OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 DECEMBER 1968[1]

Mr President,
Members of the Court,

Mr De Cicco, an Italian national, worked as a *wage-earner* in Germany from 1941 to 1945, for a period of 42 months, during which he contributed to invalidity insurance. From 1959 to 1965, for 84 months, he worked in Italy as a *craftsman* and paid contributions to the Italian social security fund (Istituto Nazionale della Previdenza Sociale, or INPS) under the special scheme for craftsmen. Thus he had what is called a 'mixed career', both as a wage-earner and as a self-employed person.

In April 1965 he was declared unable to carry out his occupation ('berufsunfähig') and in December 1967 incapable of work ('erwerbsunfähig'), in both cases within the meaning of the German pension legislation. On 9 April 1965 an application for a German invalidity pension was sent to the Landesversicherungsanstalt Schwaben (Swabian Regional Insurance Institution), the appropriate agency, through the intermediary of the provincial office of the INPS at Chieti which pointed out that Mr De Cicco had only been insured in Italy as a craftsman. Under Articles 1246 and 1247 of the Reichsversicherungsordnung (German Social security regulations) Mr De Cicco had a right to the pension applied for only if, in order to complete the requisite qualifying period of 60 months, in addition to the contributions paid to the German social security fund for wage-earners (42 months) the contributions made to the Italian craftsmen's insurance (84 months) could also be taken into account; that is, only if there was an aggregation of the corresponding periods within the meaning of Article 27(1) of Regulation No 3 concerning social security for migrant workers.

Holding that the insurance periods completed in Italy were not covered by Article 1(p) of this regulation, which defines what is meant by 'insurance periods', the German agency rejected Mr De Cicco's application for a pension on 7 September 1965. He appealed to the Sozialgericht (Social Court), Augsburg, against this decision.

By a judgment of 5 August 1968 that court has referred the case to you in exercise of its right under the second paragraph of Article 177 of the Treaty. Not that it has any doubts on the answer to be given: its judgment, containing a lengthy and detailed statement of grounds, sets out all the reasons leading it to believe that an order should be made for aggregation. However, there exists a contrary decision from the higher court, the Bavarian Landessozialgericht (Higher Social Court), which the Sozialgericht considers wrong. Your ruling on the matter will settle the point of law at issue between the two courts, but also has a wider interest than the merits of the particular case, as will be seen from the observations submitted by the Italian Government, the Commission and the Landesversicherungsanstalt.

I

The question referred to you for a preliminary ruling is in the following terms: Are periods of contribution to craftsmen's insurance (special section of the Italian National Social Security Institution for craftsmen) insurance periods within the meaning of Articles 1(p), 24 and 27 of Regulation No 3?

1. In the oral procedure the Landesversicherungsanstalt Schwaben maintained that the German court could not put such a question to you because the answer was not necessary to enable it to give judgment, which is the condition required by the second paragraph of Article 177 for making a reference to this Court. Its reasoning is as follows: the subject-matter of the appeal to the Court is indeed the refusal of the German social security institution to take into consideration the periods completed in Italy, but this refusal rests solely on the negative position adopted by the Italian social security agency. It is only this latter

1 — Translated from the French.

body which can say whether such periods are to be taken into consideration, and its decision—against which the appellant could only appeal before the Italian court—binds both the German administration and the German court. The Sozialgericht could not dispute the decision of the competent Italian agency, especially when this agency was not a party to the case before it and could not therefore ask you to interpret the text on which this decision was based. The Landesversicherungsanstalt added that even if a reference were possible then at the very least the INPS would have to be summoned to submit its observations to you in the proceedings consequent on the reference.

These objections to the admissibility of the request for an interpretation and the legality of the procedure followed cannot be sustained. Your previous judgments on the second paragraph of Article 177 have consistently held that it is for the national court alone to determine whether the provision of Community law which it asks you to interpret (in this case Article 1(p), 24 and 27 of Regulation No 3) is necessary for the decision which it must take, and you do not consider yourselves entitled to pronounce on the 'relevance' of the question to the issue before it. With regard to the procedural question, the question whether the Italian social security agency should have been called upon to submit its observations to the Sozialgericht is a matter for German law and you cannot take cognizance of it. But once it is established that that agency has not participated in the main action, Article 20 of the Statute of the Court of Justice of the EEC prevents it from appearing before you. That Article restricts the notification of the decision of the court making the reference to you for a preliminary ruling to the parties in the action before that court, the Member States, the Commission and the Council, and reserves to those various persons or agencies the right to submit observations to the Court of Justice. Moreover, intervention is not permitted in the procedure under Article 177.

2. The Commission states—with reason, I think—that the question may be reduced to deciding whether craftsmen are to be considered, for the application of the Regulations, as assimilated to wage-earners in respect of periods completed by them under Italian legislation. If the answer is in the affirmative, then Mr De Cicco's contribution periods are insurance periods within the meaning of Article 1(p), that is, periods to which the Regulations may apply.

