4. 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.

In Case 16/72

Reference to the Court under Article 177 of the EEC Treaty by the IVth Senate of the Bundessozialgericht (Social Security Court) Kassel for a preliminary ruling in the action pending before that court between

ALLGEMEINE ORTSKRANKENKASSE HAMBURG,

and

LANDESVERSICHERUNGSANSTALT SCHLESWIG-HOLSTEIN, Lübeck,

on the interpretation of Regulation No 3 of the Council of the EEC concerning social security for migrant workers, in particular Articles 26 and 27,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), J. Mertens de Wilmars and H. Kutscher, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The Allgemeine Ortskrankenkasse Hamburg (local sickness insurance fund), the plaintiff in the main action, is claiming from the Landesversicherungsanstalt Schleswig-Holstein (a pension insurance organization), the defendant in the main action, the reimbursement of expenses incurred as a result of prolonged hospital treatment for contagious tuberculosis required by the daughter of Mr Primo Primus, an Italian national.

By the time when Mr Primus's daughter fell ill in May 1965, her father had contributed to a pension insurance scheme over the following periods:

— 17 weeks in Italy—1953/1954,

— 8 months in Luxembourg—1955,

— 10 months in the Federal Republic of Germany—1962,

— 116 weeks in Italy—1962/1964,

— 2 months in the Federal Republic of Germany—March/April 1965.

In addition, Mr Primus had worked temporarily in Switzerland.

The relevant pension insurance organization refused the application for reimbursement on the ground that the conditions laid down in Article 1244a of the 'Reichsversicherungsordnung' (RVO) (State Insurance Regulation) were not satisfied in this instance, as the insurance periods completed in Italy and Switzerland by Mr Primus during the 24 months preceding 7 May 1965 could not be taken into account. Article 1244a of the RVO provides in particular that an insured person is one 'for whom contributions have been paid as a result of employment or an activity which is subject to compulsory insurance, for at least 6 calendar months during the 24 calendar months preceding the diagnosis of the condition requiring treatment', or who satisfies the general qualifying period of 60 months laid down by Article 1246(3). However, although it dismissed the inapplicability of Article 16 of EEC Regulation No 3 of the Council in this instance, on the ground that more than one month had elapsed between the end of the insurance period which the applicant completed abroad and the beginning of the period completed within the national territory (cf. first sentence of Article 17(1) of Regulation No 3 the Sozialgericht Hamburg ordered the defendant to repay the plaintiff the costs of the treatment of Mr Primus's daughter. It considered that the measures provided for in Article 1244a of the RVO fall within the invalidity benefits referred to in Article 2(1)(b) of Regulation No 3. This decision was upheld by the Landessozialgericht Hamburg.

By order of 1 March 1972 received at the Court Registry on 24 April 1972 the Bundessozialgericht decided to stay the proceedings and requested the Court of Justice under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'(a) Are Articles 26 and 27 of Regulation No 3 of the Council of the European Economic Community concerning social security for migrant workers (aggregation of insurance periods) applicable by analogy to a legal provision which, according to the law in force in the Federal Republic of Germany, does not concern social security benefits but an obligation which, for the purposes of the prevention of disease, is imposed under certain conditions on pension insurance organizations, where this provision provides for the payment of the relevant benefits—which are not pensions and are not divided *pro rata temporis*—without regard to the materialization or threat of the risk of "invalidity" and without taking into account, in making this calculation, the length of the period of affiliation, but makes the power of the pension insurance organization to pay such benefits dependent upon the existence of a certain period of affiliation to the pension insurance scheme?'

(b) If an affirmative answer is given to Question (a):

'In order to acquire a right to benefits such as those described under (a), must an insurance organization in one of the Member States of the European Economic Community—in this instance, the Federal Republic of Germany—also take into account those periods of contribution which an insurance organization in another Member State, Italy, is bound to consider under a convention on social security concluded with a third State (Switzerland)?'

