order to reduce the theoretical amount by the amount of a benefit received by the person concerned from a source outside the Community.

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Delivered in open court in Luxemburg on 10 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 16 FEBRUARY 1977 [1]

Mr President,
Members of the Court,

1. The gist of the question of interpretation referred to the Court in this case may be summarized as follows: do the Community provisions concerning social security for migrant workers permit or prohibit the application by a Member State of a rule under its own legislation against the overlapping of social insurance benefits in the case of a worker who has acquired both the right to an invalidity pension under Community rules and the right to another pension of the same kind payable by a third State?

The basic facts are as follows:

Mr Kaucic, an Italian national, had worked in three countries: in Belgium for 501 weeks between 1929 and 1940; in Austria for 42 months between 1941 and 1945; and in Italy for 323 weeks from 1949 to 1957. In 1957 he became unfit for work and was in receipt of two invalidity pensions: one (with effect from 1 October 1957) which was payable by the competent Austrian institution and which was covered by a bilateral Austro-Italian convention enabling aggregation of the periods of employment completed in the two countries and the other (effective from 1 January 1958) which was payable by the Italian and Belgian social security institutions in application of Community Regulations Nos 3 and 4. In accordance with a decision of principle adopted at its fifty-first session (January 1964) by the EEC Administrative Commission on Social Security for Migrant Workers, the proportion of this second pension payable by the Italian institution, which

1 — Translated from the Italian.

was larger in amount, was in fact substituted by the proportion due under the Austro-Italian convention.

Although the worker concerned was at the same time in receipt of the Austrian pension, the Belgian proportion of this second pension was paid to him without deductions until 31 December 1963. But, with effect from 1 January 1964, the Belgian national institution for sickness and invalidity insurance (the Institut national d'assurance maladie-invalidité) corrected the proportion of the pension payable by Belgium after working out the Belgian pension calculated for accounting purposes ('pour ordre') (namely, the pension to which Kaucic would have been entitled under Belgian legislation if the period of employment spent in Italy had also been completed in Belgium), deducting from that figure the amount of the Austrian pension and apportioning the difference. This was done in application of Article 70 (2) of the Belgian Law of 9 August 1963, which set up and organized a system of compulsory insurance against sickness and invalidity and provided as follows: 'The benefits provided for by this Law shall be granted only under conditions determined by the King, if the incapacity in respect of which a claim for benefits is made falls within the general law *or some other legislation.* In such cases insurance benefits shall *not be added to the compensation* arising under the other legislation; they shall be the responsibility of the social insurance institution *to the extent to which* the incapacity covered by that law is not in fact made good'.

Mr Kaucic appealed against this decision of the Institut national d'assurance maladie-invalidité before the Tribunal du Travail, Brussels, but the appeal was dismissed. When Mr Kaucic died in December 1973, his daughters brought an appeal before the Cour du Travail, Brussels, which upheld the decision of the Tribunal du Travail. The Kaucic sisters have therefore asked the Cour de Cassation to quash the judgment of the higher court and, in its judgment of 16 June 1976, the Cour de Cassation decided to refer the following question to the Court of Justice under Article 177 of the Treaty of Rome:

'Do Articles 27 (1) and 28 (1) of Regulation No 3 of 25 September 1958 of the Council of the European Economic Community concerning social security for migrant workers preclude the application by the institution of a Member State of the rules under its own legislation relating to the overlapping of the benefit payable under this legislation and a benefit granted under the legislation of a third country and, in particular, do they preclude the application of Article 70 (2) of the Belgian Law of 9 August 1963 to the overlapping of the benefit payable by the Belgian institution and the benefit payable by Austria, with which Belgium has not entered into a bilateral convention relating to social security, especially in the sense that the Belgian institution could not apply the said Article 70 (2) in order to determine, for accounting purposes, the amount to which the person concerned would be entitled if all the insurance periods or assimilated periods, aggregated in accordance with Article 27 of Regulation No 3, had been completed exclusively under Belgian law?'

