2. The decision on costs is a matter for the Landessozialgericht, Berlin.

Hammes Strauß Donner

Lecourt Monaco

Delivered in open court in Luxembourg on 1 December 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 4 NOVEMBER 1965[1]

Mr President,
Members of the Court,

The Landessozialgericht, Berlin, an appeal court on social questions, asks you, on the basis of subparagraph (b) of the first paragraph of Article 177 of the Treaty of Rome, to interpret the provisions of Article 22 of Regulation No 3, concerning social security for migrant workers, relating to the issue to the beneficiary of pensions of benefits in kind under sickness insurance.

In order to understand the scope of the question, it is as well to recall how the dispute giving rise to the reference came about. Mr Dekker, who is of Netherlands nationality, obtained from the Bundesversicherungsanstalt für Angestellte, a German old-age insurance institution, a pension on the basis of incapacity for work; which was changed into an old-age pension with effect from 1 January 1957. He also effected a voluntary sickness insurance with a German sickness insurance fund. Under Section 381 (4) of the Reichsversicherungsordnung the old-age insurance institution paid him a portion of the cost of his sickness insurance contribution. But when in November 1958 Mr Dekker went to reside in the Netherlands and effected a sickness insurance, again voluntary, with a Netherlands institution, the payment of this amount was withdrawn, on the ground that the sickness insurance institution did not have its head office in the Federal Republic of Germany, a condition required by the Reichsversicherungsordnung.

On Mr Dekker's objecting to this, the Sozialgericht, Berlin, upheld his claim chiefly on the basis of the provisions of Article 22 of Regulation No 3. On appeal, the Landessozialgericht felt obliged to ask you whether a portion of the sickness insurance contribution provided for by Section 381 (4) of the German Law was included among the 'benefits in kind' mentioned in Article 22, which a German pension insurance institution is obliged to issue to a beneficiary of a pension affiliated to a sickness insurance institution in another Member State. In order to remain within the limits of your jurisdiction in answering the question thus raised, you must, of course, restrict yourselves to interpreting the Community provisions, on which my observations can be brief.

Although Chapter 1 (Sickness, Maternity) of Title III of the Regulation

1 — Translated from the French.

applies different rules to 'benefits in kind' and 'cash benefits', nowhere does it give criteria for defining those expressions. But from the general system of the Regulation and the exigencies which it meets one may deduce that they have their ordinary meaning.

The coordination of health insurance schemes, which is the aim of the Chapter, is based on the idea that cash benefits are to be paid by 'the competent institution' within the meaning of the Regulation (that is to say, the institution with which the insured person is insured), whereas benefits in kind are to be issued by the institution of the country in which he is permanently or temporarily resident—subject, in certain cases, to their right to be reimbursed by the competent institution.

Article 22, which refers only to benefits in kind, applies this system to beneficiaries of pensions which may be payable under the legislation in one or more Member States. Where the pensioner is entitled to benefits in kind, those benefits are always to be *issued* by the institution of the country in which the beneficiary permanently or temporarily resides (Article 22 (1), (2) and (6)), but the final *cost* is to be borne by the competent institution. That institution is the institution of the place of permanent or temporary residence when one of the institutions liable for payment of the pensions is situated in that country (Article 22 (1) and (6) (third sentence)); where they are different, paragraph (3) lays down the conditions according to which the institution which will support the final cost is determined.

The reason for this distinction between the issuing of and the liability for bearing the cost of benefits is obvious. The person concerned must be able to receive such benefits on the spot, as soon as they are necessitated by his state of health, that is to say, as soon as the sickness risk materializes. One thus eliminates difficulties which could arise from a temporary residence—in the widest sense— in a country other than that in which the competent institution is situated, while leaving it to the latter to pay for the benefits after they have been issued. This appears to confirm that, as the very words used seem to indicate, 'benefits in kind' are those services to which an insured person is entitled in the event of maternity or sickness, including hospital treatment and the supply of medicines, whereas 'cash benefits' are payments made as compensation for loss of earnings resulting from incapacity.

But, as the Commission states in its observations: 'It would be contrary to the nature of things to put contributions or other payments towards the cost of insurance in the same category as expenditure incurred when the risks insured against materialize'. In other words, benefits in an insurance context are the compensation of whatever kind paid when the risk by that insurance actually occurs. One cannot place them on the same footing as expenses incurred to obtain—or to retain—insurance cover; the latter payments are made whether the risk insured against occurs or not, whereas the issue of benefits will arise only if the risk occurs.

It follows that contributions of the kind paid under Section 381 (4) of the German Law cannot be regarded as 'benefits in kind' within the meaning of Article 22. On this point I can but refer to the observations of the Commission which show the contradictions which would result if one wished to regard them as such.

The argument should, however, be taken one stage further. Such payments, in so far as they are made by way of contribution to the cost of health insurance, cannot, in my view, be regarded as benefits of that insurance. There is an inherent contradiction between the concept of contribution and that of benefit; the first is a condition precedent to the creation of a right,

the second presupposes the existence of a right.

There is a further question—though it lies entirely outside the question put by the German court—namely, whether the payment to a beneficiary of a pension of a contribution to the cost of his sickness insurance constitutes an old-age insurance benefit. When provision for the contribution is made by social security legislation, it is arguable that the payment is, in effect, a supplementary benefit for the beneficiaries of pensions. And it should be noted here that, according to Article 10 of Regulation No 3, pensions or death benefits payable under the legislation of one or more Member States shall not suffer reduction, modification, suspension, termination or confiscation by reason of the fact that the beneficiary is permanently resident in the territory of a Member State other than that in which the institution liable for payment is situated. Does that provision for the preservation of vested rights, the scope of which is defined and restricted by Article 10 (2), cover rights which are ancillary to a pension properly so called? This is a difficult question, but one which you cannot decide because it has not been put to you. Similarly, it is not for you to determine whether German legislation alone may provide for the maintenance of this contribution to the cost of sickness insurance when the person concerned changes his residence and becomes insured in another Member State. Today you can only interpret Article 22 of the Regulation within the limits of the question put by the Landessozialgericht.

I am of the opinion that the question should be answered as follows:

The benefits in kind referred to in Article 22 do not include the payments by which an institution liable for payment of pensions contributes towards the cost of sickness insurance entered into by the pensioner. The question of the costs of the present proceedings is a matter for the Landessozialgericht, Berlin.