In its order dated 1 March 1972, the Bundessozialgericht refers to the statements made in its order relating to Case 14/72. If the preliminary question referred in that order received an affirmative answer, it would be necessary to consider whether the affiliation periods completed in Switzerland could be taken into account in addition to the periods completed in Italy, Luxembourg and Germany, in view of the fact that the convention on social security signed on 14 December 1962 between the Swiss Confederation and the Italian Republic provides that periods of contribution to old-age and death pension insurance schemes in Switzerland must be aggregated with contribution periods completed in Italy in order to acquire a right to invalidity benefits in that country. As regards this point, the Bundessozialgericht doubts whether Article 27(1) of Regulation No 3 also refers to affiliation periods which a Member State of the EEC must take into account under a social security convention signed with a third State.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by the Landesversicherungsanstalt Schleswig-Holstein, represented by its Director, Mr Koke, the Bundesverband der Ortskrankenkassen, represented by Mr Schlüter and Mr Wortmann, Abteilungsdirektoren, the Italian Government, represented by its Ambassador, A. Maresca, acting as Agent, assisted by G. Zagari, Deputy State Advocate-General, and the Commission of the European Communities, represented by its Legal Adviser, P. Karpenstein.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided not to hold any preparatory inquiry.

By order of 13 July 1972 the Court joined the present case to Cases 14/72 and 15/72 for the purpose of the oral procedure.

The Bundesverband der Ortskrankenkassen, the Italian Government and the Commission presented oral argument at at the hearing on 4 October 1972.

The Advocate-General delivered his opinion at the hearing on 19 October 1972.

II — Observations submitted under Article 20 of the Statute of the Court of Justice

The observations submitted under Article 20 of the Protocol on the Statute of the Court may be summarized as follows:

1. *Observations of the Landesversichungsanstalt Schleswig-Holstein*

The *Landesversicherungsanstalt Schleswig-Holstein* considers that the first question must be answered in the negative, since the benefits paid under the German law on pensions insurance do not constitute invalidity benefits within the meaning of Article 2(1)(b) and Article 24 *et seq.* of EEC Regulation No 3. As this regulation does not define the concept of invalidity, it must be defined in terms of the corresponding national law and, therefore, in terms of the concepts of inability to earn and occupational invalidity. In fact, Article 1244a of the RVO does not provide that a sick person must be wholly or partially incapable of working or that a risk of such incapacity must exist. The fact that the obligation to pay benefits, which is incumbent upon the pension insurance organizations, is dependent upon the affiliation of the individual concerned to the statutory pension insurance scheme only serves to delimit the competence of the organization. It is therefore impossible in these cases to apply the provisions of Articles 26 and 27 of EEC Regulagion No 3. As regards the second question, the Landesversicherungsanstalt considers that the periods of affiliation in Switzerland must not be taken into account. The convention signed between Italy and Switzerland is based upon the principle of reciprocity and this principle cannot be invoked within the Federal Republic of Germany.

2. *Observations of the Bundesverband der Ortskrankenkassen*

The *Bundesverband der Ortskrankenkassen* (Federal Association of Local Sickness

Insurance Funds) rejects the so-called 'social scourge' theory, which forms the basis of the considerations of the Bundessozialgericht set out in its order referring the matter. This theory tends to ignore the fact that tuberculosis is an illness which, since social insurance was instituted in Germany, has been dealt with by the social insurance organizations within the context of the tasks assigned to them, where an insured person suffers from this illness.

At the most, the Bundessozialhilfegesetz (Federal Law on Social Assistance) (BSHG) of 30 June 1961, to which the Bundessozialgericht refers, filled a lacuna in the scheme of provisions intended to fight tuberculosis, which existed in the Federal Republic of Germany until the entry into force of the Bundesseuchengesetz (Federal Law concerning Epidemics). However, it in no way changed the nature of the social security benefits, within the meaning of EEC Regulation No 3, already paid by the social security organizations within the context of the fight against tuberculosis.

