OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 16 July 1998 *

1. In the present case the Centrale Raad van Beroep, Utrecht (Netherlands), has referred to the Court three questions whose essential purpose is to ascertain whether Regulation No 574/72/EEC [1] (hereinafter 'Regulation No 574/72') allows the social security institution of the Member State to whose legislation a worker was subject when he became incapable of work to adopt the decision to revise his degree of invalidity or to refuse invalidity benefits without having previously requested that the person concerned be examined by the medical services of the institution of the Member State in which he resides.

I — Facts of both proceedings

2. The first proceedings are between the Landelijk Instituut voor de Sociale Verzekeringen, appellant, and Mr Voeten, respondent. Mr Voeten lives in Belgium and from October 1976 was employed as a forklift truck driver with an undertaking in the Netherlands. In November 1989 he gave up his job because he was suffering from back, shoulder and knee complaints.

At the beginning of August 1990 Mr Voeten was examined by the medical services of the Netherlands social security institution. The specialist who was treating him in Antwerp forwarded information, which is among the documents before the Court. In December 1990 Mr Voeten was interviewed by the work expert in the Netherlands, who assessed his capacity for work. By a decision of 1 March 1991 he was awarded invalidity benefit, with effect from 22 November 1990, corresponding to a degree of incapacity for work of between 80 and 100%.

3. This degree of incapacity for work was obtained by applying the criterion of 'suitable work', defined as work appropriate to the strength and abilities of the person concerned, which he might reasonably be required to do in the light of his training and previous occupation. However, the legislation on invalidity was amended with effect from 1 August 1993 and that criterion was replaced by the criterion of 'any generally acceptable work of which the person concerned is capable having regard to his strength and abilities'.

* Original language: Spanish.

1 — Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 86), in the version amended by the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

Since then the degree of incapacity for work has been determined by comparing the earning power of a person in good health doing the work formerly done by the person concerned with the wage corresponding to the 'generally acceptable work' which he is still capable of doing. Thus the possibilities of employment of those declared to be suffering from invalidity under the former rules have been increased.

4. It was for that reason that Mr Voeten was summoned by the medical services of the institution responsible for payment in the Netherlands for the purpose of reviewing his degree of incapacity for work. The visit took place on 13 February 1995. The doctor considered that, taking Mr Voeten's limitations into consideration, he was capable of doing generally acceptable work on a full-time basis.

Mr Voeten was then interviewed by the work expert, who classified him in the degree of incapacity of 35 to 45%. He expressed the opinion that by doing other work Mr Voeten was capable of earning a wage which, compared with a fork-lift truck driver's wage, represented a loss in earning power of 36%. By a resolution of 20 June 1995 the appellant institution reduced Mr Voeten's benefits with effect from 1 July 1995 in accordance with the recommended degree of invalidity.

5. On that date Mr Voeten returned to work for his former employer, now as a freeze-drier. In the light of his earnings, his invalidity benefit was again reduced, by resolution of 25 October 1995, the amount being calculated on the basis of a degree of incapacity of 25 to 35%.

6. Mr Voeten appealed against both resolutions. He claimed that he had not been properly examined and that his complaints had been virtually ignored. He further claimed that, according to the information provided by the specialist who was treating him in Antwerp, his degree of invalidity was between 80 and 90%.

7. Mr Voeten's appeal was allowed in so far as it concerned the resolution of 20 June 1995, which was annulled by the Arrondissementsrechtbank, Amsterdam. The Landelijk Instituut voor de Sociale Verzekeringen appealed to the Centrale Raad van Beroep.

8. The second proceedings are between the Landelijk Instituut voor de Sociale Verzekeringen, appellant, and Mr Beckers, respondent. Mr Beckers lives in Belgium and from 20 February 1989 worked for an undertaking in the Netherlands as an assembly worker. He ceased work on 2 September 1993 owing to back trouble. After three months he underwent a medical examination in the Netherlands and was diagnosed as suffering from a

lumbar disc complaint. This diagnosis was arrived at on the basis of the examination and also the information provided by the orthopaedist who was treating him, but no information was requested from the social security institution of the State of residence.

9. In June 1994 Mr Beckers underwent a fresh medical examination and had a number of interviews with the work expert, who concluded that he was capable of carrying out sufficient alternative work which would not affect his back. In his opinion Mr Beckers' degree of invalidity was below 15%.

