OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 18 April 2002 [1]

1. By order of 27 June 2000, the Hof van Beroep te Antwerpen (Belgium) (hereinafter 'the Court of Appeal of Antwerp') referred to the Court two questions for a preliminary ruling concerning the interpretation of Article 1 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter 'the Brussels Convention' or 'the Convention'). [2] In essence, the national court asks whether an action under a right of recourse against a person liable to pay maintenance brought by a public body which has provided financial assistance to a maintenance creditor whose maintenance has not been paid is a civil matter coming within the scope of application of the Convention and, if so, whether such an action concerns a social security matter and, as such, falls outside the scope of the Convention.

The legal framework

The Brussels Convention

2. The scope of the Brussels Convention is determined by Article 1 thereof. The first paragraph of Article 1 provides that:

> 'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal'.

However, the second paragraph of Article 1 provides that:

> 'The Convention shall not apply... to:
>
> ...

1 — Original language: Italian.

2 — OJ 1998 C 27, p. 1 (consolidated version).

3. social security;

...'.

3. For the purpose of determining the jurisdiction of the courts of the Contracting States, the Convention establishes the domicile of the applicant as the general forum (Article 2), but also makes provision for certain special jurisdictions. In that regard, for our present purposes, mention should be made of jurisdiction 'in matters relating to maintenance' whereby the defendant may be called before the court of the place where the maintenance creditor is domiciled or habitually resident.

4. Under Article 26 of the Convention, judgments given in a Contracting State are automatically recognised in the other Contracting States 'without any special procedure being required'. However, Article 27 states the express circumstances in which recognition is refused, namely:

'1. if such recognition is contrary to public policy in the State in which recognition is sought;

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

...'.

5. It should also be recalled that Article 55 of the Convention of Brussels provides:

'Subject to the provisions of the second subparagraph of Article 54, and of Article 56, this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them:

...

— the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Brussels on 28 March 1925' (hereinafter 'the 1925 Convention').

6. Finally, Article 56 of the Brussels Convention provides that the conventions referred to in the preceding article, and in particular the 1925 Convention, continue to have effect in relation to matters to which the Brussels Convention does not apply.

The Netherlands legislation

7. The *Algemene Bijstandswet* (law on general assistance; hereinafter 'the ABW') [3] establishes a system of social security in favour of persons residing in the Netherlands who are in need.

8. Specifically, that system is based on the provision of general assistance (*algemene bijstand*) or special assistance (*bijzondere bijstand*) by the municipality where the person in need is resident. General assistance, the sole assistance in question in the present case, comprises a monthly contribution linked to the legal minimum wage which is intended to enable the recipient to cope with essential costs of subsistence. The assistance is financed out of the municipal budget and is not conditional on prior payment of insurance contributions.

3 — *Staatsblad* 1995, No 1999. The following is not an official translation of the provisions in question.

9. Article 93 of the ABW provides:

'The cost of assistance shall be recovered, up to the limit of the extent of the maintenance obligation under Book I of the Civil Code:

— from a person who, failing in his family obligations, does not, or does not fully, meet his maintenance obligation in respect of his spouse or minor child...;

— from persons who do not, or do not fully, meet their maintenance obligation following a divorce...'.

10. Article 94 of the ABW provides:

'An agreement under which spouses or former spouses stipulate that, after divorce..., they shall in no way be mutually bound by a maintenance obligation, or that such obligation shall be limited to a specific amount, shall not preclude recovery [of the

cost of assistance] from one of the parties and shall be without prejudice to determination of the amount to be recovered'.

11. A municipality which decides, under Article 93 of the ABW, to recover the cost of assistance from a third party, must notify the person concerned of that decision. Under Article 102 et seq. of the ABW, where the third party fails to make payment voluntarily, the municipality may bring an action under a right of recourse before the *arrondissementsrechtbank* (hereinafter 'the district court'), pursuant to the provisions of the Code on Civil Procedure.

Facts and procedure

12. The proceedings pending before the referring court stem from the marriage between Mr L. Baten and Mrs H. Kil, which resulted in the birth of an only daughter, T. Baten. The family was originally established in Belgium where the couple and their daughter resided. The marriage between Mr Baten and Mrs Kil broke down and was dissolved by mutually agreed divorce pronounced in Belgium on 14 May 1987. In an agreement pending the divorce, drawn up on 25 March 1986 before a Belgian notary, the couple had meanwhile stipulated that Mr Baten would pay to his wife a monthly sum of BEF 3 000 as a contribution towards the maintenance and education of their daughter, whilst no maintenance payments whatever would be payable as between the spouses themselves.

