OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 MAY 1966[1]

Mr President,
Members of the Court,

The preliminary ruling requested in this case requires not only the interpretation of certain provisions of Regulation No 3 of the Council concerning social security for migrant workers; it also requires, before you examine the questions put before you, consideration of whether the reference to the Court is a proper one, having regard to Article 177 of the Treaty.

Let me briefly go over the facts in so far as acquaintance with them is necessary for understanding the legal problem.

Mrs Vaassen, the widow of a Dutch non-manual worker employed in the mining industry, is entitled in that capacity to a pension paid out of the pension fund of the Beambtenfonds voor het Mijnbedrijf (BFM). As you were reminded during the oral procedure, this body was set up in 1952 under Dutch private law by all the organizations representing employers and wage-earners in the mining industry. The provisions concerning its operation have to be submitted to the approbation of the Minister responsible for that industry. As a pensioner residing in the Netherlands, Mrs Vaassen was also affiliated to the sickness fund which was maintained by the Beambtenfonds. When she moved to Germany in 1963, she first asked for her name to be removed from the register of the sickness fund. She was told that this happened automatically since only pensioners residing in the Netherlands were eligible, under Article 18 of the rules governing the BFM, to be affiliated. Then she changed her mind and requested instead that she be reinstated. This request was refused on the basis of Article 18.

Mrs Vaassen took her case to the Scheidsgerecht (Arbitration Tribunal) which has jurisdiction under Article 89 of the abovementioned rules to entertain appeals against the decisions of the management of the Beambtenfonds relating to the rights of members of former members of the fund. She argued that by virtue of Regulations Nos 3 and 4 of the Council she was still entitled to benefits of the type given by the sickness fund of the BFM. The latter asserted on the contrary that this fund, which was merely a mutual insurance organization and which was based on private law, fell outside the terms of the said Regulations, which applied only to 'legislation' concerning a certain number of insurance schemes specifically described therein.

It is to resolve this question that the Scheidsgerecht has referred to this Court a request for interpretation. However it did not do so without first examining its own right, or duty, to submit the case to you. It says that although it cannot be considered as a court or tribunal 'under Netherlands law' nevertheless this does not exclude the possibility that it should be regarded as a court or tribunal 'within the meaning of Article 177' of the Treaty. For according to Article 89 of the rules governing the Beambtenfonds, the Scheidsgerecht is the only body which can give judgments on any disputes which arise, and there is no appeal from its decisions. At all events it is for the Court to decide whether the Scheidsgerecht does or does not fall within the terms of Article 177.

Let me now dwell on this point as it comes prior to the examination of the questions which have been put to you. For you may only consider the latter if the reference to you is admissible. You may only give a preliminary ruling on the interpretation of the Treaty or of measures taken by the institutions of the Community in so far as Article 177 empowers you to do so, and subject to the conditions therein stated. Finally, where an interpretation of Article 177 itself is called for, it is only this Court which can give it.

Article 177 reads (in part) as follows:

'Where such a question (as to interpretation) is raised before *any court or tribunal of a Member State*, that court or tribunal may,

1 — Translated from the French.

if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before *a court or tribunal of a Member State*, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

Article 164 of the Treaty requires you to ensure that in the interpretation and application of the Treaty the law is observed. Article 177 gives you the means to do so by the direct cooperation which it establishes with the national courts, which, too, must apply Community law. But the procedure which it creates can only be set in motion by the national courts, and not by the parties to the main action, Member States, civil service departments of the latter, or by the institutions of the Community.

Thus it is in order to be sure that you can properly entertain the questions put to you that you must satisfy yourselves as to whether the Scheidsgerecht is indeed, *within the meaning of Article 177*, a 'court or tribunal of a Member State', and thus entitled to request you to give a preliminary ruling. As the Scheidsgerecht itself points out, for the exclusive purposes of this Article your interpretation need not necessarily always be the same as an interpretation given under national law, for the two things are distinct. Although the administrative organization of the courts of Member States and the extent of their jurisdiction are for the most part based on common principles, nevertheless they have been influenced by differing historical circumstances or by different legal concepts. Hence it comes about that in order to ensure the uniform interpretation and application of the Treaty, you may be led to recognize a body as a 'court or tribunal' for the purposes of Article 177, even though its own national legal system does not so consider it.

In the present case, as the Commission has well said, the question to be decided is whether, having regard to the general principles applicable in the different Member States concerning the organization of the administration of justice, the Scheidsgerecht possesses the fundamental characteristics of a body whose function is to settle disputes, and in particular disputes arising out of the application of a system of social security.

