of such temporary residence, to conditions more onerous than those which would be applied if the person concerned had fallen ill while in the territory of the State to which the insurer belongs.

4. It is for the national court to decide the question of the costs of the present case.

Donner Hammes Trabucchi
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 19 March 1964.

H. J. Eversen
Assistant Registrar
For the Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 10 DECEMBER 1963[1]

Mr President,
Members of the Court,

Once again a Netherlands court, the Centrale Raad van Beroep, a court of last instance against whose decisions there is no remedy under national law on matters of social security, refers a preliminary question to you under Article 177 of the EEC Treaty. The questions put relate to the interpretation of certain provisions of Regulation No 3 concerning social security for migrant workers, adopted in pursuance of Article 51 of the Treaty.

One procedural peculiarity should be noted. An appeal was made to the Centrale Raad van Beroep by Mrs Unger, who was a recipient of social security benefits, against a judgment by a court of first instance confirming the refusal of the competent agency to pay her sickness insurance benefit. This first judgment, which was carefully enough reasoned, dismissed in particular an argument of the appellant based on Articles 4 and 19 of Regulation No 3. The appeal court, in its judgment of 21 May 1963, limits itself to finding that a question of the interpretation of a Community regulation was raised and that therefore reference should be made to the Court of Justice of the European Communities under Article 177, but it has not put any question to this Court, merely charging its President to pass the file to this Court, and it is the President who, in a letter of 12 July 1963 addressed to the Registrar of the Court, sets out the factual and legal data of the case and formulates the question which, he says, 'the Centrale Raad considers itself obliged to refer to the Court of Justice of the European Communities'.

1 — Translated from the French.

It is clear that the obligation of a national court or tribunal in the last paragraph of Article 177 to bring the matter before the Court as soon as one of the questions defined in the first paragraph 'is raised' in a case pending before it, does not relieve the national court of its duty to formulate the questions to be brought before this Court, after having confirmed, in cases in which the request for a reference has been expressly formulated by a party, that one of the elements set out in the first paragraph — interpretation of the Treaty, etc. — is really involved.

You will appreciate this. In this case, however, in spite of the somewhat unusual nature of the procedure employed to bring the matter before this Court, I think that you can accept the reference and reply to the questions put by the President in the name of the Court, although these do not appear in the judgment; if it refused to do so, the Court would risk criticism for interfering in the functioning of national justice.

I also think that, in spite of the doubts raised by the German Government in this respect, there is no reason for the Court to examine whether the question put is really relevant to a judgment of the substantive dispute on the ground that, even if Regulation No 3 did not allow Mrs Unger to be given satisfaction, she would in any event win her case through application of the German-Dutch Convention on social security. In fact, according to your case-law, the Court is not concerned in judging the considerations upon which the national court has based the formulation of its question nor the importance attached to it within the framework of the dispute before it. This Court is judge only of its own jurisdiction and should reply to the questions posed in so far as they come within the scope of the first paragraph of Article 177.

In this case, as in all cases under Article 177, the Court must give an abstract interpretation of the provisions submitted to it (Treaties or Acts of the Community institutions). This is what those persons who have exercised their right to present observations to the Court (Mrs Unger, one of the parties in the main action, the Commission of the EEC and the German Government) have tried to do, and their observations, which were very full and extremely learned, contain all the factors necessary to allow an apposite reply to the question put. However, it must not be forgotten that the procedure under Article 177 always functions within the framework of a dispute and that the substantive aspects of the litigation often contribute usefully to clarify the problem of abstract interpretation because an example helps to support a theory. However, in the courts the example is not chosen by theoreticians but is imposed on the judge as a reality. I also think that it would perhaps be useful if I began by recalling the circumstances in which the dispute occurred within the national legal system so as to lead to a reference to us.