13. Mrs Kil then established herself with her daughter in the municipality of Steenbergen (Netherlands). The conditions required under the law being fulfilled, the municipality decided to grant social assistance payments to Mrs Kil and her daughter under the ABW.

14. Subsequently, the municipality of Steenbergen decided, under Article 93 et seq. of the ABW, to seek recovery from Mr Baten of the amount paid by way of social assistance. However, since Mr Baten did not comply with that request, the municipal council decided on 2 May 1996 to bring an action under a right of recourse within the meaning of Article 120 of the ABW, before the District Court of Breda (Netherlands).

15. By decision of 22 July 1996, the District Court of Breda upheld the application by the municipality of Steenbergen and ordered Mr Baten to pay the sum of NLG 3 706.68 in respect of the assistance granted from 9 January 1996 to 1 March 1996 and, in addition, to pay the sum of NLG 2 127.91 per month from 1 March 1996 for the duration of the assistance.

16. By order dated 11 February 1998, the President of the Court of First Instance of Turnhout (Belgium), at the request of the municipality of Steenbergen, issued an order for the enforcement of the Dutch decision, but Mr Baten subsequently lodged an objection to the enforcement on 20 May 1998.

17. During the initial proceedings of 17 March 1999, the Court of First Instance of Turnhout declared Mr Baten's objection admissible as regards the payment of maintenance for his ex-wife ruling that: 'recognition and enforcement of the judgment of the Breda District Court of 22 July 1996 concerning the personal maintenance payments for Mrs Kil are not possible in view of that judgment's incompatibility with the divorce decree by consent of 14 May 1987 in which the instrument drawn up by the Notary Eyskens on 25 March 1986 was by implication included and confirmed'. At the second proceedings of 25 March 1999, the same district court, further ruling on Mr Baten's objection in relation to the payment of maintenance for his daughter, held that: 'recognition and enforcement of the judgment of the District Court of Breda of 22 July 1996 concerning the maintenance payments for the minor daughter Tamara are not possible in view of that judgment's incompatibility with the divorce decree by consent of 14 May 1987 in which the instrument drawn up by Notary Eyskens on 25 March 1986 was by implication included and confirmed'.

18. The municipality of Steenbergen then appealed against both of the above decisions to the Appeal Court of Antwerp, alleging that the judgment of which recognition is sought does not come within the scope of the Convention, inasmuch as it involves neither a civil nor a commercial matter but is rather a social security matter, which is expressly excluded from the scope of the Convention. Accordingly, it contends, pursuant to Articles 55 and 56 of the Convention, the Belgium-Netherlands Convention of 1925 should be applied instead. [4]

19. Thus, requiring an interpretation of a provision of the Brussels Convention, the Antwerp Court of Appeal decided, by order of 27 June 2000, to refer the following questions to the Court for a preliminary ruling:

'1. Is a legal action under a right of recourse under the Netherlands Algemene Bijstandswet (General Law on Social Assistance) brought by a municipality entitled to seek recovery against a person liable to pay maintenance, as referred to in Article 93 of the Algemene Bijstandswet, a civil matter within the meaning of Article 1, first paragraph, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and does a judicial decision delivered in such an action come for that reason within the scope of that Convention?

4 — See above, paragraph 5.

2. Is a legal action under a right of recourse under the Netherlands Algemene Bijstandswet (Law on General Assistance) brought by a municipality entitled to seek recovery against a person liable to pay maintenance, as referred to in Article 93 of the Algemene Bijstandswet, a case relating to social security within the meaning of Article 1, second paragraph, point 3, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and does a judicial decision delivered in such an action for that reason fall outside the scope of that Convention?'

20. In the proceedings before the Court observations were submitted by the parties to the national proceedings, the Commission and the Governments of the Netherlands, Austria, the United Kingdom and Sweden. However, at the hearing only the United Kingdom and the Commission made submissions and that of the Commission was radically altered compared to its written submission.

The first question referred for a preliminary ruling

21. By its first question the referring court essentially seeks to ascertain whether a judicial ruling adopted following an action for recovery brought by a municipality against an individual under Article 93 ABW may be regarded as a decision 'in civil... matters' within the meaning of the first paragraph of Article 1 of the Convention.