Let me say straight away that while it seems to me that the question calls for an affirmative answer, I agree with the Government of the Netherlands and with the Commission that this does not in any way settle the question, much discussed in legal doctrine, whether arbitration in general falls within the terms of Article 177. For in spite of being called an Arbitration Tribunal, the Scheidsgerecht has very little in common with such a body.

In order to classify the Scheidsgerecht one must look first at the rules governing it, and those governing the Beambtenfonds. These are to be considered as factual data which need neither be discussed nor interpreted. We must simply draw conclusions from them as regards Article 177. The Scheidsgerecht is not a group of persons to whom the parties, by agreement between themselves, confide the task of settling the dispute between them. It is a body set up on a permanent basis by the rules governing the BFM. I do not deny that the latter may be in the nature of a body established under private law. However its rules, both in their original and amended forms, must be approved by the Minister responsible for the mining industry. The same Minister has the duty of drawing up the Scheidsgerecht's Rules of Procedure, and naming its chairman and members. It is thus composed of members who are entirely independent both of the Beambtenfonds and of its members. The procedure followed, as can be seen from the extracts of the rules produced in the report of the hearing, is of a judicial character. It involves adversary procedure, oral hearings of the parties, and, where necessary, the hearing of witnesses and experts.

Whilst these matters are not in themselves decisive, it must be particularly noted that the function of the Scheidsgerecht is to give judgment on the decisions of the management of the BFM concerning the rights of members and former members or their survivors. It is the sole tribunal for all disputes as to insurance against medical expenses so far as regards non-manual workers em-

ployed in the mining industry. It thus settles disputes, and does so *according to rules of law*. Although this last point is disputed by the Beambtenfonds on the grounds that it would mean that the Scheidsgerecht could be bound to apply the regulations laid down by the Council, this is how the Scheidsgerecht itself interprets Article 89 of the Rules of the BFM, which forbid it to give a judgment based simply on considerations of fairness. But this is an interpretation of a provision of Netherlands law, which is therefore outside your jurisdiction. So long as the opinion of the Scheidsgerecht on this point is not overruled by another national court, you are bound to accept it as a fact. Other matters, however, appear less clear. According to Article 89 of the rules to which I have just referred, the Scheidsgerecht shall 'give judgments from which no appeal shall lie'. In its observations, the Beambtenfonds objects that the parties always retain the right to submit their disputes to the ordinary civil courts, and that therefore the Scheidsgerecht's decision only constitutes 'a binding opinion' over which the ordinary courts exercise 'marginal' supervision.

Without venturing into this discussion of national law, I shall simply observe that the presence of a power of supervision vested in a court does not necessarily mean that the body submitted to this supervision cannot itself be a court. It means only that it is not a court of last resort.

Obviously the Scheidsgerecht cannot be considered a court of the traditional type, but that is not surprising. In all countries the field of social security is one of those where the special courts depart most radically from the traditional model; it does not by any means follow that they are not therefore 'courts'. The factors which I have picked out show that the Scheidsgerecht is a judicial body duly representing the power of the state, and settling as a matter of law disputes concerning the application of the insurance scheme managed by the BFM. I shall later have to define this scheme in order to reply to the questions put to the Court. Meanwhile, in agreement with both the Government of the Netherlands and the Commission, I think that what I have said above is enough to enable you to consider the Scheidsgerecht as a 'court or tribunal' in the sense used in Article 177 of the Treaty. I therefore think that it is competent to lodge a request for interpretation with the Court.

I now come to the first question, which is put in the following terms:

'Is the scheme laid down in Chapter II of the Rules of the Beambtenfonds voor het Mijnbedrijf to be regarded as legislation, as defined in Article 1 (b) of Regulation No 3 and mentioned in Article 4 thereof? Furthermore can the said scheme governing sickness expenses come within the classification in Annex B (to which Article 3 of the said Regulation refers) which comprises "sickness insurance for mineworkers (benefits in cash and in kind in the event of sickness and maternity)"? Thus does Regulation No 3 (and also Regulation No 4) apply to non-manual workers employed in the Netherlands mining industry to whom the said scheme governing sickness expenses is applicable?'

Thus it must first be decided whether the term 'legislation' covers schemes such as the one at issue in the dispute pending before the Scheidsgerecht.

Article 1(b) says that the term means 'all laws, regulations *and other enforceable provisions*, present and future, of each Member State relating to the social security schemes and branches of social security set out in Article 2 (1) and (2)' of the Regulation. This covers both general and special schemes.

What matters here—though the Beambtenfonds does not seem to realize it—is the term 'enforceable provisions'. This expression, which came into being during the drafting of the European Social Security Convention, is evidently employed so as to take account of the fact that there is a certain amount of decentralization of the administration of social security in all the Member States to a greater or lesser extent. Laws and regulations do not cover the whole field of 'legislation' in the widest sense. Funds run otherwise than by the State also have their place in adapting or extending the structures provided by the State. In its observations the Commission has supplied the Court with many examples on this point. Furthermore these administrative institutions can consist of bodies established under private law, like the BFM.

