OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 NOVEMBER 1970[1]

Mr President,
Members of the Court,

The defendant in the proceedings which gave rise to this reference for a preliminary ruling is a woman of Italian nationality resident in Belgium. From 24 August 1965 to 24 April 1967 (therefore for 21 months in all) she was employed in the Federal Republic of Germany and covered by the social insurance of that country. After that she worked from 27 April to 6 May 1967 (that is for 8 days in all) in Belgium. She was then insured through the Fédération des mutualités socialistes et syndicales de la province de Liège with the Union nationale des mutualités socialistes in Brussels, the plaintiff in the main action. Since 8 May 1967 she has been incapable of work because of illness. In consequence she drew from the Union nationale firstly the primary incapacity allowance ('indemnité d'incapacité primaire') for one year and thereafter until 29 September 1969 the extended incapacity allowance ('indemnité d'incapacité prolongée') the latter amounting to BF. 63 738. This was in accordance with the provisions of the Belgian Law of 9 August 1963 which has since been amended by the Law of 27 June 1969. As regards the primary incapacity allowance, the Union nationale took the view that it was payable in spite of the short insurance period Mrs Cacciatore had completed in Belgium, because of the aggregation of insurance periods under Article 17 of Regulation No 3 of the Council concerning social security for migrant workers. On the other hand there were difficulties regarding the extended incapacity allowance which were connected with the fact that under Belgian law this allowance was apparently regarded as an invalidity allowance. Article 146 of the Belgian Law of 9 August 1962 provides:

> 'The provisions of this law shall not prejudice the provisions of international social security conventions in force in Belgium. For the purposes of the application of the provisions of these international conventions the extended incapacity allowance shall be regarded as an invalidity allowance.'

However Mrs Cacciatore did not in fact have the right to an invalidity pension under German law and the Union nationale believes that she does not have the right to one under Belgian law. The former results from the provisions of the social insurance laws of the Federal Republic of Germany which provide for a minimum insurance period of five years (which would not be reached in this case even with aggregation). Accordingly on 13 November 1969 the LVA Rheinprovinz, the competent agency in Germany, reached a negative decision after the Institut National d'Assurance Maladie-Invalidité (which appeared as an intervening party in the main action) had referred the file to it for its approval of the pension. On 12 December 1969 Mrs Cacciatore was informed that she was also not entitled to a Belgian invalidity pension (which she had sought from the Institut National on 8 January 1969). As ground for this, the Belgian authorities did not rely on Belgian law alone under which the minimum insurance period is six months (which in fact could be reached by aggregating all the insurance periods). A decisive factor was Article 28 (2) of Regulation No 4 which provides:

> 'If the insurance periods and assimilated periods, completed under the legislation of one Member State, do not together total six months no benefit shall be granted under the said legislation; in that case, the above-mentioned periods shall be taken into account for the acquisition, maintenance and recovery of the right to benefits from other Member States, but not for determining the proportionate amount due in accordance with Article 28 (1) (b) of the Regulation. This provision however shall not apply if the right to benefits is acquired by virtue

1 — Translated from the German.

of the legislation of the former State, on the sole basis of periods completed under its legislation.'

In view of the resulting legal position the department dealing with allowances in the Institut National reached the conclusion that the extended incapacity allowance should not have been paid to Mrs Cacciatore and that she should be required to repay it. The Union nationale was informed of this on 22 September 1969 and complied with the request on 23 December 1969 but without success. As a result on 20 January 1970 it finally applied to the Commission en matière d'assurance obligatoire contre la maladie et l'invalidité to obtain an order for the repayment of the sum in question. In the main action which came about in this way the defendant's representative clearly urged that a question should be referred to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Article 28 (2) of Regulation No 4. In its decision of 3 June 1970 the Commission de réclamation accepted his submission and thus we today have to examine a question which is formulated as follows:

'Are the provisions of Article 28 (2) of Regulation No 4 applicable to a worker subject to Type A legislation in one Member State who acquires in that State (in the present case, Belgium) the right to sickness and invalidity insurance benefits by relying on insurance periods completed in another Member State in accordance with the provisions of Articles 16 and 17 of Regulation No 3, and who subsequently becomes an invalid before completing six months' work in the State where he is subject to Type A legislation, in view of the fact that no benefits can be granted by the other Member State (in this case the Federal Republic of Germany) for lack of sufficient insurance periods.'

1. First the Commission alone made (written) submissions and then the Institut national made submissions but only in the oral proceedings. It thereby became clear that there was a controversy which does not emerge in the same manner from the order making the reference. In my view it can be shown without far-reaching examination that its solution does not present any undue difficulties.

All considerations must start with the fact that Regulation No 4, of which Article 28 is here at issue, contains in principle only provisions of a mainly procedural nature in implementation of Regulation No 3. Looked at from this point of view it must *a priori* be regarded as extremely improbable that Regulation No 4 could also contain provisions with decisive importance as regards *substantive* law. In particular one would not expect Regulation No 4, but just conceivably Regulation No 3, to contain a provision which — as the Institut national believes — excludes the right to benefits in certain circumstances which constitutes a considerable incursion into national law, if it can at all be accepted that in accordance with the general system of the regulations and in view of their function under the terms of the Treaty, such a provision is intended to be a part of the European law on social security for migrant workers.