Arguments of the parties

22. All the parties agree that, in accordance with the settled case-law of the Court (to which I will return below), the concept of 'civil matters' within the meaning of Article 1 of the Brussels Convention should be regarded as an 'independent' concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the national legal systems as a whole. Similarly, also in accordance with the Court's case-law, they agree that the Brussels Convention may also be applied in respect of disputes between the public authorities and a private person, provided the former have not acted in the exercise of their public powers.

23. However, views diverge when it comes to the interpretation of the concept of 'civil matters' in relation to the facts of the present case. On the one hand, the municipality of Steenbergen and the United Kingdom contend that the facts do not come within the definition of civil matters and therefore are not within the scope of the Convention; on the other hand, Mr Baten, the Commission, and the other governments which submitted observations, contend the opposite to be the case.

24. In particular, the United Kingdom Government maintains that, by bringing an action under a right of recourse, the municipality, in seeking recovery of the costs of social assistance, has in fact 'acted in the exercise of its public powers'. To support an alternative interpretation, in particular that the right of maintenance of the two persons in receipt of assistance has been subrogated to the municipality, would necessarily entail characterising the municipality as a 'maintenance creditor' within the meaning of Article 5(2) of the Brussels Convention. However, if that were the case, argues the United Kingdom Government, that would also found jurisdiction for the courts of the place in which the public authority is established, being the domicile of the maintenance creditor, and thus establish a *forum actoris* on behalf of the public authority. That would be manifestly at odds with the purpose of the provision, which is intended to protect the maintenance creditor as the weak party in the maintenance relationship and not persons who, on whatever ground, are also within it. Accordingly, having regard also to such considerations, the United Kingdom contends that the action under a right of recourse brought by the municipality should not be regarded as an action in respect of civil matters within the meaning of Article 1 of the Convention.

25. During the written procedure, the Commission supported the arguments of the municipality of Steenbergen and the United Kingdom Government, sharing the view that, in granting assistance and deciding whether to seek recovery thereof, the municipality was exercising a public power vested in it within the framework of a social security system. In support of that conclusion, the Commission pointed out that the municipality had wide discretionary power both in determining entitlement to and the amount of social assistance and in deciding whether or not to seek recovery thereof. In particular, it contended that only where a person failed to comply with a judicial decision under Book I of the Netherlands Civil Code would the municipality be obliged to recover the cost of assistance, in compliance with the abovementioned decision; on the other hand, in all other cases it had discretion to decide whether or not to seek recovery of the amount paid. Thus, the municipality would not be acting in subrogation to the rights of the recipient of the assistance but under its own independent power under public law.

26. However, as I have already stated, the Commission radically altered its position at the hearing. It contended on that occasion that the municipality does not in fact have discretion in regard to the recovery of the cost of assistance from persons who have failed to fulfil their obligation to provide maintenance for the assisted person since, in the context of the system established by the Netherlands ABW, the public authority is always *obliged* to seek recovery. Furthermore, the action under a right of recourse may be brought only within the limits of the obligation to provide maintenance which the person in question has failed to fulfil. On the other hand, the Commission submits, under the interpretations advocated, the person originally liable to pay maintenance is not placed in a less favourable position because, far from exercising an independent public power, the municipality is merely asserting the same claims as the original creditor. Thus, *re melius perpensa*, the Commission concludes that the relationship between Mr Baten and the municipality of Steenbergen is a civil-law relationship and must therefore fall within the scope of the Convention.

27. Following the same arguments advanced by the Commission at the hearing, Mr Baten and the Governments of Austria and Sweden point out that the action under a right of recourse in question is linked to the obligation on Mr Baten to provide maintenance for Mrs Kil and the daughter. The fact that the right is transferred to a public authority does not, it is claimed, change the nature of that right because it remains none the less a right to maintenance; such transfer is rather an application of the general principle whereby a person is obliged to pay the debt of a third party, and who does so, is subrogated to the rights of the creditor against the debtor.

28. The Swedish Government adds that, should the Court rule that the action in question comes within the domain of public law, that could undermine the concept of parental responsibility towards children which could be deemed to appertain to the sphere of social responsibility rather than that of individual responsibility. Furthermore, the Swedish Government contends that exclusion of the rights in question from the scope of civil matters would be detrimental to the recognition of such rights abroad, which is in no way desirable and is inconsistent with the aim of the Convention.

