3. Rules that the decision as to the costs of these proceedings is a matter for the Centrale Raad van Beroep.

Hammes Donner Lecourt
Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 2 December 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 3 NOVEMBER 1964[1]

Mr President,
Members of the Court,

Once again you are called upon by the Centrale Raad van Beroep, the Netherlands court of final instance on social security questions, to give a preliminary ruling, under Article 177 of the EEC Treaty, on the interpretation of various Articles of Regulation No 3, concerning social security for migrant workers.

In order to clarify the scope of the questions submitted to you it will be advisable, so far as the vagueness of the file allows, to establish certain points of fact in the action pending before the Netherlands court which has now been made the subject of the reference to this Court.

Miss Dingemans, a Netherlands national, worked in Germany and afterwards in the Netherlands. In the former country she was insured against the risk of invalidity under Type B legislation, within the meaning of Article 24 (1) (b) of the Regulation (that is, legislation under which invalidity benefits are as a rule calculated in relation to the duration of completed periods), and since 1946 she received a German monthly invalidity pension. Returning subsequently to work in the Netherlands, she paid contributions in the latter country to invalidity insurance under the Invaliditeitswet (IW) of 5 June 1913, which is also Type B legislation within the meaning of Article 24 (1) (b) of the Regulation, and which makes the right to a pension conditional on the payment of 150 weekly contributions.

Despite Miss Dingemans's denials, it seems that on 17 July 1953 she filed an application for a Netherlands invalidity pension, which was refused on 1 February 1955, on the ground that she had not made the statutory number of payments at the date of her application. That number was later reached on 27 February 1955, and she then brought a new application which was related back to the date of the first application, namely 17 July 1953. It was in fact admitted that on the latter date she had reached the minimum of 150 weekly contributions, if the periods of insurance completed in Germany and in the Netherlands were aggregated, as laid down in the German-Netherlands Convention of 29 March 1951.

A Netherlands invalidity pension was accordingly granted to her by a decision of the Raad van Arbeid (Industrial

1—Translated from the French.

Court) of 25 April 1956, with effect from 1 July 1953, and weekly contributions paid after that date, namely 84, were paid over to the Municipal Department of Social Assistance in Amsterdam, apparently without Miss Dingemans's knowledge.

Subsequently — and here lies the origin of the present dispute — came an Interim Law (IWI) of 19 December 1962, which entered into force on 1 January 1963, supplementing the benefits granted to invalids in accordance with a scheme to which I shall have occasion to refer later. By a decision of 16 August 1963 the competent authority granted Miss Dingemans the new benefit, but apportioned its amount on the basis of the periods of contribution completed in the Netherlands (66 weeks) and in Germany (381 weeks), thereby applying to the present case the provisions of Articles 28 (1) (b) of Regulation No 3.

On appeal by Miss Dingemans, the Raad van Beroep in Amsterdam confirmed this application of Article 28 (1) (b), but refused to apply paragraphs 1 (f) and 3 of the same Article, which would have conferred benefits on the claimant only if, on 17 July 1953, the date at which her right to the Netherlands pension arose, that right had not been made conditional on taking into account the contribution periods completed under a different legislative system (that is, German law in the present case).

It was in these circumstances that the Centrale Raad van Beroep, with an appeal against the judgment of the court at Amsterdam brought before it, asked you the four following questions concerning the interpretation of Regulation No 3. I trust you will give me permission to read them in full.

'1. Must Articles 1 (b), 2 (1) (opening words) and (b) and Article 3 of the Regulation be interpreted so as to regard the Interimwet as "legislation" even though this Law was promulgated after the Regulation and was not notified in accordance with Article 3 (2)? In the event of an affirmative reply to Question 1:

2. Is the supplementary pension provided for in Chapter II of the Interimwet an invalidity benefit of Type B, within the meaning of Article 24 (1) of the Regulation? (The supplementary pension as such consists of a fixed annual sum without reference to the duration of the periods of insurance, but includes the invalidity pension claimed by the beneficiary, the amount of which depends upon the duration of the periods of insurance.) In the event of a negative reply to Question 2:

3. Must the supplementary pension provided for in Chapter II of the Interimwet be regarded as an invalidity benefit of Type A, or of Type A and of Type B, within the meaning of Article 24 (1) of the Regulation?

4. If the supplementary pension provided for in Chapter II of the Interimwet should be regarded as an invalidity benefit of Type A, must Article 28 (1) (b) of the Regulation then be applied in order to determine the amount of the supplementary pension? This is a point of view which the defendant has adopted as a subsidiary argument referring to the second question which the Raad put to the Court of Justice of the EEC in its letter of 11 November 1963, No AWW 1963/4, 5, 8, 9, 12, 13, 14, 15, 25 and 26.'

