JUDGMENT OF THE COURT
5 JULY 1967[1]

Auguste de Moor
v Caisse de Pension des Employés Privés[2]
(Reference for a preliminary ruling by the Cour Supérieure de Justice, Luxembourg)

Case 2/67

Summary

1. *Procedure — Preliminary ruling — Jurisdiction of the Court — Limits*
   (EEC Treaty, Article 177)

2. *Free movement of persons — Migrant workers — Insurance — Benefits — Proportional calculation as a corollary of aggregation*
   (EEC Treaty, Article 51)

3. *Free movement of persons — Migrant workers — Insurance — System provided for by Regulation No 3 — Retention of separate national systems and of separate claims*

4. *Free movement of persons — Migrant workers — Old-age and death (pensions) insurance — Pension rights relating to separate periods — Absence of improper accumulation*
   (EEC Treaty, Article 51; Regulation No 3, Articles 27 and 28)

1. Cf. paragraph 1, summary, Case 100/63, [1964] E.C.R. 565.
2. Cf. paragraph 1, summary, Case 1/67
3. 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 institutions against which the beneficiary has direct rights either under national law alone or national law supplemented, if necessary, by Community law.
   Cf. paragraph 3, summary, Case 1/67.
4. Cf. paragraph 2, summary Case 1/67.

In Case 2/67

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Cour Supérieure de Justice, Luxem-

1 — Language of the Case: French.
2 — CMLR.

bourg, sitting as a Cour de Cassation, for a preliminary ruling in the appeal pending before that court between

AUGUSTE DE MOOR, commercial traveller,

and

CAISSE DE PENSION DES EMLOYÉS PRIVÉS, a body corporate under public law, assisted by André Prost,

on :

— the interpretation of Article 28 (1) (b) of Regulation No 3 of the Council of the EEC,

— secondarily, whether this article would be in conformity with Article 51 of the Treaty in the event of its being applied independently of Article 27,

THE COURT

composed of A. Trabucchi, President of Chamber, President, R. Monaco, President of Chamber, A. M. Donner, R. Lecourt (Rapporteur) and W. Strauß, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

Mr Auguste de Moor, a commercial traveller, worked in Germany, Belgium and finally in Luxembourg. Since he had not worked for a minimum period of 15 years in Germany, he was only entitled to a pension in that Member State by virtue of the application of Article 27 of Regulation No 3 of the EEC. When he attained the age of 65 on 24 January 1958, he could claim a pension in Belgium solely under the national law of that country, provided however that he ceased to be gainfully employed. Since on 1 July 1959 he had acquired his right to a pension in Luxembourg solely under the national law of that country, he applied there for this pen-

sion and continued to work, which he was permitted to do under Luxembourg law. His right to a pension was acknowledged but the amount was disputed.

The social security institutions in Luxembourg calculated the pension in accordance with Article 28 of Regulation No 3 which lays down in paragraph (1) the conditions for the payment of benefits which may be claimed by 'an insured person covered by Article 27' if he has completed insurance periods in a number of Member States, his pension being calculated in such cases by a proportional calculation of the various insurance periods.

When he applied for a pension the periods of insurance were 7 years and 6 months in Germany, 14 years 9 months in Belgium and 10 years in Luxembourg. The Luxembourg pension was calculated by a proportional calculation of these periods, because the right to a pension could only be acquired in Germany, since he had not worked for a minimum period of 15 years there, by aggregating all these periods as provided by Article 27. Although the Belgian social security institution refused to pay any pension, applying Article 5 of the Law of 12 July 1957, which did not permit the payment of an old-age pension to a worker who was still gainfully employed, the Caisse Luxembourgeoise, however, fixed the amount of the pension due from it according to the proportion which his insurance period completed in Luxembourg represented in relation to the aggregate of the periods of insurance under the laws of the three Member States. As the Luxembourg pension consisted partly of a fixed sum, the amount of which is independent of the length of time during which contributions were paid, and partly of a sum which is proportionate to the duration of the insurance period, the proportional calculation of the pension adopted by the Caisse produced a pension which was lower than it would have been, had only the Luxembourg law and only the insurance period in Luxembourg been taken into account.