It is indeed a fact that either for historical reasons or for reasons of political philosophy, it is often bodies of this nature which administer certain areas of the provision of social security benefits. Here again the file contains examples from several Member States. Article 1(e) says that 'the term "institution" shall mean, in respect of each Member State, the *agency* or authority responsible for enforcing all or part of the legislation', but it does not say that this agency must be one established under public law.

Taking another point—and the Commission is right to stress this—the juxtaposition of 'laws, regulation and other enforceable provisions' suggests a hierarchy and relations between them. Thus only those enforceable provisions are meant which, pursuant to the provisions of a law or a regulation, add to or replace that law or regulation. Such is certainly the case with a sickness insurance scheme established by the rules of a body which can even be one established under private law, but which is supervised by the State. If, by virtue of national law, such a scheme releases its beneficiaries from the obligation to participate in the general scheme, it constitutes, one of the 'special schemes' referred to in Regulation No 3.

It is, however, objected that when the general scheme only makes affiliation compulsory up to a certain level of income, the rules of this body can only replace it in so far as the worker concerned would have been compulsorily required to participate in the general scheme if he had not been affiliated to the special scheme, and that it would not be possible for the said rules to replace the general scheme in cases where the worker's affiliation to this general scheme was only optional. But this objection arises from a failure to realize that a set of rules amounting to 'legislation' cannot be regarded as outside Regulation No 3 on the gound that it provides that affiliation to a scheme may only be optional. This statement follows from your judgment in Case 75/63 (*Hoekstra, née Unger*) of 19 March 1964 (Rec. 1964, p. 366). When a voluntary insurance scheme is thus part of a scheme which, in its entirety, is subject to Ministerial approval, the whole of the scheme must be considered as being in substitution for the general scheme, and as having, accordingly, the character of an 'enforceable provision' in the same of Regulation No 3.

In replying to the first part of the question put to you, I find it difficult to define what must be understood by the term 'legislation' without at the same time straying to a greater or lesser extent into an interpretation of the rules of the BFM or of Netherlands law, which is beyond your jurisdiction. Similarly, it will be hard for your answer to retain that degree of abstract reasoning which the procedure under Article 177 calls for, when the Scheidsgerecht asks you whether the provisions governing sickness expenses appearing in Chapter II of the Rules of the Beambtenfonds may be classified under Annex B of Regulation No 3, referred to in Article 3 thereof.

As we all know, this Article states that Annex B specifies, for each Member State, the social security legislation in force in its territory at the date of the adoption of the Regulation of the Council, to which the Regulation applies.

So far as concerns the Netherlands, Annex B mentions in subparagraph (i) 'sickness insurance for mineworkers (benefits and cash in kind in the event of sickness and maternity)', and during the proceedings before the Scheidsgerecht, the Netherlands Minister for Social Affairs expressed the opinion that this formula 'covered' the special scheme for sickness insurance for non-manual workers in the mining industry.

It may be that the Commission is right in thinking that once the meaning and scope of the term 'legislation' have been determined, the question of the classification in Annex B becomes of secondary importance, because the force of this classification is merely declaratory. All it proves is the intention to apply Regulation No 3 to provisions such as the ones at issue in the dispute before the Scheidsgerecht.

Admittedly—and the Beambtenfonds has emphasized this in its observations—the Dutch text of the Annex does not say 'werknemers' (workers) but 'mijnwerkers' (mineworkers), and under Netherlands law this expression often excludes non-manual

workers. Should this be the position in this case, the non-manual workers would come under subparagraph (a) which covers sickness insurance in general, and thus come within Regulation No 3.

Whatever the truth may be on this point, the Annex is an integral part of the Regulation. This implies that the intention of the draftsman was that it should apply to a type of scheme which is at least analogous, because the sickness insurance scheme for mineworkers established by the Algemeen Mijnwerkersfonds is of the same type as that established by the Beambtenfonds for non-manual workers.

Finally—and there is no need to say much about this—I ought to point out that amongst the provisions of social security conventions which continue to apply notwithstanding Regulation No 3, are Articles 8 and 9 of Supplementary Agreement No 2 between the Federal Republic of Germany and the Kingdom of the Netherlands, dated 29 March 1951, concerning the insurance of mineworkers *persons treated as such*. Even if these provisions only cover a pension scheme which is a special scheme on the same footing as a sickness insurance scheme, the exclusion of this special scheme by a bilateral agreement is only comprehensible if the intended meaning of 'enforceable provisions' in Article 1(b) of Regulation No 3 be taken to include this special scheme. This is a final reason why the first question should be answered in the affirmative.