2. I ought first of all to remind the Court of the substance of the two Community provisions referred to by the national court. Article 27 (1) of Regulation No 3 of the Council of 25 September 1958 refers to cases where a worker has been successively or alternately subject to the legislation of two or more Member States and lays down the principle that 'for the acquisition, maintenance or recovery of the right to benefit', the insurance (and assimilated) periods completed by the worker under the legislation of each of the Member States shall be aggregated. Article 28 (1) of the same regulation provides for the way in which the

benefits which may be claimed by an insured person covered by Article 27 shall be paid and, in particular, lays down, in subparagraph (a), that the institution of each of the Member States under whose legislation the worker has completed insurance periods shall, *in accordance with its own legislation*, and taking into account the aggregation provided for by Article 27, determine whether the person concerned satisfies the conditions for acquisition of the right to benefit. Again, subparagraph (b) provides that, where the right to benefit has been acquired, the aforesaid institution shall calculate the benefit to which the person concerned would be entitled if all the aggregated insurance periods had been completed exclusively *under its own legislation* (in other words, the 'montant pour ordre' (amount calculated for accounting purposes)), and shall then determine the amount payable by it in proportion to the length of the periods completed under the said legislation as compared with the total length of the periods completed under the legislation of all the Member States concerned before the risk materialized.

It is beyond dispute that both these articles refer exclusively to periods of employment completed in the Member States of the Community (and, accordingly, workers in so far as they have been subject to the legislation of two or more Member States, as provided for in Article 27 (1)), and not to periods of employment completed in third countries. If, therefore, Mr Kaucic had worked only in Belgium and in Austria, or in Italy and in Austria, Articles 27 and 28 would not have been applicable. Employment in a third country can be taken into account under the legislation of a Member State but certainly not by virtue of Community provisions. In its judgment of 16 November 1972 in Case 16/72, *Allgemeine Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein* ([1972] ECR 1141), the Court clearly stated that 'For the purpose of acquiring a right to social security benefits, social security organizations in the Member States are not bound to take into account affiliation periods completed in third countries'. Of course, the fact that they are not *bound* does not mean that they are not in all respects *entitled* to take those periods into account. In the present case in fact Mr Kaucic's employment in Austria was taken into consideration in Italy but on the basis of the Austro-Italian bilateral convention and outside the field of application of Community law.

It is true that, as stated earlier, the Administrative Commission of the EEC on Social Security for Migrant Workers was concerned with the application of Article 28 of Regulation No 3 to workers who have completed periods of insurance in more than one Member State and in a third State which has concluded a convention with one of them. But the purpose of this was specifically to emphasize the clear division between the duties of the Member States under Community law and the duties of one or other of such States under a bilateral convention concluded with a third State. The said decision of January 1964 requires the competent institution of a Member State which is not bound by any bilateral convention with a third State to take into account, for the purposes of aggregation and apportionment, only periods of insurance completed in the Member States, and it requires the institutions of a Member State bound by a bilateral convention with the third State to apply either the Community regulation or the provisions of the convention, the person concerned being granted the right to claim whichever is the higher of the amounts calculated. This last requirement however is of special interest in the present case in so far as it seems to involve the reduction of two pensions to one (one imagines as the result of a national rule against overlapping) and is designed in such circumstances to ensure that the insured person receives the most favourable treatment.

3. As we have seen, therefore, Articles 27 and 28 of Regulation No 3 do no more than provide for, respectively, the aggregation of the insurance periods completed in the Member States and the way in which payment shall be made of the benefits to which the insured is entitled under Article 27. In the light of this the question arises what effect these articles may have on the matter of the applicability of legal provisions of a Member State concerning the overlapping of benefits payable by that State on the basis of Community law and a benefit payable by a third State.

In my opinion the answer is that two aspects of the said Articles 27 and 28 may have opposite effects on the solution to this problem. On the one hand, there is the provision according to which the calculation of benefits for accounting purposes ('pour ordre') must be made in accordance with the legislation of the Member State concerned, from which the conclusion may be drawn that, in assessing the position of individuals *having regard to such legislation,* all its provisions, including any provisions against overlapping, must be applied. On the other hand, there are the detailed rules setting out the ways in which the benefits must be paid once it is established that a worker is entitled to them; this could be interpreted as meaning that the rules are designed to ensure that, in every case, the calculations for which it provides produce the required result thus avoiding the introduction, into the process of aggregation and apportionment, of extraneous considerations as the result of provisions against overlapping.

