3. As Regulation No 3 has allowed the continuance of separate systems creating separate claims against separate institutions, the institution of one State cannot *ipso facto* be justified in relying on the charge which Community law imposes on the institution of another State in order to reduce the charge which its own legislation imposes upon it.

In Case 1/67

Reference to the Court under Article 177 of the EEC Treaty by the Social Chamber of the Cour d'Appel, Orléans (France), for a preliminary ruling in the action pending before that court between

STANISLAS CIECHELSKI, residing at Orléans,

and

CAISSE RÉGIONALE DE SÉCURITÉ SOCIALE DU CENTRE, Orléans,

together with

DIRECTEUR RÉGIONAL DE LA SÉCURITÉ SOCIALE D'ORLÉANS, Orléans,

on the interpretation of Article 51 of the above-mentioned Treaty and Articles 27 and 28 of Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.);

THE COURT

composed of: Ch. L. Hammes, President, A. Trabucchi and R. Monaco, President of Chambers, L. Delvaux, A. M. Donner, R. Lecourt and W. Strauß (Rapporteur), Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

It appears from the file that the following facts are the basis of the present reference for a preliminary ruling:

1. The applicant, who was born on 11 November 1898, contributed in Germany and in France successively to old-age pension insurance for a total of 134 quarters, comprising 21 quarters in

Germany and 113 quarters in France.

2. When he reached the age of 62 he requested payment of his French pension. At that time, the applicant did not qualify for a pension in respect of the periods completed in Germany as he had not reached the age of 65 years as required by German legislation. The qualification for the French pension was therefore considered without reference to the insurance periods in Germany and the pension was paid having regard only to the insurance periods in France. As from 1 December 1960 the French Caisse Régionale granted to the applicant, on the basis of a period of 113 quarters completed in France, benefit amounting to 731 FF per quarter until 1 November 1963.

3. When he attained the age of 65 the applicant applied jointly to the German and French institutions.

(a) In view of the fact that German legislation required a qualifying period of fifteen years, the applicant, owing to an insufficient number of insurance periods completed there, only qualified for a pension by taking into account the insurance periods in France, in application of Article 27 of Regulation No 3.

From 1 November 1963 the German institution paid the applicant a quarterly pension of 138 DM (170.90 FF).

(b) In addition the applicant requested that his French pension should be revised by taking into account the insurance periods in Germany. The defendant institution made this revision by calculating the benefit due to the applicant in the following manner:

— In the first place it aggregated the insurance periods in France and Germany (134 quarters).

— Then it determined for accounting purposes the amount of benefit to which the applicant would have been entitled if he had completed his whole working life in France (the ('theoretical amount'); this amount was based on a formula of 120 x S ('S' = the fraction of the basic salary to be taken into account). (This method of calculation is based upon French legislation which provides for a maximum insurance period of 120 quarters so that any period completed over and above this maximum cannot increase the amount of the benefits due.)

— Finally it apportioned the said 'theoretical amount' by multiplying it by the fraction $\frac{113}{134}$. (In this calculation the denominator equals the number of periods actually completed, being consequently a number greater than the maximum of 120 quarters mentioned above.)

The applicant's French pension was therefore determined according to the formula $\frac{113 \times 120 \times S}{134}$; on 1 December 1963 it thus amounted to a round sum of 654 FF per quarter and was therefore less than the amount paid to the applicant before that date.

The defendant Caisse then requested the applicant to repay the sums which it considered had been wrongly paid between 1 November 1963 and 31 October 1965, that is, when it had paid a pension calculated solely upon the basis of the French system.

4. The applicant objected to this method of calculation and also to the request for repayment; according to him it would be 'irregular' for the defendant to pay him a pension less than the one which he could claim if the French system alone applied to him.

The request which he made for this purpose was rejected both by the defendant Caisse and by the Commission de Première Instance du Contentieux de la Sécurité Sociale d'Orléans (Commission of First Instance for disputes involving the Sécurité Sociale d'Orléans) and he lodged an appeal against the decision of that Commission with the Cour d'Appel, Orléans.

