age pension acquired in one Member State under Article 27 and another old-age pension which has not yet been acquired in another Member State or which has been acquired in another Member State whose legislation permits its payment to be deferred at the request of the person concerned;

4. **Claiming a pension from a social security institution of one Member State does not imply a waiver of the rights of election which the legislative systems of other Member States grant to the workers concerned. The national social security authorities are competent to decide when such election must be made;**

5. **The decision as to costs in these proceedings is a matter for the Belgian Conseil d'Ētat.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 12 December 1967.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 8 NOVEMBER 1967[1]

Mr President,
Members of the Court,

The reference for a preliminary ruling, upon which I give my opinion today, was initiated by a request from the Belgian Conseil d'État. It refers—as many other references do—to the provisions issued by the Council relating to social security for migrant workers and the facts are as follows.

The defendant in the original proceedings, a Belgian national resident in France, worked and was insured under social security schemes in Belgium (for one year) and then in France (for an initial period of 13 years). On 5 May 1960 (at the age of 60) he made an application for an old-age pension to the social insurance institution at his place of residence, based on French law, under which the normal retirement age is 60, with the result that he was granted a part pension in France in accordance with Article 28 of Regulation No 3 commencing on 1 October 1960, that is to say, on the date when, after taking into account his insurance periods in Belgium, he had completed the minimum social insurance period of sixty quarters under French law. The French social insurance institution then sent the application to the Belgian social insurance authority, which treated

1 — Translated from the German.

it as an application in advance for the grant of an old-age pension, since in Belgium the normal retirement age is 65. It therefore determined the Belgian part of his pension in accordance with Article 28 of Regulation No 3 at the same time making a reduction of 20% as provided by Belgian law, corresponding to the number of years remaining before he attained the age of 65, and asked the applicant to declare that he would give up work, because otherwise he could not be paid the Belgian pension.

He countered this request by appealing to the Commission d'Appel Spéciale to which he submitted that he wanted in any case to continue to work until he reached the age of 65. As a result of his appeal the disputed decision was annulled on the ground that no advance application for the determination of the pension had been made and that Article 28 (1) (f) of Regulation No 3 was therefore applicable.

The Belgian social insurance institution on the other hand did not accept this decision, because in its opinion the conditions for acquiring the right to benefit had been satisfied not only in France but also in Belgium and this fact precluded the application of Article 28 (1) (f) of Regulation No 3 and the possibility of applying for a person only in France.

When the Commission Supérieure des Pensions, to which it appealed, confirmed the view held by the Commission d'Appel in particular on the ground that by continuing to be gainfully employed Mr Couture had not fulfilled an essential condition for the determination of the Belgian pension on 1 October 1960, the case was finally brought before the Belgian Conseil d'État by the Office National des Pensions pour Ouvriers. In these proceedings the social insurance institution repeated its argument that an application for a pension to the social security institution at the place of residence is to be treated as an application made in all Member States in which insurance periods have been completed. Further it is not a condition precedent to the grant of an old-age pension under Belgian law that the claimant must have attained the age of 65, which means that Article 28 (1) (f) of Regulation No 3 is not applicable.

As the Conseil d'État was therefore faced with questions of the interpretation of Community law, namely the interpretation of Article 28 of Regulation No 3 and Article 30 of Regulation No 4 and as it regarded the answer to this question as being relevant to its decision it decided in its judgment of 24 March 1967 to stay the proceedings and to refer the following questions to the Court of Justice of the European Communities under Article 177 of the EEC Treaty:

First Question

Does a worker, who completes successively or alternately insurance periods under the legislation of two or more Member States and who does not have to aggregate these periods in order to acquire the right to benefit in any of these Member States, have the right to elect either the method of calculation provided by Article 28 of Regulation No 3 or the method of calculation resulting from the application of the legislation under which he has completed the insurance periods, or does the fact that the method of calculation provided by Article 28 of Regulation No 3 may be applicable to him exclude the application of the legislative systems under which he has completed his insurance periods?

Second Question

If the worker has the option which is the subject-matter of the first question and, having regard to the fact that Regulations Nos 3 and 4 do not lay down rules for the exercise of this option, how must a pension application

made to the competent social insurance institution of one only of the Member States and based on the insurance periods completed under the legislative systems of two or more Member States be interpreted? In particular, must such an application be regarded as an abandonment by the claimant of the right to avail himself of the application of the legislation of these states which may produce a more favourable result? Or must it be interpreted as necessarily involving the application of the most favourable system?