Although Article 4(1) of Regulation No 3 provides that the Regulation shall apply to 'wage-earners or assimilated workers', these two concepts are not defined in the text. The same problem was presented to you in one of your first decisions in the field of social security, the judgment in the case of *Hoekstra, née Unger*, of 19 March 1964 [75/63 [1964] E.C.R. 177). This declared, with regard to voluntary continued insurance, that these two concepts covered all those who, 'as such and under whatever description, are covered by the different national systems of social security'. Thus the sphere of application of the Regulation is determined by a criterion of social security and not of labour legislation; this reflects the ever growing independence given to the first of these concepts as against the second.

The Commission, in its observations, mentions certain categories of persons who are not wage-earners but to whom the Commission considers the Regulation must apply; I shall not go into these various examples but shall merely deal with that of craftsmen, which has given rise to the case pending before the German court.

The Sozialgericht has emphasized that there is a consistent tendency among the six States to grant more extensive protection to craftsmen; it has deduced from this that 'this category of small independent contractors has, according to general European legal theory, a position analogous to that of workers, is exposed to essentially the same risks as the latter, and may be assimilated to them in the field of social security, in spite of its economic and social characteristics'.

It is immediately apparent that this conclusion is drawn by the court from a comparative examination of the relevant legislation in force in each country. Here we come up against the paradox inherent in this type of case. Your jurisdiction under Article 177 only covers the interpretation of Community regulations and not that of national legislation; it is applied in the abstract. However, in order that it may be

usefully employed and may guide the national court in its appraisal of the actual case before it, you cannot avoid an examination of provisions of municipal law (which may, moreover, be the national law of the court which is asking you for a ruling as well as that of another Member State).

With regard to the case of craftsmen, perhaps it is going too far to conclude, as does the Sozialgericht and, it seems, the Italian Government, that they may everywhere be assimilated to wage-earners, for the treatment given to them is not identical in all the States. They may come under an independent scheme (as in Luxembourg and France; in the latter case periods completed as a craftsman may be aggregated under the general scheme for wage-earners), or a special scheme for independent workers (Belgium), or the scheme applicable to all residents (Netherlands). Finally, in Germany as far as pensions are concerned they come under the social security scheme for workers. In the countries which I have just mentioned, therefore, with the exception of the Federal Republic, it does not appear that the relative legislation assimilates them to wage-earners.

There thus remains the case of Italy which has given rise to the question put by the German court: what is the social security scheme for craftsmen in that country?

Compulsory sickness insurance for craftsmen was introduced by Law No 1533 of 29 December 1956. Then came Law No 463 of 4 July 1959 which provides for 'the extension of compulsory invalidity, old-age and death insurance to craftsmen and members of their families', and which extends insurance against these risks to all the craftsmen covered by the 1956 law. Article 1(2) provides that, in the absence of a contrary provision, this insurance is governed by the provisions of the Royal Decree-Law No 1827 of 4 October 1935 establishing compulsory invalidity insurance for *wage-earners*. A special scheme with financial independence was created for this purpose within the insurance agency, the INPS (Article 3). The periods completed as craftsmen may be aggregated with those completed by virtue of any activity as a wage-earner (Article 9). One pension only is paid, which, in certain cases, consists of several components corresponding to the periods completed. The system works as follows: if the right to a pension is acquired on the basis of contribution periods completed solely as a wage-earner, then the pension is calculated solely on the basis of these periods, but a supplement is added, calculated on the basis of periods as a craftsman provided that the conditions for an award laid down in the law relating to craftsmen have been fulfilled. This latter statute thus plays, as the Commission says, a supplementary role.

If the right to a pension is not acquired on the basis of periods of contribution completed solely as a wage-earner, the periods completed as a craftsman are not taken into consideration, but the periods completed as a wage-earner are aggregated for the purpose of the acquisition of the right to a pension and the calculation of its amount under the law relating to craftsmen, provided that the general and special conditions of that law are fulfilled. The legislation relating to craftsmen plays a subsidiary role in such a case.

This legislation, then, is based generally on the legislation applicable to wage-earners, the application of which it merely modifies in some respects. In view of this, I consider that craftsmen may be regarded as 'assimilated' workers under Italian legislation. Consequently, as the Italian Government states, periods of insurance completed in Italy under the insurance scheme for craftsmen as laid down in the Law of 4 July 1959 constitute periods of insurance *with all the consequences which that entails*, in particular the possibility of aggregating them with periods completed in Germany for the payment of an invalidity pension.

The oral observations made by the advocate for the Landesversicherungsanstalt Schwaben and certain documents submitted by him appeared to show that this opinion was not shared by the INPS. This divergence of view is regrettable and one may hope that in future the practice of the agency administering the insurance scheme might conform with the theory sustained before the Court by the sole authorized representatives of the Italian Republic. But that is a domestic affair. It has in any case no influence on the conclusions which may be drawn from an

examination of the 1959 Law in relation to Regulation No 3.

II

However, it is necessary at this stage to reply to a number of objections, which the Sozialgericht has pertinently refuted.