II — Question put by the Cour d'Appel, Orléans

By a judgment dated 22 December 1966 the Cour d'Appel, Orléans, considering *inter alia*:

'that the regulations of the EEC in the field of social security have as their basis their framework and their bounds Articles 48 to 51 of the Treaty of Rome; that Article 51 provides that regulations shall lay down the measures necessary to provide freedom of movement for workers, and to this end shall make arrangements to secure for migrant workers aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; that it is necessary within the framework of Article 177 of the Treaty to refer to the Court of Justice of the European Economic Community the question whether Regulation No 3, which in this case led to the loss of rights acquired in France, is compatible with Article 51 of the Treaty',

decided to ask the Court to give a ruling

'on the preliminary question concerning the interpretation to be given to Article 51 of the Treaty of Rome and to Articles 27 and 28 of Regulation No 3 of the Community concerning social security for migrant workers, for the purpose of specifying whether this regulation can validly deprive a worker of a part of the rights acquired by him in one of the States of the Community'.

III — Procedure

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the plaintiff in the main action and the Commission of the EEC submitted written observations.

However, the applicant has not adopted any position concerning the interpretation of the Community provisions, except to state that he is not a 'migrant worker'.

The hearing took place on 2 May 1967.

The Advocate-General delivered his opinion on 17 May 1967.

IV — Summary of the observations of the Commission of the EEC

The observations submitted by the Commission may be summarized as follows:

(1) The Commission believes that it can extract two matters of concern from an analysis of the case-law of the Court (judgment in Case 100/63, *Kalsbeek née van de Veen* [1964] E.C.R. 565; judgment in Case 4/66, *Labots née Hagenbeek,* Rec. 1966, p. 617 et seq.): it is necessary on the one hand to avoid depriving the migrant worker of rights which he has acquired outside the application of Community law, and on the other hand allowing this application to have the effect of giving him through accumulation the benefit of advantages to which he is not entitled. Clearly the reference from the Cour d'Appel, Orléans, has the object of obtaining from the Court a statement of the scope of the first of these rules in relation to cases such as the present one.

For this purpose it is a matter of knowing 'what is the influence on the implementation of Articles 27 and 28 of the following two facts:

— on the one hand, that French legislation provides for a maximum period of insurance;

— on the other hand, that a right to a German pension can be acquired only by taking the French insurance periods into account'.

(2) 'The Commission considers that the case-law of the Court leads to the conclusion:

— that the characteristics of French

legislation do not prohibit the proportional calculation of the pension (infra, A);

— but that the person concerned suffers a loss of rights when the amount determined for accounting purposes takes into account only those 120 quarters, corresponding to the maximum insurance period under French legislation (infra, B).'

A — As the Court has held in its judgment in *Kalsbeek née van de Veen* that Article 28 of Regulation No 3 is applicable 'to legislation which does not make the amount of the benefit dependent upon the length of the insurance period', an identical reply must be given when it is a question of legislation which requires a maximum length of insurance in the calculation of pensions.

In fact, 'the very aim of the provisions of Article 28 is precisely to take account, in the comprehensive calculation of the pension corresponding to a working life spent in several countries, of legislation in which pensions are not strictly proportional to the length of the insurance period'. For on the hypothesis of absolute proportionality the method of proportional calculation is unnecessary, as that of 'direct calculation'—which consists in taking account only of the legislation of the State in question—arrives at the same result. This reasoning is confirmed by Article 29 (2) of Regulation No 4.

Furthermore, in default of absolute proportionality, proportional calculation results, as in the present case, in an amount less than that obtained by direct calculation; the Commission quotes arithmetical examples in support of this.

B — The method of calculation adopted by the defendant institution results in the loss for the person concerned of rights acquired in France, which is contrary to the spirit of Community law.

(a) When the person concerned has not completed the maximum period of 120 quarters, as provided for by French legislation—a situation which has occurred in the present case (113 French quarters) —, the amount of the French pension is strictly proportional to the length of the insurance period. It must not differ from it under the pretext that the person concerned has, in addition, completed insurance periods in another country. Consequently, the defendant institution should have carried out the proportional calculation

— not according to the formula

$$\frac{113 \times 120 \times S}{134}$$

— but according to the formula

$$\frac{113 \times 134 \times S}{134} = 113\ S.$$

The amount thus calculated would have corresponded to that obtained by the method of 'direct calculation'.