Third Question

If an application such as the one described in the second question must be interpreted as involving the application of the most favourable system, must it necessarily be regarded as an application made in proper form to each national social insurance institution with the object of obtaining the determination of benefits which may be more favourable under the national legislation which this institution is under a duty to apply, rather than a claim based on the application of the system of proportional calculation provided for by Regulation No 3?

Fourth Question

If the worker has the option which is the subject-matter of the first question and if an application such as the one described in the second question must be deemed to be made to each national institution so that, where appropriate, the legislation of each of the states is applied, when must he exercise his option? Can he wait for a final determination, that is to say, until all legal remedies have been exhausted or not exercised, of the claims which he has under both Article 28 of Regulation No 3 and the various national legislative systems?

Fifth Question

If the worker does not have the option referred to in the first question, is the object of an application for a pension made by him in conformity with Article 30 (1) of Regulation No 4 necessarily the benefits, which, in a Member State where he has completed insurance periods, are subject to a reduction because the application was made in advance?

Sixth Question

If the worker does not have the said option, is the object of an application which he makes in conformity with Article 30 (1) of Regulation No 4 necessarily benefits, payment of which, in a Member State where he has completed insurance periods, are subject to the condition, not imposed in the other Member State, that he must cease to be gainfully employed?

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice the Belgian Government, the Office National des Pensions pour Ouvriers and the Commission of the EEC have submitted written observations on these questions. During the oral proceedings only the Commission stated its views.

My observations on these comments and the facts before us are as follows.

The answers to the questions referred

First question

In the first question the Conseil d'État wishes to know whether workers, who have been insured in more than one Member State, can make an election between the application of Article 28 of Regulation No 3 and that of national legislative systems which do not require, for a right to benefit to be acquired, aggregation of insurance periods in accordance with Article 27 of Regulation No 3.

As the Commission, the Belgian Government and the Office National des Pensions pour Ouvriers agree and rightly

stress the answer must be in the negative.

Such an option was formerly contained in a series of bilateral conventions, which were abrogated by Regulation No 3 and is still found for certain purposes in Regulation No 3 (Articles 14 and 14A) and in Regulation No 4 (Articles 12 and 13). But, for the rest, the said Council regulations, in the absence of any contrary intention in their provisions, are applicable without any reservations because under Article 189 of the EEC Treaty they are binding in all Member States. This rule is naturally also true of Article 28 with which we are concerned in this case, to the extent to which the conditions prescribed by it are fulfilled. Another and particularly persuasive argument in support of this rule—as the Belgian Government has rightly emphasized—is the system of supplementary pensions provided by Article 28 which would be meaningless if any option could be exercised.

Expanding these observations I must however add that in the case to be decided by the Conseil d'État the application of Article 28 of Regulation No 3, that is to say, the adoption of the method of proportional calculation, is in any case excluded. The same conclusion is reached if this aspect of the problem is considered on the basis of the questions referred by the Conseil d'État which indicates that aggregation of insurance periods completed in various Member States under Article 27 of Regulation No 3 is unnecessary in order to acquire the right to benefit in either of the two Member States concerned (on this point the judgment in Case 100/63 is relevant). This is also true if it is assumed on the facts before us, as it is by the Commission, that it is indeed unnecessary to take into account the insurance periods completed in France in order to acquire the right to benefit in Belgium, although insurance periods completed in Belgium have to be taken into account in order to acquire the right to benefit in France, because the minimum insurance period in France could only be completed on 1 October 1960. This second assumption is supported by the judgments in Cases 1/67 and 2/67 which state that proportional calculation is a corollary of aggregation so that proportional calculation is only admissible in that Member State in which insurance periods completed in foreign countries must be taken into account in order to acquire the right to benefit.

In addition the Commission also showed that in this case, to which the transitional provisions of the Belgian Law of 12 July 1957 do not apply, the amount of the Belgian pension is in the end the same whether the method of proportional calculation is adopted or not, because under Belgian law a pension is only granted which is proportionate to the period of insurance. Therefore the question of proportional calculation and the related question whether the claimant has the right to elect this method of calculation takes on no importance at all when considering the facts in the light of Belgian law.

Taking everything into consideration, not only must we answer the first question therefore in the negative but at the same time, having regard to the answer, we must also declare that questions two to four are irrelevant since they are based on the assumption that claimants have an option.