Since, under German law, the pension insurance organizations are competent to privide benefits in respect of hospital treatment, they constitute the competent institutions, within the meaning of Article 1(f) of EEC Regulation No 3, for the purposes of Articles 16 and 17 of that regulation.

3. *Observations of the Commission*

A — The first question

(a) The *Commission* observes that before the entry into force of the law of 1959 providing for social assistance in cases of tuberculosis, social insurance organizations acted—as they still do today in order to avoid cases of invalidity (Articles 1236 *et seq.* of the RVO, as amended)—on the basis of Article 1252 of the RVO to pay to tuberculosis sufferers benefits which were provided for not by public assistance, but by a law governing social insurance. The benefits referred to in Articles 48 to 66 of the BSHG, which have replaced the above-mentioned law of 1959, are based on the principle of the laternative nature of the social assistance (cf. Article 2 of the BSHG), that is, that in theory the assistance is only provided when the person concerned cannot receive it from other sources, in particular, from institutions paying other social benefits, and his financial circumstances must also be taken into account. Although, under Article 59 of this law, the social assistance institution is always bound to pay the benefit, the organization which actually bears this obligation must reimburse the institution with the expenses which it was forced to incur. This confirms the alternative nature of the measures of assistance in cases of tuberculosis provided for by this law. Quite independently of the benefits provided for by the BSHG, the provisions of Article 1244a of the RVO adopted in 1959 award not only to insured persons and persons receiving pensions, but also to the spounse and children of such persons, rights to medical treatment, to aid to integration into working life and to social assistance in the case of contagious tuberculosis, provided that the requisite insurance periods have been completed. These rights are not subject to any condition that they must be alternative in nature and may be enforced in legal proceedings. The right to medical treatment and to a temporary allowance exists even where there is no reason to fear that the employment of the person concerned will be endangered or where there is no chance of maintaining, considerably improving or re-establishing such employment as a result of the measures provided for. It is on the basis of this last feature that the Bundessozialgericht believes that the provisions of Articles 26 and 27 of Regulation No 3 may be inapplicable.

The Commission observes that, if the insurance periods completed in Germany are considered alone, none of the conditions provided for in Article 1244a(2) of the RVO is satisfied in the main action. The minimum number of insurance periods would, however, be completed if, by applying the rules on aggregation contained in Regulation No 3, it were possible to add the insurance periods completed in other Member States to those completed in Germany.

(b) *The question whether the benefits at issue are in the nature of social security payments*

Article 2(1) of Regulation No 3 applies to all the legislation which governs the benefits referred to in subparagraphs (a) to (h). These benefits cover, in particular, sickness and invalidity benefits, including benefits awarded for the purpose of maintaining or improving earning capacity, and family allowances. The Bundessozialgericht acknowledges that, in any event, contagious tuberculosis requiring treatment constitutes an 'illness' which also frequently gives rise to a risk of 'invalidity'. A provision of national law in favour of tuberculosis sufferers which provides, first, for rights to hospital or out-patient treatment and, secondly, for measures to facilitate the exercise of employment as well as temporary allowances in favour of the insured person, his spouse and children concerns benefits of the type referred to in Article 2(1)(a), (b) and (h) of Regulation No 3. Therefore, the application of this regulation could only be excluded if, in spite of the fact that it is to be found in a law governing social security, Article 1244a of the RVO concerned social assistance and medical aid within the meaning of Article 2(3) of Regulation No 3. Although it is true that the differences between the standard type of social assistance and the legislation on social security are becoming less and less clear in all the Member States, in a case in which a benefit is, first, subject to the completion of certain insurance periods and, secondly, awarded in the form of an actual right, there are serious reasons for regarding such a benefit as in the nature of a social security payment. If, moreover, there is no question of a benefit being alternative in nature, the existence of a social security benefit and, therefore, of the application of Regulation No 3, may only be denied in quite special circumstances. This is confirmed by the fact that Article 2(3) of Regulation No 3 is a provision which lays down exceptions and must, therefore, be strictly interpreted. On the basis of these considerations the Commission concludes that Article 1244a of the RVO forms part of the law on social security, not only because of its place in the Reichsversicherungsordnung, but also because the benefits which are at present regarded as imperative by this provision were already awarded by the social security institutions in the context of the existing powers before this provision was included in the Reichsversicherungsordnung. The prevention and cure of illness and disease held a predominant place in the earlier regulations as the typical concerns of social security. It is true that, in the context of Article 1244a, it is not easy to differentiate between measures intended to maintain or improve earning capacity and measures concerning invalidity. However, the Commission considers that it is not possible to exclude in a general way from the scope of Regulation No 3 the measures provided for by the abovementioned provision solely because of these difficulties or the wider protection which they afford in relation to the general rules. The fundamental differences which exist between the provisions of the BSHG and those of the RVO as regards the conditions to which benefits are subject and the terms on which they are awarded demonstrate the independent nature of the benefits provided for in Article 1244a of the RVO, with the result that it is mistaken to see a mere division of powers between the social assistance organizations and the social security organizations in the fact that Article 1244a of the RVO refers to a concept of social security law, that is, to the concept of the insured person.

