JUDGMENT OF THE COURT
16 NOVEMBER 1972[1]

Land Niedersachsen v Landesversicherungsanstalt Reference for a preliminary ruling by the Bundessozialgericht)

'Tuberculosis benefits'

Case 15/72

Summary

1. *Preliminary rulings — Effects of a national law in relation to Community law — Powers of the Court — Limits*
   (EEC Treaty, Article 177)

2. *Social security for migrant workers — Application to national legislative systems — Extension to prophylactic and remedial measures*
   (Regulation No 3 of the Council, Article 2 (1))

3. *Social security for migrant workers — Sickness benefits — Concept — Acquisition of the right by aggregation of the insurance periods completed*
   (Regulation No 3 of the Council, Article 2, Article 16)

1. The Court has power to provide the national court with factors of interpretation depending on Community law which might be useful to it in evaluating the effects of a provision of national law.

2. Article 2(1) of Regulation No 3 also refers to prophylactic or remedial measures.

3. The social security benefits which, although not related to the 'earning capacity' of the insured person, are also awarded to the members of his family and are principally intended to aid the recovery of the invalid and to protect those who are in contact with him must be regarded as sickness benefits within meaning of Article 2(1)(a) of Regulation No 3. For the purposes of acquiring a right to such benefits the aggregation of the affiliation periods completed in the verious Member States is governed by Article 16 *et seq.* of Regulation No 3.

In Case 15/72

Reference to the Court under Article 177 of the EEC Treaty by the IVth Senate of

1 — Language of the Case: German.

the Bundessozialgericht (Social Security Court) Kassel for a preliminary ruling in the action pending before that court between

LAND NIEDERSACHSEN, represented by the Landessozialamt (Regional Welfare Office) of Lower Saxony, Hannover,

and

LANDESVERSICHERUNGSANSTALT, Hannover,

on the interpretation of EEC Regulation No 3 of the Council concerning social security for migrant workers, in particular Articles 26 and 27, and Article 28 (2) of Regulation No 4 of the Council of the EEC on implementing procedures and supplementary provisions in respect of Regulation No 3,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), J. Mertens de Wilmars and H. Kutscher, Judges,

Advocate-General: H. Mayras
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:

In the main action the Land Nieder-Sachsen, represented by the Landessozialamt, is claiming from the Landesversicherungsanstalt Hannover (a pension insurance organization) the refund of the costs of the hospital treatment required by Antonio Buscema, an Italian national, as a result of contagious tuberculosis requiring prolonged treatment. The claim for reimbursement is dependent upon the question whether the worker himself has a claim for medical treatment against the defendant in the main action.

Mr Buscema paid invalidity insurance contributions in Italy from 1 September 1956 until 31 August 1964 and, in addition, cntributions in respect of sickness insurance and insurance against the risk of tuberculosis until 31 March 1965. Since 2 April 1965 he has been employed in Germany in a post which is subject to a

compulsory sickness and pension insurance scheme. Active tuberculosis was diagnosed at the beginning of August 1965 and Mr Buscema received hospital treatment from 12 August 1965 to 18 October 1966. The costs of this treatment were borne by the applicant.

The Sozialgericht Hannover ordered the defendant to refund these costs on the ground that the assistance to tuberculosis sufferers provided for in Article 1244a of the Reichsversicherungsordnung (RVO) (State Insurance Regulation) constitutes a sickness insurance benefit and that therefore the periods during which contributions were paid in Italy and the Federal Republic of Germany must be aggregated in accordance with Article 16 of Regulation No 3 of the Council of the EEC.

The abovementioned provision of the RVO provides, in particular, that an insured person is one 'for whom contributions have been paid, as a result of employment or an activity which is subject to compulsory insurance, for at least 6 calendar months during the 24 calendar months preceding the diagnosis of the condition requiring treatment' or who satisfies the general qualifying period of 60 months provided for in Article 1246(3).