If this is borne in mind from the outset there is no difficulty in concluding from the wording of Article 28 of Regulation No 4 that the purpose of that provision is the one stated by the Commission in its written observations. Indeed the idea that the main purpose of Article 28 is to render the administrative procedure more simple and to save expense in cases where only very short insurance periods have been completed in one Member State and the insurance institution of that Member State has therefore to bear only a very small portion of the cost of the benefits, appears convincing. It was sought to achieve the latter object because the amount of benefit due was disproportionate to the administrative cost. Under the basic principles of the law governing social security for migrant workers this is in fact only possible if any detriment to the insured's legal rights is avoided, that is to say, if no insurance periods are left out of consideration. Article 28 therefore expressly provides that the *other* Member States shall take into account the periods in question (insurance periods of less than 6 months) 'for the acquisition, maintenance and recovery of right to

benefits' and further that this shall not apply 'for determining the proportionate amount due in accordance with Article 28 (1) (b) of the Regulation'. Thus for Member States which stipulate longer insurance periods the benefits payable are higher in comparison with the system under Article 28 of Regulation No 3. The Commission dealt with this in detail in its written observations. The clear basic idea behind Article 28 of Regulation No 4 may therefore be said to be a balancing of the compensation for the necessities entailed in simplifying the administration.

On the other hand it must also follow that where there is no possibility of compensation in other Member States which stipulate longer insurance periods (as for example in this case where the minimum insurance period for the acquisition of a right to benefits is not achieved even when periods are aggregated) there can be no question of the application of the first sentence of Article 28 (2) of Regulation No 4, that is the non-payment of benefits for insurance periods of less than six months. If it were otherwise the rights of the insured would be lost, which would not be reconcilable with the principles of Regulation No 3. If the principle contained in Article 51 of the EEC Treaty, which these regulations serve to apply, is to be observed, there remains only the possibility, in cases such as this where the law of the Member State which requires the longer insurance period does not enable the right to be acquired, of applying the basic principle of aggregation to the country which requires the shorter insurance periods. In that Member State the pension must then be calculated in accordance with the provisions of Regulation No 3, that is, by taking all insurance periods into account, and the share of the benefits to be paid by its insurance institution must be calculated on the *pro rata* basis. The Commission has pointed out that this is how other cases that came before the Administrative Committee on Social Security for Migrant Workers were dealt with and it was apparently regarded as the correct interpretation in the course of the negotiations on the revision of Regulations Nos 3 and 4.

According to the explanation submitted by the Commission which is, taken as a whole, convincing and in harmony with the system, the question should be answered in the negative and it should be pointed out that Article 28 (2) of Regulation No 4 does not apply when the acquisition of a right is excluded in Member States which stipulate longer insurance periods but rather that in such a case it is the first Member State which, although the insurance periods completed in that country amount to less than six months, must determine the matured right to benefits by means of aggregation and proportional calculation.

2. The Commission believes that this still does not exhaust all the problems raised by this case. From the order making the reference it is clear that the question presupposes that what is at issue is an invalidity allowance, that is, matters related to invalidity insurance. As I have already mentioned in my summary of the facts this results from the view taken by the court making the reference that under Belgian law the allowance in respect of extended incapacity, which is claimed back from the defendant, is regarded as an invalidity allowance and not as a sickness allowance. The Commission feels that it is appropriate to make some further observations in this respect, or in other words to answer additional questions which can be said to be raised by implication in view of the known facts.

I can see no objections in principle to such an extension of the examination. Contrary to the view of the representative of the Institut National one cannot speak here or in other cases raising comparable problems of a decision *ultra petitum* because an answer to the questions raised by the Commission appears necessary from the facts themselves. They can be answered comparatively briefly.

As I have mentioned the court referring the matter relies on Article 146 of the Belgian Law of 9 August 1963. I have already cited it but I would here like to repeat its decisive Paragraph 2 which reads: 'For the purposes of the application of the provisions of these international conventions the extended incapacity allowance shall be regarded as an invalidity allowance'.

The court has apparently included Regulations Nos 3 and 4 on social security for migrant workers amongst these 'international conventions'. Without concerning ourselves with the interpretation of national law it should however be pointed out that the regulations of Community law referred to are scarcely to be included in the scope of this provision. From the point of view of Community law this can be stated immediately because they are there regarded not as international conventions but as regulations. According to the submissions of the Commission this also applies for the purposes of the Council of Europe. Such a clarification would appear to be of value in the present case because the Belgian court might then be prompted to regard the allowance in question as one for sickness rather than invalidity, which would clearly be of importance not only for the claim for repayment which is the subject of the main action but also for the subsequent payment of a pension.

Apart from that the Commission believes that the following observation should be made. The abovementioned Article 146 clearly provides for differentiation according to the nationality of the beneficiary. By Article 146 the extended incapacity allowance granted on the basis of the earlier legal situation (it ceased to exist after the Law of 1969) was only regarded as an invalidity allowance for nationals of other States and not for Belgian nationals who were not covered by that article. In so far as this affects nationals of other Member States it can be seen as a breach of the obligation of equality of treatment under the law relating to social security for migrant workers. Indeed the court making the reference should also have this factor drawn to its notice because, in view of the principle of the precedence of Community law, it could cause the court to alter the classification of the allowance in question which has hitherto been thought correct and to decide the case accordingly.

Taken as a whole then, I regard the additional observations of the Commission as well-founded and calculated to lead to the correct treatment of the dispute in the main action. In my opinion they form part of the subject-matter of the proceedings before this Court and they should therefore in some form be included in the preliminary ruling of the Court.

3. The question referred by the Belgian court should therefore be answered as follows:

(a) The provisions of Article 28 (2) of Regulation No 4 are not applicable to a worker who has completed insurance periods and assimilated periods in one Member State of less than six months if it is established that a right to benefits cannot be acquired in another Member State in spite of the aggregation of all insurance periods. The general rules of aggregation of insurance periods and calculation on a proportional basis in the first Member State should be applied instead.

(b) Regulations Nos 3 and 4 cannot be regarded as international conventions. The principle to be applied, according to these regulations, is that a Member State should not treat migrant workers who belong to another Member State less favourably than its own nationals.