OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 3 DECEMBER 1969[1]

Mr President,
Members of the Court,

The Cour d'appel, Paris, which has submitted a request to us under Article 177 of the Treaty, is concerned with a case, the facts of which are as follows:

Mrs Duffy (*née* Dustin), the widow of Pierre Duffy, as a Belgian national, had resided and worked exclusively in Belgium. By virtue of her own contributions to the Caisse nationale des pensions pour employées in Brussels she acquired a claim to an old-age pension which has been paid to her since 1 September 1958 at the legal rate for the time being in force.

Pieere Duffy, a French national, her husband, resided and worked exclusively in France and acquired through his own contributions a claim to an old-age pension from the Caisse d'assurance vieillesse des travailleurs salariés de Paris, (hereinafter referred to as 'the Caisse') which was paid to him until his death, which occurred on 9 March 1965. His widow who since her marriage has shared her husband's residence in Paris, acquired French nationality by virtue of the Decree of 29 December 1945. On 16 April 1965 she made an application for a widow's pension to the competent French social security institution. This pension was granted to her although not to its full amount. The French insurance institution applied to her Article 351 of the Social Security Code of 10 December 1956 in conjunction with Article 148 of the Decree of 29 December 1945. According to those provisions a surviving spouse who is in her own right entitled to social insurance benefit, cannot claim the widow's pension accorded by law but only the amount by which the widow's pension exceeds her own social insurance rights. In other words this amounts to the subtraction of her own rights from the amount of the widow's pension. Although this method of calculation with the object of avoiding plurality of benefits applies under French law only to the widow's rights under a *French* social security scheme, the competent Caisse considered, however, that it could also take Mrs Duffy's Belgian benefits into account, in accordance with Article 11(2) of Regulation No 3, which provides that 'provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social security benefits, . . . shall apply to a beneficiary even in respect of benefits acquired under a scheme in another Member State . . .'.

Mrs Duffy did not, however, share that view. She therefore applied to the Commission de première instance du contentieux de la sécurité sociale de Paris which in fact awarded her an undiminished widow's pension. The Caisse appealed against this decision to the Cour d'appel, Paris, before whom the proceedings are presently pending. In the opinion of the 18th Chamber which is seised of the proceedings an interpretation involving 'the greatest difficulty' is necessary to enable it to give judgment. Consequently, by a judgment of 27 June 1969 it stayed the proceedings and put the following question to the Court for a preliminary ruling:

> Can Regulation No 3, concerning social security for migrant workers, especially Article 11(2) dealing with provisions for the reduction or suspension of benefit, apply as against a widow who is in receipt of an old-age pension obtained by virtue of her having worked as a wage-earner in one Member State and who claims in a second Member State where she

1 — Translated from the German.

has her permanent residence, the survivor's pension acquired by her husband in the second Member State.

The parties to the main action and the Commission of the European Communities submitted written observations on this question, and Mrs Duffy also submitted explanations in the oral proceedings before the Court.

Let us now consider which of the *views stated with regard to the question raised* appears to be the most fitting.

The first point in dispute is whether Regulation No 3 is in any way applicable to persons who—like Mrs Duffy and her husband—were not migrant workers, but instead had been in employment requiring compulsory insurance in a single country (Mrs Duffy in Belgium, and her husband in France). From the wording of the provision which lays down the scope of Regulation No 3, that is, Article 4 thereof, it appears to be easy to answer this question. In fact that article reads:

> 'The provisions of this regulation shall apply to wage-earners or assimilated workers who are or have been subject to the legislation of one or more of the Member States and are nationals of a Member State, . . . as also to the members of their families and their survivors. In addition, the provisions of this regulation shall apply to the survivors of wage-earners or assimilated workers who were subject to the legislation of one or more Member States, irrespective of the nationality of these latter, where such survivors are nationals of a Member State . . .'.

