2. The aggregation of insurance periods and the apportionment of benefits provided for by Articles 27 and 28 of Regulation No 3 have no relevance in the case of a State in which the result sought by Article 51 of the Treaty is already attained by virtue of national legislation alone. They cannot therefore be effected, without being incompatible with Article 51 of the Treaty, if their effect is to reduce the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the periods of insurance completed under those laws provided, however, that that method does not lead to an overlapping of benefits for one and the same period.
3. The overlapping of a benefit, acquired under national law alone on the basis of national contribution periods with a benefit acquired in another State by means of aggregation in a case where, as required by Article 27, the periods of insurance "do not overlap", does not constitute an advantage which is contrary to Community law. The advantage of aggregation is the acquisition of a right to a pension which would not otherwise arise, the pension acquired in this way being calculated in proportion only to the insurance period completed in the Member State in question, to the exclusion of any period completed elsewhere.
4. The competent institution of a Member State may not rely on the provisions of Regulation No 3 or in particular in Article 28 (4) in order to refuse the grant to a worker of benefits calculated pursuant to Articles 27 and 28 of that regulation or to reduce them on the ground that that worker is receiving a pension provided by the institution of another Member State pursuant to the legislation of that State alone.

In Case 1/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the First Chamber of the Tribunal de Première Instance [Court of First Instance], Liège, for a preliminary ruling in the dispute pending before that Court between

FONDS NATIONAL DE RETRAITE DES OUVRIERS MINEURS (FNROM) [National Pension Fund for Miners]

and

YVON SALMON, of Liège,

on the interpretation of Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561),

THE COURT (Third Chamber)

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart, Judges,

Advocate General: J.-P. Warner
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. The Fonds National de Retraite des Ouvriers Mineurs (hereinafter referred to as "the Fund"), the plaintiff in the main action, brought an action before the Tribunal de Première Instance, Liège, for damages for professional misconduct on the part of Yvon Salmon, the defendant in the main action, in his capacity as an advocate.

The Fund accuses Mr Salmon of having failed, despite the issue of instructions to that effect, to lodge an appeal against a judgment delivered on 17 April 1975 by the Eupen Division of the Arbeitsgericht Verviers (Labour Tribunal, Verviers, using German as the procedural language). By that judgment the Arbeitsgericht set aside a decision by the Fund depriving Mr Tomitzek, with retroactive effect, of invalidity benefits previously awarded to him.

The defendant in the main action contended in his defence that his failure to carry out the instructions to lodge the appeal at issue did not in any event cause any damage to the plaintiff in the main action since the interpretation of Community law adopted by the Verviers court was correct in the light of the case-law of the Court of Justice.

2. The dispute upon which the Verviers court adjudicated may be briefly summarized as follows:

Mr Tomitzek, a German national, worked as a miner for 18 years 9 months and 20 days in Germany and for 8 years 8 months and 1 day in Belgium.

From 1 January 1959 Mr Tomitzek has received a Belgian invalidity pension calculated pursuant to Regulations Nos 3 and 4 after aggregation of the periods completed in Germany and in Belgium and an apportionment of the share of the Belgian pension (8/32nds).

At first Mr Tomitzek received in Germany, before 1 January 1959, an invalidity pension also calculated on the basis of the aggregation of periods and an apportionment of the benefit.

However, by a letter of 26 March 1974 the Bundesknappschaft, the German paying body, informed Mr Tomitzek that following a fresh legal interpretation of Regulations Nos 3 and 4 the decision had been taken to grant, retroactively, from 1 January 1959, the purely national pension since it had been discovered that compared to the aggregated and apportioned pension the national pension was higher. It therefore appears that in Germany Mr Tomitzek fulfilled the conditions for the grant of the German pension without the need for recourse to the aggregation of periods.

Having learned of the decision by the Bundesknappschaft, on 16 July 1974 the Fund notified Mr Tomitzek of a decision to the effect that "he cannot rely simultaneously on the provisions of Regulation No 3 and on the purely national provisions of the legislation of a Member State (Article 28 (4) of Regulation No 3)".