The person concerned, Mrs Unger, the wife of Mr Hoekstra, was compulsorily insured against sickness by reason of a contract of employment. This contract came to an end and she was afforded, at her request, the advantages of a voluntary insurance scheme under the law permitting the continuation on a voluntary basis of a previously compulsory insurance scheme 'when the persons in question carry on or will carry on in the future a trade or calling or an independent occupation or when it is reasonable to suppose that they will accept a new contract of employment should the opportunity arise'. It was this second alternative which was applied.

One month later, Mrs Unger fell ill while staying with her parents in Germany and had to receive medical attention. When she returned to the Netherlands, she tried to obtain reimbursement of her medical expenses but

this was refused to her, by reason of legislation laying down that voluntarily insured persons had the right to reimbursement of medical expenses incurred during temporary residence abroad 'only if they have been authorized, under conditions laid down for this purpose in the provisions concerning supervision, to stay abroad in order to convalesce' (which was not the case here).

She then brought an action against this refusal before the competent court of first instance, in which she relied on particular upon the provisions of Article 19 (1) of Regulation No 3 of the Council of the EEC concerning social security for migrant workers. This reads as follows:

'A wage-earner or assimilated worker, 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. The foregoing shall also apply to a worker who, although not affiliated to the said institution, is entitled to benefit from that institution or would be so entitled if he were in the former State's territory.'

In this provision, as you see, there is no question either of distinction between compulsory and voluntary insurance, or, in the case of voluntary insurance, of special authorization of convalescence abroad. But it is necessary that the beneficiary should be a '*wage-earner or assimilated worker* affiliated to an institution in one Member State'. What is a 'worker assimilated' to a wage-earner under this provision? To find out, we must refer to Article 4 (1) of the Regulation, by which:

'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 or are stateless persons or refugees permanently resident in the territory of a Member State, as also to the members of their families and their survivors.'

And then, entering the sphere of interpretation, as it was entitled to do under the second paragraph of Article 177, the court found against the appellant in a judgment of 24 October 1962 (First Schedule to the letter of reference), which is clearly the essential item in the file. I think I should cite its principal passage, in my own translation:

'Whereas, by virtue of the above-mentioned provisions of the Treaty, the application of the provisions of the Regulation of the EEC and of any provisions of the Convention concluded between the Kingdom of the Netherlands and the Federal Republic of Germany depends upon the question whether the person concerned is a wage-earner or an assimilated person within the meaning of Article 4 of the above-mentioned Regulation;

Whereas, although the Regulation of the EEC does not set out the persons who, with a view to the application and implementation of the Regulation, should be considered as being assimilated to wage-earners, it is clear, in the view of the court, that this provision envisages persons actively concerned in the economic processes and whose working relationship, although these persons may not carry on an activity within the framework of a contractual wage-earning relationship, is *expressly* assimilated to the position of a wage-earner *by means of legislative interpretation by national legislation* of the Member State concerned, *with a view to applying* one or more social insurance laws;

Whereas neither the law on sickness insurance nor the voluntary sickness insurance rules which are based on this law have recourse, in recognizing the status of voluntarily insured persons, to the *legal fiction* that the voluntarily insured person is considered as a wage-earner within the meaning of the sickness

insurance law or as an assimilated person, such that the appellant could find therein a justification of her contention that she should therefore be assimilated to a wage-earner;

Whereas, in the opinion of the court, the appellant cannot invoke the Regulation of the EEC which, if one looks at its preamble, is aimed at promoting freedom of movement for workers within the Member States, an objective which in no way affects the right of the appellant to the payment of sickness insurance as a voluntarily insured person temporarily residing abroad — covered by this insurance precisely because she had temporarily lost the status of wage-earner.'

Thus, the reasoning of the court can be analysed as follows:

First, an interpretation of Article 4 in the form of the following syllogism:

1. The criterion of 'assimilation' to a wage-earner must be sought in national law;
2. Dutch law knows no 'legal fiction' assimilating a voluntarily insured person to a wage-earner for the purpose of social security;
3. Therefore, the only person who can be considered as 'assimilated' is one who fulfils the particular conditions to which, with a view to applying one or more social security laws, the grant of certain benefits to a self-employed person is subject.

