

cannot depend on the existence of a reciprocal agreement with the Member State of which that worker is a national.

Lecourt

Mertens de Wilmars

Donner

Monaco

Pescatore

Delivered in open court in Luxembourg on 22 June 1972.

A. Van Houtte

R. Lecourt

Registrar

President

**OPINION OF MR ADVOCATE-GENERAL MAYRAS
DELIVERED ON 17 MAY 1972¹**

*Mr President,
Members of the Court,*

Mrs Rita Frilli, an Italian national, resides in Belgium. During the years 1966 and 1967 she worked there as an employed person. She is 64 years old and receives an old-age pension of 350 Belgian francs per month, the small amount of which is due to the fact that she had been employed for only a short period.

As the Law of 1 April 1969 established a guaranteed income for old people, Mrs Frilli asked for the provisions of that Law to be applied to her. Her claim was rejected by the Department of Old-Age Pensions on 5 April 1971, the reason being that under Article 1(2) of the Law of 1 April 1969 'every recipient shall either be of Belgian nationality or a national of a country with which Belgium has concluded a reciprocal agreement concerning this matter, or a stateless person, or a refugee recognized as such'. Italy, the country of which Mrs Frilli is a national, has not made such a reciprocal agreement. Mrs Frilli referred this decision to the Tribunal du Travail, Brussels, and pleaded

first the provisions of Article 7(2) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, according to which a worker who is a national of a Member State shall, in the territory of other Member States, 'enjoy the same social and tax advantages as national workers', and secondly Regulation No 3 of the Council of 26 September 1958 concerning social security for migrant workers. In a judgment of 16 December 1971 the Tribunal du Travail, Brussels, refers the following two questions to this Court for a preliminary ruling under Article 177 of the Treaty of Rome:

- (1) Is the guaranteed income granted by virtue of the Belgian Law of 1 April 1969 a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?
- (2) Is the guaranteed income, which is a non-contributory social benefit granted by the State to old people, by virtue of the same Law an old-age benefit within the meaning of Article 2(1) of Regula-

¹ — Translated from the French.

tion No 3 or is it a social assistance benefit within the meaning of Article 2(3) of this regulation?

Such are the circumstances in which the Court will have to decide the questions whether a non-contributory old-age benefit of the kind established by the Belgian Law constitutes a 'social advantage' within the meaning of Regulation No 1612/68 or whether this benefit is to be treated as assistance or social security within the meaning of Regulation No 3. Naturally enough, it is not for the Court to decide whether this national law applies to Mrs Frilli's case, nor to consider whether the Belgian Law accords with Community law. The reference made by the Tribunal du Travail asks whether certain provisions of the Community regulations mentioned apply to the Law of 1 April 1969. The Court has already examined a similar question, particularly as regards the Dutch *Algemene Weduwen- en Wezenwet* (General Widows' and Orphans' Insurance Law) (judgment of 15 April 1964, *van der Veen v Bestuur der Sociale Verzekeringsbank*, [1964] ECR 565).

Again, in this case a problem on the interpretation of Community law must be solved by seeking a legal classification of the Belgian Law as regards the provisions of the regulations in question, which were adopted in application of the Treaty of Rome.

What is the subject-matter of those regulations?

The first, in the order in which the questions have been referred to you, (Regulation No 1612/68) directly applies the principles laid down by Article 48 of the Treaty; it was issued by the Council in accordance with Article 49 and its purpose is to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work, and also, of course, to give effect to the right of such workers to move freely within the Community for the purpose of employment, subject to limitations justified on grounds of public policy, public security or public health. Under Article 7 of the regulation, a worker who is a national of a Member

State may not, in the territory of another Member State, be treated differently from national workers in respect of any conditions of employment and work and he must enjoy there 'the same social and tax advantages as national workers'.

But as is moreover already implied by the heading of Title II of this regulation '*Employment and equality of treatment*' the 'social advantages' covered by Article 7, which is part of Title II, are those connected with employment and consequently must be available to workers in employment.

The objective of the regulation is to see that workers from other Member States are treated in the same way as national workers as regards access to available employment and conditions of work and employment, but also with regard to all the factors which make up the position of national workers in the social field even including the right—which is sometimes only theoretical—to accommodation.