The Landessozialgericht Niedersachsen dismissed the defendant's appeal, although it did so not on the basis of Articles 16 and 17 of Regulation No 3, but by reference to Article 26, in conjunction with Article 27, thus regarding the hospital treatment of a person suffering from tuberculosis as an invalidity benefit, rather than a sickness benefit.

By order of 1 March 1972, received at the Court Registry on 24 April 1972, the Bundessozialgericht stayed the proceedings in the appeal on a point of law brought by the Landesversicherungsanstalt Hannover and requested the Court under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'(a) Are Articles 26 and 27 of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers (aggregation of insurance periods) applicable by analogy to a legal provision which, according to the law in force in the Federal Republic of Germany, does not concern social security benefits but an obligation which, for the purposes of the prevention of disease, is imposed under certain conditions on pension insurance organizations, where this provision provides for the payment of the relevant benefits—which are not pensions and are not divided *pro rata temporis*—without regard to the materialization or threat of the risk of "invalidity" and without taking into account, in making this calculation, the length of the period of affiliation, but makes the power of the pension insurance organization to pay such benefits dependent upon the existence of a certain period of affiliation to the pension insurance scheme?

(b) If Question (a) is answered in the affirmative:

Can the legal considerations which form the basis of the first sentence of Article 28(2) of Regulation No 4 of the Council of the European Economic Community on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers (minimum period of affiliation), apply to benefits such as those referred to under Question (a)?'

In its order referring the matter the Bundessozialgericht observes that Mr Buscema could validly have pressed his claim against the defendant if, during the two calendar years preceding the diagnosis of the condition requiring treatment, he had paid contributions for at least six calendar months within the context of employment or activity subject to a compulsory insurance scheme, or if he had satisfied the conditions concerning the qualifying period in accordance with Article 1246(3) of the RVO. As the affiliation period spent by

Mr Buscema in Germany was only 4 calendar months, he could not be regarded as insured within the meaning of Article 1244a of the RVO.

The Bundessozialgericht observes that all the statements made in the order, also dated 1 March 1972, referring a question which arose in the action between, at first instance, Helmut Heinze, plaintiff, and the Landesversicherungsanstalt Rheinprovinz, defendant (Case 14/72), also apply in this instance. However, if, in the present case, the preliminary questions set out in the order should receive an affirmative reply, it would be necessary to consider a second question concerning the first sentence of Article 28(1) of EEC Regulation No 4, which the Bundessozialgericht considers to be based upon a general legal consideration, that is, whether the minimum affiliation period imposed by the legislation of one of the Member States constitutes a condition which must be fulfilled in order to acquire a right to benefit.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Landesversicherungsanstalt Hannover, represented by Mr Remter, Landesverwaltungsdirektor, the Italian Government, represented by the Ambassador, A. Maresca, acting as Agent, assisted by G. Zagari, Deputy State Advocate-General, and the Commission of the European Communities, represented by its Legal Adviser, P. Karpenstein.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided that it was unnecessary to hold any preparatory inquiry.

By an order dated 13 July 1972 the Court joined the present case to Cases 14/72 and 16/72 for the purposes of the oral procedure.

The Landesversicherungsanstalt Hannover, the Italian Government, the Commission and the Caisse de Maladie (Sickness Insurance Fund) of H. Heye Glasfabrik 'Schauenstein', Obernkirchen, the intervener in the main action, presented oral argument at the hearing on 4 October 1972.

The Advocate-General delivered his opinion at the hearing on 19 October 1972.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

1. *Observations submitted by the Landesversicherungsanstalt Hannover*

The *Landesversicherungsanstalt* Hannover observes that the assistance awarded in the case of tuberculosis under Article 1244a of the RVO is, in the first place, a prophylactic measure and that, unlike the procedure followed under measures adopted under Articles 1236 and 1237 of the RVO, in order to maintain or improve working capacity, the cost of the hospital treatment of an insured person suffering from contagious tuberculosis is borne by the competent pension insurance organization, without regard to the prognosis. This distinguishes the German system from that in force in the other States of the EEC. An apportionment of the charges, such as that provided for in Article 28 of Regulation No 3, would thus come into conflict with the differences existing between the social security systems in the Member States. Even if, contrary to the views of the Landesversicherungsanstalt, the assistance provided in cases of tuberculosis by the pension insurance organizations of the Federal Republic were regarded as an invalidity benefit, the right to such benefits would only be acquired where it was possible to bring proof of a period of affiliation to a German pension insurance organization or an assimilated period of at least 6 months.