Finally, the Commission observes that the German authorities have for a long time applied EEC Regulations Nos 3 and 4 to the benefits which are paid to tuberculosis sufferers by the pension insurance organizations on the basis of Article 1244a of the RVO.

(c) *The question whether Regulation No 3 contains a rule enabling the aggregation, in the main action, of the insurance periods completed in the different Member States*

The Commission observes that the benefits provided for in Article 1244a of the RVO are complex and composite in nature. They

do not constitute solely invalidity benefits, as the Bundessozialgericht appears to believe, but also sickness benefits, at least in so far as they award rights to hospital and out-patient treatment. The benefits awarded for the purpose of maintaining, improving or re-establishing earning capacity are difficult to distinguish from sickness benefits. The Commission observes that, to a large extent, both France and Italy apply the criteria governing sickness insurance to the fight against tuberculosis.

In the light of the difficulties inherent in drawing a distinction between the two categories of benefits (those provided for in respect of invalidity and those in respect of sickness), the Commission considers that it is expedient to consider the problem of the aggregation of the insurance periods not only from the point of view of Articles 26 and 27 which deal with invalidity, but also on the basis of those provisions of Regulation No 3 which concern sickness, in particular since the Bundessozialgericht itself considers that Articles 26 and 27, to which it expressly refers, are only applicable by analogy and wonders whether a general principle is contained in these articles.

(d) *Aggregation on the basis of Articles 26 and 27 of Regulation No 3*

The Commission observes that, even if the provision in Article 1244a of the RVO were to be regarded as one of the Type A provisions referred to in Article 24 *et seq.* of Regulation No 3, in view of the fact that it subjects the benefits solely to the completion of certain minimum insurance periods but does not increase them in proportion to the length of time during which contributions are paid, the Federal Republic has expressed no reservations on this point in its statements concerning Annex F to Regulation No 3. Moreover, in any event insurance periods of Type B exist in the other Member States. This fact is itself sufficient to justify the application of Article 26 of Regulation No 3.

The Commission considers that neither the fact that the benefits in question do not constitute pensions which may be apportioned *pro rata temporis*, nor the fact that the amount of these benefits is not calculated in terms of the length of the periods completed, are obstacles to the application of Articles 26 and 27 of Regulation No 3. In fact, Regulation No 3 nowhere provides that the principle of the aggregation of the insurance periods laid down in Article 27 can only be applied in conjunction with a *pro rata* apportionment. Furthermore, as regards Type A benefits, Article 38 of Regulation No 1408/71 provides that the aggregation of insurance periods in order to acquire a right to invalidity benefits takes place without any *pro rata* apportionment being made. The aggregation of the insurance periods constitutes one of the basic features of Regulation No 3 which must, therefore, in cases of doubt, be interpreted in line with an application of this principle.