Of course, Article 48(3)(d) also gives workers from other Member States the right 'to remain in the territory of a Member State after having been employed in that State', but apart from the fact that the interpretation of Regulation No 1251/70 of the Commission, which implements this provision of the Treaty, is not at issue in the present case, it is clear that questions concerning social security benefits of whatever kind could only be settled—and have in fact only been settled—by applying Article 51 of the Treaty, and not Article 48. Certainly the Council adopted Regulation No 3 on the legal basis provided by Article 51. I therefore agree with the view expressed by the Commission and by the Belgian Government that the concept of 'social advantages' within the meaning of Article 7 of Regulation No 1612/68 cannot be likened to social security benefits.

On the other hand, Regulation No 3 is directly derived from Article 51 of the Treaty of Rome, which is the necessary corollary to Article 48, and which imposed on the Council the duty to adopt such measures in the field of social security as are necessary to secure, in particular, for migrant workers (or those who have emigrated) payment of social security benefits

within the territory of the Member State in which they reside. This covers not only workers in employment but also, indisputably, persons who have settled and remained in the territory of a Member State even when they are no longer carrying on any occupational activity. This follows from the kinds of benefits covered, which are the same as those mentioned in Standard 102 of the International Labour Organization amongst which old-age benefits are listed.

Therefore I think the real legal ground of the problem is to be found in the second question referred by the Tribunal du Travail, Brussels, to this Court.

Thus I must now examine whether the benefit described as 'guaranteed income', established by the Law of 1 April 1969, must be classified as a social security benefit or as a social assistance allowance for the purposes of Regulation No 3, because Article 2(3) of this regulation expressly provides that the regulation does not apply to 'social assistance and medical aid'.

Head I

Interpretation of the provisions of Regulation No 3 with regard to the distinction between social security and social assistance

It is necessary to note first of all that the Council has not given a definition of social assistance as distinct from social security either in Regulation No 3, which was in force at the time when Mrs Frilli put forward her claim to the Belgian authorities for payment of the guaranteed income, or in Regulation No 1408/71, which is intended to replace Regulation No 3. Nor is any such definition to be found in the case-law of the Court. The Court has not so far had occasion to examine this problem even though it seems to me that valuable guidance can be found in its judgments on the spirit in which it has already interpreted the provisions of Regulation No 3. At all events it strikes me as essential to enquire at the outset whether it is possible to find sufficiently reliable and precise criteria for

the distinction between the two kinds of social protection consisting in social security on the one hand and social assistance on the other. In doing so I shall have to reflect on the development of the concept of social security. I shall then attempt to clarify whether, taking into account the criteria for a possible distinction, the grant of the 'guaranteed income' is to be treated as a social security benefit within the meaning of Community law.

Section I

Would it be right to start with the idea, found in the writings of Professor Dupeyron, that the expression 'social security' does not of itself have any precise meaning? Such a statement would have been an exaggeration if the author had not modified it by saying that 'to the extent to which the expression does indeed have a meaning, this is not just the meaning commonly attributed thereto by experts, but also that attributed to it by governments'. In fact this amounts to acknowledging that, like all human institutions, social security has a continually changing content which in fact depends on what certain legislation and certain procedural practices cover and express at a given time.

The truth is that the prevention of and compensation for social risks have been dealt with and are still dealt with in different ways:

- first, by individual savings, whereby a person foregoes present purchasing power so as to be able to consume in the future. This presupposes a sufficiently high income and monetary stability; ultimately this system makes no contribution to spreading the burden;
- by assistance, in the classical sense of the term, which stems from the duty of charity—indeed it was the prerogative of the church before being taken over by the public authorities—and which presupposes a request from the person in need, and is or was until recently still of a discretionary nature;

- by the introduction of the concept of liability, which safeguards persons against the injurious consequences of certain acts of others, and which was the basis for the system of compensation for industrial accidents;
- finally, by insurance and group protection schemes which have replaced personal savings and public charity in ever-increasing sectors; in this system protection is ensured by spreading the burden over all the insured persons or members of the group scheme; it is financed by individual contributions.

Social security grew out of social insurance schemes limited originally to the working class, and then progressively extended to all persons in employment in the years preceding the Second World War. Indeed it is generally agreed that the expression 'social security' first appeared in the American Social Security Act of 1935, which was already devised as a system guaranteeing a minimum income, and it bore the imprint of the 'New Deal' and of President Roosevelt's ideas.

The Beveridge Report, based on the aim of freeing everybody from need, gave expression to the major principles of a policy for social security: extension of the protection to the whole population and flat-rate benefits.