Mr de Moor disputed this method of calculation and requested the Luxembourg social security institution to calculate his pension by applying Luxembourg law only without reference to the insurance periods completed under the laws of other Member States. The Caisse rejected this request. The Conseil Arbitral des Assurances Sociales (the Arbitration Board for Social Security) on the other hand granted his application on 27 November 1963. The Conseil Supérieur des Assurances Sociales (Social Security Court), however, quashed this decision on 5 December 1964.

When Mr de Moor appealed, the Cour Supérieure de Justice, Luxembourg, finding that the interpretation of Regulation No 3 was an issue between the parties, by judgment of 5 January 1967 made a reference to the Court of Justice of the European Communities under Article 177 of the EEC Treaty for a preliminary ruling on the two questions of the interpretation and validity of the disputed provision.

The subject-matter of the reference is 'the question whether Article 28 (1) (b) of Regulation No 3 of the Council of the EEC of 25 September 1958, concerning social security for migrant workers, is applicable for the purpose of determining the amount of old-age pensions payable by the Caisse de Pension des Employés Privés in Luxembourg, even in those cases where its application would not lead to the acquisition, maintenance or recovery of the right to benefit referred to in Article 27 (1) of the said Regulation No 3 and, in addition, whether Article 28 of Regulation No 3, if it is regarded as being applicable without distinction even in cases other than the acquisition, maintenance or recovery of a right to benefit, is in conformity with the provision upon which the said article is based, that is

to say, Article 51 of the Treaty of Rome of 25 March 1957 and whether it is therefore fully valid'.

The judgment referring the questions in this case, served by one registrar on the other, was received at the Court on 23 January 1967.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice the parties to the appeal before the Cour Supérieure de Justice, Luxembourg, the Commission of the EEC and the Member States were invited to submit their observations. Only the Caisse de Pension des Employés Privés in Luxembourg and the Commission filed a statement of case.

During the oral procedure the oral submissions of the Commission and the parties to the original proceedings were heard.

The Advocate-General delivered his reasoned oral opinion at the hearing on 1 June 1967.

II — Observations submitted under Article 20 of the Protocol on the Statute

The jurisdiction of the Court of Justice

The *Caisse de Pension des Employés Privés in Luxembourg* applied to the Cour Supérieure for a stay of proceedings on the ground that that court had refused to take notice of a pleading filed by the Caisse during the proceedings prior to the judgment of 5 January 1967. It claimed that the proceedings suffered from a serious defect, because the disputed pension was a charge partly on the funds of the Caisse and partly on the funds of the body responsible for insurance against old-age and disablement which was 'made a third party to the proceedings by the national court of first instance of its own motion' but which was not made a party to the appeal.

As on the other hand the Cour Supérieure did not accept a submission based on the interpretation of a Belgian law that the matter was one of public interest, the Caisse made an application for 'the restoration of the *status quo ante*' in application of the provisions governing Luxembourg appeals procedure. Its submissions in support of this application were intended to persuade the Cour Supérieure to request the Court of Justice to stay the proceedings for a preliminary ruling 'until the application for the restoration of the *status quo ante* has been decided'.

By reason of these proceedings under the national law of Luxembourg the Caisse only puts forward in the alternative 'submissions' under Article 20 of the Protocol on the Statute of the Court of Justice to the effect that the Court should declare that it has 'no jurisdiction', because the issue is not governed by Community law but by Belgian law.

