hereby rules:

1. A provision of national law intended to forbid the simultaneous receipt of sickness benefit and benefit from insurance against incapacity to work constitutes a provision for suspension or reduction within the meaning of Article 11 (2) of Regulation No 3.

2. The expression 'benefits acquired under a scheme in another Member State' cannot be limited merely to the case where the provision against overlapping is expressed in terms covering all benefits in general, whether acquired under the scheme in other Member States or under that of the State concerned.

3. The expression 'benefits acquired under a scheme in another Member State' can only mean the amount actually paid as assimilated benefit.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 15 May 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 27 MARCH 1974

My Lords,

Your Lordships will remember that until the entry into force, in September 1972, of Regulations (EEC) No 1408/71 and (EEC) No 574/72 of the Council the social security of migrant workers within the Community was mainly governed by Regulations No 3 and No 4 of the Council, of 25 September and 3 December 1958 respectively. These had been adopted pursuant to Article 51 of the Treaty, which required the Council to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers' and 'to this end' to 'make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods

taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States'.

This case is concerned with the extent, if any, to which, having regard to the provisions of Regulations No 3 and No 4, Herr H. W. Kaufmann, a German national resident in the Federal Republic, is entitled to invalidity benefits under a Dutch statute relating to such benefits which came into force on 1st July 1967 and which is referred to for short as the WAO.

The case comes to this Court by way of a reference for a preliminary ruling by the Centrale Raad van Beroep of the Netherlands, before which there is pending an appeal against a decision of the Raad van Beroep of Amsterdam, dated 9 November 1971. That decision was in favour of Herr Kaufmann, whom I shall call 'the respondent'. The appellant is the Dutch social security institution concerned.

The facts are briefly these. The respondent, who was born on 9 May 1906, and who is therefore now 67, spent the whole of his working life in Germany, except for a period of seven years from October 1928 to September 1935, when he was employed at a printing works in The Hague. On 4 December 1969, he became incapable of work owing to sickness. This entitled him, under the relevant German legislation, to sickness benefit ('Krankengeld'), which he duly received until 4 June 1971. While he was in receipt of it, he was awarded, also in Germany, an invalidity pension with effect from 1 January 1970. As is made clear, however, by a letter dated 22 December 1971 from the competent German institution to the appellant (Annex 8 to the Order for Reference) the amount of that pension was less than the amount of Krankengeld to which the respondent was entitled and in those circumstances, as was required by the German legislation, the amount of his Krankengeld was reduced by the amount of the invalidity pension.

It is not in doubt:

1. That the respondent can make no claim under the WAO for the period of 52 weeks from the date when he first became ill, because, under Article 19 of the WAO, invalidity benefit is not payable for the first 52 weeks of incapacity; and
2. That he can make no claim under the WAO for any period after 1 May 1971, because, under Article 49 of the WAO, the payment of invalidity benefit ends on the first day of the month in which the beneficiary attains the age of 65.

This litigation is thus only about the period from 4 December 1970 to 1 May 1971.

It is conceded by the appellant that, for that period, the respondent was, by virtue of regulation No 3, prima facie entitled to benefit under the WAO. But the appellant contends that that prima facie right was negatived by the combined effect of the provisions against overlapping of benefits contained in Regulation No 3 and in the WAO.

In order to explain this, I must first advert to the relevant provisions of Regulation No 3.

In the case of invalidity benefits, Article 24 of that Regulation distinguished between two types of national systems of legislation, namely Type A, under which the amount of benefit was independent of the duration of insurance periods, and Type B, under which, on the contrary, the amount of benefit was linked to the duration of such periods. So far as the present case is concerned, it appears that the WAO was of Type A whereas the German legislation under which the Respondent was entitled to his invalidity pension was of Type B. Article 26 of Regulation No 3 provided that, in such a case, Articles 27 and 28 of that Regulation, relating to old age and death benefits, should apply by analogy. These

Articles prescribed detailed rules for the aggregation of qualifying periods of employment in different Member States and for the calculation and payment of benefits on the basis of such aggregation.