10. On 1 September 1994, upon expiry of the 52-week period during which a claimant normally receives sickness benefit, Mr Beckers applied for invalidity benefit, which was refused by resolution of 12 September 1994. Mr Beckers appealed against that resolution; he claimed that his condition had been too lightly assessed.

11. The Arrondissementsrechtbank, 's-Gravenhage, allowed the appeal by judgment of 5 August 1996. The Landelijk Instituut voor de Sociale Verzekeringen appealed to the Centrale Raad van Beroep.

II — Questions referred to the Court

12. Before resolving those two disputes the Centrale Raad van Beroep stayed the proceedings and referred the following three questions to the Court for a preliminary ruling:

'1. Does Article 51(1) of Regulation (EEC) No 547/72 preclude the competent institution from carrying out in the country of the competent institution a medical examination of the person in receipt of benefit for incapacity for work as part of checking the employee's degree of incapacity in the absence of a prior medical examination carried out by the institution of the place of stay or residence, where the employee is a frontier worker and, as a result, it can be presumed that the distance between his place of residence and the competent institution is not necessarily greater than the distance between his place of residence and the institution of the place of residence?

2. In the case of determination for the first time of entitlement to benefit, does Article 40 of Regulation (EEC) No 574/72 preclude the competent institution from assessing the incapacity for work on the basis of its own medical examination, without a prior medical examination by the institution of the place of residence?

3. If the answer to Question 2 is in the negative: does that also apply where the com-

petent institution has not requested and hence not taken account of medical documents and reports and also information from the institution of the place of residence, but only apprised itself of medical information from the attending practitioner in the country where the employee is undergoing medical treatment?'

III — Community legislation

13. The provisions which the Court is requested to interpret are Article 40 and Article 50(1) of Regulation No 547/72 implementing Regulation (EEC) No 1408/71 [2] (hereinafter 'Regulation No 1408/71').

'Article 40

...

In order to determine the degree of invalidity, the institution of the Member State shall take into consideration the documents and medical reports and the information of an administrative nature obtained by the institution of any other Member State. Each institution shall, however, retain the right to have the claimant examined by a doctor of its own choice except where the provisions of Article 40(4) of ... Regulation [No 1408/71] apply.'

Article 51, which forms part of the provisions on 'Administrative and medical checks', provides:

'1. When a person in receipt of benefits, in particular:

(a) invalidity benefits;

...

is staying or residing in the territory of a Member State other than the State in which the institution responsible for payment is situated, administrative checks and medical examinations shall be carried out, at the request of that institution, by the institution of the place of stay or residence of the recipient in accordance with the procedures laid down by the legislation administered by the latter institution. The institution responsible for payment shall, however, reserve the right to have the

2 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ L 230, p. 6), in the version amended by the Act on the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23).

recipient examined by a doctor of its own choice.

...'

14. Also relevant, in the light of the observations put forward, is Article 121 of Regulation No 574/72, which deals with supplementary implementation agreements concluded by the Member States among themselves and which is worded as follows:

'1. Two or more Member States or the competent authorities of those Member States may, where necessary, conclude agreements designed to supplement the administrative procedure for implementing ... Regulation [No 1408/71]. Such agreements are listed in Annex 5 to the implementing Regulation [Regulation No 574/72].

...'

IV — Questions referred to the court

15. Written observations were presented, within the period prescribed for that purpose in Article 20 of the Statute (EC) of the Court of Justice, by the Landelijk Instituut voor de Sociale Verzekeringen, the Governments of The Netherlands and Germany and the Commission. The Landelijk Instituut voor de Sociale Verzekeringen, the Government of the Netherlands and the Commission were represented at the hearing, which took place on 2 July 1998.

A — *Question 1*

16. The appellant social security institution maintains that the rule in Article 51 of Regulation No 547/72, pursuant to which administrative checks and medical examinations of a worker in receipt of invalidity benefits from the social security institution of one Member State and residing in the territory of another Member State are to be carried out by the institution of the State of residence, at the request of the institution responsible for payment of the benefits, incorporates a derogation applicable to frontier workers, who are accustomed to going from one Member State to another on a daily basis and for whom travelling to the medical services of the Member State in which they reside may entail a longer journey then would be necessary to respond to the summons of the medical services of the institution responsible for payment.