The Caisse states that although Article 28 (1) (e) and (f) provides for 'the possibility of disregarding certain periods of insurance' this may be done only where the claimant does not comply with 'the conditions for the acquisition of the right to a pension' under the legislation applying to such periods. This is not the position in the present case. In fact the right of the claimant to the Belgian pension is only suspended or provisionally withdrawn, since this pension only 'begins to run' if the 'beneficiary' is no longer gainfully employed. Further this purely potestative condition, under which the exercise of the right depends solely upon the decision of the claimant, is not a constituent part of the right.

This interpretation of a point of foreign law, arrived at by the Conseil Supérieur des Assurances Sociales and therefore final, is a finding of fact which the Cour Supérieure is not entitled to review and which therefore puts an end to the dispute. Thus 'no question of the interpretation of a Community regulation' arises.

Further, there can be no question of a migrant worker's being subjected to a disadvantage or gaining a privilege in cases where 'the situation of the claimant only depends upon his own conduct'.

Finally since the content of national laws plays a decisive part in the solution of the legal problem the Court of Justice has no jurisdiction to interpret such laws.

In the opinion of the *Commission* the Cour Supérieure, Luxembourg, has overlooked a decisive element in the dispute.

The claimant in fact wished the lower courts to acknowledge that his ceasing to be gainfully employed was not a condition for the payment but a condition for the acquisition of his right to a Belgian pension. The Conseil Supérieure des Assurances Sociales expressly referred to the possibility of disregarding certain insurance periods.

The applicant and the Cour Supérieure thought that they were faced with a question of the interpretation of a point of foreign law. As this question had been determined by the lower courts, the Cour Supérieure therefore considered that it could not review this question. The Court of Justice moreover has no jurisdiction to determine such an issue.

However, the question raised by the plaintiff in the lower courts did not, according to the Commission, refer to Belgian law but to Article 28 (1) (e) of Regulation No 3.

The validity of Article 28 of the Regulation No 3

The *Commission* has taken the view that the Cour Supérieure 'appears' not to have restricted itself to a request for an interpretation. 'It seems to have wished' in addition to refer to the Court of Justice a 'request for the determination of the validity' of Article 28. However, as 'no express application for the determination of the validity (of Article 28)' has been made to the Court of Justice, the Commission has found in the order of reference and the opinion of the Procureur Général d'État [Attorney General] 'indications that the court making the reference intended to treat the question as one of interpretation'.

In order to determine the validity of Article 28 of the regulation with reference to Article 51 of the Treaty it is necessary to consider the contested provisions as interpreted by the Court of Justice and not the 'literal wording' of Regulation No 3. However if there is any doubt, this interpretation should enable these provisions to be given a meaning compatible with Article 51. This explains the importance of the judgment in Case 4/66 (Rec. 1966, p. 625) which held that Articles 27 and 28 'like the entire system of which they form part have as their basis, their framework and their bounds Articles 48 to 51 of the Treaty, which are aimed at securing freedom of movement for workers'.

The file and in particular the opinion of the Procureur Général show that it is not the validity of Article 28 which is at issue but the way in which the Conseil Supérieur des Assurances Sociales has interpreted and applied it. More specifically, according to the claimant, the failure to comply with the provisions of Article 51 lies in the fact that Article 28 was applied although the application of Article 27 was unnecessary. It is therefore of little importance whether the question referred to the validity or to the interpretation of the provisions of Article 28, because, in order to be 'completely valid', they have to be interpreted in conformity with Article 51.

Interpretation of Article 28 of the regulation

The Caisse de Pension only dealt with this question in the alternative and left the decision as to the content of the request for an interpretation to be determined by the court.

It calls attention, however, to the effect which the interpretation advocated by Mr de Moor would have, namely that the institutions having to pay the pension must on that basis bear 'the financial consequences of the decision or even of the whim of the claimant in deciding whether to remain gainfully employed for a longer or shorter period'. A strictly individual interest is in conflict with the interests of the national community.

