Donner

Trabucchi Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 5 December 1967.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 8 NOVEMBER 1967[1]

Mr President,
Members of the Court,

The request for a preliminary ruling referred to this Court by the Centrale Raad van Beroep concerns the interpretation of certain provisions of Articles 12 and 13 of Regulation No 3, which determine the social security legislation applicable to migrant workers. It arose out of the particularly complex facts of the action pending before that court. In order to understand clearly the scope of the questions referred by the President of the Raad van Beroep and to be able to reply adequately thereto it is necessary to give a short account both of the origin of the dispute which gave rise to the reference for a preliminary ruling and the rules for the solution of conflict of laws provided for in this regulation.

I

On 24 November 1963, Mr van der Vecht was engaged by the Ceto undertaking which carried on servicing and repair work at Schiedam. He was, however, engaged to carry out other activities—electric welding—at Genk (Belgium). Ceto had concluded an agreement with a German firm to undertake certain work in the Ford factories at Genk as subcontractor, supplying the labour and certain equipment. Mr van der Vecht was accommodated at Geleen

1 — Translated from the French.

(in the Netherlands) by Ceto and was taken daily to and from his place of employment by a vehicle belonging to this firm, the firm also paying him for the time spent in travelling.

On 27 November 1963 the bus in which he was travelling was involved in an accident in the Netherlands in which he was seriously injured and as a result of which he had to give up work. Let me add that Ceto had taken no measures, either in the Netherlands or in Belgium, to insure its workers against accidents under any statutory insurance scheme.

Mr van der Vecht tried without success to obtain compensation from the competent body in the Netherlands, the Sociale Verzekeringsbank, by virtue of the Netherlands Law on industrial accidents. In his principal submission he maintained that this Law was applicable to him irrespective of Regulation No 3, in that at the time of the accident he was employed in the Netherlands as transport to his place of employment formed part of the work for which he was engaged. In the alternative he submitted that this Law should be applied to him by virtue of Article 13 (a) of Regulation No 3, as worded at that time. Mr van der Vecht was successful before the Raad van Beroep, Rotterdam, but on appeal the Centrale Raad van Beroep, although of the opinion that he should benefit from the Law of 1921 irrespective of the provisions of Article 12 of Regulation No 3, decided to refer certain questions to this Court concerning both the provisions of this article and those of Article 13.

What are the principal features of the scheme established by Regulation No 3 on this point?

Article 12 establishes the principle that the legislation which applies is that of the Member State in whose territory the workers are employed, even if they permanently reside in the territory of another Member State or if the registered office of the undertaking which employs them is situated in the territory of another Member State.

Article 13 lays down a certain number of exceptions, of which paragraph (a) is of interest to us. This provision was at that time worded as follows: 'Wage-earners or assimilated workers whose permanent residence is in the territory of one Member State and who are employed in the territory of another State by an undertaking, having in the territory of the former State an establishment *to which they are normally attached,* shall be subject to the legislation of the former State as though they were employed in its territory, in so far as the probable duration of *their employment* in the territory of the latter State does not exceed 12 months'. This scheme may be extended in certain circumstances which are defined in the remainder of the paragraph. Let me add that when called upon to interpret the words 'to which they are normally attached' the Administrative Commission established under Article 43 of the regulation was of the opinion that they referred not only to workers who are already insured in the country from which they are sent, but also to those who would have been insured in that country if they had been employed by the undertaking which engaged them to work temporarily in the territory of another Member State (Decision of 18 September 1959, Official Journal of 17 December 1959, page 1245).

In the light of these provisions and the facts which I have set out above, the Centrale Raad van Beroep has referred the following questions to you:

(1) As regards Article 12: is a worker who is in a similar position to that of Mr van der Vecht at work in the territory of the Member State in which he is employed within the meaning of Article 12 even during his journey to that State and, in particular, during that part of the journey which takes place in the territory in which he permanently

resides and in which the registered office of the undertaking is situated? In other words, does the place where the accident occurred on the route to or from his work have an influence on the legislation applicable?

(2) Is Article 12 of Regulation No 3 an obstacle to the simultaneous application of the statutory accident insurance scheme of the State in which the worker permanently resides, where this insurance also covers a worker employed abroad?