It is also clear from the terms of Article 2(1)(b) of Regulation No 3, which expressly includes in the scope of this regulation benefits which are awarded for the purpose of maintaining or improving earning capacity. and Article 26(1) of the same regulation, which stipulates that the provisions of Chapter 3 shall only apply by analogy, that Article 27 must be applied to these cases, particularly since other provisions of Regulation No 3 (for example, Article 16 *et seq.*, Article 32, Article 33) show that the principle of aggregation need not necessarily be associated with the principle of *pro rata* apportionment. The fact that, quite independently of the recovery of the earning capacity of the individual concerned, certain benefits under national legislations are also awarded for other purposes, such as the protection of the population against risks of contagion, is not sufficient to exclude them from the area of application of the Community provisions relating to invalidity. For the application of Chapter 2 of Head III of Regulation No 3 it is sufficient for the re-establishment or improvement of the earning capacity of a tuberculosis sufferer to be only one of the objectives sought.

Where the measures referred to in Article 1244a of the RVO are applied to a person for whom the problem of maintaining or improving earning capacity does not arise (for example, because the age-limit has been reached, or becuase he is a total

invalid) Article 26 of Regulation No 3 is no longer applicable, but it is then necessary to consider the extent to which the provisions concerning the benefits payable in case of sickness (Article 16 *et seq.* of Regulation No 3) make it necessary to take into account the insurance periods completed in other Member States.

(e) *Aggregation on the basis of Article 16* et seq. *of Regulation No 3*

The provision contained in the second subparagraph of Article 17(1) of Regulation No 3, which limits the general principle of aggregation to cases in which the transfer to another Member State is linked to an interruption in the insurance periods of less than one month, will only cease to apply to workers and members of their families after the entry into force of Regulation No 1408/71 on 1 October 1972.

Thus, the abovementioned provision of Regulation No 3, which is still in force, appears to preclude the aggregation of the insurance periods in the main action on the basis of Article 16 *et seq.*

However, the Commission maintains that if the main action can only be finally settled after 1 October 1972, it is necessary to consider the possible consequences in this instance of the elimination by Regulation No 1408/71 of the obligation that the insurance periods must be uninterrupted. Article 94(1) of this regulation states that no right shall be acquired for a period prior to the date of its entry into force. On the other hand, Article 94(3) states expressly that, subject to the provisions of paragraph 1, a right shall be acquired though relating to a contingency which materialized prior to the date of entry into force of the same regulation. If an application is made to this case of the principles developed by the Court of Justice in Case 44/65, (*Hessische Knappschaft* v *Maison Singer et Fils* [1965] ECR 965) and Case 68/69, (*Bundesknappschaft* v *Elisabeth Brock* [1970] ECR 171) concerning the extension of Regulation No 3 to cover events which took place earlier, it does not appear impossible for the periods completed by the applicant to be aggregated as from 1 October 1972 for the application of the provisions concerning sickness.

B — The second question

The Commission considers that the second question must be answered in the negative, since, under Article 227 of the Treaty, the area of territorial aplication of Regulations Nos 3 and 4 is limited to the Member States of the Community. The aggregation of insurance periods is only provided for in respect of periods completed 'under the legislation of each of the Member States' (vide Articles 16, 27, 32 and 33 of Regulation No 3 and Article 13 of Regulation No 4). This limitation is in accordance with the objective of bringing about the free movement of workers within the Community.

4. *Observations submitted by the Government of the Italian Republic*

The *Italian Government* observes that the benefits payable as part of the fight against tuberculosis are, in a general way, in the nature of social security benefits in that, first, they are intended to maintain, improve and re-establish the earning capacity of a worker who is suffering from tuberculosis, and this aim generally gives concrete form to another—the protection of public health and the fight against tuberculosis which is regarded as a social scourge. Secondly, they presuppose the existence of an insurance scheme and it is for this reason that the receipt of benefits is subject to the payment of contributions or the completion of a specified period of insurance.