Consequently, it might be sufficient that a worker should be subject to the legislation of *one* Member State and this must correspondingly hold good for his survivors. However, Mrs Duffy doubts whether this provision is to be understood in an absolute sense. According to her, inasmuch as Article 4 does not deal with migrant workers properly so called, whose freedom of movement must be ensured through measures in the field of social security, it can only be intended to apply to particular cases which are specified as such in Regulation No 3. She quotes as an example Article 19 of Regulation No 3 which provides that a wage-earner, affiliated to an institution in one Member State and permanently resident in the territory of the said State, shall receive benefits during temporary residence in the territory of another Member State if his state of health necessitates immediate medical care including hospitalization. In fact, it must be said that the previous case-law of the Court—so far as it was concerned with Article 4—has dealt exclusively with special cases. Amongst those was Case 75/63[1] which was concerned with Article 19 of Regulation No 3. Another[2] referred to Article 22(2) of Regulation No 3, which governs the conditions on which an insurance institution in his place of permanent residence may issue benefits in kind to the holder of a pension payable by an insurance institution situated in another Member State. Finally, series of other cases[3] and the proceedings recently concluded in Case 27/69 dealt with Article 52 of Regulation No 3, that is, with the case of a person 'who is in receipt of benefit under the legislation of one Member State, in respect of an inquiry sustained on the territory of another State', and for whom the question is how the institution liable for payment is subrogated to the rights of the beneficiary in relation to his claim for damages against a third party. This body of case-law might in fact be said to favour the notion that the wide definition of the scope of Regulation No 3, as it appears in Article 4, includes, be-

1 — [1964] E.C.R. 177.
2 — Case 61/65 [1966] E.C.R. 261.
3 — Case 33/64 [1965] E.C.R. 97; Case 44/65 [1965] E.C.R. 965.

sides migrant workers properly so called, only special situations, that is to say, those case where it would be harmful to the persons concerned if 'territorial provisions were applied to them' (Judgment in Case 61/65[1]).

If, contrary to these considerations and Mrs Duffy's view, Article 4 must be understood in an absolute sense, Regulation No 3 must consequently be applied as a whole even where migrant workers properly so called are not concerned, the application of Article 11(2) to the case involved in the main action must also be contemplated.

The wording of this provision, too, seems quite clear. As I have already said, it states: 'Provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social insurance benefits... shall apply to a beneficiary even in respect of benefits acquired under a scheme in another Member State.' This indeed makes it seem that the French institution may deduct the Belgian pension paid to Mrs Duffy, especially since the reservation in the final part of Article 11(2) only relates to benefits *of the same kind* and clearly does not affect the present case, that is the receipt of a widow's pension concurrently with an old-age pension. In the Commission's view this outcome may be justified by the consideration that the function of Regulation No 3 is not restricted to the two factors—quoted purely as examples—stated in Article 51 of the EEC Treaty, that is, to make arrangements to secure for migrant workers aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries, and the payment of benefits to persons resident in the territories of Member States. The function of Regulation No 3 is rather, according to the Commission, to ensure in addition, through the abolition of territorial restriction, increased coordination of social security legislation, 'deterritorializing' this legislation in such a manner that foreign factors may be taken directly into consideration. This follows from a whole series of provisions which the Commission has set out on page 11 of its statement.

There are nevertheless various grounds for doubting the accuracy of so broad a concept. It has been repeatedly emphasized in the case-law of the Court that Regulation No 3 has not established a Community scheme of social security but that it sanctions the continued existence of the independent schemes with their independent claims for benefit (in this connexion I refer to Cases 2/67[2] and 9/67[3]). As early as the judgment in Case 100/63[4] the following clear statement can be found: 'Although, within the framework of Article 100, the States are in a position, by approximating their laws, to bring about fairly radical changes in them, subject to the safeguards found in both the Treaty and in national law, Article 51 on the other hand cannot allow the regulations to fall short of the objectives which it sets, which are intended to favour freedom of movement for workers'. In many cases, then the Court has likewise, as in the judgment just mentioned, referred back to the basic provisions of the Treaty for the interpretation of Regulation No 3 and has emphasized that the work of interpretation must be carried out in the light of the objectives served by the provisions of the Treaty and that the provisions to be interpreted must be compatible with those objectives (Case 9/67[3]). Two judgments of the Court are especially clear in this respect. One

1 — [1966] E.C.R. 261.
2 — Rec. 1967, p.268.
3 — Rec. 1967, p.304.
4 — [1964] E.C.R. 565.