In the view of the *Commission* the questions raised are not the same as the question already decided by the judgment in Case 100/63 [1964] E.C.R. 565, which states that Article 28 'is applicable only where the acquisition, maintenance or recovery of the right to benefit is at issue'.

The Cour Supérieure, Luxembourg, was of the opinion that having regard to the particular facts of the dispute the question of the relationship between the acquisition of the right (Article 27) and the proportional calculation of the pension had not been sufficiently clarified.

In order to determine this relationship it is necessary to consider the principles deduced by the Court from Article 51. The first of these principles, which has been repeated many times in the decisions of the Court, is that the migrant worker must not be deprived of the rights which he has acquired independently of the application of the regulations, unless any such loss is made good by equivalent benefits. The aim of Article 51, which provides for the aggregation of all periods 'for the purpose of acquiring the right to benefit for all periods of work' would not be attained but disregarded, if a migrant 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 without having them replaced by at least equivalent benefits. Finally Articles 27 and 28 'would not guarantee the free movement of workers if, merely by exercising this freedom, they were to lose their entitlement to social security acquired in the countries where they have worked.' These are the principles, which have been laid down in the decisions of the Court.

However on the basis of 'a ground of judgment all the more striking because it was not essential for the determination of the particular issue' the Court however decided that it does not follow from these principles that the worker must of necessity succeed, by the mere interplay of various national legislative systems in succession to one another, in obtaining 'a higher aggregate sum in benefits than would accrue to him under Article 28 (3).' Article 51 of the Treaty thus prevents the separate application of Article 28 of Regulation No 3 but perhaps permits 'a general procedure for determining pensions on the basis of proportional calculation within the framework of other methods of calculating pensions'. If the need to protect the worker means that Articles 27 and 28 of the Regulation must be applied together, this protection would necessarily lead in certain cases to cumulative benefits which would be contrary to the second principle which in the opinion of the Commission the Court laid down in its judgment in Case 4/66.

If proportional calculation is justified when aggregation is necessary for the acquisition of the right to benefit, the same principle should apply when aggregation is 'necessary in another Member State'. In this case the right to a pension was acquired in Luxembourg without the need to aggregate periods. As, however, the right to a pension in Germany could only be acquired by aggregation, the Luxembourg institution could calculate its own pension on a proportional basis, because it is not clear from the judgment in Case 100/63 that proportional calculation is subject to aggregation only in the country where the pension is calculated. It is right that Article 28 should be ap-

plied simultaneously and without distinction in the various Member States. It is 'appropriate' that aggregation, which is necessary in one state, should entail proportional calculation in the others, even if aggregation was unnecessary in those states. The working life of the worker should be considered as a whole in order to avoid a possible 'improper plurality of benefits'. As, however, such a rule might prejudice the worker, account would necessarily have to be taken, not only of the pension payments calculated on a proportional basis in each state 'but also of the differential supplementary allowances paid by the institutions to those States to make good any possible disadvantages'. This is the weakness of Regulation No 3 which does not allow compensation in every case for the loss of rights suffered by a worker through the proportional calculation of pensions under the legislation of certain States. Therefore the Commission has proposed that the said Regulation should be amended. The Court, however, decided that, as Community law stands at present, the protection of the worker against any possible loss of his rights has to prevail over the proportional calculation of his pension.

As the Commission is of the opinion that Article 28 is intended to avoid the improper plurality of benefits and that such a plurality 'without any doubt' exists in the present case, it proposes to make an allowance for the benefits to which Mr de Moor is not entitled. It takes the view in fact that there is an improper plurality of benefits 'when the pensions are not entirely proportionate to the period of insurance' but are either fixed at a flat rate (as they are in the Netherlands) or unconnected with the insurance periods (as are Type A invalidity pensions, referred to in Article 24 of Regulation No 3, under Belgian, French and Netherlands law). The same situation arises 'although to a lesser degree' in the case of pensions which, like those governed by Luxembourg law, are made up of an amount proportionate to the insurance period and of a fixed amount. In this case it would be wrong for a worker who has acquired the right in Luxembourg to the fixed proportion of his pension, to acquire in another state the right to another pension and whilst retaining the whole of the fixed proportion from Luxembourg. As this worker is more favourably placed than one who has worked all his life in the Grand Duchy, he would in this way obtain a benefit to which he was not entitled, which could only be avoided by 'proportional calculation'. However, even if it is possible in the present case to achieve this object without prejudicing the worker 'it is necessary to state' that Regulation No 3 does not make it possible in every case for the two principles, which the Commission considers are to be inferred from the case-law of the Court, to be complied with simultaneously.