(3) Should Article 13 (a) be applicable, the Centrale Raad van Beroep asks to what extent national courts or tribunals are bound by the interpretative decisions of the Administrative Commission.

(4) Does the phrase 'to which they are normally attached' appearing in this paragraph apply to a worker engaged exclusively to carry out activities in the territory of another Member State other than those which are normally carried out in the State in which the undertaking is established?

(5) Finally, in determining the probable duration of the employment of such workers in the territory of the other Member State referred to in that paragraph, should reference be made to the expected duration of the employment of each individual worker, or to the probable duration of the work to be carried out?

The points enumerated above call for two observations. The first is that the questions referred by the Centrale Raad van Beroep concern the factual circumstances of the case and are so closely connected with the action pending before it that your reply will practically dictate its decision on the main issue. This means an inevitable deviation from the principle often repeated in your judgments that in the context of Article 177 you are competent to give a ruling on the interpretation of the Treaty or acts of the Community, but have no power to apply such ruling to a specific case. The second observation is that all the above questions, whether principal or supplementary, are closely linked to one another and call into question all the provisions of Title II which determines the legislation applicable. One might hesitate over the order in which to deal with these questions. The Commission considers that the scope of Article 13, which provides for exceptions to the principle laid down in Article 12, should first be defined. For reasons of simplicity rather than of logic I shall adhere to the order adopted by the Centrale Raad.

II

The first question is as follows: by virtue of Article 12 and subject to the exceptions laid down in Article 13, the legislation applicable is in principle that of the State in whose territory the worker is employed. However, what is the meaning of the term 'employment'? The Centrale Raad refers this question to you in respect of a worker who is taken, in circumstances of which you are aware, to his place of employment in another Member State and who is involved in an accident in the territory of the State in which he resides. Is the worker in question deemed to be employed in the latter State, with all the consequences which this might entail as regards the legislation applicable?

The question of the treatment to be given to 'an accident occurring during the journey to or from the place of employment' arises in the social security legislation of all the Member States. In spite of differences in the wording of the relevant provisions, it is covered by all the legislative systems as an industrial accident in the true sense, with the exception, perhaps, of certain reservations in Italian law. However, the former accident should not be entirely assimilated with the latter and the Commission puts forward various points

(calculations of the employer's contributions; exemption from third party liability of the employer and his agents and servants; evidence of imputability) in respect of which the legislation or case-law of certain Member States reserves special treatment for accidents sustained on the way to or from the place of employment.

However, it does not appear that the place where the accident occurs influences the choice of legislation applicable, as to do so would be to vary this legislation according to the traffic hazards of the country concerned. Moreover, the worker would be subject to two legislative systems simultaneously, or rather, successively and alternatively, according to whether he was at his place of employment or was on his way to or from that employment. This would be a negation of the uniform system which Regulation No 3 is intended to establish. In addition, cases may arise in which a wage-earner works in the territory of several Member States at the same time, as in the case of the staffs of transport undertakings (Article 13 (b)) or the other workers referred to in Article 13 (c) as amended. In each case the regulation decrees the legislation (law of the registered office of the establishment, law of the place of residence, etc.), which is solely applicable.

It is clear from the above that the wage-earner's place of employment is that in which he is actually at work and where he actively carries out his duties; the journey in question merely enables him to carry out these activities. Subject to the exceptions provided for in Article 13, therefore, it is the place of actual employment which determines the legislation applicable and once this is known it will apply to all the worker's activities, including any eventualities which occur during the journey in question in the territory of the State in which he resides.

The second question concerns the possible simultaneous application of the legislation of the State of employment and the statutory accident insurance scheme of the State of permanent residence, where the latter insurance in principle covers a worker who is employed abroad. Is such a worker entitled to benefit from both legislative systems simultaneously? We are not concerned here with the possible choice of legislation provided for in the limited cases defined in Articles 14 and 14A of the regulation but with a case of simultaneous application.