Not long afterwards, in 1948, the Universal Declaration of Human Rights brought out a definition of social security and perhaps this definition is the broadest one. The Declaration provides that

'everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

Convention No 102 of the International Labour Organization applies the concept of social security in a more concrete manner by defining it as the protection of

persons against a series of events described as 'social risks', and gives a list of them. These include physical risks such as disability and old-age which reduce the capacity for work, and thus affect a person's standard of living.

Who would deny today that the protection of old people as such forms part of social security?

Thus the right to social security may be defined as follows:

- first, as a right belonging to every person, not only to the citizens of a country, but also to migrants protected by bilateral or multilateral agreements, as well, of course, as by Community law;
- secondly, as covering in practice not only the right to work and protection against unemployment, but also and more generally the right to an adequate standard of living.

Thus the purpose of social security is not merely to ensure the 'primary' needs of individuals, but also their consumer needs, that is to say, in brief, to guarantee them a certain standard of living. One of the objectives of social security consists in the improvement of the living standards of individuals and families and as a result in the reduction if not the elimination of social inequality by means of a redistribution of incomes.

Are these not also the goals of the laws of the Member States of the Community, particularly as regards old-age benefits, in that the laws of these States seek to achieve a gradual extension of the protection against the risks of old-age to the whole working and non-working population while at the same time the financing of that protection is increasingly provided by revenue from taxation?

Bearing this in mind, although the modern concept of social security demands generalized protection, either through the co-ordination and extension of existing schemes or the establishment, as was the case in Belgium in 1969, of new schemes applicable to the whole population, that extension of the scope of social security benefits, particularly with regard to old-

age, has not brought about the disappearance of assistance schemes. As Mr Guy Perrin¹ has pointed out, this competition between different protection schemes presents serious problems in the application of international law on social security or, as in this case, of Community law thereon. In fact, Community law, just like the international conventions, does not apply to assistance allowances; these are expressly excluded by Article 2(3) of Regulation No 3. Yet to the extent to which security, replacing earlier social insurance schemes, connotes a constantly broadening concept, it is more difficult to distinguish it from assistance, especially since the latter has itself undergone profound changes both in its nature and its procedures.

At the beginning assistance consisted mainly in the discretionary grant of help to persons incapable of meeting their own needs, and could therefore be described as 'remedial' in that it operated mainly to relieve individual distress. But it has undergone a radical transformation as compared with what it represented in the last century. From the moment that public assistance benefits ceased 'to be dependent on the discretion of the authorities and became a personal right, the traditional distinction, based on the concept of a "right to benefit", between social insurance and assistance lost its main justification' (Perrin, *op. cit.*). Social insurance was based in fact on the concept of a personal and absolute right, justified by the insured person's contributions. Assistance, on the contrary, only applied a contingent right subject to the proviso of insufficient means, 'the nasty, naughty means test' according to Beveridge, and it did not depend on any contributions from the person assisted. Such a clear-cut distinction no longer explains the present relationships between social security and social assistance.

The very concept of a 'personal right' in social insurance has been replaced by a concept of social right as a result of the transfer of the burdens which it places on the community.

Similarly it is often the case today that in social security schemes *stricto sensu* the

right to benefit is subject to a means test. Some laws even use the two methods for awarding similar benefits: this is the case in Canada and in New Zealand as regards aid-age benefits. In France, the new social aid scheme, which has replaced public assistance, makes it no longer possible to define assistance by the lack of precise conditions for the award of benefit and for the amount of relief. Conversely, various social security institutions may grant supplementary benefits and the administrative bodies may to a certain extent themselves decide how much shall be paid and in what circumstances, thus fitting the benefits to each individual case, as with assistance.

As for the means of financing, a comparative study shows a similar development, narrowing the difference between social security and assistance. Under the traditional system, the expenditure on assistance was paid out of public funds whereas the financing of social security benefits was based entirely on the contributions paid by insured persons and employers.

At present the State intervenes more and more frequently, by means of the budget, in the financing of expenditure on social security. This change is to be explained by a view of social security which has been broadened into a real 'monopoly of assurance', involving compulsory solidarity imposed at national level. The payment of contributions is no longer a safe criterion of social security schemes.

However there is one characteristic of assistance which has not changed and which should not be overlooked: it is its supplementary or subsidiary nature in relation to social security. This particular feature is to be seen most clearly in the fact that when the level of the means of the person assisted is calculated maintenance payments are taken into account as are the legal remedies available to the authorities responsible for assistance against those under an obligation to make maintenance payments. On this point it should be noted that taking into consideration the obligation to make maintenance payments is not just an unvarying element for the purposes of assessing means; its purpose is to maintain

1 — Les prestations non contributives et la sécurité social in 'Droit Social', March 1961.

the priority of family assistance, which is founded on the civil law, over public assistance.