Even if the treatment of a person suffering from tuberculosis constitutes a sickness insurance benefit, it would be impossible to accept that Regulations Nos 3 and 4 authorize the aggregation of the contributions paid to the German pension insurance scheme with the contribution periods completed in other Member States by way of sickness insurance or, in Italy, by way of the special scheme of insurance against tuberculosis. Unlike the provisions of the statutory pension insurance scheme, migrant workers have, within the context of the statutory sickness insurance scheme established in the Federal Republic of

Germany, rights which are required in the case of tuberculosis requiring treatment, without any need to bring evidence of a minimum period of affiliation. It cannot therefore be claimed that a migrant worker is put into an unfavourable position in the Federal Republic of Germany when he requires treatment against tuberculosis.
The provision contained in Article 1244a of the RVO must be regarded as a rule embodying an exception which is applicable solely within the territory of the Federal Republic of Germany and only where a migrant worker satisfies the legal requirements imposed in Germany by means of contributions paid to the pension insurance scheme.

2. *Observations of the Commission*

A — The first question

(a) The *Commission* observes that before the entry into force of the law of 1959 providing for social assistance in cases of tuberculosis, the social insurance organizations acted—as they still do today in order to avoid cases of invalidity (Article 1236 *et seq.* of the RVO, as amended)—on the basis of Article 1252 of the RVO to pay to tuberculosis sufferers benefits which were provided for not by public assistance, but by a law governing social insurance. The benefits referred to in Articles 48 to 66 of the BSHG, which have replaced the abovementioned law of 1959, are based on the principle of the alternative nature of the social assistance (cf. Article 2 of the BSHG), that is, that in theory the assistance is only provided when the person concerned cannot receive it from other sources, in partidular, from institutions paying other social benefits, and his financial circumstances must also be taken into account. Although, under Article 59 of this law, the social assistance institution is always bound to take action in urgent cases in so far as no other institution is bound to pay the benefit, the organization which actually bears this obligation must reimburse the instituion with the expenses which it was forced to incur. This confirms the alternative nature of the measures of assistance in cases of tuberculosis provided for by this law. Quite independently of the benefits provided for by the BSHG, the provisions of Article 1244a of the RVO adopted in 1959 award not only to insured persons and persons receiving pensions, but also to the spouses and children of such persons, rights to medical treatment, aid to integration into working life and to social assistance in the case of contagious tuberculosis, provided that the requisite insurance periods have been completed. These rights are not subject to any condition that they must be alternative in nature and may be enforced in legal proceedings. The right to medical treatment and to a temporary allowance exists even where there is no reason to fear that the employment of the person concerned will be endangered or where there is no chance of maintaining, considerably improving or re-establishing such employment as a result of the measures provided for. It is on the basis of this last feature that the Bundessozialgericht believes that the provisions of Articles 26 and 27 of Regulation No 3 may be inapplicable.
The Commission observes that, if the insurance periods completed in Germany are considered alone, none of the conditions provided for in Article 1244a(2) of the RVO is satisfied in the main action. The The minimum number of insurance periods would, however, be completed if, by applying the rules on aggregation contained in Regulation No 3, it were possible to add the insurance periods completed in other Member States to those completed in Germany.