Then comes the second part of the argument: the intention of Regulation No 3 is to promote freedom of movement for wage-earners within the Member States; but the appellant has temporarily ceased to have the status of wage-earner. As to the benefit of the payments due under the voluntary insurance, it can only be granted to her in the circumstances laid down by her national legislation.

It is against this background that the Centrale Raad, through its President, has put to you the following question:

'It is thus', it says, 'that the question arises how this Treaty and the measures adopted in implementation thereof, especially the above-mentioned Regulation, should be interpreted; in particular, whether the concept of "wage-earner or assimilated worker" is defined by the legislation of the Member States of whether it has a supranational meaning; if so, what is that meaning, because a definition of the term is necessary to decide whether the said Article 19 (1) prevents the non-payment of the sickness expenses of persons who are in the particular situation in which the appellant has been found to be?'

How should we reply to this question, and is it even possible to reply to it in the terms in which it is put?

One point is clear: although, as its preamble states, Regulation No 3 is only a reproduction of a convention on social security which has already been signed but has not yet entered into force, it nevertheless legally has the character of a 'regulation' within the meaning of Article 189 of the Treaty 'binding in its entirety and directly applicable in all Member States'. This means that its provisions are automatically rules of Community law and that the national law remains in force in only two cases: either when the Regulation refers to it expressly or by implication (but in the latter instance unequivocally), or, and this is self-evident, in so far as the Regulation allows the national law to subsist.

Of course, although easy to conceive in theory, the borderline may sometimes be difficult to recognize. A guide, however, does exist in the provisions of the Treaty, and especially Article 51, under which the Regulation was adopted.

Let us, if you will, re-read this Article: 'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their

dependants:

(a) 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;

(b) payment of benefits to persons resident in the territories of Member States.'

Thus the Council was in no way entitled, and in no wise intended, to set up Community legislation on social security as a substitute for the various national legislations. We are not even concerned with the task of approximation or of harmonization of laws under Article 100, which in any case could not be done by means of a regulation. The national legislation of each State remains, with the different insurance systems, but the *conditions of application* of such legislation are automatically modified in so far as the Regulation has enacted particular provisions for this application to take place in conformity with the aims pursued by the Treaty, that, is in the field of social security, to permit freedom of movement for workers in the Community.

If we start from these few ideas, it seems that the interpretation of the Regulation (since its legality is not in question) may be discussed without great difficulty as regards Articles 4 and 19.

Let us re-read the beginning of Article 4:

'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. . . .'

This is concerned to determine the Regulation's general field of application as regards the definition of its beneficiaries. Must we refer in this respect to a Community concept or to the national rules?

I do not think that it is possible to be satisfied with a purely Community concept, that is to stay, one which has its source exclusively in the provisions of the Treaty. In fact, we find neither in Article 51 nor elsewhere any definition of what a 'worker' or a 'wage-earner' is, still less an 'assimilated worker'. Nor do we find any sufficiently precise provisions to fill this absence of definition and allow a solid legal construction in this respect; learned counsel for Mrs Unger himself failed to provide the elements for such a construction. All the more should one admit, with the Commission, that the concept of 'wage-earners or assimilated workers' results in a contrast with the 'activities as self-employed persons' which come in Chapter 2 of Title III concerning the Right of Establishment (Article 52, second paragraph). This seems to mean that the 'workers' who are the subject of Chapter 1 of this same Title III are, within the meaning of the Treaty, *wage-earners*, except when certain self-employed persons are 'assimilated to wage-earners and, being thereby subjected to the provisions of Chapter 1, do not consequently come under the rules of Chapter 2.

One should doubtless also admit, as does the Commission, that the words 'wage-earners or assimilated workers' exclude the rare cases of social security legislation which apply to the whole of the population; at least these laws are excluded in so far as they automatically concern the self-employed sectors of the population.

Subject to these two reservations, I think that the criterion should really be sought in the passage which follows:

'. . . who are or have been subject to the legislation of one or more of the Member States. . . .'