1. Craftsmen are not mentioned in Annex 9 to Regulation No 4, established by virtue of Article 5(1)(i), which lists the general and special schemes for each Member State. Nevertheless, this circumstance *per se* does not exclude the scheme for craftsmen from the sphere of application of Regulations Nos 3 and 4; at least this is what seems to me to result from a judgment which you delivered in a fairly similar case.

In accordance with Article 3 of Regulation No 3, Annex B lists for each Member State the social security legislation to which Regulation No 3 applies and which was in force at the date of its adoption. It is laid down that each Member State shall notify the President of the Council of any amendment to be made to Annex B as a result of the adoption of new legislation, and the notification must be communicated within three months of the publication of such legislation. In your judgment in the case of *Kalsbeek, née van Der Veen* of 15 July 1964 (100/63 [1964] E.C.R. 565) you held that failure to notify new national legislation within the requisite period did not prevent such legislation from being regarded as coming within the general term 'legislation'. This decision may certainly be extended to cover Annex 9 to Regulation No 4, for which the system in force at the date of the adoption of the Law of 4 July 1959 (since changed by Regulation No 109/65 of the Council of 30 June 1965) required notification to the Administrative Commission by the competent authority in each country of amendments made to the annexes. One may only lament the fact that this notification, it seems, was not made to the Administrative Commission; had it been, that Commission would, as laid down in Article 5(2), then have notified the competent authorities in the other Member States which would have permitted the national court to apply the Community legislation in full knowledge of the facts and would perhaps have avoided the need for a reference to the Court. However that may be, one may assume that it was through inadvertence that the necessary amendment was not made to the annex or notified to the Administrative Commission, for the situation here is very different from that which in the *Welchner* case (14/67, judgment of 5 December 1967, Rec. 1967, p. 437) prevented you from making such an assumption. If it is borne in mind, on the other hand, that the Law of 4 July 1959 itself appears to be, and is in effect, an *extension* of the general invalidity insurance scheme, perhaps it might even be considered that there was no need to introduce a special mention in the Annex.

2. By virtue of Article 2(2) of Regulation No 4, the Administrative Commission may assemble for the use of the competent authorities of each Member State all information on the provisions of national legislation to which Regulation No 3 applies, in particular that concerning 'insurance periods' as defined in Article 1(p) of that Regulation.

In fact, these documents have been put together by the ILO on the basis of national contributions and under the aegis of the Administrative Commission. It does not mention for Italy the pensions insurance for craftsmen, but one cannot draw any conclusions from this fact as the information has not been brought up to date since 1958, whereas the Law in question dates from 4 July 1959. Here again one can only wish that this information could be kept up to date regularly in the interests of the administrative authorities and of the Court.

3. Finally, it may be added that the Italian Government considers that the insurance periods in question should in any case be aggregated by virtue of Article 13(2) of Regulation No 4, which states: 'The insurance periods or assimilated periods completed by wage-earners or assimilated workers under social security schemes of a Member State to which the regulation does not apply, but which are reckoned under a scheme to which the regulation does apply, shall be considered as insurance periods or assimilated periods to be taken into account for the purposes of aggregation'.

It seems, however, that this provision is

solely intended to take into consideration periods completed under a scheme to which the regulation does not apply, where the *national consolidation* rules permit them to be aggregated with periods to which the regulations do apply. The Commission of the EEC has cited as an example the case of a person working as a wage-earner in Germany, then as a wage-earner and as a craftsmen in France: the French periods as a craftsman, which may be aggregated in France under the general scheme for wage-earners (although craftsmen can certainly not be considered as assimilated to wage-earners) could on the same basis as the French periods as a wage-earner be aggregated with the German periods as a wage-earner.

The Administrative Commission is divided in its interpretation of this provision; I do not consider that there is any need for that to detain us once it is admitted, as I have suggested, that under the Italian scheme craftsmen must be assimilated to wage-earners.

We must now answer the question referred to us for a preliminary ruling.

As we have seen, it concerns expressly and directly the method of dealing with periods of contribution to the Italian insurance scheme for craftsmen.

For the reasons which I have indicated, it seems to me that it is necessary, first, to settle the question whether those concerned are assimilated to wage-earners; moreover, in spite of the examination of the Italian legislation which we have been forced to make, the Court must take care not to give a reply referring expressly and exclusively to that legislation.

We are thus led to a formula which more or less repeats and develops that which Mr Advocate-General Lagrange proposed in the case of *Hoekstra, née Unger* and which might be as follows:

1. Persons who are, under national law, protected against risks within schemes organized for the benefit of wage-earners must be considered assimilated to wage-earners whatever may be the legal forms used by the legislature to effect their inclusion in such schemes, even if the inclusion of such persons is accompanied by various special detailed rules, provided that such rules do not lead to the creation of a special independent scheme for those persons.

2. Contribution periods completed under a social security scheme of which the beneficiaries are wage-earners or assimilated workers are 'insurance periods' within the meaning of Articles 1(p), 24 and 27 of Regulation No 3.

It is for the Sozialgericht, Augsburg, to decide as to the costs of this action.