This question was previously referred to you by the Centrale Raad van Beroep in the case of Mrs Moebs (née Nonnenmacher) ((Case 92/63) judgment of 9 June 1964, [1964] E.C.R. 281), in which you ruled that, although Article 12 obliged the State in whose territory a worker is employed to apply its legislation to him, it did not prohibit the State of permanent residence from according him the benefits due under its own legislation, provided, however, that he was not obliged to contribute to the financing of a social security institution which was unable to accord him additional advantages in respect of the same risk and the same period. You based your decision on the view that the aim of Articles 48 to 51 was merely to establish the greatest possible freedom of movement for workers, but did not preclude an attempt by the legislation of Member States to grant them supplementary protection by way of social security.

It must be noted that in all the Member States insurance against industrial accidents is not at the expense of the worker but, either directly or indirectly, at the expense of the employer whether he pays out the benefits prescribed by law or more generally takes out an insurance policy. Where the insured person receives a plurality of benefits, there would be in some way a plurality of contributions or of obligations borne by the employer. This solution is not expressly contrary to the provisions of

Article 12, but does it concur with the spirit of this article? Mr Advocate-General Lagrange answered this question in the negative when he delivered his opinion in the case of *Moebs, née Nonnenmacher*. The Commission is doubtful on the point and I share that doubt.

It is such a plurality of benefits payable by virtue of two legislative systems which is referred to by the Centrale Raad. The Commission, taking its examination of the problem even further, also asks whether Community law is opposed to a *temporary* application of the legislation of the State of residence for as long as the conflict of laws has not been resolved and answers this question in the negative. I am of the opinion that it is inadvisable for this Court to consider this question at present since, first, the Centrale Raad has not referred this question to you and, secondly, even if the solution proposed by the Commission appears acceptable from the point of view of natural justice, it finds no justification in the provisions of Title II which determine which legislation is applicable.

The third question refers to the applicability of Article 13 (a) on the interpretation of which the Administrative Commission has come to a decision, but which may have a more general significance. Are the 'decisions' made in this field by this Commission binding on a judicial authority such as the Central Raad?

I consider that the answer derives necessarily from both the regulation and the Treaty.

Article 43 (a) of the regulation establishes an Administrative Commission in order 'to settle all administrative questions and questions of *interpretation* arising under this regulation and subsequent regulations', but adds 'without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and legal remedies prescribed under the legislation of Member States, in this regulation or in the Treaty'. This formula would be meaningless if in cases to which the regulation applies a private person were unable to question the Administrative Commission's interpretation of its provisions before a court and if, for its part, the court were bound by such an interpretation. Consequently, such an interpretation has merely the status of an opinion which is only valid—to repeat the phrase which is often used—subject to the findings of the courts.

I may add that if the regulation purported to empower the Administrative Commission to give authentic interpretations binding on other judicial authorities in would infringe Article 177 of the Treaty of Rome. This article empowers a court or tribunal of a Member State, from whose decisions an appeal may be brought under national law, to interpret the Treaty or the acts of Community institutions where such a question is raised before them. As regards the other courts or tribunals—those whose adjudication is final—they are bound to refer the question to this Court. Like the jurisdiction of this Court, the jurisdiction of such national courts or tribunals would be reduced to nothing if it were limited by a decision of the Administrative Commission.

Having said this, I am prepared to acknowledge the particularly authoritative nature of the opinions of this Commission—both by reason of the abilities of its members and the circumstances in which it is required to give its decision—but it remains an opinion which is not binding on courts.

The fourth and fifth questions concern Article 13 (a) of the regulation. The application by this article of the legislation of the State of residence of a worker who is employed in the territory of another Member State is subject to certain conditions which, in the wording of the original text, are different

from those set out in Regulation No 24/64 which came into force on 1 April 1964.

The original text of this article—which is alone relevant to the action pending before the Centrale Raad—presupposes, in order to be applicable, that the workers are employed in another Member State by an undertaking having, in the territory of the State in which they reside, an establishment *to which they are normally attached.*

Is this condition fulfilled where a worker is engaged solely to work in the territory of a Member State other than that in which the undertaking is established and for work other than that normally carried on in that State? This is the subject of the fourth question referred to you by the Centrale Raad, and it arose from the wording of the Dutch version of the article in question. This version speaks of an establishment 'waarbij zij gewoonlijk werkzaam zijn', which may be translated as 'in which they normally carry out their duties'. This text at least suggests, even if it does not imply it, that the worker should have been previously employed at the establishment in the State of residence.