29. Finally, the Dutch Government reaches similar conclusions but for partly different reasons. It stresses that Dutch law confers on the public authorities an independent right to seek reimbursement from the principal maintenance debtor because in such circumstances the municipality is pursuing a claim for compensation for the loss sustained by it as a result of being obliged to provide assistance to the needy person. Thus, the fact that the possibility of legal action is provided for under Dutch public law in no way precludes the municipality's action which, under Article 103 ABW, will be brought before the civil courts as a claim for compensation, thus coming within the scope of civil matters within the meaning of the Brussels Convention. In support of that conclusion, the Dutch Government points out that it may be inferred from both the Jenard [5] and Schlosser [6] Reports that exclusion of social security from the scope of the Convention does not include an action under which a public authority seeks recovery of benefits paid by way of social assistance or security from a third party obliged to provide such assistance to the recipient.

Assessment

30. To begin with, I would also recall, as have the parties, that the concept of civil

5 — Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, pp. 1-65, in particular page 13).

6 — Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, pp. 71-144, in particular page 103, paragraph 97).

and commercial matters referred to in Article 1 of the Convention must be 'regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of national legal systems'. [7] Similarly, I should point out, again as the Court has held, that in order to determine whether a decision comes within the concept of civil matters, the nature of the persons party to the legal relationship in question is to a certain extent irrelevant, irrespective of the national law applicable; [8] the decisive criterion is rather whether the relationship is based on an act *iure imperii* of the public authority. [9] Accordingly, determination of this question will entail an assessment of whether the public authority possesses, in the case in question, powers which differ from and are broader than those which a private individual, in a similar situation, would enjoy, and in particular whether it 'acts in the exercise of its power'. [10]

31. In regard to the present case, it clearly concerns, directly or indirectly, a number of relationships to which, from time to time, a private individual and the public authority are party, or to which private individuals alone are parties. For the avoidance of any risk of confusion it is therefore necessary, as the Commission correctly pointed out at the hearing, to identify the legal relationship on which the ruling is based and to distinguish it from the other relationships which merely have a connection thereto.

32. To that end, it should be noted at the outset that the present case originates in a legal relationship, governed by Netherlands law, the parties to which are the municipality and Mrs Kil (including, at the same time, the municipality and the minor T. Baten) whose subject-matter is the payment of social assistance. Thus, the nature of that relationship may be debated in light of the abovementioned criteria for interpreting the Convention. In fact, it is not clear from the case-file whether, under the system established by the ABW, the person in need of assistance has a subjective right to receive assistance from the municipality, which would consequently be in a passive legal position wholly comparable to the position of a private individual obliged to pay maintenance, or whether, conversely, the administration has a certain margin of discretion with regard to the decision on assistance, and therefore is exercising its powers in the case.

33. However, it is evident that the definition of a social assistance allowance has no effect on the reply to be given to the questions referred by the national court. In fact, that benefit and the legal relationship underlying it is not the subject-matter of

7 — Case C-29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, paragraph 3; in similar vein, see Cases C-133/78 *Gourdain* v *Nadler* [1979] ECR 733, paragraph 3; C-814/79 *Netherlands State* v *Rüffer* [1980] ECR 3807, paragraphs 7 and 8 and C-172/91 *Sonntag* v *Waidmann* [1993] ECR I-1963, paragraph 18.

8 — See *Eurocontrol*, cited above, paragraph 4 and *Rüffer*, cited above, paragraph 8.

9 — See *Eurocontrol*, cited above, paragraph 4; *Sonntag*, cited above, paragraph 20. See also the opinion of Advocate General Darmon in *Sonntag*, cited above, paragraph 43.

10 — See *Eurocontrol*, cited above, paragraph 4; *Rüffer*, cited above, paragraph 12 and *Sonntag*, cited above, paragraph 20.

the dispute but merely a factor in it which led to the decision of the Netherlands court; it is with the recognition of that decision which the present case is concerned. In actual fact that decision adjudicates on the different legal relationship between the municipality and Mr Baten and it is therefore the nature of that relationship which must be understood in order for the questions submitted by the referring court to be answered.