(b) *The question whether the benefits at issue are in the nature of social security payments*

Article 2(1) of Regulation No 3 applies to all the legislation which governs the benefits referred to in subparagraphs (a) to (h). These benefits cover, in particular, sickness and invalidity benefits, including bsnefits awarded for the purpose of maintianing or improving earning capacity, and family allowances. The Bundessozialgericht acknowledges that, in any event,

contagious tuberculosis requiring treatment constitutes an 'illness' which also frequently gives rise to a risk of 'invalidity'. A provision of national law in favour of tuberculosis sufferers which provides, first, for rights to hospital or out-patient treatment and, secondly, for measures to facilitate the exercise of employment as well as temporary allowances in favour of the insured person, his spouse and children concerns benefits of the type referred to in Article 2(1)(a), (b) and (h) of Regulation No 3. Therefore, the application of this regulation could only be excluded if, in spite of the fact that it is to be found in a law governing social security, Article 1244a of the RVO concerned social assistance and medical aid within the meaning of Article 2(3) of Regulation No 3. Although it is true that the differences between the standard type of social assistance and the legislation on social security are becoming less and less clear in all the Member States, in a case in which a benefit is, first, subject to the completion of certain insurance periods and, secondly, awarded in the form of an actual right, there are serious reasons for regarding such a benefit as in the nature of a social security payment. If, moreover, there is no question of a benefit being alternative in nature, the existence of a social security benefit and, therefore, of the application of Regulation No 3, may only be denied in quite special circumstances. This is confirmed by the fact that Article 2(3) of Regulation No 3 is a provision which lays down exceptions and must, therefore, be strictly interpreted. On the basis of these considerations the Commission concludes that Article 1244a of the RVO forms part of the law on social security, not only because of its place in the Reichsversicherungsordnung, but also because the benefits which are at present regarded as imperative by this provision were already awarded by the social security institutions in the context of the existing powers before this provision was included in the Reichsversicherungsordnung. The prevention and cure of illness and disease held a predominant place in the earlier regulations as the typical concerns of social security. It is true that, in the context of Article 1244a, it is not easy to differentiate between measures intended to maintain or improve earning capacity and measures concerning invalidity. However, the Commission considers that it is not possible to exclude in a general way from the scope of Regulation No 3 the measures provided provided for by the abovementioned provision solely because of these difficulties or the wider protection which they afford in relation to the general rules. The fundamental differences which exist between the provisions of the BSHG and those of the RVO as regards the conditions to which benefits are subject and the terms on which they are awarded demonstrate the independent nature of the benefits provided for in Article 1244a of the RVO, with the result that it is mistaken to see a mere division of powers between the social assistance organizations and the social security organizations in the fact that Article 1244a of the RVO refers to a concept of social security law, that is, to the concept of the insured person.

Finally, the Commission observes that the German authorities have for a long time applied EEC Regulations Nos 3 and 4 to the benefits which are paid to tuberculosis sufferers by the pesnison insurance organizations on the basis of Article 1244a of the RVO.

(c) *The question whether Regulation No 3 contains a rule enabling the aggregation, in the main action, of the insurance periods completed in the different Member States*

The Commission observes that the benefits provided for in Article 1244a of the RVO are complex and composite in nature. They do not constitute solely invalidity benefits, as the Bundessozialgericht appears to believe, but also sickness benefits, at least in so far as they award rights to hospital and out-patient treatment. The benefits awarded for the purpose of maintaining, improving or re-establishing earning capacity are difficult to distinguish from sickness benefits. The Commission observes that, to a large extent, both France and Italy apply the criteria governing sickness

insurance to the fight against tuberculosis. In the light of the difficulties inherent in drawing a distinction between the two categories of benefits (those provided for in respect of invalidity and those in respect of sickness) the Commission considers that it is expedient to consider the problem of the aggregation of the insurance periods not only from the point of view of Articles 26 and 27 which deal with invalidity, but also on the basis of those provisions of Regulation No 3 which concern sickness, inêparticular since the Bundessozialgericht itself considers that Articles 26 and 27, to which it expressly refers, are only applicable by analogy and wonders whether a general principle is contained in these articles.

