THE COURT

in answer to the question referred to it by the Cour d'Appel, Orléans, by judgment of that court of 22 December 1966, hereby rules:

1. **When in one Member State the right to benefit arises without its being necessary to refer to periods completed under the legislation of other Member States, the competent institution of the first State is not empowered to apply Articles 27 and 28 of Regulation No 3 in order to reduce the benefit which it is obliged to pay by virtue of its own legislation, at least in so far as that benefit does not relate to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State;**

2. **Articles 27 and 28 of Regulation No 3, when interpreted in the manner set out above, are not contrary to Article 51 of the EEC Treaty;**

3. **It is for the Cour d'Appel, Orléans, to decide upon the costs of these proceedings.**

Hammes Trabucchi Monaco

Delvaux Donner Lecourt Strauß

Delivered in open court in Luxembourg on 5 July 1967.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 MAY 1967[1]

Mr President,
Members of the Court,

You have already found it necessary in your judgments in Cases 100/63, *Kalsbeek née van der Veen* [1964] E.C.R. 565, and 4/66, *Labots née Hagenbeek* (Rec. 1966, p. 617), to interpret certain provisions of Articles 27 and 28 of Regulation No 3 concerning social security for migrant workers. It was then a question of what effect these articles, which provide in matters of old age and death (pensions) insurance for the

1 — Translated from the French.

aggregation of the insurance periods and for the apportionment of the charge, in proportion to the number of periods, between the various institutions concerned, should have in the case of the Dutch insurance under the Algemene Weduwen- en Wezenwet, which is a risk insurance.

The question is brought before you today in slightly different terms at the instigation of the Cour d'Appel, Orléans. This case is moreover the first of a long series, since seven files relating to the provisions are at present being referred to you by various civil, administrative or social courts of four Member States, some of which are obliged to refer the matter to you by virtue of Article 177 of the Treaty, whilst the others merely have the power to do so. As a matter of principle one is happy to see the use being made of this Article within the judicial practice of the Community; but from a less conjectural viewpoint one may well express a certain amount of anxiety at the number of questions of law and practice raised by this part of the regulation and reflected in these references. In any event it is a good reason to approach the present case with some caution when one considers that the investigation of the other cases now pending may clarify still further the purport of Articles 27 and 28.

The facts which led the Cour d'Appel, Orléans, to refer the matter to you are the following: Mr Ciechelski, a naturalized Frenchman who had contributed successively in Germany and France to old-age pension insurance, obtained in the first place a French pension by reason of the French insurance periods alone at a time when he fulfilled the age requirement under the legislation of that country but not that required by German legislation (Article 28 (1)(f)).

Once he had fulfilled the latter requirement his pension was, at his own request, replaced by two pensions, one German and one French, which were calculated in the following manner:

The right to a German pension—in the absence of a sufficient number of insurance periods in that country—arose only by taking into consideration the French quarters and the person concerned, after a proportional calculation, obtained a quarterly payment of DM 138 (170.90 FF).

As for the French institution, it aggregated the French and German insurance periods (that is, 113 and 21 quarters respectively), determined for accounting purposes the amount of benefit to which Mr Ciechelski would have been entitled had he completed all his working life under French legislation and, on the basis of this total, calculated the benefit due under the French system in the proportion of the number of periods completed in France to the total number of periods completed. This is a literal application of Article 28 (1)(b).

But at this stage there appears a peculiarity of the French system which provides for a maximum duration of insurance of 30 years, that is 120 quarters, for the calculation of pension. The 'theoretical' amount was therefore calculated on the basis not of the 134 quarters but of 120; on the other hand the calculation of the proportional amount was made by charging to the French system $\frac{113}{134}$ of the theoretical amount and Mr Ciechelski was granted a pension of 654 FF. This figure is less than the amount of the pension previously received by him under the French system, namely 731 FF, but, if one adds to it the German pension (170.90 FF), the aggregation of the periods more than compensates for this reduction.

Being dissatisfied with this result, the person concerned made an unsuccessful application to the Commission de Première Instance to re-establish his former pension. He subsequently appealed to the Cour d'Appel, Orléans, which, having considered the various points of fact

which I have mentioned, and having also stated that Regulation No 3 led in this case to the loss of rights acquired in France, now refers for your ruling the question of 'the interpretation to be given to Article 51 of the Treaty of Rome and to Articles 27 and 28 of Regulation No 3 . . . for the purpose of specifying whether this regulation can validly deprive a worker of a part of the rights acquired by him in one of the States of the Community'.