As I have indicated, the appellant concedes that the Respondent was, by virtue of those Articles, prima facie entitled to benefit under the WAO for the period in question. It points, however, to Article 11 of Regulation No 3, which is concerned with overlapping benefits, and more particularly to paragraph (2) thereof, the relevant words of which I must read. Since there is no authentic English text of Regulation No 3, I read from the French:

'Les clauses de réduction ou de suspension prévues par la législation d'un Etat membre, en cas de cumul d'une prestation avec d'autres prestations de sécurité sociale ... sont opposables au bénéficiaire, même s'il s'agit de prestations acquises sous un régime d'un autre Etat membre.' (OJ No 30, 16. 12. 1958)

Not because it is directly relevant, but because it throws light on the scope of Article 11 (2), I read also the proviso to it:

'Toutefois, cette règle n'est pas applicable aux cas où des prestations de même nature sont acquises conformément aux dispositions des articles 26 et 28 du présent règlement.'

Having regard to that proviso, the appellant could not rely, as against the respondent, on the fact that he was in receipt of a German invalidity pension, even if that fact was otherwise relevant under Dutch law. Nor does it seek to do so. What the appellant relies upon is the fact that he was in receipt of German Krankengeld, and this it does by virtue of Article 20 of the WAO. That Article provides that so long as a person is entitled to 'Ziekengeld' (sickness benefit) under the 'Ziektewet', the Dutch statute relating to sickness benefit, he may not receive invalidity benefit under the WAO. The appellant's argument is that Article 20 is a 'clause de réduction ou de suspension prévue par' the legislation of the Netherlands, within the meaning of Article 11(2), and that it accordingly disentitled the respondent to benefit under the WAO, because, by virtue of the words 'même s'il s'agit de prestations acquises sous une régime d'un autre Etat membre' in Article 11 (2), receipt by him of the German 'Krankengeld' had the same effect for the purpose of Article 20, as would have had receipt by him of Dutch 'Ziekengeld'. It was this argument that was rejected by the Raad van Beroep of Amsterdam, on the ground that Krankengeld could not be assimilated to Ziekengeld for the purpose of Article 20.

My Lords, the Centrale Raad van Beroep, with a view to assisting it in deciding the appeal, has referred to this Court three questions.

The first is whether the phrase in Article 11 (2) 'clauses de réduction ou de suspension prévues par la législation d'un État membre, en cas de cumul d'une prestation avec d'autres prestations' includes a provision preventing a person's entitlement to invalidity benefit from arising so long as he has a right to sickness benefit.

Both the appellant and the Commission submit that that question should be answered in the affirmative, and I agree with them. Unfortunately the respondent has not been represented in the proceedings before the Court and one does not know what submissions might have been made on his behalf had he been represented. One looks forward, my Lords, to the day when the proposed new Rules of Procedure of the Court will have been approved and it will be possible for the Court, in such circumstances as these, to afford legal aid to a respondent.

I infer, however, from the Observations of the appellant and of the Commission that the genesis of this first question posed by the Centrale Raad lies in a distinction that is made in Dutch law, in

the context of social security legislation, between provisions that constitute conditions precedent to the grant of benefits and provisions merely designed to prevent duplication of benefits, the suggestion being that, if Article 20 of the WAO is of the former kind, it may not have come within Article 11 (2) of Regulation No 3. My Lords, it seems to me that distinctions of such refinement ought not to be imported into Community social security legislation, which must necessarily be interpreted broadly, so as to be capable of ready and uniform application in relation to the varied social security laws of the Member States. Be that as it may, I think that a provision preventing a person's entitlement to invalidity benefit from arising so long as he has a right to sickness benefit, since it has as its manifest purpose to render sickness benefit and invalidity benefit alternative rather than cumulative, is clearly within both the spirit and the letter of Article 11 (2).

The second question asked by the Centrale Raad goes directly to the point on which the decision of the Raad van Beroep of Amsterdam turned. Essentially it is whether the provisions of Article 11 (2) applied to a 'clause de réduction ou de suspension prévue par la législation d'un État membre' even though such 'clause' expressly named the social security statute of that Member State in relation to which it was to operate (as, in the present instance, Article 20 of the WAO expressly referred to the Dutch Ziektewet). The question, in other words, is whether Article 11 (2) enabled the legislation of another Member State corresponding to the statute so named to be assimilated to it.

Here again both the appellant and the Commission submit that the question should be answered in the affirmative, and I agree with them. It seems to me that it would be wrong to give to the provisions of Article 11 (2) — and in particular to the words 'même s'il s'agit de prestations acquises sous un régime d'un autre État membre' — too narrow an interpretation to hold that they could apply only where the 'clause de réduction ou de suspension' in question was in general terms, as would have been the case, in the present instance, if Article 20 of the WAO, had referred to sickness benefit simpliciter, without referring to the Ziektewet. As the Commission points out, such an interpretation would lead to quite fortuitous differences in the application of Article 11 (2) in different Member States, differences that would depend on the form, rather than on the substance, of their respective laws.