The conflicting arguments of the two parties in the main action are, of course, connected with these two interpretations of the Community rules. The defendant before the Belgian courts, namely the Institut national d'assurance maladie-invalidité, considers that, as this is a pension the amount of which depends on Belgian law, the provision against overlapping which is in force in that legal system must be applied. The defendant emphasizes that, if the right to pension had in the present case been acquired solely on the basis of Belgian law, there would have been no need to discuss the applicability of the provision in question, and argues that, even although Mr Kaucic received the Belgian pension on the basis of the principle of aggregation introduced by Community law, he should not thereby be placed in a more advantageous position than a worker who had acquired the right to two pensions wholly on the basis of insurance periods completed in Belgium and in Austria.

On the other hand, the appellants in the main action maintain that both the existence and the amount of the pensions 'payable under European regulations' are inviolable and accordingly contend that the national social insurance institutions cannot apply to those benefits the rules against overlapping laid down in their respective legal systems.

According to the appellants, it would, moreover, be 'paradoxical' to take account, in calculating the Belgian pension, of the fact that the person concerned had also received an Austrian pension, since the periods of insurance on the basis of which the latter pension had been paid are disregarded for the purpose of establishing the right to the Belgian benefit. Finally, the appellants argue that any repercussions on the insurance position of employment in Austria must be irrelevant with regard to the determination of the insured's position in Belgium since there is no convention between Austria and Belgium; nor can the convention in force between Austria and Italy be held to have effect in Belgium.

4. Before commenting on the two interpretations which flow from Articles 27 and 28 of Regulation No 3, I must deal with two other Community rules which have been referred to by the parties in these proceedings as liable to

have a bearing on the question. I refer specifically to Article 11 (2) of Regulation No 3 and Article 9 of Regulation No 4 of the Council. Article 11 (2) provides as follows: 'Provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social insurance 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; provided that this rule shall not apply where benefits of the same kind are acquired in accordance with the provisions of Articles 26 and 28 of this regulation'.

Article 9 of Regulation No 4 is one of the implementing provisions of the said Article 11 of Regulation No 3. It lays down the limits and rules for the reduction or suspension procedures provided for in Article 11 (2).

In my view, it is not necessary to spend much time on those provisions. In its judgment of 10 December 1969 in Case 34/69, *Assurance Vieillesse* v *Duffy* ([1969] ECR 597), this Court rightly held that 'Provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social insurance benefits only apply, by virtue of Article 11 (2) of Regulation No 3, to insured persons if they are in receipt of benefits which they acquired through the application of the said regulation'. Subsequently in its judgment in Case 184/73, *Bedrijfsvereniging* v *Kaufmann* ([1974] ECR 517), the Court had occasion to rule that 'Article 11 (2) of Regulation No 3 is the counterweight to the advantages which Regulations Nos 3 and 4 procure for workers' (Ground of Judgment No 9) and that: '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' (Ground of Judgment No 10). In accordance with this interpretation of Article 11 (2) the 'plurality with other social insurance benefits' referred to therein must, therefore, be understood as meaning overlapping of benefits all of which have been granted on the basis of Community legislation. In the present case, however, the situation concerning overlapping which has to be considered involves the simultaneous receipt of a Belgian pension based on Community obligations and of a pension from a third State. The situation is, therefore, outside the ambit of the said Article 11 (2).

This emerges even more clearly if account is taken only of the final proviso in Article 11 (2) that the rule shall not apply (that is to say, a national provision for reduction cannot be set up against an insured person) where benefits of the same kind are *acquired in accordance with the provisions of Articles 26 and 28 of Regulation No 3.* In this case, the benefits were certainly of the same kind (invalidity pension) but only one of them was acquired by virtue of Articles 26 and 28 of Regulation No 3. Consequently, if the field of application of the first part of the said Article 11 (2) were held to be wider, and the words 'other... benefits' interpreted as also including benefits governed by the legislation of third countries, nothing would be left except the principle that national provisions against overlapping can be set up against the insured. It cannot be concealed that an argument to this effect, namely that the first part of Article 11 (2) should be given a wide application, could be based on the phrase in which it is stated that the provision may apply '*even* in respect of benefits acquired under a scheme in another Member State'; the inclusion of the word 'even' would justify the conclusion that provisions for reduction are *a fortiori* applicable in circumstances where benefits have been acquired under a scheme in another Member State *or in a third State.* In my opinion, the better

course is to abide by the case-law established by this Court, referred to above, and, as I have stated, to restrict the application of Article 11 (2) *taken as a whole* to cases in which there is overlapping of two or more benefits all of which arise under Community legislation. As for the possibility of an application 'by analogy' of the article in question, suggested by the appellants in the main action (who accept that the provision is concerned only with benefits paid under European regulations), this, in my opinion, is clearly inconsistent with the specific purpose of Regulation No 3 and the precise limits of its application.

