Regulations Nos 3 and 1408/71 of the Council replace, in respect of persons covered by them, the social security Conventions concluded between Member States which are not mentioned in Articles 6 and 7 or in Annexes D and II of the said Regulations respectively, even if the application of the Conventions is more advantageous to persons entitled to benefits than the said Regulations.

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

Delivered in open court in Luxembourg on 7 June 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 23 MAY 1973 [1]

Mr President,
Members of the Court,

The Centrale Raad van Beroep, a Dutch court of last resort having jurisdiction in social security matters, has, by an order dated 14 December 1972, referred the following questions for a preliminary ruling:

How are the provisions contained in Articles 5 and 6 and in Annex D of Regulation No 3 to be interpreted?

(a) As regards persons covered by Regulation No 3, do the provisions of that Regulation replace the provisions of social security Conventions concluded between Member States which are not mentioned in Article 6 (1) (a) and (b), 6 (2) (a) and (b) or Annex D, even when the application of the Conventions is more favourable to persons entitled to social security benefits than the application of the abovementioned Regulation?

(b) If not, what are the criteria for ascertaining which of the two pieces of legislation, the Convention or the Regulation, would produce a more favourable result in a particular case? In such a case, must there be taken into consideration what is ultimately paid *de facto* to the

1 — Translated from the German.

beneficiary in the other Member States?

(c) In this connection, how are Articles 6 and and 7 and Annex II of Regulation No 1408/71 to be interpreted?

For an understanding of these questions we must begin with the following preliminary observations.

Mr Walder, the Plaintiff in the main action, is a Dutch national who has resided in Belgium since 1954. From 1920 to 1954 he worked in the Netherlands and for a period of 75 weeks paid contributions under the old-age and invalidity insurance scheme for wage-earners, operating under Dutch law.

When he retired from work after attaining the age of 65 years, he applied for an old-age pension to the Dutch social insurance authority. This was granted to him by a decision of the authority dated 30 March 1971 with effect from 1 January 1970. Since Mr Walder was a migrant worker within the meaning of Regulation No 3 on social security for migrant workers, the insurance authority, in giving its decision, applied Articles 27 and 28 and Annex G III B a of that Regulation. It therefore proceeded from the basis that contribution periods completed in the Netherlands before 1 January 1957 were to rank with insurance periods under the (Dutch) Algemene Ouderdomswet, i.e. were to be dealt with under the provisions of the Act that (as regards old-age pensions) replaced the old-age and invalidity insurance scheme for wage-earners operating in the Netherlands with effect from 1 January 1957, by a general old-age insurance scheme for all persons residing in the Netherlands. Accordingly there resulted a retirement pension at the rate of 4 % of the old-age pension payable to an unmarried beneficiary under the Algemene Ouderdomswet.

However, this was not acceptable to Mr Walder. He is convinced that he is entitled to a higher retirement pension, i.e. one amounting to 33·6 % of a married person's pension. He argues that this would be the rate resulting from a calculation on the basis of the social security Convention of 29 August 1947 between Belgium and the Netherlands and its supplementary implementing Convention of 21 April 1951 (both amended by an agreement dated 4 November 1957). A better result would be produced under these provisions because not only periods of employment in the Netherlands but also periods of residence in the Netherlands on the part of the beneficiary and his wife, if any, completed before 1 January 1957 would be taken into account.

Mr Walder therefore appealed against the decision of the Dutch social insurance authority to the Raad van Beroep and then, having had no success, to the Centrale Raad van Beroep. This court, before which the matter is now pending, is thus concerned with an inquiry into the relationship of Regulation No 3 and of its succeeding Regulation No 1408/71 to bilateral social security Conventions. The questions which we mentioned at the outset, and in particular those relating to the interpretation of Articles 5 and 6 and of Annex D of Regulation No 3, are thus now brought into focus.

However, before we deal with this question, it seems appropriate to recall to mind the arguments of the Commission (the body which participated only in the proceedings before the national court) on the subject of the evolution of the Dutch social security law (so far as it is relevant here), the structure and evolution of the social security Convention between Belgium and the Netherlands, and the evolution of Regulation No 3 in this connection.

Firstly it is significant, according to the Commission, that the Algemene Ouderdomswet, which came into force on 1 January 1957, contains certain transitional provisions which are favourable to the persons whom they

