OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 7 APRIL 1976

My Lords,

Herr Aulich is a German citizen. For a long time he has been entitled to an old-age pension under the legislation of the Netherlands and also to a retirement pension under the legislation of the Federal Republic of Germany. He formerly lived in Germany, but in 1970 he moved to the Netherlands and he now lives at Eindhoven. When he lived in Germany he qualified, as a pensioner, for free sickness insurance, but he is not entitled to such insurance in the Netherlands. He has accordingly, since 1 September 1970, voluntarily insured himself against sickness with the Algemeen Ziekenfonds at Eindhoven. For this insurance he pays monthly premiums. These premiums amounted to Fl. 84·50 a month in 1970 but had risen to Fl. 178·10 a month by 1975.

As Your Lordships know, the German social security legislation contains a provision, paragraph 381 (4) of the Reichsversicherungsordnung (the 'RVO'), under which pensioners who do not qualify for free sickness insurance are entitled to an allowance towards any contributions they pay for voluntary sickness insurance. The Bundessozialgericht has ruled in a number of cases that pensioners who, like Herr Aulich, live abroad and are there voluntarily insured against sickness are entitled to receive this allowance if certain conditions are satisfied. It appears that those conditions are satisfied in Herr Aulich's case. It also appears that the allowance amounted in 1975 to DM 115 a month, so that it went a long way, though not the whole way, towards paying the premiums on Herr Aulich's Dutch insurance.

On 21 August 1970 Herr Aulich applied for the allowance to the competent German institution, the Bundesversicherungsanstalt für Angestellte (the 'BVA'). He asked to be paid the allowance as from 1 September 1970. On 23 September 1970 the BVA rejected his application on the ground that Article 22 of Regulation No 3 of the Council of the EEC rendered the Dutch social security institutions responsible for his sickness insurance.

Against the rejection of his application Herr Aulich appealed to the Sozialgericht of Berlin and, on 26 February 1971, that Court delivered judgment allowing his appeal. It held that Article 22 of Regulation No 3 did not debar Herr Aulich from receipt of an allowance under paragraph 381 (4) of the RVO and it ordered the BVA to pay him that allowance as from 1 September 1970.

On 25 May 1971 the BVA lodged an appeal against that Judgment to the Landessozialgericht of Berlin.

Two important things then happened.

First the Council adopted Regulation (EEC) No 1408/71, which superseded Regulation No 3 as from 1 October 1972.

Secondly, on 11 October 1973, this Court delivered judgment in Case 35/73 (*Kunz* v *BVA* 1973/II [ECR] 1025), the relevant facts of which were indistinguishable from those in Herr Aulich's case. The Court there held that Article 22 of Regulation No 3 did not have the effect contended for by the BVA.

The BVA thereupon abandoned its appeal in Herr Aulich's case in respect of the period up to 1 October 1972. The BVA contends however that, as from that date Regulation No 1408/71 has created a legal situation different from that previously obtaining.

The provisions of Regulation No 1408/71 on which the BVA relies are those of Article 27 combined with those of Annex V.

Article 27 is in Section 5 of Chapter 1 of Title III of the Regulation. Title III contains the 'Special provisions relating to the various categories of benefits'. Chapter 1 relates to 'Sickness and Maternity', and Section 5 thereof to 'Pensioners and members of their families'.

Article 27 was amended in two respects as from 1 January 1973 by virtue of the Act concerning the Accession of the new Member States. I will advert to those amendments in a moment. They do not in my opinion affect the present case. The original text of Article 27, which was applicable from 1 October to 31 December 1972, was as follows:

'A pensioner who is entitled to draw pensions under the legislation of two or more Member States and who is entitled to benefits in kind under the legislation of the Member State in whose territory he resides, taking account where appropriate of the provisions of Article 18 and Annex V, shall, with the members of his family, receive such benefits from the institution of the place of residence and at the expense of that institution as though he were a pensioner whose pension was payable solely under the legislation of the latter State.' (OJ L 149 of 5. 7. 1971)

Article 18 which is there referred to is the Article providing for the aggregation of insurance periods where appropriate. Nothing turns on it in this case.