As Annex B to Regulation No 3 expressly brings the Italian legislation on insurance against tuberculosis within the area of application of the regulation, a repatriated worker suffering from tuberculosis may aggregate insurance periods completed in Germany in order to receive in Italy benefits payable in that country under the scheme of tuberculosis insurance.

It is essential to avoid the unequal treatment of Community workers when applying the principle of the aggregation of insurance periods, which forms the basis of Regulations Nos 3 and 4.

Grounds of judgment

1 By order of 1 March 1972, received at the Court Registry on 24 April 1972, the Bundessozialgericht referred to the Court under Article 177 of the EEC Treaty a question concerning the interpretation of certain provisions of EEC Regulation No 3 of the Council concerning social security for migrant workers with reference to the application of Article 1244a of the Reichsversicherungsordnung (RVO) (German State Insurance Regulation). This article concerns the benefits which the pension organizations must pay to insured persons who suffer from tuberculosis. The question asks whether Articles 26 and 27 of Regulation No 3 are applicable by analogy to benefits such as those referred to in Article 1244a of the RVO.

2 This article was introduced into the RVO by Article 31 of the Law of 23 July 1959 concerning assistance in cases of tuberculosis. In order to 'encourage and ensure the recovery of invalids' in accordance with the first sentence of Article 1(1), this law provided for medical treatment, aid to integration into working life, economic aid and aid of a prophylactic nature to be provided by the social assistance organizations to all persons suffering from tuberculosis to the extent to which they cannot receive the necessary assistance by any other means. On the other hand, by referring solely to those tuberculosis sufferers who are insured with and receive pensions from pension insurance organizations and to their spouses and children, the introduction of Article 1244a into the RVO by the abovementioned Article 31 compelled the pension insurance organizations to provide such persons with, in particular, the necessary medical treatment and a temporary allowance even where, contrary to the general provisions of Article 1236 of the RVO concerning the conditions under which benefits are paid by the pension insurance organizations of workers, there is no reason to fear that the invalid's employment will be jeopardized or where no chance exists of maintaining, improving or re-establishing such employment by means of the measures provided for.

3 The file shows that the plaintiff in the main action, a German sickness insurance organization, claimed unsuccessfully from a German pension insurance organization the reimbursement of expenses incurred as a result of hospital treatment required by an Italian migrant worker's daughter who had contracted tuberculosis. The claim for reimbursement was rejected on the ground that Article 1244a of the RVO was not applicable, since the insurance periods completed in Germany by the worker in question were insufficient to satisfy the condition of 60 months' affiliation laid down therein. In order to settle the case before it, the German court must decide whether the affiliation periods previously completed by the worker in another Member State must be taken into account in applying Article 1244a of the RVO. To this end, therefore, the Bundessozialgericht must classify the benefits provided for by Article 1244a of the RVO in the light of the criteria which define the scope of Regulation No 3 of the Council concerning social security for migrant

workers. Without being empowered to classify the abovementioned provision of the RVO in the context of the present proceedings, the Court may, however, provide the national court with factors of interpretation depending on Community law which might be useful to it in evaluating the effects of that provision.

4 Under the terms of Article 1(b), Regulation No 3 applies to all the legislation of the Member States relating to 'the social security schemes and branches of social security' referred to in Article 2(1) and (2), and under Article 2(3) the Regulation shall not apply to 'social assistance and medical aid'. In order to reply to the question referred it is first necessary to consider whether such advantages as those provided by Article 1244a of the RVO are included in the social security benefits listed in Article 2(1) and (2) of Regulation No 3. Regulation No 3 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. The pursuit of this objective enables the concept of social security to be regarded as including the aim of preventing the spread of disease, which cannot be regarded as a mere measure of social assistance.