In support of that argument it claims that the purpose of the provision is to protect the health of the worker, which should not be prejudiced by a long journey, where the

Member State of the institution responsible for payment and the Member State of residence are geographically remote from each other. That is not the case of a worker like Mr Voeten, for whom the distance from the medical services in the Netherlands is less than the distance he would have to travel if he were called upon to attend a review in Belgium.

The appellant further states that the Bilateral Agreement between Belgium and the Netherlands of 12 August 1982 on insurance for sickness, maternity and invalidity [3] supports that argument. Article 21 of that Agreement provides that the medical examination is to be carried out by the institution of the place of residence, at the request of the institution responsible for payment, while Article 23 further provides that the institution responsible for payment is entitled both to carry out the medical examinations in the other country and to call upon the person concerned to undergo such examinations. The appellant states, in that regard, that Article 121 of Regulation No 574/72 allows the Member States, if they consider it necessary, to establish administrative procedures for implementing Regulation No 1408/71 which contain derogations from its provisions.

17. The Netherlands Government observes that, since the legislative amendment which entered into force in August 1993, it is not the medical practitioner who determines the degree of invalidity of a worker but the work expert who determines, on the basis of the disability established by the medical practitioners, whether the person concerned is still capable of doing any work. Throughout the procedure the work expert maintains contact with the worker and with his former employer with the intention that he should be reinstated in the undertaking. After August 1993 the competent institution in the Netherlands revised the degree of occupational invalidity of all those under the age of 45, since the criteria were radically altered. Accordingly, the main purpose of the examination which Mr Voeten was required to undergo was not to ascertain whether his health remained the same but to determine whether, according to the new criteria, he continued to be unfit for work. In the Government's opinion Article 51 of Regulation No 547/72 cannot apply in this case, since the object of the exercise was not to carry out a simple examination but to adopt a new decision on Mr Voeten's occupational invalidity. Since the procedure can be assimilated to that followed for the purpose of declaring a worker unfit for work it must be governed by Article 40 of that Regulation, not by Article 51.

In case the Court should not take that view, the Government claims that in the case of frontier workers the fact that they are required to travel to the Member State of the institution responsible for payment neither constitutes an obstacle to the free movement of workers nor represents a danger to their health. It further states that reinstating workers residing abroad is generally difficult, since the further away they are the more difficult it is to maintain contact between the work expert and the undertaking and between the under-

3 — This Agreement is referred to in paragraph 9(d) of Annex 5 to Regulation No 574/72 on the implementing provisions of bilateral conventions which remain in force.

taking and the worker. Frontier workers, on the other hand, are for practical purposes in the same situation as those who reside in the Netherlands as far as successful reinstatement is concerned. That is amply illustrated by the case of Mr Voeten, who succeeded in being re-employed by the undertaking for which he had previously worked.

18. The German Government states, first, that Article 51 of Regulation No 574/72 provides for no derogation applicable to frontier workers and that what the national court asks is whether the result of the examination carried out in the Member State of the institution responsible for payment can be relied upon *vis-à-vis* a worker residing in another Member State. In the Government's opinion the institution responsible for payment continues to be competent to take the final decision, even where it was required to have recourse to the services of the institution of the Member State of residence of the person concerned in order to spare him the inconvenience of a journey.

The Government goes on to state that it is optional for the persons concerned to have recourse to the protection which Article 51 affords them; that once recognition has been made in the other State the beneficiary does not need to avoid the inconvenience of travelling and that it would be absurd, from both an administrative and an economic point of view, and contrary to the objective of administrative simplification which Article 51 pursues, to insist, when the institution responsible for payment has already examined the beneficiary, that a prior examination of the person concerned should be carried out in the Member State in which he resides. The German Government concludes its argument by stating that it is not open to a person who has voluntarily undergone an examination in the Member State of the institution responsible for payment to withdraw his consent where he does not agree with the result of that examination.

