THE COURT

in answer to the question submitted to it by the Arbeidsrechtbank Tongeren in accordance with the decision taken by that court on 30 April 1971, hereby rules:

1. **The concept of an 'assimilated' worker used in Regulations Nos 3 and 4 of the Council includes a 'helper', within the meaning of Belgian legislation, considered as a self-employed person in so far as, under that legislation, the benefits of the social security scheme provided for wage-earners as a whole against one or more risks is extended to him, provided that, in respect of the risk concerned, the extension ensures that he receives protection comparable to that provided under the general scheme;**

2. **When the legislation of a Member State governing the benefis available to self-employed persons allows the insurance periods completed by the insured person under the social security scheme for wage-earners to be taken into account in establishing the right to benefit, the insurance periods completed as a wage-earner under the social security scheme of another Member State must be taken into account in applying that legislation.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 27 October 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 5 OCTOBER 1971[1]

Mr President,
Members of the Court,

Arising out of proceedings brought before it, the Belgian Labour Court of Tongeren is asking you to interpret Regulation No 3 of the Council on social security for migrant workers (OJ No 30 of 16.12.1958, p. 561).

The relevant facts are as follows. Mr Janssen, the plaintiff in the main action, who is of Belgian nationality and is at present resident in Belgium, worked in France from 16 October 1967 to 31 December 1969 as an agricultural wage-earner and in this capacity was insured there with the Mutualités Sociale Agricole de la Somme against the contin-

1 — Translated from the German.

gencies of sickness and invalidity. With effect from 1 January 1970 he began work as a 'helper' on his father's farm. It is in this capacity that he is insured with the defendant institution in the main action. He has regularly paid the contributions due. In January 1970 his wife went into a Belgian hospital for a confinement. The applicant takes the view that the Landesbond der Christelijke Mutualiteiten of Brussels as his insurance institution should reimburse him for the expenditure incurred in connexion with the confinement. The institution however refuses to do so on the ground that he has not completed the waiting period, namely, the minimum insurance period of six months which must have elapsed when the risk materialized, in accordance with the relevant provisions, which are contained in the Royal Decree of 30 July 1964 'concerning the conditions in which the application of the Law of 9 August 1963 establishing and providing for a system of compulsory insurance against sickness and invalidity is extended to self-employed persons'.

Mr Janssen considered this decision to be unacceptable and brought proceedings before the Labour Court of Tongeren. In so doing he relied mainly on the contention that, under Regulation No 3 of the Council on social security for migrant workers, the insurance periods which he had completed in France must be taken into account and that, once they had been, the requirement of Belgian law regarding a minimum insurance period was fulfilled. As this contention raised a question of European law the court, by judgment of 30 April 1971, decided to stay proceedings and to ask you to give a preliminary ruling on

> 'the interpretation of the words "and assimilated" appearing in Regulations Nos 3 and 4 of the EEC and more particularly on the question whether helpers regarded under Belgian social legislation as self-employed persons come within the ambit of these regulations in as much as they are assimilated to wage-earners.'

To reply to this question, on which the plaintiff in the main action and the Commission of the European Communities alone submitted observations, it is first of all necessary to look at certain features of Belgian legislation.

In Belgium, sickness and invalidity insurance is governed by a Law of 9 August 1963, Article 22 of which provides that a Royal Decree may, in whole or in part, extend the application of the Law to self-employed persons and to helpers. This extension was effected by the Royal Decree of 30 July 1964, already mentioned, which was last amended by the Royal Decree of 29 June 1970. On the meaning of 'helpers', regard must be paid to the definition given in Article 6 of Royal Decree No 38 of 27 July 1967 laying down social security regulations for self-employed persons and declaring in terms that 'helpers' are persons who in Belgium normally deputize for or assist a self-employed person for at least 18 days every year without being bound under a contract of service. This amounts to saying that these helpers are regarded as self-employed persons.

On the other hand, Article 16 of Regulation No 3 on social security for migrant workers, a provision of the Chapter headed 'Sickness, Maternity', which according to the plaintiff, applies in his case, provides as follows:

> 'For the acquisition, maintenance or recovery of the right to benefit, where a wage-earner or an assimilated worker has been successively or alternately subject to the legislation of two or more Member States, the insurance periods and assimilated periods completed under the legislation of each of the Member States shall be aggregated in so far as they do not overlap.'

In the light of this, since the applicant cannot be regarded as a wage-earner in

the strict sense of the term, the whole issue, as the court making the reference grasped very clearly, is to establish what is to be understood by 'assimilated' within the meaning of Regulation No 3. As the concept of 'assimiliated' is nowhere defined in Community instruments, the Court has already been called upon to give two preliminary rulings on the subject and thus define the type of person to whom Regulation No 3 applies. We must pay particular attention to these decisions because they should enable us to find a solution in the present case.