The Cour d'Appel thus asks you to interpret both Article 51 of the Treaty and the two articles of the regulation adopted in implementation thereof; in fact—and this will become still clearer if one compares the question asked with the grounds of judgment—it asks for your opinion on the validity in relation to the Treaty of the provisions of the regulation which might deprive the migrant worker of part of the rights acquired by him. It is clear that it refers, therefore, to your judgment in Case 100/63 *Kalsbeek (née van der Veen)*, where for the first time you laid down a certain number of principles for the interpretation of the regulation. You recalled that this regulation [and Regulation No 4] have 'as their basis, their framework and their bounds, Articles 48 to 51 of the Treaty which are aimed at securing freedom of movement for workers', and that the aim of these articles 'would not be attained but disregarded if the worker were obliged, in order to avail himself of the freedom of movement which is guaranteed to him, to find himself subjected to the loss of rights already acquired in one of the Member States *without having them replaced by at least equivalent benefits*'. You confirmed that answer in your judgment in Case 4/66, *Labots (née Hagenbeek)*, at the same time adding that it did not follow therefrom that the migrant worker must 'of necessity succeed, by the mere interplay of various national legislative systems in succession to one another, in obtaining a higher aggregate sum in benefits than would accrue to him under Article 28 (3).'

It is in the light of these principles that you first gave an interpretation of Articles 27 and 28 of the regulation in the case of Netherlands legislation, the special characteristics of which are well known to you. But your answer does not exhaust the question, for it remains to be determined how in each case the principles can be applied to the varying legislation of the separate Member States, which relates nevertheless to the same regulation. It is for this reason that one can again raise a question to which you appear already to have replied; for, although it is not part of your function to pronounce upon the application of Community law to a specific case, it is still clear that both the question and answer can be understood only by reference to specific legislation and must be considered within the framework of such legislation. It is because the calculation of the amount for accounting purposes and the proportional calculation were effected within the framework of French legislation that it is necessary to consider, as requested by the Cour d'Appel, whether Article 28 can validly deprive a worker of a part of the rights already acquired by him.

The peculiar feature of this legislation is to provide a maximum period of 120 quarters, giving entitlement to the maximum pension which is proportional to the duration of the insurance as long as the maximum is not attained, but is then subject to a ceiling. As can be seen from the file, and in particular from the observations addressed to you by the Caisse Régionale, it is by reason of this peculiarity that this institution took as the amount for accounting purposes a maximum pension corresponding to 120 quarters, whereas the claimant had completed a total of 134 quarters if one takes his working life in Germany into account.

It does not appear that this peculiarity of the French system is of itself contrary to the application of Article 28 and to the principle of proportional calculation. As the Commission has shown, the latter has no such effect unless under the legislation of a Member State the pension is not strictly proportional to the duration of the insurance, otherwise one would arrive at the same result by the method of 'direct calculation' which is authorized in this case by Article 29 (2) of Regulation No 4. Your judgment in Case 100/63, *Kalsbeek (née van der Veen)*, accepts proportional calculation in the circumstances which it specifies in respect of legislation which, like Netherlands legislation, does not make the amount of benefit dependent upon the duration of insurance, and it appears that the same solution must be adopted for the French system which I have described. Let me add that you will no doubt have to ask yourself the same question in respect of Luxembourg legislation in which the pension includes a part proportional to the length of the insurance and a fixed part.

However, the principle of proportional calculation, as it is applied in accordance with the letter of Article 28 (1) (b), actually results in the migrant worker's receiving, for the same number of quarters completed in that country, a lower pension than that which would be received by a non-migrant worker. To take the figure of 113 quarters, the latter would receive a pension equal to 113/120 of the maximum amount, whilst the migrant worker on the other hand, owing to the fact that he had completed 21 quarters in Germany, would receive a French pension equal only to 102 quarters; the greater the number of quarters completed under other legislation, the less the amount of the French pension; the only alleviation of these losses may possibly be found in the supplement provided for by Article 28 (3).

This probblem is not new and has already been met by French courts, since in a very similar case the judgment in the Nani case (Cour d'Appel, Paris, 4 March 1964) prior to your judgment in the case of *Kalsbeek (née van der Veen)* applies the provisions of Article 28 literally, but states that, for that worker, who had contributed in France and in Italy, the position was considered as if he had never contributed in the latter country, the contribution made in Italy procuring no advantage for him.

You know the manner in which the Commission proposes that such losses shall be avoided. It considers that the migrant worker, for the purpose of the application of French legislation, must be considered as being under the same system as other workers. This implies that, in so far as the number of contribution periods in that country remains below the maximum of 120 quarters, his French pension must be proportional to the duration of the insurance, which would in fact lead to a reversion to the direct method of calculation. On the other hand, if he had completed in France a period of insurance greater than the maximum, his French pension must reach the maximum but cannot exceed it. On this point I can only refer to the Commission's observations which set out the formulae according to which proportional calculation should be effected and which also indicate the arrangements of the present provisions of Article 28 which it had inserted in its proposal for the revision of Regulation No 3 in such a way as to ensure that migrant workers subject to legislation of this type should not be placed at a disadvantage.