19. The Commission points out that the purpose of Article 51(1) is not merely to avoid travel which is unnecessary and possibly detrimental to the worker's health and that the reason for establishing that the institution of the Member State of residence is to carry out the examination is to ensure that the examination will be carried out by the medical services with whom the worker is familiar and in the language of the State in which he has his permanent residence, which, presumably, is the one of which he has the best command. That reasoning may be extended to frontier workers, even where, as in a case such as Mr Voeten's, the distances are short. The Commission states in conclusion that there can be no derogation from Article 51 of Regulation No 574/72 and that any amendments which may be required are a matter for the Community legislature.

20. As I understand it, by its first question the national court asks whether, where the recipient of invalidity benefits is a former frontier worker, Article 51(1) of Regulation No 574/72 is to be given a different interpretation from that suggested by its wording or one which differs from that hitherto given by the Court.

Let me say at the outset that I see no reason why that should be so.

21. It is apparent upon a literal reading of Article 51(1), first, that it applies to a worker in receipt of invalidity benefits who lives in a Member State other than that of the institution responsible for payment; second, that it governs the procedure for carrying out a medical examination of the recipient; and, third, that it provides that the medical examination is to be carried out, at the request of the institution responsible for payment, by the institution of the place of residence, in accordance with the legislation administered by that institution.

22. It is also necessary to take account of the final sentence of Article 51(1) of Regulation No 574/72, which, in recognising that the institution responsible for payment is to reserve the right to have the recipient examined by a doctor of its own choice, is of crucial importance to the interpretation of the provision in its entirety. In my opinion that sentence means that, notwithstanding the whole procedure laid down for examining the recipient in his place of residence, the institution responsible for payment can ultimately decide whether to accept the examination carried out by the institution of the place of residence or to carry out an examination of its own.

23. Article 51(1) of Regulation No 574/72 has already been interpreted by the Court in the *Martínez Vidal* judgment, [4] delivered in 1991, which contains some dicta which are of great assistance for the purpose of determining the present case. On that occasion the questions were referred to the Court by the Arrondissementsrechtbank, Amsterdam, and the facts of the case were as follows: Mr Martínez Vidal, of Spanish nationality, had worked since 1963 as a seaman in the Netherlands merchant navy. In 1979 he ceased to work owing to back trouble. He returned to Spain, where he was operated on for a slipped disc. He received sickness benefit for 52 weeks and then invalidity benefit under Netherlands legislation. His degree of invalidity was established at between 80 and 100%.

The Spanish social security institution kept Mr Martínez Vidal under medical examination and provided the Netherlands institution responsible for payment with information on his operation in 1980 and with further information in 1982 and 1984. In Aril 1989 the institution responsible for payment invited Mr Martínez Vidal to undergo an examination in the Netherlands, with the travel expenses being borne by the institution. Mr Martínez Vidal did not claim that the state of his health prevented him from travelling but refused to comply with the notice summoning him and instituted proceedings before

4 — Case C-344/89 *Martínez Vidal* v *Gemeenschappelijke Medische Dienst* [1991] ECR I-3245.

the Amsterdam courts for a declaration that he was not required to return to the Netherlands to undergo a medical examination.

24. The Arrondissementsrechtbank asked the Court of Justice to rule on whether a person in receipt of invalidity benefits who is able to travel without endangering his health may be required to travel to the Member State of the institution responsible for payment of his benefits where that institution exercises the power conferred on it by the final sentence of Article 51(1) of Regulation No 574/72 to have a recipient residing in another Member State examined by a doctor of its own choice.

25. In its judgment the Court held that Article 51(1) could not be interpreted to the effect that, in a case of invalidity, the institution responsible for payment of benefits may either ask the institution of the place of residence of the recipient to carry out an examination or arrange an examination itself since if, in such a case, an examination is carried out only at the request of the institution responsible for payment, it is because an examination is not always needed. The Court went on to say that if an examination does take place, it is carried out by the institution of the place of residence but that the institution responsible for payment may none the less arrange for an additional examination. [5] The Court then contrasted the situation of a worker who becomes ill in a Member State which is not that of the institution responsible for payment of benefits and the situation of a person in receipt of invalidity benefits: in the first case there is a risk that the recovery of the person concerned will be seriously impaired by the journey and for that reason he cannot be required to return to the Member State of the institution responsible for payment to undergo a medical examination, while in the second case the same restriction of the right of the institution responsible for payment to carry out examinations cannot be accepted and fitness to travel must be assessed on a case-by-case basis.