I have persisted in reading the four questions to you in full, in spite of their length, in order to put before you the reasoning of the Netherlands Court. Far from being independent of each other, the questions are put in a strictly logical series. A negative reply to the first question would make a reply to the

others pointless, since it would imply that they lay outside the field of application of Regulation No 3. Similarly, an affirmative reply to the second question would of itself answer the third question, but would make the examination of the last question pointless, since the last question is a subsidiary one, which arises only in the event of the second question's receiving a negative reply.

In fact, as I shall explain later, I am led to the conclusion that you will not have to rule on the fourth question, even though it is the most interesting.

The first question — concerning the nature of 'legislation' within the meaning of Articles 1 (b) et seq. of the Regulation — raises, in the context of invalidity, the very question which was put to you in Case 100/63 in connexion with death benefits, and the solution which you adopted in that case can lead, for the same reasons, only to an affirmative reply.

The term 'legislation' used in the Regulation refers also to laws coming into force after the Regulation itself, even when they are not notified in accordance with Article 3 (2); apart from anything else, Article 1 (b) makes this quite clear. In the present case, the Interimwet of 19 December 1962 covers one of the branches of social security enumerated in Article 2, namely 'invalidity benefits, including benefits granted for the purpose of maintaining or improving earning capacity, other than those paid in respect of industrial accidents or occupational diseases'.

Furthermore, the obligation to give notice imposed by Article 3 exists only when the adoption of new legislation necessitates an 'amendment' to Annex B. This is not the case when the legislation already falls under one of the headings set out in this Annex. The Interimwet obviously falls under the heading 'Invalidity insurance, including increases in pensions' which appears in paragraph (b) of the section entitled 'Netherlands'.

The second and third questions must be considered together. They concern the nature of the supplementary pension provided for in Chapter II of the Interimwet. Is it invalidity benefit or Type B, within the meaning of Article 24 (1) of the Regulation? If not, must the supplementary pension be regarded as an invalidity benefit of Type A, or of Type A and of Type B, within the meaning of the same paragraph?

Let us ignore this wording, which implies a belief on the part of the Centrale Raad that a benefit can have a mixed character and belong simultaneously to Type A and B. That is a mistake which rests on a misunderstanding of the scope of Article 24 of the Regulation. Article 24, which appears in the Chapter on invalidity, provides for three possibilities affecting the payment of benefits, depending on whether the insured person has completed periods: exclusively under Type A legislation, under which benefits are calculated in principle without reference to the duration of completed periods; or exclusively under Type B legislation, under which, on the contrary, the benefits depend on the length of the periods completed; or, finally, under both Types A and Type B legislation. In the last two cases, that is, when the insured person has completed periods exclusively or partly under Type B legislation, Article 26 makes the provisions of Articles 27 et seq. on the calculation of benefits — especially those concerning calculation *pro rata* —applicable to invalidity.

As a result, the Commission, in its comments, raises doubts on the relevance of these two questions, which the Netherlands court treats as a necessary prelininary to determining the applicability of Article 28 (1) (b). Miss Dingemans had completed insurance periods in Germany, where Type B legislation is in force, and that is enough to make Articles 27 and 28 applicable, *under conditions which however remain to be*

determined; it matters little therefore whether the Interimwet is of Type A or of Type B. But in its decisions the Court has always held that it should not set itself up as a judge of the considerations which lead the national court to bring a question before it for a preliminary ruling. It is sufficient that there should be a question coming under Article 177, that is to say, relating to the interpretation of the Treaty or of a Community regulation.

Here however the Commission observes that what is really requested is not so much an interpretation of Community law, as an interpretation of national law. The Centrale Raad van Beroep is in fact asking the Court to assess the nature of the system adopted by the Netherlands legislature concerning the calculation of benefits, and that falls within the competence of the national court. The court's previous cases show that the national court, caught between its own legislation and the Community law, often has some difficulty in investing the question which it puts to you with the degree of abstraction and generality which justifies the reference. In the present case, however, nothing prevents us from thinking that the Centrale Raad intends to ask you to define the exact scope of the concepts of 'Type A legislation' or 'Type B legislation', as mentioned in Article 24 (1) of the Regulation. But, in order that the Court's reply may be of some avail, it is still necessary to examine the problem from the point of view of the legislation which gave rise to the question.