Case (4/66[1]) contains the statement: 'The said articles, like the entire system of which they form part, [meaning Regulation No 3] have as their basis, their framework and their bounds Articles 48 to 51 of the Treaty, which are aimed at securing freedom of movement for migrant workers'. The other judgment (in Case 44/65[2]) states: 'The establishment of as complete freedom of movement for workers as possible, which thus forms part of the 'foundations' of the Community, therefore constitutes the ultimate objective of Article 51 and thereby conditions the exercise of the power which it confers upon the Council'. (Similar views are also expressed in Cases 75/63, 100/63, 12/67 and 22/67). In these, the emphasis is clear, in my opinion. There can certainly be no question of any extensive degree of coordination and 'deterritorialization' of social insurance law under Articles 48 to 51 of the Treaty.

In addition, it is a constantly recurring concept in its case-law that in its application of Regulation No 3 the Court accords the latter a special meaning, and one which may come into play in the present case. That is the idea that the application of Regulation No 3 must not result in the reduction or loss of rights, or in insurance periods completed in one Member State not being taken into account for the purposes of pensions. In this connexion I refer to Cases 100/63[3], 4/66[4], 9/67[1] and 22/67[5]. Of all those the judgment in Case 2/67[6] is particularly clear in this connexion. In one place it states expressly: 'These provisions [that is, of Regulation No 3], which are intended to give a migrant worker more favourable treatment in certain respects than he would receive if his national law alone were applied in his case but at least to guarantee his right to a pension, cannot be interpreted in a way which conflicts with this objective'.

If this basic objective is also observed in the present case (and I do not see how, without breaking with your previous case-law, you could leave it out of account), there is only one conclusion at which I can arrive. According to the statement of the facts it appears certain that Regulation No 3, by not taking account of territorial limitations, does not work in favour of Mrs Duffy and did not work in favour of her husband with regard to the acquisition of a right to benefit and the calculation of it. At least it may be said that there is no advantage which may be set against the disadvantageous effect of Article 11(2) for the purpose of not disturbing the coherence of the general scheme of Regulation No 3. Moreover, it cannot be said that Mrs Duffy derives an advantage from the application of Article 10 of Regulation No 3, that is, the benefit of payment of the Belgian pension in the place where she resides abroad (a benefit, moreover, which is paid directly without the intervention of the French insurance institution). In fact this is not an advantage *originating* in Regulation No 3, which might be offset by a disadvantageous provision. As I understand it, this was already possible in the previously existing legal situation, that is, after the entry into force of Article 10 of the Convention concluded between Belgium, France and Italy. The said Article 10 states: 'Those benefits the payment of which was withheld pursuant to the legislation of one of the contracting parties on the grounds of the nationality or of the permanent residence of the persons concerned shall again become payable'. At the same

1 — [1966] E.C.R. 425.
2 — [1965] E.C.R. 965.
3 — [1964] E.C.R. 565.
4 — Rec. 1967, p.304.
5 — Rec. 1967, p.421.
6 — Rec. 1967, p.267.

time, with regard to the old-age and survivors' pensions, there is no preservation corresponding to Article 11 of Regulation No 3. In fact it is thus impossible to say Article 10 of Regulation No 3 *creates* a benefit for Mrs Duffy as a counterbalance to which (or, as the Court said in Case 33/64 in connexion with Article 52, in compensation for which) the possibility of reduction under Article 11 could be considered. If this is so, however, if it is recognized that the application of Article 11 to certain cases, such as the present, produces only a *disadvantage*, we must, in accordance with existing case-law and observing the fundamental principles of the Treaty, adopt the interpretation of this article which excludes this consequence, as only thus can it be recognized as compatible with the Treaty. Consequently, my final conclusion is that Article 11 is limited in its application to cases where migrant workers properly so called are concerned or where Regulation No 3 has beneficial results, at least with regard to the acquisition of the right to a pension, its calculation or payment.

The meaning and objective of Regulation No 3 thus require the following reply to the question put to the Court: Regulation No 3 concerning social security for migrant workers, and especially Article 11(2) concerning provisions for the reduction or suspension of benefits, cannot apply as against a widow who is in receipt of an old-age pension obtained by virtue of her gainful employment in one Member State and who claims in a second Member State where she has her permanent residence the survivor's pension acquired by her husband in that second State.