The Court observed that under the legislation of the various Member States the differences are particularly pronounced with regard to invalidity; that in order to determine the degree of invalidity the examinations necessary require the participation of various experts; and that substantial expense would be incurred if those experts were required to travel. Furthermore, it is not certain that they would find in the Member State of residence of the person concerned all the facilities necessary to carry out the examinations.

The Court inferred that in a case where the state of health of the person concerned so allows, he is required, when asked by the institution responsible for payment, to go to the Member State of that institution in order to undergo there an examination by a doctor, provided that the travel and accommodation expenses incurred are borne by that institution. [6]

5 — Ibid., paragraph 9.

6 — Ibid., paragraphs 15 and 17.

26. To my mind the correct interpretation of Article 51(1) of Regulation No 574/72 must be based both on the letter of that provision and on that decision of the Court of Justice, which may be summarised as follows:

1. The medical examination of a recipient of invalidity benefits who resides in a Member State other than that of the institution responsible for payment is carried out, at the request of that institution, by the institution of the Member State of residence, in accordance with the legislation administered by that institution.

2. The institution responsible for payment reserves the right to have the recipient examined by a doctor of its own choice. Where it decides to exercise that right, and provided that the state of health of the person concerned allows and the institution responsible for payment bears the travel expenses, the recipient will be required to go to the Member State of the institution responsible for payment in order to undergo the medical examination there.

27. Contrary to what the Landelijk Instituut voor de Sociale Verzekeringen and the Government of the Netherlands maintain, I see no need to take a different approach in the case of a former frontier worker, first because a provision which does not differentiate between two situations must not be interpreted as though it did and, second, because there is no guarantee that a former frontier worker now in receipt of invalidity benefits will continue to have the same residence as he had when he was working. Nor would it make sense for the provision to make an exception for such recipients of invalidity benefits, since one of the principal purposes of Regulation No 1408/71, which was adopted pursuant to Article 51 of the EC Treaty, is to ensure that migrant workers are paid benefits irrespective of the Member State in which they live.

At the hearing, after oral argument had been heard, I asked those representing the Landelijk Instituut voor de Sociale Verzekeringen and the Government of the Netherlands to explain more fully why the Court should interpret Article 51(1) as applying differently according to whether or not the recipients were former frontier workers. Their answers failed to convince me of the need to propose that the Court interpret Article 51(1) in that sense.

28. I do not agree with the Landelijk Instituut voor de Sociale Verzekeringen's argument that Article 121 of Regulation No 574/72 allows Member States to establish administrative procedures for implementing Regulation No 1408/71 which are not provided for in Regulation No 574/72 and that Articles 21 and 23 of the Agreement concluded in 1982 between Belgium and the Netherlands on insurance for sickness, maternity and invalidity allow the medical examination to be car-

ried out directly by the institution responsible for payment, without the intervention of the institution of the State of residence. My reasons for disagreeing are as follows.

First, Article 121 merely allows the Member States, where necessary, to conclude agreements designed to supplement the administrative procedure for implementing Regulation No 1408/71. It follows from the wording of Article 121 that an agreement having those characteristics provides no legal basis for derogating from either Regulation No 1408/71 or Regulation No 574/72, which implements it.

Second, Articles 21 and 23 of that Agreement reproduce, more or less word for word, Article 51(1) of Regulation No 547/72. In any event, the wording of those two provisions may be interpreted in a way which is consistent with Article 51(1) of that regulation.

29. It is possible, on the basis of the foregoing reasoning, to state, in answer to the first question, that Article 51(1) of Regulation No 574/72 precludes the institution responsible for payment of one Member State from requiring the recipient of invalidity benefits to undergo a medical examination in the territory of that State without first requesting that he be examined by the institution of the Member State in which he resides, and that in that regard the fact that the recipient was a frontier worker when the incapacity for work followed by invalidity occurred is irrelevant.

30. It is necessary to determine next what happens in a case such as Mr Voeten's, where although the person concerned could have been examined in Belgium at the request of the Netherlands institution responsible for payment, he complies with that institution's request and goes to the Netherlands, presumably of his own volition, to undergo a medical examination there.