The Commission next poses the question whether, on the assumption that the person concerned had completed a period of insurance in France longer than the maximum of 120 quarters, the method of calculation put forward above would have the result of favouring the migrant worker as compared to the worker who had spent his working life only under the French system; relying upon figures in support, it replies in the negative.

(b) It is true that in the present case

— without the application of Article 27 of Regulation No 3, the applicant would have no right to a pension under German legislation;

— the amount paid to the applicant by the German institution is more than the amount by which the French pension has been reduced.

However, in the opinion of the Commission it is incompatible with the case-law of the Court concerning the interpretation of Article 51 of the Treaty to justify the method of calculation used by the defendant institution on the ground that the loss of rights suffered by the applicant under the French system was 'compensated' by the German pension. On the one hand 'the implementation of

Article 28 can . . . be effected only by observance of the principle that the person concerned cannot find himself subjected to the loss of rights already acquired in one of the Member States without having them replaced by at least equivalent benefits' (cf. judgment in *Kalsbeek née van de Veen,* loc. cit.). On the other hand it cannot be stated that the applicant would receive a 'higher aggregate sum in benefits' than would otherwise accrue to him (cf. judgment in *Labots née Hagenbeek,* loc. cit.) if he could continue, while benefiting from the German pension, to receive a French pension calculated without taking into account the German insurance periods. On the contrary, the method used by the defendant institution results in a loss of rights in respect not only of the French pension—which is obvious—but also of the German pension.

(c) In support of that argument, the Commission compares the respective situations of two workers who have had an identical working life in France of 113 quarters, the first of whom however has had a working life in Germany of 60 quarters and the second (like the applicant) a working life of less than 60 quarters:

— The German insurance periods completed by the first worker are sufficient to entitle him to a right to benefit under German legislation without its being necessary to take account of French insurance periods. Consequently, this worker 'retains his rights in France and acquires a right in Germany proportional to his German working life, since the calculation under each legislation can be carried out separately'.

— The second worker, on the other hand, can claim a German pension only by virtue of the aggregation provided for by Regulation No 3. 'But that regulation, whilst allowing his French working life to be taken into account for the qualifying period, merely considers that he has properly completed the time required, employment in another Member State being regarded as having the same significance for fulfilling the requirement as employment in Germany. He is thus, as it were, excused from a qualifying period.

— On the other hand, in respect of the calculation of the amount of the German pension, the worker derives no benefit under German legislation because of Regulation No 3, as compared to the worker who had no need of French insurance periods to acquire rights. In either case the German pension is proportional to the length of the German working life alone. Equality between these two workers is properly observed by the German institutions. The application of the regulation has the sole effect of making it possible to establish this equality'.

— This equality is destroyed by the method of calculation used by the defendant institution. The first worker would benefit from a French pension calculated on the basis of 113 quarters. The second, on the other hand, would see his pension reduced to an amount less than proportional to the French working life (it is thus that the French pension of the applicant, as it has been calculated, constitutes the equivalent of $\frac{120}{134} \times 113$, or approximately only 102 quarters).

— It would be mistaken to claim that this loss of French rights is compensated by the German pension. In order to obtain this, the second worker, like the first, has worked and paid contributions. If his French pension is reduced, 'he partially loses the benefit of his affiliation to the German insurance system'. The case of the applicant demonstrates this: having contributed for 134 quarters he is given a total pension (the sum

of the French and German pensions) corresponding to only 123 quarters (102 French quarters—cf. preceding paragraph—and 21 German quarters) consequently he has lost 'in the aggregate'. In such a case the provisions of Regulation No 3 are intended to prevent the relevant working life from being reduced artificially as a consequence of migration. It would be paradoxical if the validation of insurance periods in one country (in this case, Germany) by virtue of aggregation should have as its consequence the rejection in the other country (in the present case, France) of periods which do not coincide with the former'.