34. To that end, it is appropriate to begin with the relationship between Mr Baten and his ex-wife (and between himself and the daughter) which encompasses the contested obligation to provide maintenance. That relationship, whilst not directly forming the subject-matter of the decision whose recognition is at issue, is none the less decisive for the purposes of the reply which the Court is called upon to give to the questions referred to it. That is because, as already stated, once payment has been made in the form of *algemene bijstand*, the municipality has a right of recourse against certain third parties, including primarily persons who fail to meet their family obligations to minors, or who fail to comply with the obligation to provide maintenance for their former spouse following divorce.

35. In the present case, the municipality of Steenbergen is acting precisely under a right of recourse against Mr L. Baten in so far as he is obliged to provide maintenance for Mrs Kil and T. Baten. Under Article 93 ABW, such an action may be brought only up to the limit of the amount of maintenance which the third party liable to provide maintenance is obliged to pay. It follows that, under those circumstances, the municipality is not acting in the exercise of a public power because, in fact, it has no power in that regard. It does not have the power either to determine the parties from whom it seeks repayment of expenditure incurred, or to specify the extent of the benefit payable. Nor does it have any power in regard to recovery of the cost of assistance: it can only request payment from the third party, it cannot impose such a requirement; if the third party refuses to pay, the only option open to the municipality is to take legal proceedings, thus giving the third party defendant the opportunity to defend himself and also, where appropriate, to contest the very existence of the obligation to provide maintenance or its extent.

36. Accordingly, it appears to me that the municipality is not exercising as regards the third party any public powers and that the legal relationship between the two parties is no different from the normal relations under the law of obligations existing between parties on the same footing, which are by definition relationships governed by civil law. The position of the municipality *vis-à-vis* the third party liable to pay maintenance may in fact be compared to that of a private individual who, having paid for whatever reason another person's debt, is subrogated to the rights of the original creditor, or to the rights of a person who, outside of any pre-existing relationship under the law of obligations, has suffered loss as a result of an act imputable to a third party.

37. On that premiss, there is no need for a technical definition of the nature of the

action in terms of a specific national law and, in particular, it is otiose to debate, as the parties to the present proceedings have done, whether that action should be classified under the domestic law of the Netherlands, Belgium or another applicable law in force by reference to private international law as an action by way of subrogation to the rights of the person receiving maintenance or whether it is rather an independent action for compensation for loss occasioned to the municipality. The only interpretation relevant for present purposes is that concerning the Convention and the conditions governing its application; that is to say, it is sufficient to establish that the decision was handed down in a civil action and that such action therefore comes within the scope of 'civil matters' within the meaning of Article 1 of the Convention.

38. I therefore propose that the reply to the first question should be that a decision in an action for recovery, pursuant to Article 93 ABW, brought by a municipality against an individual liable to pay maintenance to a person in receipt of assistance granted by that municipality, is a decision in civil and commercial matters within the meaning of Article 1 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

The second question referred for a preliminary ruling

39. The second question seeks to establish whether the contested action, on the supposition that it comes within the scope of civil and commercial matters, is a case relating to social security since, if so, it would not come within the scope of Article 1, second paragraph, point 3 of the Convention.

Arguments of the parties

40. The Governments of the Netherlands and Austria paid particular attention to that question. The former makes the initial point that the Convention itself does not define the concept of 'social security' and that that concept must therefore be construed in accordance with the principle that the concepts enshrined in the Convention are to be interpreted independently. To that end, according to the Government of the Netherlands, it may be useful to refer both to information gleaned from international law and to Community secondary legislation. As regards the former, the Netherlands Government points out that in various international agreements an express distinction is made between social security and social assistance. However, as regards the latter, reference is made in particular to Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [11] which makes a distinction between social security payments and social assistance payments. According to the Netherlands Government,

11 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

the payments made by a municipality under the ABW should be classified as social assistance payments.