The fact that public assistance is of a subsidiary nature also appears from the relationship established between the bodies dispensing assistance and other institutions for social protection; the former usually only act if the latter cannot provide the persons concerned with a minimum standard of living.

Assistance bodies are not only in most cases subrogated to the rights of the recipients, but also have power to recover the allowances which they have paid out either from the assisted person himself when his fortunes improve, or from his estate, or even from any legatee or donee.

Are these characteristics enough to deduce a satisfactory test for differentiation? Certainly they are a useful indication, but I cannot go so far as to say that they are decisive. For, to take an example, the French Law on the national collective liability fund, which concerns old-age benefits, provides for the grant of a supplementary allowance, granted subject to a means test, and upholds the priority of claims for maintenance payments, while also creating a charge in favour of the fund secured on the property or on the estate of the recipients. Yet this legislation has always been considered as covering social security, even though at the beginning, at least, the financing of the national collective liability fund drew much more on the public purse than it does today. Moreover the Court itself has already acknowledged that this non-contributory scheme must be classified as social security for the purposes of Regulation No 3. It is a fact that it was listed in Annex B to that regulation (judgment of 7 May 1969, *Caisse Régionale de Sécurité Sociale du Nord de la France v Torrekens*, [1969] ECR 125).

Likewise, the supplementary allowance granted under the national collective liability fund is intended to supplement social aid allowances, as well as disability pensions, and old-age benefits payable under the general social security scheme.

Therefore the fact that assistance is of a subsidiary nature compared with other kinds of social protection is not by itself a

valid criterion. Nevertheless it should be noted that assistance, according to Mr Guy Perrin, 'constitutes a supplementary form of protection the function of which, until it is effectively reabsorbed into social security properly so-called, consists in granting *secondary aid* to persons insufficiently protected by social security and to persons whom it does not yet protect or whom it no longer protects'.

Thus, faced with the two-fold development which has on the one hand affected social security—a tendency to extend its application and the guarantee of a minimum standard of living—and on the other assistance—the recognition of a genuine guaranteed personal right—the attempt to find sufficiently rigorous criteria so as to be able to distinguish between the two concepts appears to yield rather disappointing results.

Section II

I must therefore turn to Community law in order to look for the true grounds for a decision.

A — As I have already said, one would also look in vain in Regulation No 3 for a criterion for distinguishing between social security and social assistance and the same moreover would be true of Article 51 of the Treaty of Rome.

But it should first be noted, merely from the point of view of textual interpretation, that the Council certainly intended to give the concept of social security the widest possible meaning.

Several of the general provisions of the regulation lead to this conclusion, particularly those determining its scope.

Thus the word 'legislation' applies not only to the 'laws and regulations', but also to the 'enforceable provisions' of each Member State.

Thus, Article 1 of the regulation refers not only to present but also to 'future' legislation in the Member States, because its authors were aware of the evolutionary nature of social security.

Thus, the list set out in Article 2(1) applies

to all legislation governing, in effect, all benefits normally provided by legislation on social security in developed countries including, of course, old-age benefits.

Thus, the social security schemes referred to in Article 2(2) are general as well as special schemes and contributory as well as non-contributory schemes.

Moreover, provisions of this kind only reflect in Community law the tendency, noted in all the national legal systems, to extend the scope of social security and to broaden the protection which it aims to provide.

Thus merely by looking at the way in which the regulation is drafted one is led to the conclusion, *a contrario*, that the exclusion of 'social assistance and medical aid' set out in Article 2(3) can only be interpreted restrictively.

B — Coming now to the case-law of this Court, I think it is sufficient to take a quick look at the most typical of the judgments delivered on this subject to come to the conclusion that the Court itself has given Regulation No 3 a liberal, if not even far-reaching interpretation.

Is it not the case that, as regards the laws on social security covered by this regulation, the Court has decided that the Dutch *Algemene Weduwen- en Wezenwet* (General Widows' and Orphans' Insurance Law), which set up a general scheme of insurance against premature death granting benefits to survivors, was covered by Regulation No 3 even though this Law was only adopted after the entry into force of that Community regulation and was not notified in accordance with Article 3(2) (judgment of 15 July 1964 in Case 100/63, *Mrs J. Kalsbeek (née J. G. van der Veen) v Bestuur der Sociale Verzekeringsbank* [1964] ECR 565)?

