The decision on costs in the present proceedings is a matter for the Cour d'Appel, Paris.

Hammes Trabucchi Monaco

Delvaux Donner Lecourt Strauß

Delivered in open court in Luxembourg on 5 July 1967.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 14 JUNE 1967[1]

Mr President,
Members of the Court,

In the case referred for a preliminary ruling which I have to discuss today, the subject is again a question concerning migrant workers' rights to social security.

The following facts gave rise to the problem:

The plaintiff in the main action before a French court (a German citizen) was employed successively in both France and Germany and affiliated to the social insurance systems there. When he reached the age of 65, in June 1962, he claimed an old-age pension from the German social insurance institution. In accordance with Regulation No 3 of the Council of the EEC concerning social security for migrant workers, it was granted to him with effect from 1 May 1962 on the basis of 150 insurance quarters of which 100 were completed in Germany.

At this point the plaintiff did not wish to avail himself of his insurance rights in France because he was continuing his work there and thus had the opportunity to become entitled to additional benefits under French law.

The French social security fund (the Caisse Régionale Vieillesse des Travailleurs Salariés de Paris), having received notification from the German social insurance institution, on 14 May 1964 on its own initiative issued a decision to pay the French old-age pension, to take effect from 1 July 1962, despite the repeated express protests of the plaintiff.

Against this payment made by the Caisse on its own initiative, Mr Colditz first of all made an application to the Commission de Recours Gracieux and when this application was dismissed by the latter on 12 January 1965 he then appealed to the Commission de Première Instance du Contentieux de la Sécurité Sociale et de la Mutualité Sociale Agricole de Paris. He claimed that the French old-age pension was only payable on the termination of his work in France and on the basis of the claim which he had made on 3 March 1965 with the Caisse, that is to say, from 1 April 1965, when he had completed in all 161 quarters.

1 — Translated from the German.

When this appeal was also dismissed, by a decision of 22 November 1965, the plaintiff, who had in the meantime (23 March 1965) moved to Germany, appealed to the Cour d'Appel, Paris. On 28 January 1967 the 18th Chamber of that court, sitting as a social security court, decided, under Article 177 of the EEC Treaty, to stay the proceedings and to request the European Court of Justice to 'rule whether the provisions of Article 28 of Regulation No 3 [of the Council of 25 September 1958 (Official Journal No 30 of 16 December 1958, pp. 561/58 et seq.)] and of Articles 30 to 36 and 83 of Regulation No 4 [implementing and supplementing Regulation No 3 concerning social security for migrant workers (Official Journal No 30 of 3 December 1958, pp. 597/58 et seq.)] must be interpreted to mean that apart from the special cases provided for by Article 28 (1) (e) and (f) a claim for a pension must necessarily be met simultaneously by each of the national institutions so as to take effect from the date of the first actual claim addressed to one of those institutions'.

In the course of the proceedings before you, only the Commission of the European Economic Community has submitted observations. We shall see that its appraisal of the legal situation indeed appears to be correct.

Reply to be given to the question

If one has regard only for the letter of the regulations of the Council concerning social security for migrant workers, one finds that, although there is no provision expressly requiring the simultaneous payment of old-age pensions or prohibiting successive payments, certain arguments drawn from the text of the provisions nevertheless appear to favour the principle of simultaneous payment on the basis of the date of the first claim, and this moreover appears to be the normal practice of the social security institutions of the Member States. Thus the wording of Article 28 of Regulation No 3 for example states that 'payment of benefits . . . shall be made', that is to say that, being expressed in imperative terms, it appears to preclude the necessity of a *claim* by the person concerned. Likewise Article 28 speaks, not of benefits which an insured person claims, but of benefits which '*may be* claimed' by him, which might also lead to the conclusion that its application does not depend on a claim by the person entitled.

But the question might also be asked whether Article 28 (1) (e) and (f) cannot give rise to an interpretation which would imply the *successive* payment of benefits *at the request* of the person concerned. As we know from other proceedings subparagraphs (e) and (f) refer to cases where, at a specific point in time, the insured person does not comply with the conditions applicable to him under the legislative systems of various Member States. In the calculation of the benefits in those cases, it is initially permissible not to take account of periods completed under legislation which prescribes conditions for granting benefits which have not yet been fulfilled. For such cases moreover Article 28 (1) (g) provides for a subsequent review of claims to benefits (that is to say, in reality, a successive payment of insurance benefits), to the extent to which the conditions required by the legislation of a Member State and not complied with at the time of the first calculation are fulfilled. If by the term 'conditions', within the meaning of this provision, we understand not only *objective* conditions conferring entitlement to benefits, such as age, insurance periods, etc., but also subjective circumstances (which I advocated in the *de Moor* case in a particular aspect) the *claim* which the laws of certain Member States (among them France)

require the insured person to submit, and which is a condition the fulfilment of which depends on his will, might be regarded as a 'condition' within the meaning of Article 28. This would necessarily result in a successive payment of benefits, if *no* claim were submitted to one of the insurance institutions.

In the search for a solution however it appears more reasonable (as the Commission proposes) not to rely on textual arguments (and other arguments based on Regulation No 4 which I shall consider later), but to take account above all of the objectives of the relevant provisions of the Treaty (Articles 48 to 51) which the regulations of the Council must serve and which the judgment in Case No 100/63 has defined as follows: 'The aim of this provision' (Article 51) 'is to allow the migrant worker to acquire the right to benefit by the aggregation of the periods of work completed by him in various Member States . . . The aim of Articles 48 to 51 of the Treaty would not be attained but disregarded if the worker were obliged, in order to avail himself of the freedom of movement which is guaranteed to him, to find himself subjected to the loss of rights already acquired in one of the Member States without having them replaced by at least equivalent benefits'. The basic concept is thus to avoid an application of the regulations of the Council concerning social security for migrant workers which results in the persons concerned losing their rights.

