OPINION OF MR ADVOCAT-GENERAL TRABUCCHI DELIVERED ON 23 OCTOBER 1974 [1]

Mr President,

Members of the Court,

That, after an interval of more than 12 years, an insurance institution should be seeking repayment of a sickness and invalidity benefit granted unconditionally to a worker may be justified by the requirements of the impersonal machinery of administration but it is in violent contrast with the ideals underlying the social security system. The *repetitio indebiti* brought in the present case against the insured arises from the invalidity benefit he received from 1 January to 31 October 1959 from an insurance institution in another Member State on the basis of a general system of invalidity insurance from which he was able to benefit by reason of his employment in this second state.

The Labour Court of Mons, which is uncertain whether a Community period of limitation is applicable to the action for recovery brought by the insurance institution, seeks the Court's ruling on this point. However, in order to answer the question concerning limitation, it is logical and necessary to ascertain whether, after Community legislation on migrant workers came into force, insurance organizations continued to be entitled, when paying invalidity benefits, to take into account similar benefits received by the person concerned under the legislation of another state. There is therefore a prior question of interpretation concerning Articles 27 and 28 of Regulation No 3.

In this connexion, it must be borne in mind that entitlement to benefit under the Belgian legislation, which is of type A, was acquired by the insured without the need to aggregate the periods completed under other legislations. This state of affairs is not affected in the slightest by the fact that, before the relevant Community rules entered into force, on the basis of the agreements subsisting between Belgium and the Federal Republic, the Belgian insurance institution had been able to obtain repayment from the German insurance institution of part of the benefits it had paid out to the worker as a result of his incapacity for work from 9 January 1953 onwards. After 1 January 1959, the date of entry into force of the Community rules which coordinate national insurance legislations for the benefit of workers who have been, in turn, insured with different national insurance schemes in the Community, the German insurance organization paid its benefits direct to the worker, and this was the situation until 31 October 1959. On that date the person concerned ceased to be classified as a refugee subject to the special UNO rules; by virtue of Article 4 (1) together with Article 1 (j) of Regulation No 3, so long as he was so classified, he was entitled to benefit from the relevant Community legislation. It is to this short period that the Belgian insurance companies' request for repayment refers.

In the judgment of 6 December 1973 in Case 140/73 (*Mancuso*, [1973] E.C.R. 1449), the Court ruled that 'the application by analogy of Articles 27 and 28 of Regulation No 3 to the cases referred to by Article 26 (1) implies that apportionment of benefits may only take place if it has been necessary, in order to give rise to entitlement, to aggregate beforehand the periods completed under different legislations'. A principle which no one has sought to have reviewed and which, therefore, must *prima facie* be decisive in the present case.

1 — Translated from the Italian.

As aggregation was not a condition precedent for acquisition of entitlement to sickness and invalidity benefit, under the scheme in force in Belgium, the Belgian insurance institution could not, after Regulation No 3 came into force, claim that, by virtue of Articles 27 and 28 of the Regulation, the cost of the validity benefits should be the subject of apportionment with the German insurance institution. Nor, on this ground, was it entitled, in calculating the payment it had to make, to take account of invalidity benefits paid by the German insurance institution to the person concerned. It could not, therefore, make use of Article 34 (3) of Regulation No 4 of the Council concerning the recovery of advances in order to obtain repayment of a sum equal to that which the worker had legitimately received by virtue of the rights he was recognized as having by the German insurance system.

Its inability to do so, however, applies only in respect of the possibility of apportionment on the basis of Articles 27 and 28 of Regulation No 3 and does not affect the rights of the States to implement, as required by Article 11 of Regulation No 3, measures necessary to prevent an unwarranted overlap of invalidity benefits related to the same period of incapacity for work.

Their right to do this was expressly recognized in the judgment quoted from Case 140/73, on condition, however, that it is exercised in respect of benefits 'acquired outside the application of Articles 27 and 28' of the Regulation.

What is the significance of the condition referred to by the Court? Obviously it concerns only the States where, before the insured can qualify for benefit, the periods of completed insurance in other Member States have to be aggregated, and does not concern the States where, to create entitlement and to calculate benefit, aggregation is not required, as is particularly the case in States where type A insurance legislation applies. Thus the States whose legislation does not take the length of the insurance periods into account may take advantage of the invalidity benefits which the insured receives on the basis of other legislations for the same occasion of incapacity for work and, in consequence, they can if need be recoup themselves even from those in receipt of benefit on the basis of the general principle *'ne bis in idem'*.

It is therefore incumbent on the court dealing with the main action to ascertain whether repayment of an invalidity benefit is being sought not as the result of a fresh calculation made by the Belgian insurance institution on the basis of an impermissible apportionment of its liability under Articles 27 and 28 of Regulation No 3 but purely under a national rule which, while at all times complying with the principle and standards laid down in the case law of this Court which I have cited, is designed to prevent overlap of benefits relating to a single insurance contingency.

In the first eventuality, the question of limitation could not even arise. In the case of the second, where the right to recovery is based wholly on national law, and not on Article 34 (3) of Regulation No 3 of the Council, it seems clear that national law is equally applicable on the subject of limitation.