A word or two must be said about Article 9 of Regulation No 4, which the Commission would like to see applied at least in the case of any reduction of the Belgian pension in consequence of the provision against overlapping. My view is that, if Article 11 (2) is held to have no application to the situation with which we are concerned, the same conclusion must *ipso facto* be drawn in the case of Article 9 of Regulation No 4, which is no more than a provision implementing Article 11 (2) and does not call for any change in its field of application.

5. Another subject of argument between the parties is the alleged effect of the Austro-Italian social security convention on the application of the rule against overlapping contained in Belgian law. In particular, it was argued by the Commission that the reduction, to Mr Kaucic's disadvantage, of the Belgian pension would not have occurred if it had not been for the said convention since Mr Kaucic was able to 'export' his Austrian pension only on the basis thereof.

I cannot agree with this reasoning. In my opinion, the Belgian provision against overlapping was applied solely because Mr Kaucic was in receipt of a pension payable by a third State, and the reduction was in no respect due to the fact that the third State paid the pension because of the obligation imposed upon it under a bilateral convention with a Member State. In this connexion it must be borne in mind that the Belgian provision, by virtue of which a reduction in pension in the case of Mr Kaucic was made, makes provision for it in cases where 'the incapacity in respect of which a claim for benefits is made falls within the general law *or some other legislation*'. In dealing with this case, the Belgian courts interpreted the words 'other legislation' as including the legislation of another State. Nevertheless, even if there had been no convention whatsoever between Italy and Austria, the position of the person concerned under Belgian law would, in my view, have been the same.

More generally, I cannot see how it is possible to speak of the Austro-Italian convention having any bearing on the reduction of Mr Kaucic's Belgian pension in view of the fact that the object of that convention and, consequently, of the obligations imposed on the parties is designed to favour the worker who has been employed in the two States, whereas Mr Kaucic's advantageous position under Austrian law is accepted by Belgian law as a justification for a reduction which was clearly to the detriment of the worker concerned. In other words, although it is perfectly true that a bilateral convention concluded between a Member State and a third State cannot impose on the other Member States obligations which go beyond those of Community law (as was emphasized by Mr Advocate-General Mayras in his opinion in Case 16/72), it is quite clear that, in this case, there is no question of the imposition on Belgium of obligations corresponding to those assumed by Italy in respect of Austria, in view of the fact that it is not a requirement that the periods completed in Austria must be added to the periods of insurance which Mr Kaucic completed in Belgium or that the proportionate amount payable by the competent Belgian institution must be calculated on the basis of the relationship between the

Belgian insurance period and the aggregate of that period and the Austrian period. Indeed, it is possible to observe that, precisely since Belgium is free of any obligations to Austria in social security matters, there are no international restrictions which prevent it from taking an Austrian pension into account as a factor in the reduction of the Belgian benefit payable to the worker.

6. It seems to me reasonable, therefore, to look for the answer to the question of interpretation referred to the Court by the Belgian Cour de Cassation in one of the two possibilities I have described above: the decision is either that the national legislation of the Member State under which the pension, granted in accordance with Community rules, is paid, must be applied in its entirety, including the provisions against overlapping or that the result of the calculations provided for by Community regulations for the purpose of determining the amount of a pension is inviolable and that, therefore, it is impossible to alter it pursuant to national rules aginst overlapping. I hasten to add that the first of these two alternatives is the one which, in my opinion, is the one to be preferred.