The Commission stated that it was proposed that the Regulation should be amended in order to remedy this defect. It has drawn the attention of the Court to the disadvantages which it finds in the absence of any proportional calculation of pensions where the right to a pension can be acquired in all the Member States concerned without recourse to aggregation. In order to give an example of an improper benefit resulting from the adding together of pension rights acquired in the normal way in each Member State solely under their respective national laws, the Commission compares the old-age pension with the Belgian or French pension which is granted after a short qualifying period. Finally it relies on the spirit of Regulation No 3 as expressed in Article 11 (1) relating to the plurality of benefits which states that, save for exceptions, of which old-age/death insurance is one, Regulation No 3 cannot confer "entitlement under the legislation of the Member States, to more than one benefit of the same kind in respect of any insurance period".

The case where benefits of the same kind do not exist concurrently is easier to understand if the difference between private insurance (in particular life insurance) and social security is examined. Whereas in insurance against damage the insurance benefits cannot be added together, as the total amount of such benefits may not exceed the value of the interest insured, the aggregation of benefits is possible on the other hand in life insurance. In this case concerning social security where the distinction between insurance against damage and personal insurance does not exist, the prohibition on the plurality of benefits is however justified because the existence of reciprocal obligations in the relationship between the insured and the institution is less marked, indeed is wholly absent, and because the size of the individual contributions are insignificant compared with the funds provided by national budgets. The relationship between a contribution and a benefit and that between a contribution and a risk are only the same in private insurance.

These are the various considerations which caused the Commission to prepare a draft regulation and, after it has been issued, 'the general application of proportional calculation' will be obligatory. Finally with special reference to the present dispute the Commission has considered the question—raised in the lower courts in Luxembourg — whether the temporary suspension of the pension by the Belgian authorities gives the Luxembourg institutions the right to disregard the Belgian insurance periods. This question of the interpretation of Article 28 (1) (e) and (f) of Regulation No 3 is different from the preceding question, because, as the Commission believes, 'the principle of proportional calculation of the Luxembourg pension was justified'.

According to the Commission it is necessary to avoid a literal interpretation of these provisions—namely that 'insurance periods completed in other Member States may only be disregarded if the right to benefit has not been acquired'—and rather to ascertain its real meaning in the context of a system established to facilitate the movement of workers. Having regard to the objectives of Article 51 of the Treaty as defined by the Court, the provisions of Article 28 are not applicable if Community regulations do not allow the loss of rights already acquired without having them replaced by at least equivalent benefits (judgment in Case 100/63). As Mr de Moor does not receive a Belgian pension, because he continues to be gainfully employed, he suffers a reduction of the total amount of his pensions—a loss which is justified under Belgian law. He would suffer, on the other hand, an unjustified loss if, for the same reason, the Luxembourg proportion of his pension were in addition to be reduced as a result of the Luxembourg institution's taking into account periods of work in Belgium for which he receives no corresponding pension. The proportional calculation of a pension consisting partly of a fixed amount would lead to a reduction in the amount of the pension in a case such as this.