5 Considered from this point of view, a provision which establishes a direct link between the affiliation of an individual to a pension insurance scheme and the acquisition of a right to benefits which are payable by pension insurance organizations to insured persons and their dependants, as a result of the fact that they have contracted tuberculosis and chiefly in order to bring about their recovery, must be regarded as forming part of the legislation governing social security referred to in Article 2(1) of Regulation No 3. This classification cannot be modified by the fact that, since tuberculosis is contagious and constitutes a danger to public health, it has formed the subject of a special law providing for prophylactic or remedial measures which the social assistance organizations are required to apply in favour of any person residing in the Member State concerned, to the extent to which such benefits are not already provided by the insurance organizations.

6 Therefore, Article 2(1) of Regulation No 3 covers benefits of a prophylactic or remedial nature.

7 In order to reply to the question referred it is still necessary to consider whether the aggregation of the affiliation periods completed in the various Member States, which is necessary in order to acquire a right to the benefits in question, should be carried out on the basis of Articles 26 and 27 of Regulation No 3 to which the German court refers.

8 As is pointed out in the order referring the matter, in the absence of any contrary provision, benefits which are not related to the 'earning capacity' of the insured person cannot be regarded as invalidity benefits within the meaning of Article

(2)(1)(b) of Regulation No 3. On the other hand, where such benefits are also awarded to the members of the family of the insured perso nand where their essential aim is to cure the invalid and protect those who are in contact with him they must be regarded as sickness benefits within the meaning of Article 2(1)(a) of Regulation No 3.

9 Therefore, the aggregation of the affiliation periods completed in the various Member States, for the purposes of acquiring a right to such benefits, is governed by Article 16 *et seq.* of Regulation No 3.

10 Secondly, the question is also asked whether, in order to acquire a right to the benefits in question, an insurance organization in one of the Member States — the Federal Republic of Germany — must also take into account those periods of contribution which an insurance organization in another Member State, Italy, is bound to consider under a convention on social security concluded between Italy and a third country, Switzerland.

11 For the purpose of implementing the principle of the free movement of workers, Article 51(a) of the Treaty empowers the Council to make arrangements to secure for workers the aggregation of 'all periods taken into account under the laws of the several countries'. Article 16 of Regulation No 3, which lays down the rules relating to aggregation, only refers to the insurance periods and assimilated periods 'completed under the legislation of each of the Member States'. Article 1(b) of that regulation states that 'the term 'legislation' shall mean all laws, regulations and other enforceable provisions (*dispositions statutaires*) present and future of each Member State relating to the social security schemes and branches of social security'.

12 Therefore, for the purposes 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.

Costs

13 The costs incurred by the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter ofr that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Bundesverband der Ortskrankenkassen, the Italian Government and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 51 and 177;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers;
Having regard to Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
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 by the Bundessozialgericht, by a decision of that court dated 1 March 1972, hereby rules:

1. **A provision which establishes a direct link between affiliation to a pension insurance scheme and the acquisition of a right to benefits which are payable by pension insurance organizations to insured persons and their dependants as a result of the fact that they have contracted tuberculosis and chiefly in order to bring about their recovery, must be regarded as forming part of the legislation governing social security referred to in Article 2 (1) of Regulation No 3;**

2. **The social security benefits which, although not related to the 'earning capacity' of the insured person, are also awarded to the members of his family and are principally intended to aid the recovery of the invalid and to protect those who are in contact with him must be regarded as sickness benefits within the meaning of Article 2 (1) (a) of Regulation No 3. For the purposes of acquiring a right to such benefits, therefore, the aggregation of the affiliation periods completed in the various Member States is governed by Article 16 *et seq* of Regulation No 3.**

3. **For the purposes 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.**

Lecourt Monaco Pescatore

Donner Trabucchi Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on 16 November 1972.

A. Van Houtte
Registrar

R. Monaco
(President of Chamber)
For the President

OPINION OF MR ADVOCATE-GENERAL MAYRAS

(See Case 14/72, page 1116)