Grounds of judgment

The Cour d'Appel, Orléans, requests the Court to give a ruling 'on the interpretation to be given to Article 51 of the Treaty of Rome and to Articles 27 and 28 of Regulation No 3 of the Community concerning social security for migrant workers, for the purpose of specifying whether this regulation can validly deprive a worker of a part of the rights acquired by him in one of the States of the Community'.

Cases arising under systems with insurance periods, such as that which has given rise to the question set out above, are characterized first of all by the fact that in one of the States concerned the benefit is acquired by virtue of national law alone, whilst in the other State concerned a right to benefit can arise only with the assistance of the aggregation of the periods, as provided for by Article 51 of the EEC Treaty and Article 27 of Regulation No 3. Furthermore they have the peculiarity that the application by the competent institution of the first State of Articles 27 and 28 of the said regulation might have the effect of reducing the benefit arising from the application of national law alone, whilst that benefit would not be related to the periods from the second State. It is necessary therefore to consider whether in such a case the institution paying a pension arising by virtue only of its national law is justified in applying the said Articles 27 and 28.

(1) Under the terms of Articles 28 (1) (a), the provisions of that article, and in particular subparagraph (b) which provides for the so-called proportional calculation, appear to be applicable equally to every 'insured person covered by Article 27 of this Regulation'—that is to say, having been 'successively or alternately subject to the legislation of two or more Member States'—as well as to 'the institution of each of the Member States'. Nevertheless, under the terms of the said subparagraph (b) proportional calculation shall be used when the right to benefit 'is acquired by virtue of subparagraph (a)', that is to say, 'taking into account the aggregation of periods' completed under the legislation of various States in accordance with Article 27, which suggests

a contrario that proportional calculation is excluded if, according to the national legislation in question, the right of the insured person is acquired without the need to refer to periods completed by virtue of the legislation of other States. This interpretation finds support in Article 27 (1) which provides for aggregation only 'for the acquisition, maintenance or recovery of the right to benefit', but not for 'calculating the amount of benefit', the expression used in Article 51 of the Treaty. In fact, that wording seems to limit aggregation to cases in which it is necessary in order to establish a right to benefit and to exclude it in cases where it would have the effect simply of maintaining or varying the content of a right already acquired by virtue of national legislation alone.

(2) In view of the difficulties of interpretation of these provisions it is necessary to consider them in the light of Articles 48 to 51 of the Treaty which the regulations in the field of social security have as their basis, their framework and their bounds.

These provisions are aimed at securing 'freedom of movement for workers', particularly by 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. More particularly, Article 51 specifies that the regulations adopted in implementation thereof must make 'arrangements to secure for migrant workers . . . aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries'. These provisions establish at the outset that the said regulations, regarded as a whole, are intended, in certain circumstances, to benefit the migrant worker as compared with the situation which would result for him from the exclusive application of national law. In case of doubt these regulations must therefore be interpreted in the light of this objective.

It follows from its very wording that Article 51 refers above all to cases in which the legislation of one Member State by itself would not enable an insured person to qualify for the right to benefit because of an insufficient number of periods completed under that legislation. In such a case it seeks to require to take into account the periods completed under the systems of other Member States and to pay benefit in so far as the total of the periods thus added together equals or exceeds the minimum number of periods provided for by the legislation of the said State. However, if such benefit is not to confer unjustified advantages upon the person insured, it cannot, under the terms of Article 28 (1)(b) of Regulation No 3, exceed the '[amount due] *pro rata* with the length of the periods completed under the said legislation

. . . as compared with the total length of the periods completed under the legislation of all the Member States concerned'. Thus the power to make a proportional calculation, which is provided for by the above-mentioned provision, whilst not expressly referred to by Article 51 of the Treaty, is an inseparable component of the operation of aggregation and necessarily presupposes a prior aggregation.

It follows from the foregoing that aggregation and proportional calculation have no purpose in the case of a Statute in which the result sought by Article 51 is already attained by virtue of national legislation alone. Article 51 cannot therefore serve as a basis for calculation of the benefit by the competent institution of that State by means of aggregation and proportional calculation.