Grounds of judgment

By judgment of 5 January 1967 lodged at the Court on 23 January 1967 the Cour Supérieure de Justice of Luxembourg, sitting as a Cour de Cassation, asked 'whether Article 28 (1) (b) of Regulation No 3 of the Council of the EEC of 25 September 1958 concerning social security for migrant workers is applicable for the purpose of determining the amount of old-age pensions

payable by the Caisse de Pension des Employés Privés in Luxembourg, even in those cases where its application would not lead to the acquisition, maintenance or recovery of the right to benefit referred to in Article 27 (1) of the said Regulation No 3 and, in addition, whether, Article 28 of Regulation No 3, if it is regarded as being applicable without distinction even in cases other than the acquisition, maintenance or recovery of a right to benefit, is in conformity with the provision upon which the said Article 28 is based, that is to say, Article 51 of the Treaty of Rome of 25 March 1957 and whether it is therefore fully valid'.

This question raised in the context of a national system of insurance periods conferring the right to a pension after payment of contributions for a considerable time deals with any effect on the worker's rights of insurance periods completed in three Member States leading first to the acquisition by him in Luxembourg of a right to a pension solely under its national law, secondly to the acquisition by him in Belgium solely under its national law of a right to a pension payable only when he ceases to be gainfully employed and finally to the acquisition by him in West Germany of the right to a pension as the result of aggregating insurance periods as provided by Article 27 of Regulation No 3.

The jurisdiction of the Court

The Caisse de Pension des Employés Privés du Grand-Duché criticizes the judgment of the said court, challenges the jurisdiction of the Court of Justice to give a ruling on the question referred and maintains that it is a Belgian law and not Community law which has to be interpreted.

However as the Court has been properly seised under Article 177 of the Treaty of a question relating to the interpretation and validity of Regulation No 3 of the Council, the observations of the Caisse are irrelevant.

Nor can either the fact that the beneficiary could, by ceasing to be gainfully employed, receive payment of the Belgian pension, nor the fact that periods of work and contributions were respectively completed and paid for the most part prior to the entry into force of the Community provisions relating to the free movement of workers have any significance.

Under Article 177 the Court is not asked to decide a specific case but to give a ruling on thes interpretation or validity of Community provisions with due regard to the findings of the national court.

It therefore has jurisdiction to answer the question which has been raised.

The interpretation and the validity of Article 28 (1) of Regulation No 3

Article 28 (1) of Regulation No 3 which the Court is asked to interpret provides for the determination by the method of proportional calculation (subparagraph (b)) of the 'benefits which may be claimed by an insured person covered by Article 27 . . . or his survivors'.

The question which has been raised is whether this method is applicable in a state where the right to a pension has already been acquired solely under its national legislation and where consequently the aggregation of insurance periods provided by Article 27 (1) does not apply.

The subsidiary question whether these provisions are in conformity with Article 51 of the Treaty, which arises out of the main question, cannot be severed from the interpretation requested, since Regulation No 3 has as its basis, its framework and its bounds the requirements of Articles 48 to 51 of the Treaty the implementation of which is its aim. Under Article 51 of the Treaty the regulations to be implemented in application of this Article must adopt 'such measures . . . as are necessary to provide freedom of movement for workers' by introducing in particular a system securing for them, the acquisition and maintenance of the right to benefit.

These provisions, which are intended to give a migrant worker more favourable treatment in certain respects than he would receive if his national law alone were applied in his case but at least to guarantee his right to a pension, cannot be interpreted in a way which conflicts with his objective.

The aim of Article 51 of the Treaty is not to secure in the first instance the equalization of benefits between social security institutions but to enable a worker, who may lose the benefit of a period of contributions not long enough to give him the right to a pension, to avoid such a loss by aggregation, only the concept of which is laid down by this Article. The method of proportional calculation worked out by the implementing regulations based on this Article is, as it were, the corollary of aggregation in those cases where aggregation makes it necessary that the amount of the benefit should be calculated in accordance with a rule, without which it might be that this amount could not be determined. Proportional calculation is therefore an integral part of the system of aggregation. No authority can be found in the Treaty, which does not mention this concept, for the general application of proportional calculation.