Annex V is that containing what are described as 'Special procedures for applying the legislations of certain Member States'. The relevant provision in that Annex was, in the original version of Regulation No 1408/71, paragraph F 1 (a). In the version as amended by the Act of Accession it is paragraph H 1 (a). Its wording is the same in the two versions, viz., so far as material:

'A person receiving an old-age pension under Netherlands legislation and a pension under the legislation of another Member State shall, for the purposes of Article 27 . . ., be considered to be entitled to benefits in kind if ... he satisfies the conditions required for entitlement to voluntary sickness insurance for elderly persons.' (OJ L 149 of 5. 7. 1971)

It is undisputed that the effect of that provision is that Herr Aulich is to be deemed, for the purposes of Article 27, to be entitled to benefits under the legislation of the Netherlands, so that that Article applies to him. This distinguishes the position under Regulation No 1408/71 from the position under Regulation No 3 as it was held to be in *Kunz* v *BVA,* because the whole basis of the decision there was that Article 22 did not apply to a person who was not actually entitled to benefits under the legislation of the Member States where he resided.

This is probably the point at which it is convenient for me to consider the amendments that were made to Article 27 by, or as a result of, the Act of Accession.

As I have mentioned there were two.

The first was made by the Act of Accession itself. It was effected by Article 29 and Part IX of Annex I of that Act and consisted simply of the deletion from Article 27 of the words 'in kind'. The result was to make Article 27 applicable to benefits in cash as well as to benefits in kind.

The second amendment was made, pursuant to Articles 30 and 153 of the Act, by Council Regulation (EEC) No 2864/72. Its effect was to render Article 27 inapplicable unless the pensioner concerned resides in one of the Member

States where he is entitled to draw a pension. Herr Aulich of course does so reside.

The argument of the BVA is, as I understand it, that the effect of Article 27, and in particular of the words 'as though he were a pensioner whose pension was payable solely under the legislation of the latter State', is to require Herr Aulich to be treated, for all purposes of sickness insurance, as if he were entitled to a pension only in the Netherlands, and so to disentitle him to any allowance under paragraph 381 (4) of the RVO, since such an allowance is payable only to one who is entitled to draw a pension in Germany.

That argument is reflected in the question referred to this Court for a preliminary ruling by the Landessozialgericht by Order dated 13 August 1975.

My Lords, it seems to me that, as was suggested by the Commission, the answer to that question is pointed by the Judgment of this Court in Case 33/65 (*Dekker* v *BVA* [1965] II ECR 901). The question in that case was whether the allowance under paragraph 381 (4) of the RVO was a benefit to which Article 22 of Regulation No 3 applied. The Court pointed out that each Chapter of Title III of that Regulation contained provisions concerning a particular category of risks. 'In these circumstances' the Court said 'it is evident that, where the provisions of those Chapters use the concept of "benefit", they refer to benefits to be granted on the occurrence of the specific risk to which the Chapter in question relates'. Article 22 was to be found in Chapter 1 of Title III, which related to sickness and maternity, so that the benefits to which it referred must be those to be granted on the occurrence of an actual case of sickness or maternity. It followed that an allowance supplementary to a pension and intended as a contribution to the financing of the beneficiary's sickness insurance was not a benefit of the kind to which Article 22 referred. In my opinion the selfsame reasoning applies in the case of Article 27 of Regulation No 1408/71. The structure of Title III of that Regulation corresponds to the structure of Title III of Regulation No 3, and Article 27, as I have mentioned, forms part of Chapter 1, which relates to 'Sickness and Maternity'. It follows that the benefits to which Article 27 refers do not include an allowance such as that provided for by paragraph 381 (4) of the RVO.

I am therefore of the opinion that Your Lordships should answer the question referred to this Court by the Landessozialgericht of Berlin by declaring that Article 27 of Regulation No 1408/71 relates only to the benefits to be received by the pensioner concerned or the members of his family from the institution of the Member State in whose territory he resides on the occurrence of sickness or maternity and does not affect any right he may have under the legislation of another Member State to an allowance towards contributions to a voluntary sickness insurance scheme.