THE COURT

in answer to the question referred to it for a preliminary ruling by the Centrale Raad van Beroep, forwarded by a letter of 16 October 1963 from the acting President of that Court,

hereby rules:

1. **Article 12 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.) does not prohibit Member States other than those in the territory of which wage-earners or assimilated workers are employed from applying their social security legislation to such persons.**

2. **It is otherwise only if a Member State, other than that in the territory of which the worker is employed, requires him to contribute to the financing of an institution which would not accord him supplementary protection by way of social security in respect of the same risk and of the same period.**

3. **The decision on costs is a matter for the Centrale Raad van Beroep.**

Donner Hammes Trabucchi
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 17 APRIL 1964[1]

Mr President,
Members of the Court,

For the second (and not the last) time, the Centrale Raad van Beroep refers to you for a preliminary ruling a question concerning the interpretation of Regulation No 3 concerning social

1—Translated from the French.

security for migrant workers. The present case involves Article 12 of this Regulation which reads as follows:

> 'Save as otherwise provided under this Head, wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if they permanently reside in the territory of another Member State or their employer or the registered office of the undertaking which employs them is situated in the territory of another Member State.'

The question asked is as follows: 'Must Article 12 of Regulation No 3 be construed as meaning that the persons to whom it refers are subject *only* to the legislation of the Member State in whose territory they are employed, irrespective of whether the persons concerned can in fact assert any rights on the basis of such legislation?'

The crucial word is the word 'only'. The point to be settled is whether the application of the legislation of the country of employment (which is mandatory according to Article 12) *excludes* by itself the application of any other legislation and especially that of the country of permanent residence, whatever may be the consequences, favourable or unfavourable, which may ensue, or whether, on the other hand, this exclusiveness may, to a greater or lesser extent, be set aside, and if so to what extent this may be done.

I

Before considering this question, I propose to review the facts and to try to see how this problem is raised in relation to the Netherlands legislation. Although you are required to give a decision which is within the competence of the Court by virtue of Article 177, without pronouncing judgment on the relevance of this question to the solution of the main action, I think it desirable to look as clearly as possible into the history of the case so as to provide, if only by way of an example, a concrete background for the purposes of the consideration of the question of the abstract interpretation you will be called upon to give.

In the Netherlands, there are three insurance schemes for wage-earners.

1. The 'Disablement, Old Age, Survivors' scheme, or Invaliditeits-, Ouderdoms- en Overlevingsrenteverzekering, or IOOV, which concerns only *wage-earners*, and is the oldest of the three. It has an upper limit for membership, and ceases to be compulsory when the annual wage exceeds 8000 guilders. On the other hand, there is no upper limit to the assessable income.

2. The 'General Old Age Insurance' scheme, or Algemene Ouderdomswet, or AOW, established by a law of 31 May 1956. Unlike the preceding scheme this is applicable to the *whole population* and is financed by contributions assessed on the income of the persons concerned and collected in the same way as taxes. This scheme, unlike that which preceded it, has no upper limit for membership, but, on the other hand, it has an upper limit for assessable income; in 1962 this upper limit was 8250 guilders per annum.

3. The 'General Widows and Orphans Insurance' scheme or Algemene Weduwen- en Wezenwet (AWW), which covers death. Like the preceding scheme, the AOW, this scheme is applicable to the whole population and is subject to the same rules: there is no upper limit for membership, which depends on the dual condition of being more than 15 years old and a resident of the Netherlands; there was an upper income limit for assessable income of 8250 guilders per annum in 1962. Employers do not contribute to this scheme, which is financed only by the compulsory contributions of the insured persons and also by the State, which guarantees to make up any deficits. The beneficiary is the widow, who must comply with the following conditions: to be aged 50 at

the date of the death of the insured person, or to have at least one dependent child, or to be disabled. This scheme came into force on 1 October 1959, subject to certain implementing procedures.

Mr Moebs, a French national, had worked for some time as a wage-earner in Luxembourg, in France and then in the Netherlands (from 1955 to 1959). In the last-named country, he appears not to have belonged to the IOOV scheme because his earnings exceeded the upper limit for membership. On the other hand, his employer has attested in a written statement, which is entered on the Court file but of which the Commission was unaware when it submitted its observations, that he paid contributions under the 'General Old Age Insurance' scheme, AOW, namely 6.75% of the assessable income for 1958 and 1959 until 31 August 1959, the date of the termination of the contract of employment. As a matter of fact, the employer states that he had deducted the sums equivalent to the *AWW and the AOW* contributions and not merely the latter. This is obviously a mistake, since the AWW did not enter into force until 1 October 1959 and the first contributions to this new insurance scheme were collected only from 1 January 1960, but it is a mistake of no consequence: in fact, the contribution rate under the new AWW scheme is only a fraction of the old rate, 1.25%, while the rate of contribution under the AOW from then on was fixed at 5.5%.