Taking the view that Mr Tomitzek was therefore disqualified from receiving a part of the Belgian pension the Fund retroactively withdrew, as from 1 January 1959, all the benefits granted to him by previous decisions.

On the application of Mr Tomitzek the case was submitted to the Arbeitsgericht Verviers.

That tribunal decided that the German pension had been granted pursuant to Regulations Nos 3 and 4 and that only the amount of it had been determined in accordance with German law.

Referring *inter alia* to the judgment of the Court of Justice of 5 July 1967 (Case 1/67, *Ciechelski,* [1967] ECR 181) the tribunal decided that Mr Tomitzek was entitled to the German pension, not by virtue of the provisions of the legislation of one Member State only (Article 28 (4) of Regulation No 3) but by virtue of the combined provisions of Community law and German law.

Consequently the Belgian institution could not reduce the Belgian benefit. The decision to cease payment of the pension was set aside by the Arbeitsgericht Verviers.

3. In order to establish whether the argument advanced by the defendant in the main action was well founded, the Tribunal de Première Instance, Liège, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"Did the Arbeitsgericht Verviers, in its judgment of 17 April 1975, correctly interpret Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation (EEC) No 3 of 25 September 1958 concerning social security for migrant workers by ruling that the German insurance institution, the Bundesknappschaft, did not award a purely national pension which would have justified the

decision taken by the plaintiff, but a Community pension which was more advantageous for the person entitled, thereby excluding the application of Article 28 (4) of the said Regulation (EEC) No 3?"

4. The order making the reference was lodged at the Court Registry on 2 January 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the Fund, represented by Jean Dal of the Brussels Bar, by Yvon Salmon, represented by Roger Bourgeois and Paul Remits, advocates of Liège, and by the Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, assisted by Francis Herbert, of the Brussels Bar.

In accordance with Article 95 (1) and (2) of the Rules of Procedure of the Court the case was assigned to the Third Chamber.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

A — The Fund submits that the dispute turns on the interpretation of Article 28 (4) of Regulation No 3 which is worded as follows:

"Subject to the provisions of paragraph (1) (f) of this Article, persons who may claim under the provisions of this Chapter shall not be entitled to claim a pension under the legislation of one Member State only."

Subparagraph (f) of paragraph (1) reads as follows:

"If the person concerned does not at a given date satisfy the conditions required by all the legislative systems applicable to him, but satisfies the conditions of one of them without need of recourse to periods completed under one or more of the other legislative systems, the amount of benefit shall be determined solely in accordance with the legislation under which the right to benefit is opened and taking account only of the periods completed under that legislation".

According to the Fund, except for the particular case referred to under Article 28 (1) (f), by virtue of paragraph (4) of that article a migrant worker who receives a national pension may no longer claim entitlement to a Community pension arising from Articles 27 and 28.

In this respect the Fund criticizes the interpretation of the decision of 24 January 1974 of the Bundesknappschaft made by the Arbeitsgericht Verviers in its judgment. It may be seen clearly from the text of that decision [1] that the German institution is awarding a national pension and not a Community pension, contrary to what the Arbeitsgericht incorrectly states. This is confirmed by the letter of 26 May 1974 sent by the Bundesknappschaft to the Caisse de Prévoyance [Provident Fund],

1 — In support of its argument the Fund quotes the following extract from the decision:

"The best benefit should be granted, either the national pension or the international pension calculated pursuant to Regulation Nos 3 and 4 of the EEC.

Since the national benefit is in this case the higher, that is the one which must be paid as a benefit by virtue of Regulations Nos 3 and 4 of the EEC".

Liège, explaining the decision of 24 January 1974.

The judgment of the Arbeitsgericht Verviers leads to a result which is inequitable and non-sensical: if the court's ruling were to be followed, Mr Tomitzek would not only receive a national German pension higher than that which would accrue under Articles 27 and 28 of Regulation No 3, but in addition an apportionment of the Belgian pension. This would on any view be incompatible with Article 28 (4) of Regulation No 3.