Those are the considerations on the basis of which the Commission examined the *consequences* entailed by the various methods of payment of insurance benefits in a case like this and it has arrived at the following conclusions.

In any event the *German* insurance benefits are constant, whether the French benefits are paid on the same date (the basis is then 100 insurance quarters in Germany and 50 in France), or whether a successive payment is made in which case, to begin with, (without *pro rata* calculation) only the 100 German insurance quarters are to be taken into consideration and subsequently when the French insurance quarters, amounting in all to 61 quarters, are taken into account, there is a *pro rata* calculation in the ratio of 100/161. In fact, as the Commission has shown, the outcome of the calculation always corresponds to that given by a *direct* calculation on the basis of 100 German insurance periods, which amounts to saying that the method of paying the benefits in France does not affect the German pension and its calculation. On the other hand, the consequences with regard to the right to benefit in France differ with the date of payment. If payment takes place in 1962, at the same time as payment by the German insurance institution, this means that from that date the claimant obtains an old-age pension on the basis of 50 French quarters (out of a total of 150 insurance quarters). But, according to French law, the payment is *definitive* (that is to say, it precludes any subsequent review, despite the fact that the claimant has continued to pay contributions through continuing his work). If payment is postponed the claimant initially does not receive the French old-age pension, although he remains bound to pay the social security contributions, because he has not yet reached the upper limit of insurance periods required by the French system. But to offset this the basis of calculating the French pension subsequently becomes more favourable, owing to the longer insurance period (61 quarters) and to the fact that the French system provides for a special ratio of increase for the insurance periods completed after the age of 60.

If, despite this situation, it were necessary to pay the benefits simultaneously, an insured person such as the claimant

would lose his opportunities of improving the benefits available to him under the system of a Member State by the sole fact of his status as a migrant worker. According to our case-law the detriment thus caused to legal opportunities must be considered as an unjustified denial of legal rights since the use of the special features of the French system must be deemed an interest worthy of protection; this interest is significant only for the purposes of French insurance benefits and not in calculating and paying the German old-age pension.

Accordingly, and I agree with the Commission on this point, there must be rejected, at any rate in situations such as the present, the principle of simultaneous payment of social security benefits on the basis of the same date.

This conclusion is not convincingly contradicted by the provisions of Regulation No 4 which the French insurance institution relies on in the main action. No doubt several expressions employed in Articles 30 to 36 and 83 of Regulation No 4 favour the argument that the general rule is that of simultaneous payment of benefits. This is so in the case of Article 30 which only mentions *a single* claim which must be made to the insurance institution of the place of permanent residence of the person concerned, and which speaks of forwarding the claim to the competent institution. This is true, too, of Article 31 according to which, in the form referred to in Regulation No 4, the institution concerned must be designated for each of the Member States; the same applies to Article 33 which speaks of the detail and total of the insured periods completed under the legislation of each of the Member States and of the transmission of the form to the competent institutions of other Member States. The same applies to Article 34, under which each of these competent institutions shall add on the form the insurance periods or assimilated periods completed under its own legislation and return it to the scrutineer institution after calculating the benefit payable in the particular case. Finally the same proposition applies to Article 36, which requires the scrutineer institution to advise the claimant of *all* decisions taken regarding award of the benefits due, together with Article 83 under the terms of which: 'The date of submission of claims, declarations or appeals to an authority . . . of another Member State shall be deemed to be the date of submission thereof to the competent authority'.

Nevertheless the determining factor is that in this case, within the framework of the implementing provisions of Regulation No 3, we are concerned only with *procedural* rules governing the submission and scrutiny of claims for pensions and co-ordinating payments; these rules are intended, by simplifying formalities, to facilitate and expedite the making of claims under Regulation No 3. On the other hand the rôle of those provisions precludes them from defining and complementing the *basic* principles of the law on migrant workers and from indicating whether simultaneous payment is obligatory. It is therefore quite impossible to interpret Article 83 (on which the French insurance institution particularly relies) to mean that, in all those cases where a claim is submitted to an institution of one Member State, this necessarily implies that it must be regarded as having also been submitted to the institutions of the other Member States; on the contrary, as the Commission has stated, this provision at the most implies a *presumption* which may be rebutted by the express and unequivocal declarations of an insured person to the extent to which the material principles of Regulation No 3 allow it.

Finally, as the Commission rightly emphasizes, the fact that Regulation No 4 does not provide any special rules of procedure for the successive payment of

benefits does not provide a basis for a decisive argument against the legality of such a method of payment. In fact such special procedural rules (with regard to the scrutineer institution for example) are also lacking for the cases referred to by Article 28 (1) (e) and (f) of Regulation No 3, which, under subparagraph (g), may involve successive payment of benefits. Despite this, as the Commission has shown, in this case there is nothing to preclude a sensible application of the procedural rules governing the payment of benefits.

Consequently I am of the opinion that, as the Commission has suggested, a reply should be given to the question of the Cour d'Appel, Paris, as follows:

Article 28 of Regulation No 3, read in conjunction with Articles 30 to 36 and 83 of Regulation No 4, does not, apart from the cases referred to in Article 28 (1) (e) and (f), require the institutions of the various Member States to pay old-age pensions simultaneously and on the basis of the same reference date, and the calculation of the pension initially claimed is not affected by the fact that the payment of the pension owed in another Member State takes place subsequently.