(d) *Aggregation on the basis of Articles 26 and 27 of Regulation No 3*

The Commission observes that, even if the provision in Article 1244a of the RVO were to be regarded as one of the Type A provisions referred to in Article 24 *et seq.* of Regulation No 3, in view of the fact that if it subjects the benefits solely to the completion of certain minimum insurance periods but does not increase them in proportion to the length of time during which contributions are paid, the Federal Republic has expressed no reservations on this point in its statements concerning Annex F to Regulation No 3. Moreover, in any event insurance periods of Type B exist in the other Member States. This fact is itself sufficient to justify the application of Article 26 of Regulation No 3.

The Commission considers that neither the fact that the benefits in question do not constitute pensions which may be apportioned *pro rata temporis*, nor the fact that the amount of these benefits is not calculated in terms of the length of the periods completed, are obstacles to the application of Articles 26 and 27 of Regulation No 3. In fact, Regulation No 3 nowhere provides that the principle of the aggregation of the insurance periods laid down in Article 27 can only be applied in conjunction with a *pro rata* apportionment. Furthermore, as regards Type A benefits, Article 38 of Regulation No 1408/71 provides that the aggregation of insurance periods in order to acquire a right to invalidity benefits takes place without any *pro rata* apportionment being made. The aggregation of the insurance periods constitutes one of the basic features of Regulation No 3 which must, therefore, in cases of doubt, be interpreted in line with an application of this principle.

It is also clear from the terms of Article 2(1)(b) of Regulation No 3, which expressly includes in the scope of this regulation benefits which are awarded for the purpose of maintaining or improving earning capacity, and Article 26(1) of the same regulation, which stipulates that the provisions of Chapter 3 shall only apply by analogy, that Article 27 must be applied to these cases, particularly since other provisions of Regulation No 3 (for example, Article 16 *et seq.*, Article 32, Article 33) show that the principle of aggregation need not necessarily be associated with the principle of *pro rata* apportionment. The fact that, quite independently of the recovery of the earning capacity of the individual concerned, certain benefits under national legislations are also awarded for other purposes, such as the protection of the population against risks of contagion, is not sufficient to exclude them from the area of application of the Community provisions relating to invalidity. For the application of Chapter 2 of Head III of Regulation No 3 it is sufficient for the re-establishment or improvement of the earning capacity of a tuberculosis sufferer to be only one of the objectives sought.

Where the measures referred to in Article 1244a of the RVO are applied to a person for whom the problem of maintaining or improving earning capacity does not arise (for example, because the age-limit has been reached, or because he is a total invalid) Article 26 of Regulation No 3 is no longer applicable but it is then necessary to consider the extent to which the provisions concerning the benefits payable in case of sickness (Article 16 *et seq.* of Regulation No 3) make itênecessary to take account of the insurance periods completed in other Member States.

(e) *Aggregation on the basis of Article 16* et seq. *of Regulation No 3*

The Commission considers that in the main action the provision contained in the second subparagraph of Article 17(1) of Regulation No 3 does not exclude the aggregation of the insurance periods completed in Italy and Germany and, therefore, the application of Article 1244a of the RVO.

B — The second question

The Commission considers that Article 28 (2) of Regulation No 4 is intended to govern an individual case and therefore does not lend itself to a wider interpretation. As is also shown by the judgment in Case 32/70, this provision is only intended to simplify the payment procedures, where several Member States are liable for the payment of *pensions*. This provision is always inapplicable where an insurance period of less than 6 months cannot be taken into consideration by another Member State. In the case of benefits in kind, in respect of which the legislation applicable provides for no apportionment *pro rata*, the application of the above-mentioned Article 28(2) is excluded.
The reply to the question referred by the Bundessozialgericht must therefore be in the negative.