Finally, the Fund argues that the judgment of the Court cited by the Arbeitsgericht Verviers in support of its decision, and in particular the *Ciechelski* judgment [1967] ECR 181, have no bearing on this case.

In conclusion the Fund proposes that the following answer be given to the question referred to the Court of Justice by the national court:

"... in granting Rudolf Tomitzek a Belgian benefit determined under the provisions of Articles 27 and 28 of Regulation No 3 although the benefit awarded to the claimant as from 1 January 1959 is a benefit determined under the provisions of German legislation alone and in thus awarding a Community pension concurrently with a national pension notwithstanding Article 28 (4) of the said regulation the Arbeitsgericht Verviers in its judgment of 17 April 1975 misinterpreted Article 51 of the EEC Treaty and Articles 27 and 28 of EEC Regulation No 3 of 25 September 1958 concerning social security for workers and especially Article 28 (4) thereof".

B — *Mr Salmon* states that the question referred to the Court must be answered in the affirmative.

The Arbeitsgericht Verviers correctly interpreted the consistent case-law of the Court established since the *Ciechelski* judgment, cited above. The effect of that case-law is that the application of Regulation No 3 cannot result in a worker's losing his entitlement to national benefits acquired solely under national law if those benefits are higher than those which, in the Member State concerned, result from the application of the rules on aggregation and apportionment laid down by that regulation. That case-law also permits the overlapping of a benefit acquired solely under national law, with another benefit acquired in another State, by means of aggregation, as long as the periods do not overlap. The principles laid down by the Court of Justice were followed by the Belgian Cour de Cassation [Court of Cassation] in its judgment of 2 October 1974, *Vittorino* v *FNROM*

Mr Salmon consequently concludes that the Arbeitsgericht was right to decide that the Bundesknappschaft "was not awarding a purely national pension, which would have justified the decision taken by the Fund, but a Community pension which was more advantageous for the person entitled, thereby excluding the application of Article 28 (4) of the said Regulation (EEC) No 3".

C — The *Commission* first proposes that the question submitted by the national court, which invites the Court to carry out a direct review of the interpretation of Community law by a national court, should be re-worded as follows:

"How must Article 28 (4) of Regulation No 3, which provides that 'persons who may claim under the provisions of this Chapter shall not be entitled to claim a pension under the legislation of one Member State only', be interpreted?"

For a summary of the principles laid down by the Court for the interpretation of Articles 27 and 28 of Regulation No 3 the Commission refers to the opinion of Mr Advocate General Warner in Case 191/73, *Niemann* [1974] ECR 571.

In the light of those principles it is clear that Article 28 (4) is incompatible with the case-law of the Court to the extent to which it provides that a worker may claim entitlement to a pension only by means of aggregation of periods and the apportionment of benefits save in the case set out by Article 28 (1) (f). In fact the effect of the case-law of the Court is that the method of aggregation and apportionment applies only to the extent to which the non-apportioned national benefit to which a worker is entitled under national law alone is lower than the amount of the benefit resulting from the application of the method of aggregation and apportionment. A migrant worker may therefore lawfully acquire both a non-apportioned national pension and a pension calculated in another Member State on the basis of Regulation No 3. The position would be different only in the event of overlapping periods. In its review of the compatibility of Article 28 (4) with Article 51 of the Treaty the Commission refers in particular to the *Balsamo* judgment [1976] ECR 375 and the *Niemann* judgment cited above.

The Commission also states that in its opinion the reference made by the Fund to Article 28 (4) is completely irrelevant. Article 28 (4) concerns only the situation of a migrant worker in the Member State in which he is entitled to a benefit without the need to have recourse to the aggregation of periods. In this case it therefore concerns only the position of Mr Tomitzek in Germany. It does not relate to the calculation or the conditions for the grant of the supplementary benefit to which Mr Tomitzek is entitled in Belgium.