In case 75/63 (*Hoekstra (née Unger)* [1964] ECR 184 *et seq.*), the Court began by emphasizing that the concept of 'wage-earner or assimilated worker' must be defined by reference to the provisions of the Treaty which apply in the field of social security. The Court held that the expression 'wage-earners or assimilated workers' extended to 'all those who, as such and under whatever description, are covered by the different national systems of social security'. The effect of this judgment is that assimilation is decided not on the basis of national labour legislation but national social security legislation.

This is also the tenor of the judgment in Case 19/68 *De Cicco* [1968] ECR 480 *et seq.*, where it is declared that 'the material field of application of Regulation No 3 is determined essentially according to that of national legislation in social security matters referred to by the [Community] provisions . . .' The Court further emphasized that the provisions of Regulation No 3 are based on a wide conception of the persons to whom they apply since they cover not only wage-earners in the narrower sense but, in addition, all those assimilated to such workers. The exact measure of this assimilation, the judgment continued, can only be determined in terms of national legislation to which the regulation refers. The Court went on to declare that such an assimilation takes place on every occasion on which 'as a result of the effect of national legislation, the provisions of a general scheme of social security are extended to a category of persons other than the wage-earners referred to by Regulation No 3 . . .'

Now, if we go no further than the provisions of Belgian law so far referred to, this condition has every appearance of having been fulfilled as regards agricultural 'helpers'. Nevertheless, as the Commission rightly points out, this first impression does not stand up to closer examination. Of course, as the Commission has convincingly demonstrated, the concept of 'assimilation' does not exclude the possibility that the extension of a general social security scheme may, in its application, present certain peculiarities. However, both the literal meaning of the term 'assimilation' and the general plan of Regulation No 3 make it inconceivable that there can be any question of certain groups of persons who are not wage-earners in the strict sense being, in practice, subject to a scheme which is separate and distinct and so independent of other schemes. But it must be recognized that Belgian law has done just this in the case of self-employed persons and helpers. An immediate illustration of this is that Article 18 (3) of the said Royal Decree No 38 of 27 July 1967 provided that the scheme for sickness and invalidity insurance benefits for self-employed persons and helpers must be established 'within the framework' of the Law of 9 August 1963 and not by way of a simple extension. Closer examination reveals (and this is of even greater importance) that the Royal Decree, decisive in this matter, adopted for the purpose of 29 June 1970 precisely defined the limits within which the general scheme was to be extended. In fact, of the benefits provided for under the general scheme, the Royal Decree of 1970 makes provision only for benefits

1 — Cf. Rapport au Roi, Pasionomie 1967, II, p. 1001 *et seq.*

in cases of serious illness (as the Commission has shown in detail on page 13 of its statement). Finally, both the previous history and the general plan of the Royal Decree of 27 July 1967 laying down social security regulations for self-employed persons (cf. Rapport au Roi, Pasionomie 1967, II, p. 1001 *et seq.*) show that the decree was designed to establish a separate and self-contained scheme for the category of persons designated therein. This scheme was established by integrating the conditions applicable to the three social security sectors (family allowances, pensions and survivors' pensions as well as sickness and invalidity benefits), by integrating the methods of affiliation and contribution and by a standardization of the structures (creation of a national social security office for self-employed persons). Consequently, it certainly seems that, unless the concept of assimilation is to be extended to cover cases where special and separate schemes are set up for specified categories of persons, it cannot be held that in the present case there is assimilation with wage-earners within the meaning of Article 16 of Regulation No 3.

Confirmation of the correctness of this conclusion is moreover to be found in Regulation No 1408/71 of the Council of 14 June 1971 (OJ L 149, p. 2 *et seq.*; OJ (English Special Edition) 1971 (II), p. 416 *et seq.*) on the application of social security schemes to employed persons and their families moving within the Community. Article 1 (a) of the regulation, which is intended to replace Regulation No 3, gives the following definition of the term 'worker': 'subject to the restrictions set out in Annex V, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons'. Such a restriction was indeed laid down in the case of Belgium and this was done in the following terms: 'The provision of Article 1 (a)(i) of the Regulation shall not apply to self-employed persons or to other persons receiving medical treatment under the Law of 9 August 1963 on the establishment and organization of a compulsory sickness and invalidity insurance scheme, unless they receive the *same protection* as employed persons in respect of such treatment'. Indeed as the Commission has explained, this is the only way of avoiding a situation in which, paradoxically, self-employed persons within the meaning of Belgian law who stay abroad or establish a residence abroad enjoy greater protection than that which is available to them in Belgium.

Therefore, on the basis contended for by the Commission and contrary to the view taken by the plaintiff in the main action, who has been unable to find in Community instruments anything relevant to support his argument, I take the view that the following reply should be given to the question referred to you by the Labour Court of Tongeren:

Persons, such as helpers within the meaning of Belgian law, to whom the provisions of national law have extended the benefits of a general social security scheme covering employed persons against one or more contingencies cannot be regarded as 'assimilated to wage-earners' within the meaning of Regulation No 3 if the extension does not cover all contingencies and if, consequently, it is clear that the intention was, in fact, to set up a separate and independent scheme.