3. *Observations submitted by the Government of the Italian Republic*

The *Italian Government* observes that the benefits payable as part of the fight against tuberculosis are, in a general way, in the nature of social security benefits in that, first, they are intended to maintain, improve and re-establish the earning capacity of a worker who is suffering from tuberculosis, and this aim generally gives concrete form to another—the protection of public health and the fight against tuberculosis which is regarded as a social scourge. Secondly, they presuppose the existence of an insurance scheme and it is for this reason that the receipt of benefits is subject to the payment of contributions or the completion of a specific insurance period.

As Annex B to Regulation No 3 expressly introduced the Italian legislation on insurance against tuberculosis into the area of application of this regulation, a worker suffering from tuberculosis who returns to his own country may succeed in obtaining the aggregation of insurance periods completed in Germany in order to be eligible, in Italy, for insurance benefits against tuberculosis.
It is essential to avoid unequal treatment between Community workers when applying the principle of the aggregation of the insurance periods, which forms the basis of Regulations Nos 3 and 4.
Finally, the Italian Government agrees with the findings of the Sozialgericht and considers that the general provision set out in Article 16 of Regulation No 3 is the most relevant to this case.

Grounds of judgment

1 By order of 1 March 1972, received at the Court Registry on 24 April 1972, the Bundessozialgericht referred to the Court under Article 177 of the EEC Treaty questions concerning the interpretation of certain provisions of EEC Regulations Nos 3 and 4 of the Council concerning social security for migrant workers with reference to the application of Article 1244a of the Reichsversicherungsordnung (RVO) (German State Insurance Regulation). This article concerns the benefits which the pension insurance organizations must pay to insured persons who suffer from tuberculosis. The first question asks whether Articles 26 and 27 of Regulation No 3 are applicable by analogy to benefits such as those referred to in Article 1244a of the RVO.

2 This article was introduced into the RVO by Article 31 of the Law of 23 July 1959 concerning assistance in cases of tuberculosis. In order to 'encourage and ensure the recovery of invalids' in accordance with the first sentence of Article 1(1), this law provided for medical treatment, aid to integration into working life, economic aid and aid of a prophylactic nature to be provided by the social assistance organizations to all persons suffering from tuberculosis to the extent to which they cannot receive the necessary assistance by any other means. On the other hand, by referring solely to those tuberculosis sufferers who are insured with and receive pensions from pension insurance organizations, and to their spouses and children, the introduction of Article 1244a into the RVO by the abovementioned Article 31 compelled the pension insurance organizations to provide such persons with, in particular, the necessary medical treatment and a temporary allowance even where, contrary to the general provisions of Article 1236 of the RVO concerning the conditions under which benefits are paid by the pension insurance organizations of workers, there is no reason to fear that the invalid's employment will be jeopardized or where no chance exists of maintaining, improving or re-establishing such employment by means of the measures provided for.

3 The file shows that the plaintiff in the main action, a German social assistance organization, was refused by a German pension insurance organization the reimbursement of hospital expenses incurred in the treatment of an Italian worker suffering from tuberculosis, on the ground that Article 1244a of the RVO was not applicable, since the insurance periods completed in Germany by the worker in question were insufficient to satisfy the condition of sixty months' affiliation laid down therein. In order to settle the case pending before it, the German court must decide whether the affiliation periods previously completed by the worker in another Member State must be taken into account in applying Article 1244a of the RVO. To this end, therefore, the Bundessozialgericht must classify the benefits provided for by Article 1244a of the RVO in the light of the criteria which define the scope of Regulation No 3 of the Council concerning social security for migrant workers. Without being empowered to classify the abovementioned provision of the RVO in the context of the present proceedings, the Court may, however, provide the national court with factors of interpretation depending on Community law which might be useful to it in evaluating the effects of that provision.