31. In my view, since the legal consequences for the person concerned of waiving the right to be examined in his place of residence are not specifically prescribed, they must be determined in the light of the objective pursued by Article 51(1) of Regulation No 574/72, which is to enable the recipient of invalidity benefits to avoid the inconvenience which might be occasioned by having to travel to another Member State. I agree on this point with the opinion expressed by the German Government in its observations. This was clearly recognised by the Court in paragraph 16 of the *Martínez Vidal* judgment, [7] where it stated that the objective of Article 51 is to protect recipients of, inter alia, invalidity and old-age benefits from the inconveniences caused by

7 — Cited in footnote 4 above, paragraph 16.

journeys to undergo medical examinations in a Member State other than that in which they reside.

32. There is no doubt, however, that the institution responsible for payment is the institution ultimately empowered to decide whether the recipient is entitled to continue to receive the benefit. In that sense, although it requests the institution of the place of residence to examine the person concerned, it has the power to designate a doctor to carry out an additional examination and, since Article 51 does not specify the place in which this examination is to be carried out, the Court interpreted the relevant provision as meaning that the person concerned will have to travel, at the request of the institution responsible for payment, where his health allows, and the institution responsible for payment will bear the expenses.

33. There may be a particular need to travel since, as the Court recognised in *Martínez Vidal*, [8] under the legislation of the various Member States the differences are particularly pronounced with regard to invalidity and, in order to determine the degree of invalidity under that legislation, the examinations necessary require the participation of various experts, in particular, in the case of the Netherlands, in the fields of medicine, employment and law.

That argument is further reinforced where, as happened in the Netherlands owing to the legislative reform which entered into force in August 1993, the criteria used to determine the degree of invalidity were changed in such a way that a worker like Mr Voeten who was recognised as having a degree of invalidity of 80 to 100% under the former legislation has a degree of invalidity of 25 to 35% under the new legislation and could again form part of the working population.

34. Since the purpose of Article 51(1) of Regulation No 574/72 is essentially to protect the recipient of an invalidity or old-age benefit, I consider that if the person concerned waives the right to be examined first by the institution of the Member State in which he resides and goes to the Member State of the institution responsible for payment in response to its invitation to undergo an examination there, he will be unable subsequently to withdraw his consent where he does not agree with the result.

Furthermore, in the present case, since the Netherlands institution requested the Belgian institution to carry out an initial examination, which was done in accordance with Belgian legislation, it must be presumed that the institution responsible for payment then called upon Mr Voeten to be examined in accordance with the parameters of the new law.

8 — Ibid., paragraph 14.

35. In accordance with the foregoing reasoning, it is necessary to add in answer to the first question that where the person concerned waives the procedure laid down in his favour in Article 51(1) of Regulation No 574/72 and goes voluntarily to the Member State of the institution responsible for payment, he cannot subsequently claim, if he does not agree with the result of the examination, to re-initiate the procedure under which he may be first examined by the institution of the Member State in which he resides.

B — *Question 2*

36. By its second question the national court seeks to ascertain whether, for the purpose of recognising the right to invalidity benefits, Article 40 of Regulation No 574/72 precludes the competent institution from assessing the degree to which the worker is affected by taking into consideration only the medical examinations carried out by its services, without the worker having first been examined by the institution of the Member State in which he resides.

37. The Landelijk Instituut voor de Sociale Verzekeringen maintains that, according to Article 40 of Regulation No 574/72, in order to determine the degree of invalidity the institution of the Member State is to take into consideration the documents and medical reports obtained by the institution of any other Member State. It takes the view that there is no requirement that the first medical examination be carried out by the institution of the Member State of residence. It further states that, in any event, if the person concerned has taken the initiative to submit his request to the institution of the Member State under whose legislation he comes at that particular time it would be illogical for that institution to be required to forward the request to the institution of the State in which he resides in order for him to undergo a medical examination there.

38. The Netherlands Government proposes that the second question be answered in the negative. It claims that the difference between Article 40 and Article 51(1) of Regulation No 574/72 may be explained by the fact that they pursue different aims. Article 40 governs the determination of the right to benefits under a specific national legislation, which requires an assessment of the state of the worker which is necessarily different from the assessment made for the purposes of Article 51, which governs the procedure for ascertaining whether the state of health of a worker already in receipt of invalidity benefits remains the same.

