JUDGMENT OF THE COURT
1 DECEMBER 1965[1]

Adrianus Dekker
v Bundesversicherungsanstalt für Angestellte[2]
(Reference for a preliminary ruling by the Landessozialgericht, Berlin)

Case 33/65

Summary

1. Procedure — Preliminary ruling — Jurisdiction of the Court — Limits (EEC Treaty, Article 177)

2. Free movement of persons — Migrant workers — Social insurance — Sickness and maternity — Benefits in kind within the meaning of Article 22 of Regulation No 3 — Concept

1. Cf. paragraph 1, Summary, Case 24/64 (Rec. 1964, p. 1263).

2. The expression 'benefits in kind' within the meaning of Article 22 of Regulation No 3 refers to benefits in respect of a specific case of sickness or maternity and does not apply to supplementary pension payments intended as a contribution to the financing of the beneficiary's sickness insurance.

In Case 33/65

Reference to the Court under Article 177 of the EEC Treaty by the Landessozialgericht, Berlin, for a preliminary ruling in the action pending before that Court between

ADRIANUS DEKKER, engineer, residing at Utrecht (Netherlands),

plaintiff,

and

BUNDESVERSICHERUNGSANSTALT FÜR ANGESTELLTE, Berlin,

defendant,

on the interpretation of Article 22 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561),

1 — Language of the Case: German.
2 — CMLR.

THE COURT

composed of: Ch. L. Hammes, President ,W. Strauß (Rapporteur), President of Chamber, A. M. Donner, R. Lecourt and R. Monaco, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. By letter dated 20 May 1965 the Landessozialgericht, Berlin, in accordance with the decision of its IXth Senate of 28 April 1965, requested the Court of Justice to give a ruling on the following question:

'Does the payment of the sickness insurance contribution provided for by Section 381 (4) of the Reichsversicherungsordnung (RVO) fall within the "benefits in kind" mentioned in Article 22 of Regulation No 3 of the European Economic Community, which a German pensions insurance institution is required to pay to a pensioner insured with a sickness insurance institution in another Member State?'

The court referring the question states the legal grounds for this decision as follows:

'Which among the benefits paid by a pensions insurance institution fall within the description "benefits in kind" in Article 22 of EEC Regulation No 3 can, in view of the need for the utmost possible reciprocity, be determined only by reference to the internal law of all Member States.'

2. The decision concerned contains the following summary of the facts on which it is based:

'The plaintiff is of Netherlands nationality and has been living at Utrecht in the Netherlands since November 1958.

On the basis of his claim made on 24 April 1950, he was granted, by a decision of the defendant dated 12 July 1950, a pension on account of incapacity for work as from 1 May 1950.

By a decision of 8 June 1959, the defendant recognized the plaintiff's entitlement to an old-age pension with effect from 1 January 1957 as he had attained the age of 65. However .... the pension continued to be paid to him at the former rate, because the new pension rate .... was less than the amount previously paid.

Up to 6 November 1958 the plaintiff was resident at Aurich (East Friesland). Until 30 November 1958 he was voluntarily insured against sickness with the "Allgemeine Ortskrankenkasse" in Aurich. The defendant contributed to this sickness insurance under Section 381 (4) of the Reichsversicherungsordnung (RVO). On 30 November 1958 the plaintiff insured against sickness with the "Algemeen Provinciaal Ziekenfonds voor Utrecht en Omstreken". By a decision of 20 June 1962 the defendant refused to pay for this contribution under Section 381 (4) of the RVO for this sickness insurance, on the ground that the payment of this contribution could be made only to

an insurance institution with its head office in the Federal Republic of Germany.

The plaintiff instituted proceedings for rescission of the defendant's decision of 20 June 1962, and for an order that the defendant should pay the contribution for the sickness insurance (DM 17.40 per month) from 30 November 1958. By a decision of 3 June 1964, the Sozialgericht, Berlin, upheld this claim for the period from 1 April 1961. The defendant appealed against this decision to the Landessozialgericht, Berlin.'

3. Of the parties referred to in Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, only the EEC Commission submitted written observations.

The oral procedure before the Court of Justice took place on 12 October 1965. The Advocate-General delivered his opinion on 4 November 1965.

II — Arguments and observations of the Commission of the EEC

The arguments contained in the observations submitted by the Commission in accordance with the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

The Commission replies in the negative to the questions referred to the Court; the reasons on which it relies in support of these arguments are in essence the following:

1. Article 22 of Regulation No 3 forms part of the Chapter concerning insurance for 'Sickness, Maternity' (Article 16 to 23). 'The coordination of national sickness insurance systems arranged by this Chapter is based on the distinction between cash benefits (payments to compensate for the loss of wages) and benefits in kind which cover all types of care, including the administration of medicine, to which the person insured in respect of sickness or maternity is entitled.' This distinction is necessary to delimit the respective rôles of the institution to which the insured person is affiliated and the institutions in whatever other Member State the insured person receives treatment, according to the circumstances. Under these provisions, cash benefits are always paid by the first institution and in accordance with the conditions laid down by the legislation applying to it, whilst benefits in kind are issued by the institution of the country in which the insured person is to receive treatment, in accordance with the provisions laid down by the legislation of that country. In addition, these Articles lay down the conditions under which an institution is required to reimburse another institution for the amounts disbursed by the latter.