4 Under the terms of Article 1(b), Regulation No 3 applies to all the legislation of the Member States relating to 'the social security schemes and branches of social security' referred to in Article 2(1) and (2), and under Article 2(3) the Regulation shall not apply to 'social assistance and medical aid'. In order to reply to the question referred, it is first necessary to consider whether such advantages as those provided by Article 1244a of the RVO are included in the social security benefits listed in Article 2(1) and (2) of Regulation No 3. Regulation No 3 must be interpreted with regard to the fundamental aim of Article 51 of the Treaty, which is to establish the most favourable conditions for achieving the freedom of move-

ment and employment of Community workers within the territory of each of the Member States. The pursuit of this objective enables the concept of social security to be regarded as including the aim of preventing the spread of disease, which cannot be regarded as a mere measure of social assistance.

5 Considered from this point of view, a provision which establishes a direct link between the affiliation of an individual to a pension insurance scheme and the acquisition of a right to benefits which are payable by pension insurance organizations to insured persons and their dependants, as a result of the fact that they have contracted tuberculosis and chiefly in order to bring about their recovery, must be regarded as forming part of the legislation governing social security referred to in Article 2(1) of Regulation No 3. This classification cannot be modified by the fact that, since tuberculosis is contagious and constitutes a danger to public health, it has formed the subject of a special law providing for prophylactic or remedial measures which the social assistance organizations are required to apply in favour of any person residing in the Member State concerned, to the extent to which such benefits are not already provided by the insurance organizations.

6 Therefore, Article 2(1) of Regulation No 3 covers benefits of a prophylactic or remedial nature.

7 In order to reply to the question referred it is still necessary to consider whether the aggregation of the affiliation periods completed in the various Member States, which is necessary in order to acquire a right to the benefits in question, should be carried out on the basis of Articles 26 and 27 of Regulation No 3 to which the German court refers.

8 As is pointed out in the order referring the matter, in the absence of any contrary provision, benefits which are not related to the 'earning capacity' of the insured person cannot be regarded as invalidity benefits within the meaning of Article 2(1)(b) of Regulation No 3. On the other hand, where such benefits are also awarded to the members of the family of the insured person and where their essential aim is to cure the invalid and protect those who are in contact with him they must be regarded as sickness benefits within the meaning of Article 2(1)(a) of Regulation No 3.

9 Therefore, the aggregation of the affiliation periods completed in the various Member States, for the purposes of acquiring a right to such benefits, is governed by Article 16 *et seq.* of Regulation No 3.

10 In the event of an affirmative answer being given to the principal question, it is further asked whether the legal considerations which form the basis of the first sentence of Article 28(2) of Regulation No 4 on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security

for migrant workers (minimum period of affiliation) apply to benefits such as those in question.

11 In the light of the reply to the first question, the second question has become irrelevant.

Costs

12 The costs incurred by the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court are not recoverable, and as these 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 national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Landesversicherungsanstalt Hannover, H. Heye Glasfabrik 'Schauenstein', Obernkirchen, the Italian Government and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 51 and 177;
Having regard to Regulations Nos 3 and 4 of the Council concerning social security for migrant workers;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Bundessozialgericht, by a decision of that court dated 1 March 1972, hereby rules:

1. **A provision which establishes a direct link between affiliation to a pension insurance scheme, and the acquisition of a right to benefits which are payable by pension insurance organizations to insured persons and their dependants as a result of the fact that they have contracted tuberculosis and chiefly in order to bring about their recovery, must be regarded as forming part of the legislation governing social security referred to in Article 2 (1) of Regulation No 3;**

2. The social security benefits which, although not related to the 'earning capacity' of the insured person, are also awarded to the members of his family and are principally intended to aid the recovery of the invalid and to protect those who are in contact with him must be regarded as sickness benefits within the meaning of Article 2 (1) (a) of Regulation No 3. For the purposes of acquiring a right to such benefits, therefore, the aggregation of the affiliation periods completed in the various Member States is governed by Article 16 *et seq.* of Regulation No 3.

Lecourt Monaco Pescatore

Donner Trabucchi Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on 16 November 1972.

A. Van Houtte
Registrar

R. Monaco
(President of Chamber)
For the President

OPINION OF MR ADVOCATE-GENERAL MAYRAS

(See Case 14/72, page 1116)