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.

The extension of a provision against overlapping of national benefit to benefit due under the legislation of another Member State is possible, however, only in so far as the two benefits assimilated are genuinely comparable, particularly as regards the possibility of their overlapping.

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

In Case 184/73

Reference to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep at Utrecht for a preliminary ruling in the action pending before that court between

BESTUUR VAN DE NIEUWE ALGEMENE BEDRIJFSVERENIGING of Amsterdam, Netherlands,

and

H. W. KAUFMANN, resident at Neuwied, Federal Republic of Germany,

on the interpretation of Article 11 (2) of Regulation No 3 of the Council concerning social security for migrant workers (OJ No 30, 16. 12. 1958, p. 561/58),

THE COURT

composed of: R. Lecourt, President, A. M. Donner, M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars (Rapporteur), P. Pescatore, H. Kutscher, C. Ó Dálaigh, A. J. Mackenzie Stuart, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment making the reference and the written observations submitted under Article 20 of the EEC Statute of the Court may be summarized as follows:

I — Facts and procedure

Mr H. Kaufmann, a German national, born on 9 May 1906, spent the whole of his working life in Germany, except for the period from 1 October 1928 to 30 September 1935 when he was employed in the Netherlands.

Taken ill on 4 December 1969 and incapable of work on this account, since 5 December 1969 he has been in receipt of sickness benefit (Krankengeld) under Clause 183 (2) and (3) of the Reichsversicherungsordnung of 19 July 1911. With effect from 1 January 1970 he was granted an invalidity pension. However, since the amount of this pension was less than his sickness benefit, he continued to receive the latter, the pension being considered as included in the sickness allowance. (Clause 183 (5) of the Reichsversicherungsordnung).

Relying on his period of employment in the Netherlands, Mr Kaufmann applied to the Nieuwe Algemene Bedrijfsvereniging (the Dutch social security institution) for the grant of benefits for incapacity to work under the Netherlands law on invalidity insurance (wet op de arbeidsongeschiktheidsverzekering, hereinafter called WAO). When his application was rejected by a decision dated 17 March 1971 he appealed against that decision to the Raad van Beroep of Amsterdam.

Before this tribunal, the social security institution supported its refusal on three grounds, each relating to one of three different periods:

(a) for the period prior to 4 December 1970, the insured could have no claim to the grant of benefits for incapacity to work because, having been taken ill on 4 December 1969, he had not yet fulfilled the condition as to continuous incapacity for 52 weeks (Article 19 of the WAO).

(b) for the period after 1 May 1971, he was similarly unable to claim, because he attained the age of 65 on 9 May, and the benefit on account of incapacity to work comes to an end at that age under Article 49 of the WAO.

(c) for the intermediate period (4 December 1970 to 1 May 1971) he was prevented from benefiting from the WAO pension because he was still in receipt of sickness benefit (although reduced) in the Federal Republic, supplementing his German invalidity pension, and this, by the combined operation of Article 11 (2) of Regulation No 3 and of Article 20 of the WAO, prevented him from benefiting under the latter law.

Concerning this last period, the Nieuwe Algemene Bedrijfsvereniging pointed out that since it was by virtue of Articles 27 and 28 of Regulation No 3 that the insured was able to avail himself of the WAO, it was equally right to apply Article 11 (2) of the same Regulation, whereby 'Provisions in the legislation of one Member State for reduction or suspension of benefit in cases of overlapping with other social security benefits or other income, or because of gainful employment, shall apply to a beneficiary even in respect of benefits acquired under a scheme in another

Member State or in respect of income derived from, or employment in, the territory of another Member State'. It is claimed that as a consequence, for the purposes of Article 20 of the WAO, whereby 'so long as the insured is entitled to payment of sickness benefit (Ziekengeld) under the law relating to sickness insurance (Ziektewet), he shall not be entitled to any benefit on account of incapacity to work,' the 'Krankengeld' granted under German law must be assimilated to the 'Ziekengeld' of Dutch law. Thus the clause against overlapping in Article 20 comes into operation in the present case, and under Article 11 (2) of Regulation No 3 it applies to the beneficiary.

This argument was rejected by the Raad van Beroep of Amsterdam, which by judgment dated 9 November 1971, declared the appeal wellfounded, annulled the decision dated 17 March 1971, and held that the social security institution must grant Mr Kaufmann the benefits due under the WAO.

The Bestuur van de Nieuwe Algemene Bedrijfsverenigung brought an appeal against that judgment before the Centrale Raad van Beroep, which, taking the view that a question was raised as to the interpretation of a Community act, by order dated 2 November 1973, referred the following questions to the Court of Justice:

1. Does the phrase 'legislative provisions of a Member State for reduction or suspension of benefit in cases of overlapping with other social security benefits' in the said Article [Article 11 (2) of Regulation No 3] include a provisions conferring entitlement to a grant of benefit for incapacity to work only when there is no longer a claim to sickness benefit?