Mr Moebs was subsequently employed in France from 1 to 21 October 1959, when he died. During this period his place of permanent residence continued to be in the Netherlands where his family remained. It was only during the year 1960 that his widow left the Netherlands to live in France. Mr Moebs has been affiliated to the French social security scheme as from 1 October 1959. Yet Mrs Moebs cannot claim a widow's pension under French law, because she does not meet the conditions required under that law, and more especially that of being disabled herself. On the other hand, she is entitled to a death grant, and we know from a recently issued document that she has in fact obtained this grant. She is also entitled to family allowances which, in France, are granted irrespective of affiliation to a social security scheme or of the payment of contributions.

That is why Mrs Moebs has endeavoured to obtain in the Netherlands an AWW pension, to which she would be entitled because of her eight infant children. She has claimed and still claims that her husband, having retained his residence in the Netherlands until his death, was affiliated to the AWW scheme at least as from 1 October 1959 until his death on 21 October 1959. Her claims have, however, been dismissed by the competent courts, which based their decisions in particular on a Royal Decree of 10 July 1959 made under the AWW.

In Article 7 (4), the AWW lays down that 'general measures may make exceptions to the provisions of Article 7 (1) (according to which any person over the age of 15 years residing in the Netherlands is covered), in respect of . . . persons who are covered by a *similar* regulation outside the Kingdom'. It is on this basis that Article 2 of the Royal Decree of 10 July 1959 contains the following provision: 'By way of exception to the provisions of Article 6 of the AOW *and of Article 7 of the AWW*, the following persons shall not be regarded as insured within the meaning of those laws: (a) any person established in the Kingdom, who is in gainful employment outside the Kingdom and who, because of his employment, *is insured against the financial consequences of old age and death by virtue of legislation in force in the country of employment*'.

The courts which dealt with the case considered that Mr Moebs, because of his employment as a wage-earner in

France, was entitled to life assurance cover under a social security legislation, and this can hardly be denied.

However, it does not follow, as stated by the Commission, that the application of the Netherlands legislation 'probably' sufficed to settle the case, without the need for reference to Article 12 of Regulation No 3. If Article 12 had to be construed to mean that the application of French legislation, unquestionable in this case, *did not exclude* application of Netherlands legislation, *at least as far as a law such as the AWW was concerned*, it would follow of course that the restrictions imposed by the Royal Decree would have to be considered, if not as illegal, then at least as inapplicable with regard to the legislation of the countries of the Community, because these restrictions would no longer be justified legally by Regulation No 3 and furthermore they would not be any the more justified by the law itself; in fact this law provided only for exceptions in respect of the application of '*similar* provisions outside the Kingdom'. This is not the case when, as in the present matter, we are dealing, on the one hand, with a social security scheme for workers, and on the other, with a scheme covering the whole population. Of course, on this last point, the Netherlands courts alone are competent to decide on the legality or the applicability of the Royal Decree under the afore-mentioned law.

However that may be — and my only aim has been to make this clear — it is understandable that the Centrale Raad van Beroep has considered it necessary to secure from the Court an interpretation of Article 12 of Regulation No 3.

II

As to the substance of the case, that is to say the interpretation of Article 12, my comments will be brief. I have been entirely convinced by the comments of the Commission, which seem to me to be entirely to the point.

The main aim of Article 12 is to settle a conflict of laws by laying down which law is applicable when the country of employment and the country of permanent residence are different. In this connexion, the provisions of this Article validate the rule generally followed in national legislation as well as in prior international conventions, that is to say, the law applicable is the legislation of the country where the place of employment is situated, except when expressly stipulated otherwise in the Regulation itself: what is more important than the rule is in fact the restrictive enumeration of these exceptions which apply to all Member States.

But, as the Commission has rightly pointed out, this rule, accompanied by its exceptions, which lays down in *mandatory* form which legislation is applicable, does not stipulate, at least not expressly, that this legislation is in all cases *exclusively* applicable. The question whether this condition of exclusivity is necessarily implied by the terms of Article 12 thus remains open.