It is apparent from that observation that the question of the description of the German benefit in question is of no consequence in order to establish Mr Tomitzek's entitlement to a Belgian benefit. The Commission thinks that it is clear that the German benefit granted was awarded "under the legislation of one Member State only" but that is irrelevant since the Fund may not rely on Article 28 (4) in any case.

Finally the Commission points out that no national provisions against overlapping may be invoked against the grant of an apportioned Belgian pension to Mr Tomitzek so long as there is no overlapping of periods (*Guissart* judgment, [1967] ECR 425). According to the judgment making the reference there are in fact no overlapping periods in this case.

In conclusion the Commission suggests that the question referred to the Court be answered as follows:

"Subject to its compatibility with Article 51 of the Treaty, Article 28 (4) of Regulation No 3 relates solely to the situation of a migrant worker in the Member State in which he may claim a benefit under

the legislation of that State alone. That provision may not therefore be invoked by the institution of a Member State which has to pay a *pro rata* pension calculated pursuant to Articles 27 and 28 of Regulation No 3, in order to refuse to grant that *pro rata* pension on the grounds that the claimant is receiving a pension paid by the institution of another Member State on the basis of the legislation of that latter State alone".

III — Oral procedure

The Fund, represented by J. Dal, Mr Salmon, represented by R. Bourgeois and P. Remits, and the Commission of the European Communities, represented by F. Herbert, presented oral argument at the sitting on 22 May 1980.

In reply to a question from the Advocate General the Commission explained that, regardless of whether Article 28 (4) of Regulation No 3 is or is not applicable to a situation such as this, the provisions must in any event be regarded as incomptabile with Article 51 of the Treaty. In actual fact Article 28 (4) is based on the premise that a migrant worker's pension may as a general rule be calculated only by the method of aggregation and apportionment, an assumption which has been expressly rejected by the Court in its consistent case-law dating from the *Ciechelski* judgment.

The Advocate General delivered his opinion at the end of that sitting.

Decision

1 By an order of 21 December 1979 which was received at the Court Registry on 2 January 1980 the First Chamber of the Tribunal Civil de Première Instance, Liège, referred a question to the Court of Justice under Article 177 of the Treaty on the interpretation of Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561).

2 This question has arisen in the context of a dispute between the Fonds National de Retraite des Ouvriers Mineurs [National Pension Fund for Miners], hereinafter referred to as "the Fund", the plaintiff in the main action, and one of its lawyers, the defendant in the main action, whom the Fund accuses of failing despite the issue of instructions to that effect to lodge an appeal in due time, against a judgment delivered on 17 April 1975 by the Eupen Division of the Arbeitsgericht [Labour Tribunal] Verviers.

3 By that judgment the Arbeitsgericht set aside, on the basis of an interpretation of Community law which was challenged by the Fund, a decision by the Fund to withdraw, pursuant to Article 28 (4) of Regulation No 3, with retroactive effect, invalidity benefits awarded pursuant to Regulation No 3 to Mr Tomitzek, a German national who had worked as a miner first in Germany and then in Belgium. The Fund's decision was based on the fact that, following a decision by the Bundesknappschaft, the competent German institution, of 26 March 1974, Mr Tomitzek received, with retroactive effect, an invalidity pension calculated on the basis of German legislation alone, which was higher than the pension previously paid by the Bundesknappschaft pursuant to Regulation No 3.

4 The Fund then brought an action for damages for professional misconduct on the part of its lawyer, who argued in his defence that the Fund had not suffered any damage in this case since the Arbeitsgericht Verviers had correctly interpreted the Community law applicable in the matter.

5 The Tribunal Civil de Première Instance, Liège, decided to stay the proceedings and referred the following question to the Court for a preliminary ruling:

"Did the Arbeitsgericht Verviers, in its judgment of 17 April 1975, correctly interpret Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation (EEC) No 3 of 25 September 1958 concerning social security for migrant workers by ruling that the German insurance institution, the Bundesknappschaft, did not award a purely national pension which would have justified the decision taken by the plaintiff, but a Community pension which was more advantageous for the person entitled, thereby excluding the application of Article 28 (4) of the said Regulation (EEC) No 3?"