affect. It appears from these provisions that periods of residence in the Netherlands completed before 1 January 1957 and other periods rank as insurance periods under the Algemene Ouderdomswet. For this purpose it is however a necessary requirement that the beneficiary should have resided in the Netherlands from the age of 59 to 65. A further important point is that the social security Convention between Belgium and Holland contains provisions under which the transitional provisions of the Algemene Ouderdomswet can apply even though the said requirement is not fulfilled because during the time in question the beneficiary was in fact resident in Belgium. This Convention retained its validity for the time being notwithstanding the entry into force of Regulation No 3 (which, as is known, was intended to replace such arrangements) because its relevant provisions were included in Annex D of Regulation No 3 (Official Journal first edition, 1958, p. 588). However this situation appears subsequently to have given rise to administrative and legal difficulties. For this reason the Belgian and Dutch governments notified the President of the Council, under Article 54 (1) of Regulation No 3, of an amendment to Annex D and informed him that those provisions of the social security Convention between Belgium and the Netherlands that related to the transitional provisions of the Algemene Ouderdomswet would be removed from Annex D. From then on it was only the application of Articles 27 and 28 of Regulation No 3 which required consideration in the case of migrant workers who had lived in the Netherlands, i.e. an old-age pension was calculated in respect of insurance periods prior to 1 January 1957 on the basis of the old-age and invalidity insurance scheme then in existence, and the Algemene Ouderdomswet only applied to insurance periods completed after 1 January 1957. However, since this did not prove to be an entirely satisfactory solution, the Netherlands proposed the introduction into Annex G III B of Regulation No 3 a system of rules, under which, as mentioned already, for the purposes of the application of Articles 27 and 28 of Regulation No 3, contribution periods under Dutch social insurance law completed before 1 January 1957 were to rank as insurance periods under the Algemene Ouderdomswet. This was implemented by the Council Regulation of 18 December 1963 which amended Annex G.

Lastly it should be mentioned that Regulation No 1408/71, which some time ago replaced Regulation No 3, again accords more favourable treatment to migrant workers who worked in the Netherlands before 1 January 1957, since Annex V F 2 of this Regulation substantially incorporated the context of the social security Convention between Belgium and the Netherlands, and in particular the equation of periods of residence completed in another Member State between the ages of 59 and 65 with periods of residence in the Netherlands, so that it is now possible, in calculating a Dutch old-age pension, to take into account periods of residence in the Netherlands before 1 January 1957.

Against the background of these observations we shall now turn to the problems raised by the Centrale Raad van Beroep.

1. Firstly, we are concerned with an inquiry into the interpretation of Articles 5 and 6 and Annex D of Regulation No 3, or more precisely: with an examination of the problem whether the provisions contained in the Regulation have replaced those provisions of the Convention which are not mentioned in Article 6 (1) (a) and (b), and Article 6 (2) (a) and (b) or in Annex D, and whether this is so even if the provisions in the Convention would produce a more favourable result for those affected.

As the Commission has shown, the answer to this question presents no difficulties.

The essential starting-point is Article 5 of Regulation No 3, in which it is laid down that the Regulation shall, in respect of persons covered by it, replace social security Conventions concluded between two or more Member States exclusively as well as supplementary agreements to such Conventions. This provision is mandatory and leaves no room for doubt. It contains only one reservation, namely 'same as otherwise expressly stated herein'. In this connection Article 6 (2) should be considered, where it states 'the provisions of this Regulation notwithstanding . . . (e) such other provisions of social security Conventions as are listed in Annex D to this Regulation'. This clause, too, is clear: everything depends on the contents of Annex D; anything which is not listed in Annex D was replaced by Regulation No 3.

Over and above this one can agree with the Commission when it says that Article 6 establishes no criteria for including social security Conventions in Annex D. Even if the persons affected would be better placed if the provisions of such Conventions were included, Member States and the Council are under no duty to do so. Rather it is true to say that there exists a discretionary power deriving in particular from Article 6 (3), which speaks of amendments to Annex D which Member States 'consider necessary'.

The answer to the first question, therefore, is that any provisions in bilateral agreements which are not mentioned in Annex D, were replaced by Regulation No 3, and this is so, even if the persons affected would be better placed under such agreements than they are under Regulation No 3.

2. Since the second question only arises if the first question is answered in the negative, and as we have seen that no such answer has been given, there is no necessity to investigate the second problem raised by the Centrale van Beroep.

3. Finally, with regard to the third question, which concerns the interpretation of Articles 6 and 7 of Regulation No 1408/71, it is appropriate to refer to the answer to the first question.

Article 6 of Regulation No 1408/71 in fact corresponds with Article 5 of Regulation No 3 i.e. it lays down that the Regulation replaces, as regards persons covered by it, social security Conventions concluded between two or more Member States. Article 7, to which a reservation in Article 6 refers, lists the international agreements which are not affected by the Regulation and provides-as does Article 6 (2) of Regulation No 3 — that only those provisions of social security Conventions which are listed in Annexe II shall continue to apply. Since these do not include the Convention between Belgium and the Netherlands with which we are now concerned, there is likewise no possibility of invoking that Convention under Regulation No 1408/71.

4. Summarizing what I have said one might therefore suggest the following answers to the questions submitted:

(a) It must be held that the provisions of Regulation No 3 replaced, as regards persons covered by it, those social security Conventions concluded between two or more Member States which are not mentioned in Article 6 or in Annex D.

(b) It must be held that, further, the same applies in the case of the provisions of Regulation No 1408/71, with regard to the Conventions which are not mentioned in Article 7 thereto or in Annex II.