Let us first note that this question does not arise until two sets of legislation under consideration both come within the field covered by Regulation No 3. The term 'legislation' is defined in Article 1 (b) to mean 'all laws, regulations and other enforceable provisions (dispositions statutaires) *present and future* of each Member State relating to *social security schemes and branches* of social security set out in Article 2 (1) and (2) of this Regulation'. We are thus referred to Article 2, which stipulates that 'this Regulation shall apply to *all legislation* governing . . . (d) survivors' benefits other than those paid in respect of industrial accidents or occupational diseases'.

The AWW scheme therefore comes without question into the 'legislation' which Regulation No 3 has in view, although this is only expressly mentioned for the first time in Article 7 of Regulation No 130 (Official Journal of

28 December 1963), completing Annex G to Regulation No 3, as you will see in a forthcoming case. The fact that this scheme *is not restricted to* wage-earners is unimportant, since wage-earners are covered. In any case, *Annex B to Regulation No 3*, which lists the legislation to which the Regulation applies, refers in a general manner, with regard to the *Netherlands*, to 'legislation respecting . . . (e) insurance against premature death . . .'. Furthermore, Annex 9 to Regulation No 4 singles out among the general schemes of the Netherlands, 'Widows and Orphans insurance'.

It should be further noted that, before the question can arise, the two laws must *cover the same risk*: this seems obvious.

After these preliminary remarks have been made, the distinctions proposed by the Commission, which are based on a comparative analysis of the whole of Regulation No 3 in the matter of determining which law is applicable and which endeavour to find a '*ratio legis*', seem to the point.

First it is necessary to distinguish between the laws, one based on the exercise of a working activity and the other based on permanent residence. As the Commission has pointed out, in this case it is not the same set of circumstances which give rise to the application of each of the two laws. The most typical example is the French legislation on family allowances, which covers the whole population.

The distinction is, however, not sufficient to sanction the simultaneous application of the two laws. Another distinction must be made, that of the compulsory nature or, on the contrary, the voluntary (or 'optional continued') nature of the insurance. In compulsory insurance schemes, there is generally some contribution from the employer to the financing of the scheme and it would be contrary to the aims of Article 12 to allow a double contribution by employers to cover the same risk. Article 12 aims at avoiding this double contribution as well as at giving the worker the guarantee that he will always be covered by one set of social security laws.

This is, however, also true in respect of the worker's contribution: therefore in exceptional cases (to which the AOW or the AWW belong), when the insured person alone is liable to contribute, it would be out of the question to *compel* him to contribute simultaneously to two schemes covering the same risk, one in his country of permanent residence, the other in the country in which he is employed. It is also out of the question to compel one of the schemes (for example, in this case, the AWW) to continue to cover the risk without any contribution from the insured person.

On the contrary, if the insurance scheme is voluntary and its cost is entirely borne by the insured person, then there is no difficulty; it would even be inequitable to deprive the person concerned from benefiting from the insurance, in cases where this insurance enabled him to obtain greater benefits or to obtain benefits not provided for by the other law (as in this case). This situation is in fact very similar to that in which an insurance effected with a private company, or a mutual benefit society, whereby the insured person takes cover for risks for which the law does not make full provision. But it is necessary that the law should permit such a 'voluntary' or 'optional continued' insurance, and this is not so in the present case. This point of view is in addition one which stems from Regulation No 3, supplemented by Regulation No 4, and this is proved by examples quoted by the Commission: subparagraph (c) of Article 8 and Article 13 (1) (b) and (5) of Regulation No 4, and as regards family allowances, Article 9 (4) of this Regulation.

It thus appears that, apart from the very special case of the French system of family allowances (which not only makes permanent residence the sole qualifica-

tion but gives benefits without reference to any contribution by the insured person and in respect of which one may well ask what remains of the concept of membership and even of insurance itself), Article 12 cannot be considered as allowing the simultaneous application of two laws covering the same risk, unless one of the schemes provided by these laws is a voluntary (or 'optional continued') scheme to which the worker alone contributes.

To reply to the question posed by the Centrale Raad van Beroep I propose a formula of the following type:

Article 12 of Regulation No 3 is to be interpreted to mean that the application of the law of the country of employment excludes any simultaneous application of the law of the country of permanent residence, when the two laws, whether or not based on the same qualifications for membership, cover the same risk and involve in both cases a compulsory insurance scheme to which the insured person must contribute, irrespective of whether or not, when these conditions are satisfied, the legislation of the country of employment allows the insured person at a given moment the right to make a claim on the basis of that legislation.

I am also of the opinion that the decision as to costs in these proceedings is a matter for the General Raad van Beroep.