I base this on the principle laid down by this Court in its judgment of 5 July 1967 in Case 2/67, *De Moor* v *Caisse de Pension des Employés Privés* ([1967] ECR 197). According to one of the grounds of the judgment in that case: 'Regulation No 3 did not provide for a common system of social security giving the beneficiary a single entitlement based on a simple apportionment of such benefits between national institutions, but allowed separate systems to continue, creating separate claims against separate institutions against which the beneficiary has direct rights either under national law alone or national law supplemented, if necessary, by the system of the aggregation of insurance periods provided for by Article 51 of the Treaty'. The same principle was, moreover, expressed, although in more concise terms, in the judgment of the same date in *Ciechelski,* Case 1/67, ([1967] ECR 181) and was then reiterated in the judgments of 10 November 1971 in *Keller* v *Caisse d'Assurance Vieillesse de Strasbourg,* Case 27/71, ([1971] ECR 885) and of 12 November 1974 in *Mutualités Chrétiennes* v *Rzepa,* Case 35/74 ([1974] ECR 1241). In the first of these judgments it was held *inter alia* that 'the system at present in force ... in the absence of a common social security scheme, depends on a simple coordination of national legislative systems which have not been harmonized'; in the second it was held that 'the system embodied in Regulations Nos 3 and 4 rests on mere coordination of national legislation in the field of social security'. In any case it is clear that the determination of the amount of the pensions to be paid varies from State to State since every Member State is still free to lay down both what these amounts should be and the detailed rules and conditions for granting pensions of all kinds. Thus, in the invalidity insurance scheme, Belgian legislation grants the maximum pension on the sole condition that the insured has worked 120 days whereas in Italy the amount of the allowance is calculated in proportion to the length of the period in paid employment.

The rules against overlapping must, in my view, be laid down in terms of the aim and the requirements of each national legislation. In particular, the introduction of rules reducing the amount of the pension in cases of overlapping is clearly more justified under a scheme such as the Belgian one, in which the right to a maximum invalidity pension is obtained without difficulty, than under a scheme such as the Italian one. And, in this connexion, I should like to emphasize that the question concerning the validity, in terms of Community law, of a rule against overlapping must be put so as to take into account the effect of a rule of

this kind, which is to reduce the amount of a pension calculated on the basis of Community requirements, and not the way in which the reduction is made. In the present case, the judgment in which the Belgian Cour de Cassation asked for a preliminary ruling refers to a certain conflict between the statements of the defendant and those of the judgment on appeal concerning the way in which the rules against overlapping fixed under Belgian law have been applied: according to the Institut national d'assurance maldadie-invalidité, the deduction is made when calculating the theoretical benefit for accounting purposes ('pour ordre') whereas, according to the appeal judgment, the amount calculated on the basis of Community rules was reduced by the amount of the Austrian pension. It does not seem to me to make any difference which method was followed; what matters is the legality or otherwise of a reduction as the result of national rules against overlapping. On the ground indicated earlier (or, I repeat, because the amount of the benefits depends on the relevant national law as well as upon Community law) I am of the opinion that Community law does not preclude the introduction and application of legislation against overlapping at national level.

Finally, I must refer to two more general considerations. Article 8 of Regulation No 3 ensures that persons permanently resident in the territory of any Member State to whom the provisions of the regulations apply receive the national treatment (that is to say equality of treatment with the subjects of any Member State) and lays down that those persons 'shall have the same rights and obligations under the social security legislation of every other Member State as the latter's nationals'. This provision seems to me to imply that the obligations and benefits under each social security system are indivisible and means that, even as regards obligations and restrictions, there must be no preferential treatment for the nationals of other Member States (unless they arise specifically and expressly from other provisions of the regulation). In conclusion, I should like to recall the general principle of interpretation laid down by this Court on the subject of the interpretation of Regulation No 3 when it declared that it 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 movement and employment of Community workers within the territory of each of the Member States (judgment of 16 November 1972 in Case 14/72, *Heinze* v *Landesversicherungsanstalt Rheinprovinz*, ([1972] ECR 1105). In the present case, as the Commission also recognized in its observations, the application of the rule against overlapping does not compromise the freedom of movement for workers since the circumstance which makes this rule applicable is the worker's employment in a third country.

7. For the foregoing reasons I conclude by recommending that the Court should answer the question submitted to it under Article 177 of the EEC Treaty by the Belgian Cour de Cassation by ruling that the provisions of Regulation No 3 of the Council of 25 September 1958, in particular Articles 27 (1) and 28 (1), do not prevent the competent social security institution of a Member State from applying the rules of its own national legislation on the overlapping of social insurance benefits in a case where one benefit is payable by the same institution on the basis of Community rules and another benefit of the same kind is paid to the insured by a third State to which the Member State is not bound by a bilateral convention on social security.