2. Do the words 'shall apply to a beneficiary' have the effect of extending national legislation of a Member State providing for the suspension or reduction of benefit for incapacity to work by the amount of benefit under an expressly named social insurance law of that Member State into a provision making it possible to suspend or reduce the benefit for incapacity to work by the amount of benefit under a law of another Member State corresponding to the said social insurance law?

3. Where benefit is in fact enjoyed in a Member State, but is subsequently reduced on account of overlap with benefit under another social insurance law of the same Member State, is the firstmentioned benefit in its entirely (as it was in fact enjoyed) to be regarded as benefit 'acquired under a scheme in another Member State,' or only the part remaining after the reduction?

The order making the reference was registered at the Court on 21 November 1973. The Commission of the European Communities and the Nieuwe Algemene Bedrijfsvereniging submitted written observations.

Upon hearing the report of the Judge-Rapporteur, and the opinion of the Advocate-General, the Court decided that it was not necessary to order any preliminary inquiries.

II — Observations submitted under Article 20 of the EEC Statute of the Court of Justice

A — Observations of the Commission

The Commission notes firstly that, since the Dutch law on incapacity to work is based on risk, the respondent is entitled to benefit under the WAO only because, under Article 27 of Regulation No 3, as interpreted by the Court of Justice in its judgment dated 13 July 1966 (Case 4/66 *Hagenbeek v Raad van Arbeid of Arnhem*, Rec. 1966, p. 618), his cover under German law at the time the risk materialized can be assimilated to cover under Dutch law.

However, although the Dutch institution relies on the fact that it is to Article 27 and 28 of Regulation No 3 that Mr Kaufmann owes his entitlement, in order to apply to him Article 11 (2), it is refusing him the benefit in its entirety instead of proceeding to calculate it in accordance with Article 27 and 28.

This leads, in the Commission's view, to the conclusion that the Dutch institution considers Article 20 of the WAO rather as a condition precedent to entitlement, but in this case why is it relying on Article 11 of Regulation No 3?

The Commission takes the contrary view that it is really a nonoverlapping clause within the meaning of Article 11, but that at the same time account must be taken of the fact that Article 11 of Regulation No 3 in combination with Article 9 (2) of Regulation No 4, which lays down detailed rules of application providing for apportionment of benefits with reduction or suspension of payments, covers not only complete suspension but also the possibility of benefits merely being reduced. Article 20 of the WAO does not therefore have the absolute effect attributed to it by the Dutch institution and it is not possible to exclude the possibility that Mr Kaufmann is entitled to a pension, albeit reduced. Even if it is admitted that on the literal interpretation of Article 20 of the WAO., there is a condition precedent rather than a non-overlapping clause, the Dutch expression 'toekenning' covering the recognition of entitlement to benefit rather than the actual provision of it, it seems nevertheless (in the Commission's view) that the purpose of Article 20 of the WAO is to avoid the overlapping of sickness benefit and the benefit for incapacity to work, more particularly in view of the facts that the WAO is based on risk and that at the end of the waiting period of 52 weeks, during which the insured is paid sickness benefit, he receives the allowance in its entirety according to his degree of incapacity. Although, in view of the internal coherence of national schemes, the distinction between a condition precedent to entitlement and a suspensive clause has, according to the Commission, no practical effect, the same is not true at Community level, where the possibility cannot be excluded that the amount of sickness benefit payable under the legislation of a Member State may well be lower than the amount of benefit payable under the WAO.

Article 20 of the WAO accordingly constitutes a provision for suspension in cases of overlapping with other social security benefits.

As regards the second question, the relevant point, in the Commission's view, is whether the Dutch institution can take advantage of Article 11 (2) to assimilate sickness benefit payable under German law to sickness benefit payable under a Dutch law (Ziektewet) expressly named in Article 20 of the WAO in order to apply that Article. On a literal interpretation of Article 11 (2) which provides for the application of legislative provisions of a Member State for reduction or suspension 'even in respect of benefits acquired under a scheme in another Member State', it seems that the purpose of this provision would be defeated if the intended extension were to be limited merely to the case where the national provision against overlapping is expressed in general terms, to the exclusion of those cases where the various benefits which may not overlap are expressly named by reference to the national legislation alone. The application of Community regulations cannot depend upon the form given to the national legislative provisions.

The third question asks whether, in reducing or suspending a benefit, it is the initial amount of the benefit payable under the legislation of another Member State, where this provides for reduction or suspension, which must be taken into account, or whether it is the amount remaining after this latter benefit has itself been reduced in consequence of the grant of another benefit payable under the legislation of this same Member

State. In the absence of a contrary indication, bearing in mind the fact that the reduced benefit can be considered as complementing the invalidity pension and that Article 9 (2) of Regulation No 4 seeks to prevent the application of non-overlapping clauses from depriving insured persons of their rights, it seems that the solution most favourable to the person concerned should be adopted and that only the amount actually received by the latter should be taken into account.