The second question, which assumes that an affirmative answer has been given to the first question, is as follows:

'Can it then be accepted that in this case the applicant is entitled to the benefits in kind referred to in Article 22 of Regulation No 3, and specified at the end of Article 22(2)? Can this be accepted even though under Article 18 (b) (1) of the Rules of the Beambtenfonds, according to the wording which it had at the relevant time, the only right conferred is the right to be admitted to insurance providing reimbursement out of the sickness fund for the cost of medical treatment, the provision of medicines and nursing?'

Clearly this question is badly drafted. First because it is not for the Court to decide whether Mrs Vaassen is entitled to social security benefits, but only to interpret the Regulation of the Council. Secondly because in referring to the condition of residence appearing in the text of the rules of the BFM, the Scheidsgerecht shows that what it in fact wants to know is whether Article 22 of Regulation No 3, which provides that benefits in kind payable under a sickness insurance scheme shall be paid to beneficiaries resident outside the territory of the State liable for the payment of the pension, is applicable notwithstanding the restrictive condition to which I have just alluded. This is the question which the Court is required to answer.

It must at once be made clear that contrary to the argument of the Beambtenfonds, the benefits in kind mentioned in Article 22 also include the provision of medical treatment in the form of reimbursement of expenses. Although the expression 'benefits in kind' has not been defined by the Regulation, the countries which practise this system (Belgium and France) have never doubted that Article 22 applies to this method of making provision to meet the burden of medical expenses.

That being the case, it is certain that a condition of residence for affiliation to a sickness insurance fund can never be imposed on active workers, because in accordance with Article 12 of Regulation No 3 such workers are subject to the law of the Member State in whose territory they work 'even if they permanently reside in the territory of another Member State'. Where a pensioner is automatically insured against sickness the result is the same by virtue of the combined provisions of Articles 12, 10 and 22. However the result is not clear when sickness insurance does not necessarily follow from membership of a pension scheme. For Article 12 is only concerned with active workers, and Article 22 only deals expressly with the right to sickness insurance benefit of a person entitled to a pension, and not with the right to be affiliated to a sickness insurance fund.

But in order to interpret Article 22, one must read it in the context of the whole of Regulation No 3. Presumably it is not enough to observe that this Article, which is a part of the chapter on insurance against

'Sickness, Maternity', is intended to adapt such insurance to the position of persons entitled to pensions. It cannot be deduced from this that the solution given in Article 17 for active workers is to be extended to such persons.

More generally, it may be argued that the intention of Article 4 (General Provisions) is to treat a pensioner in the same way as an active worker. This is because it provides that the 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 line of reasoning is strengthened by the fact that the right to a pension arises from a worker's having been affiliated to the social security legislation during his active working life.

One argument in particular strikes me as decisive. It is that when the authors of Regulation No 3 intended that the right to benefits should cease upon transfer of permanent residence abroad, they have expressly said so, as witness Article 10(2). Thus the absence of any express statement in Article 22 of any exception as regards affiliation to sickness insurance schemes may be interpreted as forbidding national schemes from imposing a residence requirement on persons subject to Regulation No 3.

Thus it seems to me that the second question also calls for an affirmative answer. However, it will be noted that in this case the result which is reached is to apply Regulation No 3 concerning migrant workers to a worker's widow, who has never worked herself and who, after having obtained her widow's pension, transfers her residence to another Member State for reasons other than to take up gainful employment. The Beambtenfonds asks whether that is a reasonable result. One may reply that Article 4 provides that the provisions of the Regulation apply *to the survivors* of wage-earners or persons treated as such. The intention behind this very sweeping proposition is to eliminate anything which could, even as a mere possibility, restrict the free movement of workers. It does not seem that there is any reason for fearing, contrary to what the Beambtenfonds seems to think, that the advantage to be had from greater medical benefits might of itself induce the survivor of a worker to make a change of residence.

In short, therefore, I am of the opinion that the following reply should be given to the Scheidsgerecht:

— as to the first question: that any set of rules which creates and regulates a special security scheme must be considered as 'legislation' within the meaning of Regulation No 3, even when the scheme has been conceived and is managed by a body established under private law, provided that this body is subject to the control of the Government through its officials, and provided also that for those who are affiliated either compulsorily or optionally to it the scheme replaces the relevant general social security scheme in accordance with the conditions laid down by national law;

— as to the second question: that Article 22 of Regulation No 3 never allows the right to the payment of benefits in kind under sickness insurance to be subject to any condition of residence.

Finally, it is for the Scheidsgerecht to rule on the costs of the present proceedings.