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.

It is doubtful from the wording of Article 28 whether it aims at separating proportional calculation for which it provides from the aggregation of insurance periods upon which it is based and at making it generally applicable. This doubt cannot be resolved by a liberal interpretation which would moreover be incompatible with the framework and bounds of Article 51 of the Treaty.

It is argued that, with the intention of avoiding an improper plurality of benefits and guaranteeing an apportionment of pension obligations among institutions liable to pay benefits, Article 28 might be applied in one state where Article 27 is not applicable, whereas it has to be applied in another State.

As, however, cumulation of pensions is not prohibited by any provision but is on the contrary expressly provided for by Article 11 (1) of Regulation No 3, it does not of itself necessarily amount to an abuse. The acquisition of a right to benefit, conferred solely by virtue of the national law of one state and based on contribution periods completed in that state, in addition to another benefit acquired in another state by means of aggregation in a case where, as required by Article 27, the periods of insurance 'do not overlap', does not constitute an advantage to Community law. The advantage of aggregation is the acquisition of a right to a pension which would not otherwise arise, the pension acquired in this way being calculated in proportion only to the insurance period completed in the Member State in question, without taking into account in the calculation insurance periods completed in other Member States.

In pension systems based on insurance periods where a right to a pension is acquired after the completion of a minimum contribution period of a substantial length of time, the addition of this benefit to another benefit directly acquired in another Member State solely under its national law and based on

insurance periods completed in that state alone cannot be regarded as an improper plurality of benefits.

A different interpretation of the provisions in question might, in circumstances such as those in the present case, result on the one hand in the exclusion of one of those periods by reason of a rule of national law forbidding the simultaneous receipt of both a pension and remuneration for employment and, on the other hand, in allowing the said period to be taken into account in another state, where the right to a pension has been acquired solely under national law, on the ground that aggregation and proportional calculation were necessary in a third state.

These considerations are also valid even where the benefit which the insured person obtains as a result of the application of Article 27 in one state is higher than the loss which he would suffer if another state were to apply Article 28 without the need of recourse to Article 27.

Costs

The costs incurred by the Commission of the EEC which has submitted its observations are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Cour Supérieure de Justice of Luxembourg, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon reading the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the EEC and the parties to the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 48 to 51 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), especially Articles 11, 27 and 28;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it for a preliminary ruling by the judgment of 5 January 1967 of the Cour Supérieure de Justice of Luxembourg sitting as a Cour de Cassation, hereby rules:

1. **The introductory provisions and subparagraph (b) of Article 28 (1) of Regulation No 3 are not applicable for the purposes of determining the amount of an old-age pension based on a contribution period and acquired solely under national law without recourse to Article 27, unless the same contribution period is used at the same time to determine the amount of other pensions in other Member States;**

2. **The decision as to costs in these proceedings is a matter for the Cour Supérieure of Luxembourg.**

Trabucchi Monaco

Donner Lecourt Strauß

Delivered in open court in Luxembourg on 5 July 1967.

A. Van Houtte
Registrar

A. Trabucchi
President

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

Mr President,
Members of the Court,

The present proceedings initiated by a question from 'the Cour Supérieure de Justice of Luxembourg sitting as a Cour de Cassation' provides me for the first time with the opportunity of giving my opinion on social security for migrant workers, a somewhat obscure subject which is difficult to grasp.
My opinion is based on the following facts.

The plaintiff in the Luxembourg proceedings during his working life was a commercial traveller successively in Germany, Belgium and Luxembourg and affiliated to the old-age insurance schemes in each of those countries. When on 24 January 1958—at which time resident and working in the Grand Duchy of Luxembourg (Bertrange)—he attained the age of 65 and thereby reached the age limit under the laws of the said three Member States, he could not apply to the Caisse de Pen-

1 — Translated from the German.