Fifth question

The fifth question raises the problem whether an application for a pension under Article 30 of Regulation No 4 made in one Member State necessarily leads to the determination of the amount of benefits in another Member State, even if it is subject to a reduction because the application in that country is for the grant of a pension before the normal retirement age.

As we have seen in the present proceed-

ings such a reduction has to be made under Belgian law if the claimant has not attained the age of 65, and it is calculated according to the number of years which remain until he reaches that age.

It might appear at first sight surprising that the Belgian Conseil d'État ever referred this question, as it proceeds upon the basis that an application of Article 27 of Regulation No 3, that is to say, aggregation of insurance periods completed in various Member States, was unnecessary in each of the two Member States concerned, which in itself must have suggested the conclusion that the Belgian application must be dealt with exclusively under Belgian law without taking into account Community law.

But of course the case can be regarded in a different light once it is realized that in fact aggregation of insurance periods in one Member State, in this case France, was necessary in order to acquire the right to benefit, that is to say, that the relevance of Community law to the whole of the facts of this case cannot be denied.

Nevertheless the proper view to take is that there is no need to proceed on the basis that simultaneous determination of the right to benefit is necessary.

As I have already stated in the *Colditz* case the wording of Article 28 (1) (e) and (f) supports the possibility of successive determination of insurance benefits at the request of the claimant (where this is necessary—as it is in Belgium—in the case of the grant of a pension before normal retiring age) or, in other words, it might be justifiable to regard the express application for a pension as a *condition* within the meaning of these provisions. On the other hand—as was shown in the *Colditz* case—there is nothing in Article 30 of Regulation No 4 to justify the view that an application made to the social security institution of one Member State is necessarily to be regarded as an application to all the other social security institutions concerned, because Article 30 is solely a provision designed to facilitate and expedite the procedure for obtaining pensions, and it cannot be used to ascertain when and in what circumstances the simultaneous determination of pension claims is necessary.

In the final analysis the decisive consideration is, therefore, as in the *Colditz* case, that the application of the provisions relating to social security must not be permitted to lead to the loss of any right to benefit. Mr Couture would suffer such a loss in Belgium if he were forced either to give up the pension granted in France before he reached the age of 65 or to accept a reduction of his Belgian pension. Such a loss cannot be justified by the argument that otherwise the Belgian social security institution could not avoid suffering financial loss, because—as we have been told—Regulation No 3 does not provide for compensatory payments between social security institutions when insurance periods in other countries are taken into account.

Relying on the general principles governing the application of Community provisions concerning social security for migrant workers we thus come to the conclusion that in circumstances such as the present the simultaneous determination of rights to benefit is unnecessary.

Sixth question

Finally in its sixth question the Conseil d'État wishes to know whether an application made in one Member State under Article 30 of Regulation No 4 necessarily leads to the determination of benefits in another Member State, even if their payment depends upon the claimant's giving up work.

In my opinion the answer to this question, too, presents no difficulties. I can in this connexion refer in particular to my opinion in Case 2/67, in which I examined the special feature of Belgian law, which has also to be considered

in this case and under which, in accordance with the Law of 21 May 1955, the payment of an old-age pension is suspended if the claimant continues to be gainfully employed. The decisive fact is therefore that requirement of Belgian law that the claimant must give up work is to be regarded as a *condition* within the meaning of Article 28 (1) (e) and (f). As however in the case before us the insured person did not intend to give an undertaking that he would cease to be gainfully employed, it must be assumed that the object of his application for a French pension could not have been the determination of a Belgian pension, precisely because an essential condition was lacking for this to be true, a condition moreover, which—as we have seen—would have involved a loss of rights, if it had been fulfilled. Therefore the sixth question contrary to the view of the Office National des Pensions pour Ouvriers and of the Belgian Government, must be answered in the negative.

Summary

Taking everything into consideration I therefore suggest that your answers to the questions put to you should be as follows:

First question

Regulation No 3 does not confer upon insured persons who apply for an old-age pension the right to make an election between the application of the Regulation and that of the relevant provisions of national law, but this does not mean that the method of proportional calculation provided for by Article 28 is applicable in every case.

Fifth and sixth questions

Questions 5 and 6 are to be answered in the negative.

In accordance with the normal practice of the Court the decision as to costs is not a matter for this Court but for the Belgian Conseil d'État.