41. However, according to the same government, even if such payments were subsumed within the scope of social security, not all legal relationships having a connection thereto can be brought within the concept of social security for the purposes of Article 1, second paragraph, point 3. That would be true only of disputes concerning contributions payable by insured persons, or of social security payments made to such persons on the occurrence of certain social risks. Conversely, according to the Netherlands Government (and the Commission) the contested action concerns a request for reimbursement addressed to a person liable to pay maintenance and therefore comes fully within the scope of the Convention, as confirmed by the Jenard and Schlosser reports. The former states that: '..., the litigation on social security which is excluded from the scope of the Convention is confined to disputes arising from relationships between the administrative authorities concerned and employers or employees. On the other hand, the Convention is applicable when the authority concerned relies on a right of direct recourse against a third party responsible for injury or damage, or is subrogated as against a third party to the rights of an injured party insured by it, since, in doing so, it is acting in accordance with the ordinary legal rules.' [12] The latter states that: 'Legal proceedings by social security authorities against third parties, for example against wrongdoers, in exercise of rights of action which they have acquired by subrogation or by operation of law, do come within the scope of the 1968 Convention.' [13]

42. For its part, the Austrian Government likewise considers that the objective of both the Convention and Regulation No 1408/71 is to provide increased protection for the rights of individuals established in the Community, and observes that the rationale for excluding social security from the scope of the Convention is specifically the fact that a special parallel scheme exists, in the context of which the concept at issue must be construed by reference to the aforementioned regulation and to the Court's relevant case-law. Thus, under that case-law, a payment comes within the concept of social security where it is 'granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71'. [14] In applying those criteria, the Court has, in particular, confirmed that a payment made to cover basic subsistence needs, without reference to any previous periods of professional activity or insurance contributions, does not come within the concept

12 — Jenard report, cited above, p. 13.

13 — Schlosser report, cited above, p. 92, paragraph 60.

14 — See Cases C-160/96 *Molenaar* [1998] ECR I-843, paragraph 20 and C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 57.

of social security for the purpose of that regulation. [15] However, in the present case, the Austrian Government submits, the facts of the case do not provide sufficient detail in order to enable the payments made by the municipality of Steenbergen to be classified under the abovementioned criteria. It therefore concludes, like the United Kingdom Government, that it should be left to the national court to determine, in the light of the general criteria provided, the nature of the action which led to the decisions of the Netherlands court.

Assessment

43. It seems reasonable to me as well to proceed on the basis of the notion that, in the absence of an appropriate definition in the Convention itself, the concept of social security within the meaning of the Convention should be construed by reference to the relevant provisions of Community law, in particular the abovementioned Regulation No 1408/71. As I have already pointed out, the concepts employed by the Convention are in principle 'independent' concepts and must therefore be interpreted, as the Court has ruled, by reference to the objectives and scheme of the Convention. But regard must also be had, I should add, to the broader context in which the Convention is set, that is to say Community law in a wider sense. That is primarily for reasons of a general nature but also on grounds specifically related to matters of social security.

44. In general terms, it appears to me in fact very difficult to refute the 'Community' nature of the Convention and the fact that it cannot be interpreted in isolation from the Court's case-law on cognate concepts to be found in the Treaties or in secondary legislation. I would add that the need for such interpretation to operate in tandem which, in my view, is already clearly warranted by the link established between the Convention and the Community legal order by Article 220 of the EC Treaty (now Article 293 EC), [16] acquires even greater validity at the present juncture following the adoption of Council Regulation No 44/2001 [17] which integrates the Convention into the Community legal order in a yet more systematic and direct manner.

45. On the specific point, therefore, I consider it difficult, in defining the concept of social security, to depart from a 'Community' interpretation of that definition as referred to above, that is to say from an interpretation which is therefore guided by the cognate concepts in Article 42 EC and Regulation No 1408/71.

15 — Cases C-249/83 *Hoeckx* [1985] ECR 973, paragraphs 13 and 14 and C-122/84 *Scrivner* [1985] ECR 1027, paragraphs 20 and 21.

16 — See Case C-398/92 *Mund & Fester* [1994] ECR I-467, in particular paragraphs 10 to 13.

17 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

46. In that regard, I recall that Article 42 EC makes provision for special measures 'in the field of social security' to secure for migrant workers and their dependants aggregation of all periods taken into consideration under various national legislation and payment of benefits to persons resident in the Member States. Measures were implemented specifically for that purpose with the adoption of Regulation No 1408/71 mentioned above, which is concerned primarily with allocating the relevant areas of competence of the national legal orders, establishing a system whereby, in general terms, a Member State's exclusive 'legislative competence' is coupled with the competence of the administrative and judicial authorities of that State. Thus the regulation, whilst pursuing, like the Convention, the objective of providing increased protection for the rights of individuals established in the Community, adopts an approach that is not always compatible with that of the Convention, thereby making it impossible for the two systems to be automatically superimposed on each other.