39. The German Government also proposes that this question be answered in the negative, for the same reasons as those put forward in the context of the first question.

40. The Commission considers that it is not to be inferred from the wording of Article 40 of Regulation 574/72 that before the competent institution examines the person concerned he must have undergone a medical examination in the Member State in which he resides, since Article 40 refers only to 'the institution of any other Member State', meaning any Member State in which the person concerned has applied for invalidity benefits or in which he is entitled to benefits of that type. The other Member States referred to will normally be those in which the person concerned has worked and been insured against invalidity rather than the Member State of residence.

41. In order to answer this question it is necessary, in my view, to begin with the context of Article 40 of Regulation No 574/72. That provision, which is entitled 'Determination of the degree of invalidity', is in Chapter 3 of that regulation, on invalidity, old-age and death (pensions), Articles 35 and 36 of which govern the procedures for submitting and forwarding claims for benefits, which differ according to the types of legislation to which the worker was subject throughout his working life.

42. It is apparent from the documents before the Court that throughout his working life, and up to the time when he applied for invalidity benefits, Mr Beckers was subject to the legislation cited in letter J (Netherlands) of Part A of Annex IV to Regulation No 1408/71, which lists the legislation under which the amount of invalidity benefits is independent of the length of periods of insurance.

His claim for benefits is therefore governed by the procedure set out in Article 35 of Regulation No 574/72. In accordance with that provision, in order to receive invalidity benefits the worker is to submit a claim either to the institution of the Member State to whose legislation he was subject at the time of occurrence of the incapacity for work followed by invalidity or to the institution of the place of residence, which is then to forward the claim to the first institution.

43. Under that provision Mr Beckers was able to submit his claim in the Netherlands, where the institution of the State to whose legislation he was subject at the time of occurrence of the incapacity for work is situated, or in Belgium, his place of residence. Had he submitted his claim in Belgium, and not directly in the Netherlands, the Belgian institution would have forwarded it to the Netherlands institution, to which it was ultimately addressed.

44. Once the claim has been received by the institution to which it is addressed, I consider that that institution has sole competence to determine the claimant's degree of invalidity. It does not follow from the literal wording of Article 40 of Regulation No 574/72, the only provision intended to regulate this aspect of

the procedure, that the claimant must or may, for those purposes, undergo a prior medical examination by the institution of the Member State in which he resides.

C — *Question 3*

45. It must not be forgotten that Article 39 of Regulation No 1408/71, which governs the award of benefits where the worker has been subject only to legislations under which the amount of invalidity benefits is independent of the length of periods of insurance, provides that it is the institution of the Member State, whose legislation was applicable at the time when incapacity for work followed by invalidity occurred, which is to determine, in accordance with its own legislation, whether the person concerned satisfies the conditions for entitlement to benefits. I understand those conditions to include medical conditions and, accordingly, infer that that institution is not required to request the institution of the place of residence to examine the person concerned.

46. I therefore propose that the answer to the second question be that Article 40 of Regulation No 574/72 does not preclude the competent institution from determining, for the purpose of recognising the right to invalidity benefits, the degree to which the worker is affected, taking into consideration solely the medical examinations carried out by its services.

47. The national court asks the third question only in the event that the answer to the second question is in the negative. Since that is what I propose, I shall now consider the third question, whereby the national court seeks to ascertain whether the outcome is the same where the competent institution has not requested and hence not taken into consideration medical documents and reports which the institution of the Member State of residence may possess, but has only used information provided by the doctors who have treated the worker in the Member State in which the competent institution is situated.

48. The Landelijk Instituut voor de Sociale Verzekeringen and the Netherlands Government point out in that regard that Article 40 of Regulation No 574/72 does not require the institution of the Member State to whose legislation the worker was subject at the time when incapacity for work arose to seek medical information from the institution of the State of residence, but merely establishes that if any documents and information have been drawn up by the institution of any other Member State the competent institution is to take them into consideration.

49. The German Government considers that the competent institution must take into consideration the medical information available in the Member State in which the worker resides at the time when it takes its decision, in order to avoid the duplication of medical examinations. By way of example, it refers to the situation where a seasonal worker has applied for invalidity benefits to the social security institution of the Member State in whose territory he happens to be and that institution has carried out its own medical examinations.