But it must not be forgotten—this is the second aspect of the question—that your case-law interprets Article 51 of the Treaty as opposing the loss of rights already acquired only if those rights are not replaced by benefits of at least equal value. As I have said, without the application of Article 27 of the regulation the person concerned would not have

had a right to any pension under German legislation. On the other hand, the total of his two proportionally calculated pensions, French and German, is greater than the amount of the original French pension not calculated proportionally. Is such a compensatory measure sufficient for the purposes of observing Article 51?

In replying in the negative the Commission points out that the method used by the Caisse results not only in a loss of rights as regards the French pension —which is obvious—but also as regards the German pension, which is more difficult to understand. In support of this argument it compares the position of two workers both having the same working life of 113 quarters in France but one of whom has completed a working life of 60 quarters in Germany— the minimum required for obtaining a right to a pension by direct calculation —whilst the other had completed only a smaller number of quarters there. In the first case there would be no proportional calculation since aggregation would not be necessary and he would benefit in both of these countries from a pension proportional to his working life, and thus in France in proportion to the whole of his 113 quarters. In the second instance the consideration given to his working life in France under the regulation would certainly qualify him for a pension, but would not give him any advantage as to the calculation of the pension since the German pension would be proportional only to the length of his working life in Germany. The application of the regulation, says the Commission, would have as its sole effect the establishment of equality between them. But to treat them differently under French law would have the effect of destroying this equality. In fact, the worker who would qualify in Germany without taking into account French insurance periods would benefit from a pension calculated on the basis of 113 quarters (let us admit that he should benefit in this way since, according to the information which the Caisse has given you, the latter considers wrongly that there should be a proportional calculation even in this case); as to the second worker, his pension would be reduced to an amount which would be less than a proportionate part of his working life in France, whereas he, like the first, had worked and contributed in order to obtain this German pension.

The Commission concludes that, if the French pension is reduced, the person concerned partially loses the benefit of his affiliation to German insurance: having contributed for 134 quarters, he would in reality have a pension corresponding to a total of approximately 122 quarters (rather less than 102 + 21). Although the provisions of the regulation are intended to prevent the useful working life of a person being reduced by migration, the validation of periods in one country owing to aggregation should not have as a result the rejection in another country of periods *which do not coincide with the first.* This last remark is important, since it differentiates between the present circumstances and those which might arise where a risk insurance is concerned, such as the Netherlands Algemene Weduwen- en Wezenwet (General Widows' and Orphans' Law), where the same periods may be taken into account twice with a risk of this producing 'a higher aggregate sum in benefits' than would otherwise accrue, which the judgment in the case of *Labots née Hagenbeek* rejects.

I have attempted to set out the rather subtle argument of the Commission in detail; what conclusions should be drawn from them? It all comes down to the wider or narrower acceptance given to this concept of equivalent advantages which may, according to you, compensate for the loss of acquired rights. If I think that it must be interpreted strictly, as does the Commission, it is

because the aim of Article 51 is both limited and precise and seeks simply to allow freedom of movement for workers. The rules which it lays down must ensure for them the aggregation of all the periods taken into account by the legislation of the various Member States for the purpose of acquiring and retaining the right to benefit or of calculating the amount of benefit. What is envisaged is essentially the qualifications for benefit. Proportional calculation is not mentioned, which is not to say that it is consequently excluded but that it can apply only in limited circumstances. In fact Article 28 of the regulation was created essentially within the perspective of the proportional systems of old-age pension insurance and to prevent the accumulation of all kinds of fixed rights, but since the appearance of systems like those in French law it is difficult to see how the principle of proportional calculation pure and simple can be based upon Article 51. Consequently the Commission, as we have seen, has been obliged to deviate considerably from this concept.

Just as the position concerning the basis of the right is not obvious, the form of the answer to be given to the court which has referred the matter to you is also far from simple. You are asked to say whether an article of the regulation which leads to a loss of acquired rights is compatible with Article 51 of the Treaty. The reply which you have already given to this question by your judgment in *Kalsbeek* (*née van der Veen*) must be adapted to take into account the peculiarities of the legislation and of the case which has led the Cour d'Appel to refer the question to you. One must, I think, specify that, although recourse to proportional calculation should not in principle be excluded in a system such as that comprised in the French legislation, a calculation of the amount 'for accounting purposes', which would take into account the existence of a ceiling for the pension in circumstances different from those applying to non-migrant workers, would be contrary to Article 51 of the Treaty.

Finally, in my opinion it is for the Cour d'Appel, Orléans, to decide upon the costs incurred in the proceedings before you.