The Commission finally, bearing in mind the Court's judgment of 10 December 1969 *(Case 34/69, Caisse d'assurance vieillesse des travailleurs salariés de Paris v Jeanne Duffy,* Rec. 1969, p. 597), concerning the interpretation of Article 11 (2) of Regulation No 3, examines the question whether the Dutch social security institution is correct in applying this provision in the present case. The *Duffy* judgment made it clear that limitations can only be imposed upon workers as a counterweight to the advantages which they derive from Regulation No 3 and 'that without such a counterweight there is no justification for this kind of limitation, since it would result in the worker being placed in a less favourable position than that which would have resulted, in the absence of the Regulations, from the application of national law or special agreements concluded between Member States.' In the present case there is a German-Dutch agreement earlier than Regulation No 3 and the WAO, and reproduced in Annex D of Regulation No 3. In the Commission's view Article 11 (2) of Regulation No 3 and Article 12 (2) of Regulation No 1408/71 (OJ No L 149, 5 July 1971, p. 1) are operative only where Member States have not concluded a bilateral agreement prior to the coming into force of the said Regulations, since all the bilateral agreements concluded between Member States for which the Community Regulations were substituted, are equally based upon equality of treatment, aggregation of qualifiying periods and payment of benefits abroad.

B — Observations of the Nieuwe Algemene Bedrijfsvereniging

As regards the first question the Nieuwe Algemene Bedrijfsvereniging considers that the purpose of Article 11 (2) of Regulation No 3 is to bring into play the provisions intended to prevent the overlapping of benefits regarded by the national legislation of a Member State as undesirable, even in the case of benefits acquired under the legislation of another Member State.

The expression 'provisions for reduction or suspension' therefore covers, in addition to provisions for reduction or suspension of benefits actually paid, also those provisions which fix the time from which a benefit arising only upon the cessation of another benefit becomes payable, and even those which fix the time at which the right to benefit may arise when that depends upon another benefit ceasing to be paid.

The Nieuwe Algemene Bedrijfsvereniging points out that although Article 12 (2) of Regulation No 1408/71 of the Council dated 14 June 1971 re-enacts the provisions of Article 11 (2) of Regulation No 3 and also mentions 'provisions for withdrawal of benefit', there is nothing to show that, in using this term, which clearly refers to the existence of the right to benefit, the Community legislator has sought substantially to modify the system derived from the application of Article 11 (2) of Regulation No 3.

As regards the second question, the Nieuwe Algemene Bedrijfsvereniging considers that the answer to be given is to be found in the actual wording of Article 11 (2) of Regulation No 3, particularly the phrase 'even in respect of benefits under a scheme in another Member State'. It appears from the observations of the Commission and the judgment of the Court in Case 34/69 *(Duffy,* Rec. 1969, p. 597), that there is a relationship between the extent of the

benefits granted to workers and the limitations which can be imposed.

The Nieuwe Algemene Bedrijfsvereniging then examines the condition imposed by the Court in the *Duffy* judgment on applying the limitations provided for under Article 11 (2) of Regulation No 3, namely that these limitations are applicable to insured persons only if they are in receipt of benefits acquired by the application of this same Regulation. This is certainly so in the present case, despite the existence of a Regulation of Public Administration (Algemene Maatregel van Bestuur) enacted under Article 52 of the WAO which provides for reductions in case of overlapping of Dutch benefits under the WAO with invalidity benefits paid by a foreign country. This Regulation is not applicable in the present case because it deals with the overlapping of benefits already granted, whereas in the case of Mr Kaufmann the benefits were not yet payable.

The reason that, under the WAO, benefit is not granted under the heading of insurance against incapacity to work until the time when the right to sickness benefit has expired is that the sickness benefit can be considered as complete and adequate compensation, not requiring any supplement. Under the legislation of each Member State it ought similarly to be considered as compensation as adequate as possible for the loss of wages or salary in the country where the employee works, which would exclude any supplementary benefit under Dutch law under the heading of insurance against incapacity to work.

The Nieuwe Algemene Bedrijfsvereniging answers the third question by saying that if the result of Article 20 of the WAO is to suspend the entitlement to provision of the benefit, it is irrelevant whether the sickness benefit, the payment of which has this suspensive effect, is being paid in full or only in part.

In the course of the oral procedure on 27 March 1974, the Commission, represented by its Legal Adviser, Mr Bayens, assisted by Miss Jonczy, referred to its written memorandum.

The Advocate-General delivered his opinion on 27 March 1974.