(3) Having regard, nevertheless, to the complexity of the legislation of Member States and that arising from the provisions of Community law, this principle cannot be regarded as an absolute rule. In particular it can be valid only in so far as its application does not provide the insured person with benefits exceeding those expressly provided for by Article 51 of the Treaty or the regulations adopted in implementation thereof.

The said article is intended to take into account insurance periods which would otherwise be inoperative, but not to allow the insured person to claim benefits relating to one and the same period from the institutions of several States. It is moreover in this spirt that Article 27 (1) of Regulation No 3 provides for aggregation only to the extent to which the assurance periods in question 'do not overlap'. The above-mentioned principle is thus subject to an exception when its application would lead to an accumulation of benefits for one and the same period.

However in cases such as the present there is no undue accumulation of benefits. In fact in this case the benefit paid by one of the States concerned under its legislation as supplemented by Community law, on the one hand, and the benefit paid by the other State concerned on the basis of its own legislation alone, on the other hand, refer to entirely distinct periods. In particular the purpose of Article 51 of the Treaty cannot cause the fact that the insured person has maintained the rights acquired in the latter State and at the same time has become entitled to benefit in the former State to be regarded as an accumulation of benefits contrary to Community rules. These considerations remain valid even in a case in which the benefit which the insured person obtains from the application of Article 27 in one State is more than the loss which he would suffer if another State were to apply Article 28 without the need to have recourse to Article 27. The institution of a State whose legislation includes a ceiling for benefit established in terms of a maxi-

mum number of periods cannot rely either upon the said Articles 27 and 28 as an argument for a proportional calculation of the benefit due in accordance with that legislation, with the object of bringing the total benefit due to a migrant worker nearer the said ceiling. In fact, as Regulation No 3 has allowed the continuance of separate systems creating separate claims against separate institutions, the institution of one State cannot *ipso facto* be justified in relying on the charge which Community law imposes on the institution of another State in order to reduce the charge which its own legislation imposes upon it.

The foregoing considerations taken as a whole lead one to admit that in cases such as the present the institution of a State in which the insured person can qualify without aggregation cannot rely upon Articles 27 and 28 of Regulation No 3 for the purposes of reducing the benefit which it would be required to pay solely upon the basis of its national legislation.

Articles 27 and 28 of Regulation No 3, when interpreted in the manner set out above, are not contrary to Article 51 of the EEC Treaty. In fact, far from prejudicing the rights of a migrant worker, they respect the rights acquired by him in one State whilst granting him the right to qualify for a pension in another State.

The costs incurred by the Commission of the EEC which 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 Cour d'Appel, Orléans, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the EEC;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 48 to 51 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), especially Articles 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 question referred to it by the Cour d'Appel, Orléans, by judgment of that court of 22 December 1966, hereby rules:

1. **When in one Member State the right to benefit arises without its being necessary to refer to periods completed under the legislation of other Member States, the competent institution of the first State is not empowered to apply Articles 27 and 28 of Regulation No 3 in order to reduce the benefit which it is obliged to pay by virtue of its own legislation, at least in so far as that benefit does not relate to periods which have already been taken into account in the calculation of the amount of the benefit paid by the competent institution of another State;**

2. **Articles 27 and 28 of Regulation No 3, when interpreted in the manner set out above, are not contrary to Article 51 of the EEC Treaty;**

3. **It is for the Cour d'Appel, Orléans, to decide upon the costs of these proceedings.**

Hammes Trabucchi Monaco

Delvaux Donner Lecourt Strauß

Delivered in open court in Luxembourg on 5 July 1967.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 MAY 1967[1]

Mr President,
Members of the Court,

You have already found it necessary in your judgments in Cases 100/63, *Kalsbeek née van der Veen* [1964] E.C.R. 565, and 4/66, *Labots née Hagenbeek* (Rec. 1966, p. 617), to interpret certain provisions of Articles 27 and 28 of Regulation No 3 concerning social security for migrant workers. It was then a question of what effect these articles, which provide in matters of old age and death (pensions) insurance for the

1 — Translated from the French.