50. The Commission maintains that in order to determine the degree of invalidity the competent institution may carry out the initial medical examination directly, although it must take into consideration the medical and administrative documents and information drawn up by the institution of another Member State.

51. In my opinion, in order to interpret Article 40 of Regulation No 574/72, it is once again necessary to have recourse to its literal wording, taking its context into consideration. First, Article 40 makes no reference to the Member State of residence, but provides that '[i]n order to determine the degree of invalidity, the institution of the Member State shall take into consideration the documents and medical reports and the information of an administrative nature obtained by the institution of any other Member State ...'.

52. I infer from that wording that the State of residence may be any of those other Member States or the State in which the competent institution is situated. The situation of Mr Beckers, who resides in Belgium and is subject to the Netherlands legislation, may fall within the first hypothesis, while the situation of anyone who has worked in various Member States before working and living in, for example, the Netherlands would fall within the second hypothesis.

53. Secondly, it is necessary to take into consideration the fact that Article 40 of Regulation No 574/72 lays down the procedure for determining the degree of invalidity of migrant workers who have been subject exclusively to the legislations referred to in Part A of Annex IV of Regulation No 1408/71, that is to those under which the amount of the invalidity benefits is independent of the length of periods of insurance. However, for the purpose of determining the degree of invalidity of workers who have been subject to the legislation of two or more Member States, at least one of which provides that the amount of the benefits depends on the length of periods of insurance or residence, the applicable provision is Article 44 of Regulation No 574/72.

54. In my opinion the procedure laid down in Article 40 of Regulation No 574/72 supplements the procedure laid down in the preceding article, which provides that the institution which has received a claim for benefits is, where necessary, to obtain from the institu-

tion with which the person concerned was last insured or, where appropriate, the institutions of all the other Member States in which he has worked, a certified statement of the periods of insurance completed under their legislation.

55. Therefore the requirement in Article 40 of Regulation No 574/72 that the institution of one Member State, when determining the degree of invalidity, is to take into consideration the medical reports and the administrative information obtained by the institution of any other Member State, will be applicable only where two conditions are met: the worker has been subject, throughout his working life, to the social security legislation of two or more Member States and, under all those legislations, the amount of invalidity benefits is independent of the length of periods of insurance. Were it not so, it would not be necessary for the second sentence of Article 40 to add that each institution, *however*, is to retain the right to have the claimant examined by a doctor of its own choice.

56. For the reasons which I have just set out, I propose that the answer to the third question be that Article 40 of Regulation No 574/72 precludes the institution of the Member State to whose legislation the worker was subject at the time when incapacity for work followed by invalidity arose from determining his degree of invalidity without taking into consideration the documents and medical information obtained by the institution of any other Member State, provided that the worker has been subject to the social security legislation of other Member States and that, as a consequence of the procedure laid down in Article 39 of that regulation, the institutions of those States forward that information.

V — Conclusion

57. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Centrale Raad van Beroep, Utrecht, as follows:

(1) Article 51(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security legislation to employed persons, to self-employed persons and to members of their families moving within the Community precludes the institution responsible for payment of one Member State from

requiring the recipient of invalidity benefits to undergo a medical examination in the territory of that State without first requesting that he be examined by the institution of the Member State in which he resides. In that regard, the fact that the recipient was a frontier work when the incapacity for work followed by invalidity arose is irrelevant. Where the person concerned waives the procedure laid down in his favour in Article 51(1) and goes voluntarily to the Member State of the institution for payment, however, he cannot subsequently seek, if he does not agree with the result of the examination, to re-initiate the procedure under which he may be first examined by the institution of the Member State in which he resides.

(2) Article 40 of Regulation No 574/72 does not preclude the competent institution from determining, for the purpose of recognising entitlement to invalidity benefits, the degree to which the worker is affected, solely on the basis of the medical examinations carried out by its services.

(3) Article 40 of Regulation No 574/72 precludes the institution of the Member State to whose legislation the worker was subject at the time when incapacity for work followed by invalidity arose from determining his degree of invalidity without taking into consideration the documents and medical information obtained by the institution of any other Member State, provided that the worker has been subject to the social security legislation of other Member States and that, as a consequence of the procedure laid down in Article 39 of that regulation, the institutions of those States forward that information.