47. That being the case, I consider it reasonable to infer that matters governed by the regulation are excluded from the scope of the Convention since effective protection of legal rights in that context is guaranteed 'upstream', with the identification of a national legal order with competence and does not require judgments to be circulated. Further, it seems to me that the Jenard report also agrees with that. Explaining the reasons which led to social security being excluded from the scope of the Convention, that report states that it was thereby sought to allow current work on rules and provisions to implement then Articles 51, 117 and 118 of the Treaty of Rome 'to develop independently'; it then goes on to observe that 'social security has not in fact hitherto given rise to conflicts of jurisdiction, since judicial jurisdiction has been taken as coinciding with legislative jurisdiction, which is determined by Community regulations adopted pursuant to Article 51 of the Treaty of Rome.' [18]

48. The foregoing considerations lead me to form the view that extension of social security matters for the purposes of Article 1, second paragraph, point 3 of the Convention must be determined by reference to the scope of the abovementioned regulation, as laid down in Article 4 thereof and as clarified by the case-law of the Court.

49. Turning now to the present case, I should point out once again that the relevant relationship here, in so far as it is the subject-matter of the decision of the Netherlands court, is not that between the two women in need of assistance and the municipality, which is rather to do with the payment of assistance, but the relationship between the municipality and Mr Baten, the subject-matter of which is recovery of monies paid by the former as a result of the alleged non-compliance by the latter with

18 — Jenard report, cited above, p. 12.

his obligation to provide maintenance. The subject-matter of the obligation adjudicated upon cannot therefore under any circumstances be regarded as a payment 'granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71'. Thus, it is not a social security payment, within the meaning of the abovementioned Community legislation, as defined by the Court's case-law, and therefore does not concern the field of social security. [19]

50. Moreover, I would add that the solution would not be any different even if the nature of the relationship of assistance between Mrs Kil and T. Baten, on the one hand, and the municipality, on the other, were taken into account. In fact I should point out that a benefit granted 'to any person who does not have adequate means and is unable to obtain them either by his own efforts or in any other way..., being a general social benefit, cannot be classified under one of the branches of social security listed in Article 4(1) of Regulation No 1408/71 and therefore does not constitute a social security benefit'. This is because need is the essential criterion for its application and there is no stipulation as to periods of work, contribution or affiliation to any particular social security body covering a specific risk. [20]

51. However, in the present case, it follows from the information provided by the referring court that the assistance provided by a municipality by way of *algemene bijstand*, under the ABW, takes specific account of need as an essential criterion for its application and is not dependent on any contribution or affiliation to any social security body covering a particular risk. That leads to the conclusion that even the claim by Mrs Kil and T. Baten for municipal assistance which, I repeat, merely constitutes a necessary precondition of the relevant request, does not come within the field of social security within the meaning of Regulation No 1408/71.

52. In view of my earlier comments regarding the relevance of Regulation No 1408/71 in interpreting the Convention, I must conclude that the decision whose recognition is sought does not have as its subject-matter, nor does it presuppose, a claim within the field of social security within the meaning of Article 1, second paragraph, point 3 of the Brussels Convention.

53. The reply to the second question referred for a preliminary ruling must therefore be that a decision in an action

19 — See *Molenar*, cited above, paragraph 20 and *Kuusijärvi*, cited above, paragraph 57.

20 — See *Hoeckx*, cited above, paragraphs 13 and 14 and *Scrivner*, cited above, paragraph 20.

under a right of recourse under Article 93 ABW, brought by a municipality against an individual liable to pay maintenance to a person in receipt of assistance granted by that municipality, should not be deemed to be a decision concerning social security within the meaning of Article 1, second paragraph, point 3 of the Brussels Convention and is not therefore outside the scope of that Convention.

Conclusion

54. In light of the foregoing considerations I therefore propose that the Court should rule as follows:

(1) A decision in an action under a right of recourse under Article 93 ABW, brought by a municipality against an individual liable to pay maintenance to a person in receipt of assistance granted by that municipality, is a decision in civil and commercial matters within the meaning of Article 1 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

(2) A decision in an action under a right of recourse under Article 93 ABW, brought by a municipality against an individual liable to pay maintenance to a person in receipt of assistance granted by that municipality, should not be deemed to be a decision concerning social security within the meaning of Article 1, second paragraph, point 3 of the Brussels Convention and is not therefore outside the scope of that Convention.