Under the system of the Invaliditeitswet, of which Miss Dingemans was a beneficiary, the amount of the invalidity pension depended on the length of the insurance periods. The Interimwet grants a supplementary pension, and Article 5 of that Law indicates in the following terms how it should be calculated: 'The supplementary pension paid under the IWI shall be such a sum as with the disability pension granted under the Invaliditeitswet will amount to 3924 guilders for an insured invalid of Class A'.

In other words, the aggregate amount received by the beneficiary is determined by reference to the greater or lesser degree of invalidity (corresponding to Classes A, B and C), and not by reference to the insurance periods completed. As to the supplementary pension provided for by the new law, this represents the difference between the aggregate benefit, which is fixed, and the pension, which varies in proportion to the periods completed. It therefore depends, at least indirectly, on those periods.

Is this type B or Type A legislation? And where can we find the answer to that question?

Let us go back to Article 24 of Regulation No 3. It states in paragraph (2) that Annex F specifies for each Member State the Type A and Type B legislation in force in its territory or part thereof at the date of the Regulation's adoption. It also specifies that each Member State shall give notice of all *amendments* to be made in Annex F arising from new legislation. Such notification must be addressed within three months of the new legislation to the President of the EEC Council, who transmits it in turn to the EEC Commission, the High Authority of the ECSC and the Member States.

Furthermore, Article 50 of the Regulation describes as an integral part of the Regulation the Annexes referred to in the various Articles, among them Article 24, *including any amendments to, or changes in, the said Annexes.*

According to the original text of Annex F, Netherlands legislation was of Type B. But at that time the Invaliditeitswet of 1913 was the legislation in question. In the absence of an amendment to Annex F to take account of the Interimwet, the question might arise whether the new legislation, subsequent to Regulation No 3, was not different in nature from

the old. For my own part, I was tempted to follow the Commission's opinion and class the Interimwet as Type A. The aggregate amount of the benefit, namely what the insured person receives in the final analysis, is determined solely by reference to a degree of invalidity. It matters little therefore that the aggregate is the sum of two elements, the pension which depends directly on the insurance periods and the supplement which depends on them indirectly, since the aggregate benefit for a given degree of invalidity is fixed and the supplement will simply be raised correspondingly as the ordinary pension falls. But the Official Journal of the European Communities of 14 February 1964 (that is, prior to the judgment requesting the Court to give a preliminary ruling) published an amendment to Annex F as regards the Netherlands. It reads as follows:

> 'The legislation is of Type B, with the exception of the pension scheme for miners, as regards invalidity benefits payable to insured persons whose affiliation to the scheme came to an end after 31 December 1962 and who are entitled to benefits under the Interim Law concerning the recipients of invalidity pensions. Invalidity benefit payable to that group of insured persons under the pension scheme for miners is of Type A'.

So, apart from the case of certain miners, Netherlands legislation in the field of invalidity is of Type B. And it is obvious that the notification which I have just read and the amendment to Annex F to the Regulation were made in order to remove all doubts which might have arisen from the enactment of the Interimwet on 19 December 1962, and in order to cover the case of the new Law. It might be useful to stop here for a moment and consider the peculiarity of this procedure and of its consequences. Admittedly, it is likely that the original text of Annex F was drawn up by each Member State in so far as it was affected thereby, but the fact that the Regulation emanated from the Council gave the Annexes, like the Regulation itself, the character of Community legislation. The curious thing is that the amendments to the Annex emanated from the Member States themselves. Doubtless, the States notify them to the President of the Council, but that is a mere notification, and nowhere is there any suggestion of ratification, or of any sort of review, on the part of the institutions of the Community. However, as I have said, the 'amendments' to the Annexes, in accordance with Article 50, form an integral part of Regulation No 3.

As a result, the problem seems to me to be solved. Once more it must be remembered that the supplementary pension represents the benefit provided for in the Interimwet and that the latter forms part of Netherlands legislation on invalidity; the supplementary pension constitutes, therefore, an invalidity benefit of Type B, within the meaning of Article 24 (1) of the Regulation. The second question must be answered in the affirmative.

We must now consider the consequences of that answer, as regards the outcome of the following questions.

The third question is put to the Court in the event of a 'negative reply' to the second. It is thus subsidiary, even conditional, in character. Once you reply in the affirmative to the second question, the third must be regarded as withdrawn; it is no longer before the Court, and there is no longer any need to reply to it.

In any case, the point is relatively unimportant, since the two questions are like two sides of a coin, and an affirmative reply to the second question constitutes by implication a negative reply to the third question.