Although the versions in the four languages are authentic, this nuance only apears in the Dutch text. In particular, it is not to be found either in the Italian or in the French texts. However, French was the working language during the preparatory stages of the European Convention which became Regulation No 3 and the expression 'dont ils relèvent normalement' (to which they are normally attached) appears in all the drafts. It is therefore the French text which must be regarded as authoritative. It implies an active relationship between the wage-earner and the undertaking which employs him, but not that this relationship should exist prior to his employment in the territory of a Member State in which the undertaking to which he is attached is not situated. In other words, the provision in question may be applied even if a worker has been engaged specifically to carry out activities abroad. As I have said, this is the interpretation which the Administrative Commission has adopted in respect of the social security of migrant workers.

On the other hand, it is of little importance—and this is the reply to the second part of the question referred to you by the Centrale Raad—that the activities of the worker in question are different from those normally carried out in the State in which the undertaking is established; the relationship between the worker and this undertaking remains unaltered.

Finally, if Article 13 (a) is to be applicable, the worker must be *employed* by this undertaking. Does this apply in the case of a 'temporary supply of labour', when the undertaking which engages the worker merely places him directly at the disposal of another undertaking to which he is attached in carrying out his work? Contrary to the opinion held by counsel for Mr van der Vecht the Commission gives a negative reply to this question, on the ground that in such a case the relationship between the worker and the undertaking which engages him becomes too tenuous.

I was tempted to adopt this view although it is not necessary to deal with this question today. The solution in such a case depends on all the circumstances, on the agreements made between the two undertakings as well as between the employer and the wage-earner. If it is clear that this undertaking is merely a supplier of labour and that, once engaged, the wage-earner is not subject to its authority, it is clearly incorrect to say that he remains employed by this undertaking, as required by Article 13 (a); this is, however, a question of fact which it will often be difficult to clarify in view

of the purely oral nature of the agreements made between the parties concerned.

The final question referred to you by the Centrale Raad whether the expression 'employment' in the phrase 'the probable duration of their employment' refers to the employment of each individual worker or to the probable duration of the work to be carried out.

Let me refer again to the text of Article 13 (a) as worded at that time: 'Wage-earners ... whose permanent residence is in the territory of one Member State and who are employed in the territory of another State by an undertaking, having in the territory of the former State an establishment to which they are normally attached, shall be subject to the legislation of the former State ..., in so far as the probable duration of *their* employment in the territory of the latter State does not exceed 12 months'. Although this text refers to *workers* and not to *a worker* and does not allude either to the work to be carried out or to its duration, it appears to refer to the probable duration of the employment of each worker.

In conclusion, let me say that as this wording authorized abuses on the part of undertakings seeking to place themselves under the legislation of the State in which the social security contributions are the lowest, Article 13 (a) was amended as from 1 April 1964, in terms which perhaps do not remove every difficulty.

For these reasons, I suggest the following answers to the questions referred to the Court:

(1) A worker who is employed in the territory of one Member State, but who permanently resides in the territory of another Member State and who is conveyed at the expense of his employer between his place of residence and his place of employment, remains subject to the legislation of the former State by virtue of Article 12 of Regulation No 3, even as regards that part of the journey which takes place in the territory of the State in which he resides and in which the undertaking is established.

(2) Article 12 of Regulation No 3 prohibits a Member State other than that in whose territory the workers are employed applying their social security legislation to such workers where such application would lead to an increase in the charges borne by the wage-earners or their employers in respect of the same risk and the same period, without any corresponding supplementary protection by way of social security.

(3) The decisions of the Administrative Commission for the social security of migrant workers, made in pursuance of Article 43 (a) of Regulation No 3, are not binding on courts or tribunals.

(4) Article 13 (a) of Regulation No 3, as worded prior to the introduction of Regulation No 24/64, applies to a worker who is engaged solely to work in the territory of a Member State other than that in whose territory

the establishment to which he is normally attached is situated, even where the activities in question are different from those normally carried out in the State in which the undertaking is established, in so far as the probable duration of his employment in the territory of the former State does not exceed 12 months.

In conclusion, I consider that the decision as to costs incurred before this Court is a matter for the Centrale Raad van Beroep.