Article 22 only adapts this system to the sickness insurance of the beneficiaries of pensions. It is based on the 'very simple' idea that a pensioner who, in accordance with the legislation applicable, is entitled to benefit from an insurance against the risk of illness must receive the care that his condition requires, wherever he lives or is temporarily residing, when the risk against which he is insured materializes (particularly in case of sickness).

2. It follows that by 'benefits in kind' there is meant only the treatment which is actually given to an insured person when the risk against which he is insured (particularly sickness) materializes. On the other hand, contributions such as that which is the subject of the present case are not included in 'benefits in kind'; these contributions are intended only to constitute and maintain insurance against the risk of sickness since they are paid independently of the materialization of that risk.

The contrary proposition would lead to absurd results or would have to have

recourse to less convincing arguments:

— The rôle which Regulation No 3 lays down for institutions in the place of permanent residence or the place of temporary residence in the issue of 'benefits in kind' 'would be absurd if, among the latter, were included contributions intended to finance insurance'.

— If one tries to apply Article 22 to the contribution in dispute, one immediately finds oneself in conflict with the first two paragraphs of that Article, according to which benefits in kind are issued by the institution *of the place of permanent residence.* To avoid this contradiction it would be necessary to allow the inclusion among 'benefits in kind' of that part of the cost of the voluntary insurance in the Netherlands which in the present case is borne by the Dutch institution (Algemeen Provinciaal Ziekenfonds voor Utrecht en Omstreken) and to require the competent German institution to make reimbursement of those costs under Article 22 (3); according to that Article, such a right of reimbursement belongs to the Dutch institution, but never to the person concerned.

Grounds of judgment

I—The jurisdiction of the Court

The Landessozialgericht, Berlin, asks the Court, 'in accordance with subparagraph (b) of the first paragraph of Article 177 of the EEC Treaty', to rule whether the supplementary contribution for sickness insurance provided for by section 381 (4) of the Reichsversicherungsordnung (German law concerning insurance) is included in 'benefits in kind', within the meaning of Article 22 of Regulation No 3, 'which a German pensions insurance institution is obliged to pay to a pensioner affiliated to a sickness insurance institution in another Member State.'

Under the terms of subparagraph (b) of the first paragraph of Article 177 of the EEC Treaty, the Court has jurisdiction to give preliminary rulings upon the interpretation of an act of a Community institution.

On the other hand, the interpretation of the national law of Member States is outside the framework of the powers conferred upon the Court by Article 177.

It follows that the Court is not competent to rule on the interpretations of the Reichsversicherungsordnung, but the reference involves a question of the interpretation of Regulation No 3, which it is appropriate to extract from the specific data supplied by the Landessozialgericht.

II—The substance of the case

Regarded from this point of view, the substance of the question is whether 'benefits in kind', within the meaning of Article 22 of Regulation No 3, include supplementary pension benefits which are intended as a contribution towards the financing of the beneficiary's sickness insurance.

Article 2 of Regulation No 3 lists the types of 'benefit' to which the Regulation applies, and relates each of those 'benefits' to the occurrence of an actual risk ('sickness', 'maternity' etc.).

This emerges particularly clearly from the German version which mentions, for example, 'Leistungen bei Krankheit' (benefits *in case* of sickness).

Chapters 1 to 7 of Head III of the Regulation, which contain particular provisions concerning each of the abovementioned risks, deals with each in the same order as they appear in Article 2.

In these circumstances it is evident that, where the provisions of those Chapters use the concept of 'benefit', they refer to benefits to be granted on the occurrence of the specific risk to which the Chapter in question relates.

Further, as Article 22 is found in Chapter 1 of the Head in question under the heading 'Sickness, Maternity', it appears that the concept of 'benefits in kind', which appears in the said Article, means benefits which are to be granted on the occurrence of an actual case of sickness or maternity.

This reasoning is reinforced by both Article 19 (5) of the Regulation, which refers to 'the provision of prostheses, major appliance and other substantial benefits in kind', and Article 22 (6), by which 'the beneficiary . . . shall be entitled to the benefits in kind during temporary residence in the territory of a Member State other than his country of permanent residence'.

There is further support for this interpretation in the basic principle of Article 22, according to which 'benefits in kind' shall be issued by the institution of the place in which the person concerned permanently or temporarily resides, regardless of which authority is in the final analysis liable to bear the cost of such benefits.

In fact the said principle is totally consonant with the aim of Chapter 1, in question here, which is to ensure that medical assistance is available as rapidly and effectively as possible to any worker who needs it. The expressions 'immediate' and 'extreme urgency' appearing in Article 19 (1) and (5) respectively make this aim particularly clear.

It follows from these considerations that benefits such as those forming the subject-matter of the present request cannot amount to 'benefits in kind' within the meaning of Article 22 of Regulation No 3. Consequently the question put by the Landessozialgericht, Berlin, must be answered in the negative.

III — Costs

The costs incurred by the Commission of the EEC which has submitted observations to the Court are not recoverable.

As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Landessozialgericht, Berlin, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon reading the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the EEC;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), especially Articles 2, 19 and 22;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Landessozialgericht, Berlin, by an order of that court of 28 April 1965,

hereby rules:

1. **Supplementary pension payments which are intended as a contribution to the financing of the beneficiary's sickness insurance do not fall within the meaning of the expression 'benefits in kind' in Article 22 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.);**

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

Hammes Strauß Donner

Lecourt Monaco

Delivered in open court in Luxembourg on 1 December 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

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

Mr President,
Members of the Court,

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

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

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

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

1 — Translated from the French.