The consequences may be more serious when we approach *the fourth question*; which is why I would like to remind you of its terms: 'If the supplementary pension provided for in Chapter II of

the IWI should be regarded as an invalidity benefit of Type A, must Article (28 (1) (b) of the Regulation then be applied in order to determine the amount of the supplementary pension?' In other words, you are asked to deal with the problem of determination *pro rata*, but, once again, only in the event of the benefit's being regarded as of Type A, which means that the question must be regarded as withdrawn if the benefit is of Type B.

Admittedly, it is not for you to consider whether or no a question is necessary to settle the dispute. Once it is put to you, you must reply. But, when the question is put to you upon a condition, the failure of that condition entails the disappearance of the question. And this, I submit, is what happens here.

I am aware of the inconvenience of this solution which, no doubt, leaves unresolved a number of points which the Netherlands court would have used to decide the case. But, short of completely altering *the form in which the fourth question is put to the Court*, I believe that the Court does not have to answer it.

The position would be different if, and only if, you considered that the Interimwet constituted Type A legislation, in spite of the terms of Annex F. In case you should come to that conclusion, I shall carry out a rapid examination of the fourth question. When putting it to you, the Netherlands court referred to the question contained in its letter of 11 November which gave rise to your judgment of 15 July last in Case 100/63.

You will remember that the question of 11 November 1963, to which the Centrale Raad alluded, was in two parts. It dealt simultaneously with the existence of a necessary link between Article 27 and Article 28 (1) (b), and with the application of the latter to legislation in which the amount of the pension does not depend on the length of the insurance period.

If the Centrale Raad thereby seeks to ask you whether the rules applicable to death benefits are also applicable to invalidity benefits, the reply is in some respects free from doubt. First, Article 26 lays down that the provisions of Articles 27 and 28 are applicable by analogy to the case of invalidity except where the periods completed by the person concerned were completed exclusively under Type A legislation. Secondly, your judgment in Case 100/63 relied on the spirit of Articles 48 to 51 of the Treaty, which are the basis of the regulations on social security, and gave a full and liberal interpretation of Article 28 of Regulation No 3. This Article is linked to Article 27 and is only applicable to cases concerning the acquisition, maintenance or recovery of the right to benefit referred to in Article 27; it applies only to the extent that the Regulation enables insured persons to obtain benefits which are at least equivalent to the total of those which they would have enjoyed in each country under the national legislation to which they were subject, considered independently of Regulation No 3 and the other Community regulations.

On the question whether the provisions of Article 28 are applicable to legislation which does not make the amount of the benefits dependent on the length of the insurance period (that is, to Type A legislation), your judgment gives an affirmative answer. It is true that it did so in a situation where it was able to rely on Regulation No 130 of the Council; however, the operative part of your judgment is very wide, since it states that the provisions of Article 28 'apply to legislation which does not make the amount of the benefit dependent upon the length of the insurance period'. And I would prefer to follow the opinion expressed by the Commission, and consider that the application of Article 28 (1) (b) can be justified in the case of Type A legislation, even without Regulation No 130 and relying solely on Regulation No 3.

But, as you know, the condition precedent to the application of this Article is that there should be an issue concerning the acquisition, maintenance or recovery of the right to benefits. In order to make a full and relevant reply to the question put to it, the Court would therefore have to determine the conditions governing the rights to benefits under the Interimwet. Since the right to benefits under the Interimwet is open to persons entitled to an invalidity pension, is it necessary to lay down the same conditions concerning the length of insurance periods, as in the case of the Invaliditeitswet, and to rely, where appropriate, on the aggregation of periods completed under different legislative systems? Or would it be sufficient, as the Commission maintains, to be entitled to a pension under the Invaliditeitswet? The question is certainly doubtful, but in any case it lies outside the Court's jurisdiction, because it raises primarily a question of the interpretation of Netherlands law.

Consequently, I do not see how the Court could give a full and relevant reply to the fourth question, assuming that it was bound to answer it. But I have already given the reasons why you should stop your interpretation short of this point in the argument. To sum up, I am of the opinion that the Court should only reply to the first two questions put by the Centrale Raad, and that the reply should be framed as follows:

First Question: the term 'legislation' in Articles 1 (b), 2 and 3 of Regulation No 3 includes the Interimwet.

Second Question: the supplementary pension referred to in Chapter II of the Interimwet relates to Type B legislation, within the meaning of Article 24 (1) of the Regulation.

I also take the view that the Centrale Raad van Beroep should decide on the costs incurred before the Court.