Likewise, in Case 24/64 (*Miss A. M. Dingemans v Bestuur der Sociale Verzekeringsbank* [1964] ECR 647), the Court decided, with regard to another Dutch law known as the *Interimwet* (Law on Persons in Receipt of Disability Pensions) of 19 December 1962, that the concept of invalidity benefits is to be interpreted widely as including those granted for the purposes of maintaining or improving earning ca-

capacity, other than those paid in respect of industrial accidents or occupational diseases.

In another connexion, concerned with the definition of the word 'workers' within the meaning of the said Regulation No 3, the Court has expressly stated that this concept is not limited solely to migrant workers *stricto sensu* or solely to workers required to move for the purpose of their employment (judgment of 9 December 1965, *Hessische Knappschaft v Maison Singer et Fils*, [1965] ECR 965).

Finally in its judgment of 30 June 1966 in the *G. Vaassen (née Gobbels)* case ([1966] ECR 261), the Court decided that a sickness insurance scheme run by an institution established under private law, since it is an enforceable scheme, falls within legislation on social security within the meaning of Regulation No 3 when it aims to supplement or be a substitute for laws and regulations on social security.

Thus you have elaborated a broad conception of the scope of Regulation No 3, both as regards the laws and benefits covered and as regards the range of recipients covered by that regulation.

C — In fact, the thread running through this case-law brings me back to the essential reason for deciding what it is that flows from Articles 48 and 51 of the Treaty of Rome. The intention of the authors of the Treaty in requiring the Council, in Article 51, to adopt a regulation on social security in favour of migrant workers was to ensure the establishment of freedom of movement for these workers, which was laid down as a primary object with regard to the attainment of the Common Market. Article 51 and, automatically, Regulation No 3 of the Council, cannot be dissociated from Article 48; they even derive therefrom in so far as they contribute to ensure its implementation, notably by the payment of social security benefits to all residents, without their having cause to fear discrimination on grounds of nationality.

Is it not the case that the principle of equality of treatment established and enforced by Community law is not only a basic right enjoyed by migrant workers, but within a wider context is also a principle

common to all coordination of social security legislation and common to most of the agreements concluded in this field, notably Convention No 97 of the International Labour Organization on migrant workers?

Although, therefore, in concluding these initial observations I am bound to confess that I have not been able to elicit either from positive law or from case-law a sufficiently precise criterion or set of criteria for making a *categorical* distinction between the concept of social security on the one hand and the concept of assistance on the other, nevertheless in my search I have become convinced that the concept of social security exerts an 'attraction' over the other forms of social protection, and in particular over assistance.

Let me explain what I mean by this word 'attraction' by making a comparison: the Court is aware that French administrative case-law recognizes that the concept of public employment is of an 'attractive' nature in the precise and limited sense that it is confirmed that administrative tribunals have jurisdiction *as soon as an element of public employment is involved*. Transposing this judge-made theory, can it not be said that after invading and occupying the field formerly reserved to social insurance schemes and replacing them, social security has enveloped and submerged a substantial part of the area of protection formerly reserved to public assistance? This observation leads me to the view that where, in a given scheme of social protection, elements are found, amongst others, which are derived from the spirit and the procedures of social security, such elements are decisive and must entail the legal classification of 'social security' for the purposes of Community law. In fact, the distinguishing criterion can no longer be found either in a personal right to a benefit, nor in the 'state of need' of the recipient, still less in the system of financing, that is to say, in the contributory or non-contributory nature of the scheme in question; the truth is that one of the objectives of social security, already described by Beveridge, is to guarantee everybody and especially old people with a guaranteed minimum income.

The objection will, however, be made that such a wide concept of social security would lead to the inclusion therein of all the forms of assistance which are still in force, at least on a supplementary or subsidiary basis. That is not what I mean, and I will presently show what limits should be set on the 'attractive' nature of the concept of social security as regards the interpretation of Regulation No 3.

Before doing so it is, however necessary to analyse the Belgian Law of 1 April 1969 and obtain from this analysis the conclusions which will enable me to classify it under Community law. This is precisely what the Tribunal du Travail, Brussels, has asked the Court to do.

Head II

Application of the concept of social security to the Belgian Law of 1 April 1969

Section I — Analysis of the Law

Apart from the requirements as to nationality on the one hand and as to residence on the other, this Law applies to all persons who have reached retirement age. This age is fixed, as in the compulsory old-age pensions scheme for employees, at 65 for men and 60 for women.