Law

1 By judgment dated 2 November 1973 the Centrale Raad van Beroep referred to the Court three questions relating to the interpretation of Article 11 (2) of Regulation No 3 of the Council concerning social security for migrant workers (OJ No 30, 16. 12. 1958, p. 561/58).

2 Under this provision, 'the legislative provisions of a Member State for reduction or suspension of benefit in cases of overlapping with other social security benefits or with other income ... shall apply to a beneficiary, even in respect of benefits acquired under a scheme in another Member State ...'

3 The first question asks whether this Article covers a provision of national law, such as Article 20 of the Netherlands law on insurance against incapacity to work (WAO) which provides that 'so long as the insured is

entitled to payment of sickness benefit (ziekengeld) under the law relating to sickness insurance (ziektewet) he shall not be entitled to any benefit on account of incapacity to work'.

4 Article 11 (2) of Regulation No 3 covers all national legislative provisions for reduction or suspension of benefit intended to prevent overlapping, without distinction as to whether the provisions concern the entitlement to benefit or the provision thereof.

5 A provision of national law intended to prohibit the simultaneous receipt of both sickness benefit and benefit on account of incapacity to work accordingly constitutes a provision for suspension or reduction within the meaning of the above mentioned Article 11 (2).

6 It is for the national judge to decide whether, in the present case, such a risk of overlapping exists.

7 The second question asks, in substance, whether the fact that a national provision against overlapping describes the sickness benefit which may not overlap with benefit on account of incapacity to work by its typically national designation, renders this clause inapplicable to the recipient of sickness benefit granted under the legislation of another Member State.

8 The answer to this question must enable the national court to determine whether Article 20 of the WAO, which precludes the receipt of the benefit provided for by that law, so long as the insured is in receipt of the sickness benefit provided for by Dutch law under a specific name (ziekengeld), applies to the recipient of sickness benefit provided for by German law (Krankengeld) so that for the purposes of the said Article 20 of the WAO the German 'Krankengeld' is assimilated to the Dutch 'ziekengeld'.

9 In the light of Articles 48 to 51 of the Treaty, Article 11 (2) of Regulation No 3 is the counterweight to the advantages which Regulations Nos 3 and 4 procure for workers by enabling them to claim benefit simultaneously under the social security laws of several Member States, and its purpose is to prevent them deriving from that claim advantages which the national legislation considers excessive.

10 The limitations mentioned in Article 11 (2) accordingly apply to insured persons only in so far as regards benefits acquired through the operation of those same regulations.

11 This condition is satisfied when a worker who has been successively employed in different Member States claims, on the basis of Article 26 of Regulation No 3, that Article 27 be applied by analogy in order to establish his entitlement in one Member State to invalidity benefit exclusively dependent on the materialization of a risk, where that risk materialized in another Member State.

12 Article 11 (2) of Regulation No 3 provides for provisions for reduction or suspension to apply 'even in respect of benefits acquired under a scheme in another Member State'.

13 The practical effect of this provision would be greatly diminished if the expression, 'benefits acquired under a scheme in another Member State', were limited merely to the case where the provision against overlapping is expressed in terms covering all benefits in general whether acquired under the scheme of the other Member States or under that of the State concerned.

14 The extension of a provision against overlapping of national benefit to benefit due under the legislation of another Member State is the counterweight to the assimilation under Regulation No 3 of a national risk with a risk materializing in another Member State.

15 Such an extension, however, is only possible in so far as the two benefits assimilated are genuinely comparable, particularly as regards the possibility of their overlapping.

16 The third question asks whether, in applying the national provision against overlapping, the expression 'benefits acquired under a scheme in another Member State' used in Article 11 (2) of Regulation No 3 must be understood to mean the entire benefit to which the recipient is entitled or only the benefit actually paid to him after its reduction, in conformity with the law of that other Member State, by the amount of benefit granted under another social security law.

17 It must be remarked that the answer to this question can only affect non-overlapping provisions that reduce benefit and not those which suspend the grant.

18 It is for the national judge to decide the category under which Article 20 of the WAO falls.

19 With this qualification, the answer to this question is to be found in the basic purpose of Article 11 (2) of Regulation No 3, which imposes on workers enjoying certain social security advantages, limitations corresponding to the said advantages.

20 Article 11 of Regulation No 3 would, when applied, exceed its objective, to the detriment of the worker to whom it applies, if it had to result in reducing social security benefit in one Member State by the total amount of benefit in another Member State, where that latter benefit, under the terms of a non-overlapping provision, has only been allowed for an already reduced amount.

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

Costs

22 The costs incurred by the Commission, which has submitted observations to the Court are not recoverable.

23 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action before the national court, costs are a matter for that court.

THE COURT

in answer to the questions referred to it by the Centrale Raad van Beroep by judgment of that court dated 2 November 1973,

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