Nor is there, to my mind, any hardship to the Respondent in holding that, in his case, his German Krankengeld is, by virtue of Article 11 (2), to be assimilated, for the purpose of Article 20 of the WAO, to the Dutch Ziekengeld, provided of course that they are really similar and not similar only in name, which is a matter for the national Court to ascertain. The case is, in a sense, the converse of Case 34/69 *Caisse d'assurance vieillesse des travailleurs salariés de Paris v Duffy* (Rec. 1969 p. 597) where the Court held that Article 11 (2) could be invoked against a person only if he or she was claiming the benefit of the provisions of Regulation No 3. If that person was entitled to a particular benefit in a particular Member State independently of Regulation No 3, Article 11 (2) could not be invoked so as to deny that benefit to him or to her. Here, however, there appears to be no doubt that the respondent would have no claim under the WAO but for the provisions of Regulation No 3. That being so, it is to my mind fair that he should receive by virtue of the Regulation only such benefits, if any, as the authors of the Regulation really intended a person in his position to receive.

I should perhaps mention parenthetically that the Raad van Beroep of Amsterdam seems to have thought that the principle of the *Duffy* case might be applicable here because the respondent was entitled

to his Krankengeld independently of Regulation No 3. But, with all respect to that Court, this seems to me immaterial. What is material is that he could not claim under the WAO except by virtue of the Regulation.

The third question referred to the Court by the Centrale Raad relates to the fact, which I have mentioned, that the amount initially awarded to the respondent in Germany by way of Krankengeld was subsequently reduced by the set-off against it, under the relevant German legislation, of the amount awarded to him by way of invalidity pension. In substance the question is whether, in such circumstances, the reference in Article 11 (2) to 'prestations acquises sous un régime d'un autre État membre' is a reference to the amount initially awarded or is a reference to the reduced amount.

My Lords, I confess that I have been puzzled as to the relevance of this question. Neither the Centrale Raad's Order for Reference nor the documents annexed to it seem to give the slightest hint as to what that relevance might be. The Commission suggests, in its Observations, that the question is relevant because of Article 912) of Regulation No 4 of the Council, which Regulation, Your Lordships remember, was adopted to implement and complete the provisions of Regulation No 3.

The terms of Article 9 (2), so far as possibly in point, are as follows:

'... lorsque l'application des dispositions de la première phrase du paragraphe (2) de l'article 11 du règlement entraînerait la réduction ou la suspension d'une prestation d'invalidité ... liquidée en vertu des dispositions de l'article 28 du règlement par l'institution d'un Etat membre, cette institution ne prend en compte, pour la réduction ou pour la suspension, qu'une fraction des prestations ... entraînant la réduction ou la suspension.'

There follows a provision prescribing the method of determination of the appropriate fraction by reference to the provisions of Article 28.

I do not, for my part, see how Article 9 (2) can have effect in a case where the relevant provision of national law applies regardless of quantum as does, so it seems, Article 20 of the WAO. On the face of it that Article denies to a person any right to invalidity benefit so long as he is in receipt of sickness benefit, whatever may be the quantum of the latter.

But, of course, whether that is really so or not is a matter of interpretation of the WAO, which is for the Centrale Raad, not for this Court.

So, I apprehend, the question must be answered.

The appellant and the Commission differ as to what the answer should be. The appellant submits that the relevant amount is that initially awarded. The Commission submits that it is the reduced amount.

My Lords, I agree with the Commission. The matter may be tested by supposing that, in this case, the respondent had been entitled in Germany to an invalidity pension greater than his Krankengeld. In that case he would have received, in effect, no Krankengeld, but only his invalidity pension. Yet, on the interpretation suggested by the appellant, he would have had to be treated, for the purposes of Articles 11 (2) and 9 (2), as if in receipt of Krankengeld. Quite apart from the obvious unreality and unfairness of such a result, it seems to me that it could, in certain circumstances, defeat the object of the proviso to Article 11 (2).

I am therefore of the opinion that each of the questions referred to the Court by the Centrale Raad should be answered in the way suggested by the Commission.