The purpose of the Law is to grant these old people a guaranteed income, the amount of which was initially fixed at Bfrs 20 000 per annum for a single person and at Bfrs 30 000 for a married man living with his wife. These rates are linked to the retail-prices index and may also be increased by Royal Decree passed by the Council of Ministers.

The guaranteed income is only granted on request, after a means test has been carried out with regard to the person concerned, and, where applicable, to his spouse.

Generally speaking all means are taken into account whatever their nature or origin, with the exception of certain benefits.

The guaranteed income is financed by the State out of the budget.

The scheme is managed by the National Fund for Retirement and Survivors' Pensions.

The Law of 1 April 1969 marks an important stage in the development of social protection in Belgium.

A — Old-age insurance which was at first limited as in most countries to employed persons, has thus been extended to the whole population. Breaking all bonds with the concept of a 'pension', which is subject to the pursuit of employment, a certain length of working life and to the payment of contributions, the new law has introduced a 'guaranteed income' free of these conditions.

Thus the Belgian legislature has enshrined the assumption by the State of the responsibility for a general guarantee of a minimum standard of living along the lines laid down by the International Labour Organization

The characteristics of this legislation show that it has close links with social security schemes, from which it has undeniably borrowed a number of features.

1. First, as regards the age of entitlement the guaranteed income is similar to the compulsory old-age pensions scheme (Article 1).

2. Secondly, notwithstanding the fact that it is only granted to persons whose means are below a given level, as is generally the case with assistance, it should be noted that certain means are not taken into account, notably 'benefits which come under the category of public or private assistance' (Article 4).

Thus the legislature itself made an express distinction between the guaranteed income and assistance allowances. It follows from this that the guaranteed income is not really subsidiary in nature.

3. Similarly, maintenance payments payable between parents and children are not deducted, although their deduction is, as I have shown, one of the characteristics of assistance. Consequently the Fund for Old-age Pensions is not subrogated to the rights of the recipients of the guaranteed

income against those liable to make maintenance payments.

4. Even more interesting is the fact that in calculating the amount of means available, pensions received under private old-age pension schemes are not taken into account.

However retirement and survivors' pensions paid under a compulsory retirement scheme are deductible from the amount of guaranteed income.

This means that in the mind of the legislature the guaranteed income and these compulsory old-age benefits are *homogeneous* because the former is added to them or even, depending on the circumstances, replaces them.

5. Finally no means of recovery is provided for in favour of the paying institution where a person who has received the guaranteed income has at his disposal as from a certain date an income exceeding the level at which the guaranteed income is payable. In such a case, payment of the guaranteed income merely ceases. Similarly no means of recovery is provided from the estate of a recipient.

It can thus be seen that the guaranteed income is not intrinsically different, either in nature or as regards the circumstances in which it is payable, from other old-age benefits classifiable as social security.

B — As regards organic or formal links with social security, interesting indications are also to be found. Even though the guaranteed income is only granted at the request of the person concerned, this request is 'considered as made pursuant to the scheme for retirement and survivors' pensions for employed workers' (Article 15). The claim is investigated under the same conditions. Payment is made by the National Fund for Retirement and Survivors' Pensions (Article 17). Where entitlement to the guaranteed income is contested the pensions tribunals have jurisdiction, that is, the Labour Tribunals since the entry into force of the Belgian Judicial Code. Finally, although payment is entirely financed by the State, it is a fact that the same is also at least partially true of

certain social security benefits. Moreover, non-contributory social security schemes are expressly covered by Regulation No 3 of the Council.

Thus my analysis of the Law of 1 April 1969 seems to me in itself to elucidate sufficiently the question which the Tribunal du Travail, Brussels, has asked the Court.

C — Ought I, further, to have recourse to the *travaux préparatoires*, notably the parliamentary debates, in order to look for other indications? I do not think so. These debates do not yield any precise information. Although, in reply to a question asked by a Member of Parliament, the Minister for Social Security declared that he did not see any reason why the Law should not be described as a 'law on assistance', this reply is not such as to throw light on the objective classification of the guaranteed income. On the other hand, the extract from the general report on social security published in 1970 by the Ministry for Social Security takes us no further. This report, which is devoted to the examination of certain legislative measures adopted during the course of 1969 in the field of social security, and of the guaranteed income in particular, says, as I must admit, that the guaranteed income cannot be considered as a social security benefit in favour of former workers; the report also says that the concepts upon which the Law is based are akin to those underlying social aid. However the report says, on the other hand, that the new law shows that the Belgian Government has committed itself to a new course in that for the first time a *Belgian social security law* has, by ensuring a minimum income for individuals, enshrined the principle of generalized protection for the population.