6 In connexion with the task entrusted to it by Article 177 the Court has no jurisdiction to review the application of the provisions of Community law to a given case or to criticize the way in which a national court applies Community law. However, the need to arrive at a serviceable interpretation

of Community law permits the Court to extract from the details of the dispute in the main action the information necessary for an understanding of the question referred to it and for the formulation of an appropriate answer.

7 It is apparent from the file that the purpose of the reference for a preliminary ruling is to enable the national court to determine whether the Fund could properly rely on Article 28 (4) of Regulation No 3 in order to withdraw, with retroactive effect, the benefits previously granted to Mr Tomitzek. The court will therefore examine whether, bearing in mind the provisions of Article 28 (4) of Regulation No 3, Community law allows the competent institution of a Member State to refuse to grant a *pro rata* pension calculated by applying Articles 27 and 28 of Regulation No 3 to a worker who receives a pension provided by the institution of another Member State pursuant to the legislation of that State alone.

8 Article 28 (4) of Regulation No 3, which applies to invalidity benefits by virtue of Article 26 of that regulation provides that "subject to the provisions of paragraph (1) (f) of this article, persons who may claim under the provisions of this chapter shall not be entitled to claim a pension under the legislation of one Member State only".

9 Article 28 (4) is based on the premise that a migrant worker who has been successively or alternately subject to the legislation of two or more Member States may claim entitlement to a pension only by means of the aggregation of periods and the apportionment of benefits provided for by Articles 27 and 28 of Regulation No 3.

10 Under well-settled case-law dating from its judgment of 5 July 1957 in Case 1/67 *Ciecheleski,* [1967] ECR 181 the Court has ruled that aggregation and apportionment have no relevance in the case of a State in which the result sought by Article 51 of the Treaty is already attained by virtue of national legislation alone. By that case-law aggregation and apportionment cannot be

effected, without being incompatible with Article 51, if their effect is to reduce the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the periods of insurance completed under those laws provided, however, that that method does not lead to an overlapping of benefits for one and the same period.

11 It should be further emphasized that the overlapping of a benefit, acquired under national law alone on the basis of national contribution periods with a benefit acquired in another State by means of aggregation in a case where, as required by Article 27, the periods of insurance "do not overlap", does not constitute an advantage which is contrary to Community law. The advantage of aggregation is the acquisition of a right to a pension which would not otherwise arise, the pension acquired in this way being calculated in proportion only to the insurance period completed in the Member State in question, to the exclusion of any period completed elsewhere.

12 The answer to the question referred to the Court should therefore be that the competent institution of a Member State may not rely on the provisions of Regulation No 3 or in particular on Article 28 (4) of that regulation in order to refuse the grant to a worker of benefits calculated pursuant to Articles 27 and 28 of that regulation or to reduce them on the ground that that worker is receiving a pension provided by the institution of another Member State pursuant to the legislation of that State alone.

Costs

13 The costs incurred by the Commission of the European Communities which has submitted observations to the Court are not recoverable. Since 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Tribunal Civil de Première Instance, Liège, by order of 21 December 1979, hereby rules:

The competent institution of a Member State may not rely on the provisions of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers or in particular on Article 28 (4) of that regulation in order to refuse the grant to a worker of benefits calculated pursuant to Articles 27 and 28 of that regulation or to reduce them on the ground that that worker is receiving a pension provided by the institution of another Member State pursuant to the legislation of that State alone.

Kutscher Mertens de Wilmars Mackenzie Stuart

Delivered in open court in Luxembourg on 12 June 1980.

H. A. Rühl
Principal Administrator

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 22 MAY 1980

My Lords,

I am so entirely in agreement with what the Commission has said that no purpose would be served in my asking the Court for time to reflect.

I propose that the Court reply to the question referred to it by simply saying that Article 28 (4) of Regulation No 3 is incompatible with Article 51 of the Treaty and is consequently invalid.