National systems of legislation, as we have seen, subsist and it is quite simply to these systems that we must refer to know which are the persons 'assimilated' to a wage-earner in respect of social security: members of the professions, craftsmen, etc. There is no need for the national legislation to contain a general definition of assimilation or to create a 'legal fiction' in this respect; this is not

the case in the Netherlands, I know, but neither is it in the other countries of the Community. So, for the beneficiaries of this system to be considered as 'assimilated' to wage-earners within the meaning of Article 4 of Regulation No 3, in my opinion, it is sufficient if the national legislation governing the person concerned provides a social security system in favour of self-employed persons. Such is certainly the case with a system of voluntary insurance, organized, for example, in favour of former wage-earners capable of becoming wage-earners again; we find, in addition, evidence of this in Article 9 of the Regulation.

This is, then, a reference to national law, but this reference is itself a rule of Community law.

The problem has, however, not yet been resolved. It is not enough, in fact, to have recognized that a person fulfils the conditions of Article 4 and can, consequently, take advantage of the Regulation's provisions. It must still be verified that those of its provisions on which he relies are applicable to him. It is here that both Article 19 and the second question posed by the President of the Centrale Raad come in. It is here also that we meet the reasoning given by the court of first instance in the latter part of its grounds of judgment.

On this point, however, I do not think that there is any difficulty: as soon as we are faced with a 'wage-earner or assimilated worker' within the meaning of Article 4, we find that under Article 19 he has without any special condition the right to social security benefits 'during temporary residence in the territory of another Member State if his state of health necessitates immediate medical care, including hospitalization'. As soon as it has been recognized that the voluntarily insured person, having temporarily lost his status as a wage-earner, should be considered as 'assimilated' to a wage-earner within the meaning of Article 4, as a result of such a system's being provided for by the national legal system, then this benefit resulting from the assimilation should also be granted to him in the application of the other provisions of the Treaty in so far as they also use the expression 'wage-earner or assimilated worker', as Article 19 does. Furthermore, contrary to what the court of first instance appears to think, this interpretation of Article 19 is completely in accordance with the objectives of Article 51 of the Treaty. It is to adopt 'such measures in the field of social security as are necessary to provide freedom of movement for workers'. It is clear that any measure which assimilates the territory of the various Member States to the territory of the State of origin for the benefit of the various payments is fully in conformity with such an objective. Let us note in this connexion that the provisions contained in Article 51 (a) and (b) are not exclusive, being preceded by the words 'to this end'.[1]

We thus find ourselves in the position where the rule of national law (in this case the exceptional nature of the right of voluntarily insured persons to sickness benefits in the case of temporary residence in foreign territory) is modified by a rule of Community law. It is not, however, a modification bearing on the system of social security in question, but solely having as its object, and its effect, the adaptation of the functioning of this system to the necessities of the aims pursued by the Treaty.

Let me indicate, in closing, that in my opinion there is no reason to give answers to the questions raised by the Commission on page 27 under (b) which do not seem to me to have been posed. On the other hand, I think that an interpretation should be given of Article 19, which is expressly requested.

1—Translator's Note: The French text says 'notamment' ('in particular').

I am therefore of the opinion that the following reply should be given to the questions put (I use almost verbatim the first reply from the Commission, for it seems to me to be excellent):

1. Those persons are 'assimilated to wage-earners' within the meaning of Article 4 (1) of Regulation No 3 who, in the field of social security, are, by virtue of provisions of national law, protected against one or more risks to life within the framework of systems organized for the benefit of wage-earners, no matter what legal forms or terminology is used by national legislation to ensure that extension or whether the affiliation of these persons is compulsory or voluntary.

2. The provisions of Article 19 (1) of Regulation No 3 apply to 'wage-earners or assimilated workers' envisaged in Article 4 (1) and with the same meaning.

As regards costs, I am of the opinion, in conformity with your previous decisions, that the decision as to them is a matter for the Centrale Raad van Beroep.