D — I come now to the Belgian juridical writers,¹ who draw attention in particular to the links which exist between the Law of 1 April 1969 and certain earlier provisions relating to private pension schemes made under the Law of 12 February 1963.

Article 20 et seq. of this Law, which were expressly repealed by the Law of 1 April 1969, provided for increases, to be borne by the State, in old-age and widows' pensions. Payment was subject, in particular, to a means test.

Furthermore it was necessary for the claimant to have made payments as a member of a private scheme.

The Law of 1 April 1969 profoundly altered this system and the authors see in this development and in the recognition of a genuine right to a guaranteed income free from any uncertainty 'the difference which divides an elementary method of social protection such as assistance from a modern social security policy'. They note also that the Law of 1 April 1969 'took over from the provisions of the Law of 12 February 1963', experience having shown that the latter provisions only gave 'very imperfect protection to the socially deprived'.

Finally it should be noted that until the entry into force of the Law of 1 April 1969 Belgian nationals in receipt of a retirement pension for employed workers under the compulsory general old-age insurance scheme could also obtain the increases in pensions provided for by the Law of 12 February 1963 when their pension did not reach a sufficient level. However, taking into account the principle of equality of treatment between Belgian workers and workers who are nationals of other Member States, these increases would certainly have been payable to nationals of the Member States for it strikes me as beyond doubt that these benefits were in the nature of social security.

Therefore it would be paradoxical if the repeal of these increases, which had been introduced by the Law of 1963, by Article 25 of the Law of 1969 and their replacement by the new guaranteed income scheme which, according to its authors, reflects a more advanced social attitude, has resulted in making the situation of migrant workers worse, causing them to lose rights which they had already acquired, and leading to their being treated worse than, to take

¹ — Pierre Denis - droit de la sécurité social
Paul Horion - Nouveau précis du droit social belge

particular examples, stateless persons and refugees.

Therefore because of the very nature of the benefit introduced by the Law of 1 April 1969 and the organic links connecting it to the old-age pension scheme and finally because of the fact that it takes over from certain provisions of the Law of 1963, the Law of 1 April 1969 closely resembles the concept of social security, and constitutes an extension thereof to a certain section of the population, namely old people.

E — To my mind these considerations are enough to show that this Law falls within the scope of Regulation No 3 of the Council. But there is more to be said.

On the one hand, it might be imagined that the Law of 1 April 1969 has replaced all earlier legislation on assistance. Yet this is not so. The Law of 10 March 1925, which set up a national assistance board in each commune is still in force. The main duty of the boards is to help the poor, but the Law leaves them the right to provide help in the form and to the extent most appropriate for each individual situation. The state of need of the person given assistance is determined exclusively by the board. A poor person who claims that a decision of the assistance board has affected him adversely is entitled to take his case before a conciliation committee, but as this committee consists of one member of the local council and two members of the assistance board, it cannot be regarded as a truly independent tribunal. Thus it can be seen that Belgian legislation on assistance *stricto sensu* differs clearly in certain aspects from schemes forming part of social security.

F — *On the other hand*, as the Commission has pointed out in its oral observations, on 25 July 1969 the Belgian Government informed the General Secretariat of the Council of Europe that the Law of 1 April 1969 on the guaranteed minimum had been adopted and gave notice to the Council of its intention to have this scheme included in Annex I to the European Interim

Agreement on Social Security Schemes relating to Old-Age, Invalidity and Survivors. I would remind the Court that this Agreement was signed in Paris on 11 December 1953 by the Governments of the Member States of the Council of Europe, including Belgium, and that it applies to all laws and regulations in force on the date when it was signed or coming into force thereafter concerning, in particular, old-age benefits. The Agreement expressly covers contributory and non-contributory schemes; on the other hand it excludes social assistance, as does Regulation No. 3 of the Council of the European Communities. The Governments of the signatory States are required to give notice to the Secretary-General of the Council of Europe of any law or new regulation not yet included in Annex I within three months from the date of their publication. This is precisely what the Belgian Government did within three months from publication of the Law of 1 April 1969.

Admittedly, the Belgian Government included a reservation under which the guaranteed income, which is a non-contributory benefit subject to a means test, will only be granted 'to nationals of the contracting States whose legislation permits Belgian nationals to obtain equivalent advantages'. However this reservation, which to my mind has no significance for Community law, cannot hide the admission thus made that for the purposes of applying the European Agreement on Social Security the Law of 1 April 1969 is not concerned with social assistance, but with social security.

Could the Belgian Government adopt a different position as regards Community law?

I therefore suggest that you reply to the second question referred by the Tribunal du Travail, Brussels, by saying that the 'guaranteed income' granted under the Law of 1 April 1969 to all persons who have reached the normal retirement age and subject to the requirements which I have just analysed is in the nature of an old-age benefit for the purposes of Article 2(1)(c) of Regulation No 3 of the Council.

Section II

Limits to the class of persons covered by Regulation No 3

However this reply by way of principle calls for precise details and the limits to the solution which I have reached ought to be stated clearly.

In fact the grant of the guaranteed income to Belgian nationals is not subject to any conditions other than those relating to age and inadequacy of means. In particular there is no requirement that they should have been engaged in occupational activity, whether as employees or otherwise.

Should one therefore accept that nationals from other Member States of the Community who are settled in Belgium can legally claim the advantages of the Law of 1 April 1969 subject to these conditions alone?

Would it be permissible for persons who arrived in Belgium at an age approaching retirement but who never worked there to be able thus to enjoy the advantages of an exercise in national solidarity?

One could be tempted to say that this is in a sense the price that the most developed industrial States have to pay and that the very fact that they are developed leads them to call upon foreign workers; one might argue that such States are thus required to shoulder burdens which only an appropriate Community equalization mechanism could distribute fairly, taking into account the resources of each of the Member States.

But there is no need to pursue a question which the Community legislature will doubtless have to resolve one day because in my opinion the effect of the very wording of Regulation No 3, the interpretation of which is at issue, is to limit the consequences which could result from an unduly broad solution in principle.

For it is a fact that although the principle of equality of treatment, the basis of this Community regulation, undeniably requires nationals of a Member State resident on the territory of another Member State

to be treated in exactly the same way as nationals of that Member State, this does not mean *all* Community nationals whatever their occupation and whatever the circumstances in which they have come to settle in a country other than their own.

Although the material scope of Regulation No 3 is, as has been seen, particularly extensive, as regards the determination of social security laws covered and the benefits paid, this regulation only concerns, by reason of its subject-matter, one category of persons: these are, in the actual words of Article 4 of the regulation, 'wage-earners or assimilated workers'.

You have admittedly put a wide interpretation on this expression, taking the view that craftsmen are 'assimilated' to wage-earners because the concept of assimilation to wage-earners applies 'on every occasion on which, as a result of the effect of national legislation, the provisions of a general scheme of social security (applicable to wage-earners) are extended to a category of persons other than wage-earners' (judgment of 13 December 1968 in the *De Cicco* Case [1968] ECR 473).

The reasoning of the Court was the same in the case of 'helpers' under Belgian law, meaning the family helpers of an independent farmer (judgment of 27 October 1971 in the *Janssen* Case [1971] ECR 849). But however liberal the case-law of the Court may be, it remains true that to be eligible, on the basis of Regulation No 3, for the social security benefits provided by the legislation of the State where they are resident, nationals of other States of the Community must be wage-earners or assimilated workers or, in the case of old-age benefits payable to persons who have reached retirement age, have been wage-earners or assimilated workers in that same State.

So my final view on the matter is that the guaranteed income should be paid to nationals of Member States of the Community other than Belgians subject to this condition and within these limits.

The requirement of reciprocity laid down by the Law of 1 April 1969 may not in my opinion be set up against them. Therefore for the purposes of replying to the question asked by the Tribunal du Travail,

Brussels, it is, to my mind, of no interest that the only country to have made a reciprocal agreement with Belgium on this subject is the Netherlands. This does not make the requirement of reciprocity any the less effective as regards nationals of States which are not members of the Community.

Finally, I feel I should add that while Regulation No 3 of 1958 will shortly be replaced by Regulation No 1408/71, the answer which I think legally appropriate on the basis of the former regulation also holds good for the same reasons for the purposes of interpreting the latter.

I am therefore of the opinion that the Court should rule that:

the guaranteed income granted under the Belgian Law of 1 April 1969 to all persons who have reached normal retirement age is, as regards nationals of Member States of the Community who have been wage-earners or assimilated workers in Belgium, in the nature of an old-age benefit within the meaning of Article 2(1)(c) of Regulation No 3 of the Council.