JUDGMENT OF THE COURT
10 MARCH 1977 [1]

Silvana Kaucic and Anna Maria Kaucic v Institut national d'assurances maladie-invalidité (preliminary ruling requested by the Belgian Cour de Cassation)

Case 75/76

Social security for migrant workers — Invalidity insurance — Insurance periods completed — Benefits — Calculation — Theoretical amount — Reduction — National rule — Application where payment is made to the person concerned from a source outside the Community

(Regulation No 3 of the Council, Article 11 (2), Article 26, Article 28; Regulation No 4 of the Council, Article 9 (2))

The provisions of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, and in particular Article 28 (1) thereof, and of Regulation No 4 of the Council of 3 December 1958 do not preclude the application by the institution of a Member State, when calculating 'for accounting purposes' the amount of the benefit to which the person concerned would be entitled if all the insurance periods had been completed exclusively under the legislation of that Member State, of a rule laid down under its own legislation in order to reduce the theoretical amount by the amount of a benefit received by the person concerned from a source outside the Community

In Case 75/76

Reference to the Court under Article 177 of the EEC Treaty by the Belgian Cour de Cassation for a preliminary ruling in the action pending before that court between

1. SILVANA KAUCIC, residing in Grimaco, Udine, Italy,

2. ANNA MARIA KAUCIC, residing in Turin, Italy,

and

INSTITUT NATIONAL D'ASSURANCE MALADIE-INVALIDITÉ, Brussels,

1 — Language of the Case: French.

on the interpretation of Articles 27 (1) and 28 (1) of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (JO 1958, p. 561) regarding the right to draw invalidity pensions acquired, on the one hand, under the legislation of Member States of the EEC concurrently with those acquired, on the other, under the legislation of a third country,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The father of the appellants, Mr Luigi Kaucic, an Italian national, was born in Italy in 1900. He worked in Belgium from 1929 to 1940, in Austria from 1941 to 1945 and in Italy from 1949 to 1957. On 30 September 1957 he became unfit for work.

He accordingly received an invalidity pension payable by the competent Austrian institution from 1 October 1957. From 1 January 1958 he obtained a pension payable by the competent Italian and Belgian institutions.

Relations between Italy and Austria are governed by a bilateral convention. There is no bilateral convention governing relations between Belgium and Austria.

A decision of the Administrative Commission of the EEC, adopted in the course of its fifty-first session held in January 1964, settled the solution to be adopted in similar circumstances; it was stated that:

— A Member State which has not entered into a bilateral convention with the third country shall calculate the proportionate amount of the pension in accordance with EEC Regulations Nos 3 and 4 taking into account for the purposes of

aggregation insurance periods completed in the Member States.
- A Member State which has entered into a bilateral convention with the third country shall calculate separately the proportionate amount payable within the framework of the EEC and that payable within the framework of the bilateral convention and shall grant the insured person the higher amount.
- The third country shall grant the pension pursuant to the bilateral convention.

In accordance with this decision the pension payable to Mr Kaucic by the competent Italian institution was calculated pursuant to the convention between Italy and Austria in proportion to the insurance periods completed in Austria and in Italy because the pension was higher under this convention than under the Community rules.

The Institut national d'assurance maladie-invalidité (the National Institution for Sickness and Invalidity Insurance, hereinafter referred to as 'the Institution') calculated the proportion of Mr Kaucic's Belgian pension in accordance with Articles 27 and 28 of the said Regulation No 3 taking into account for the purposes of aggregation insurance periods completed in Italy and in Belgium.

However the Institution deducted the amount of the Austrian pension from the Belgian allowance calculated 'for accounting purposes', that is to say, the allowance to which the person concerned would have been entitled if all the insurance periods or assimilated periods aggregated in accordance with the procedures referred to in Article 27 of Regulation No 3 had been completed exclusively under Belgian legislation. In so doing the Institution applied Article 70 (2) of the Belgian Law of 9 August 1963 setting up and organizing a compulsory system of sickness and invalidity insurance (Moniteur Belge of 1 and 2 November 1963, p. 10555).

2. Article 70 (2) of the Belgian Law of 9 August 1963 reads as follows:

'The benefits provided for by this law shall be granted only under conditions determined by the King, if the incapacity in respect of which a claim for benefits is made falls within the general law or some other legislation. In such cases insurance benefits shall not be added to the compensation arising under the other legislation; they shall be the responsibility of the social insurance institutions to the extent to which the incapacity covered by that law is not in fact made good. In every case the recipient must receive amounts which are not less than the amount of the insurance benefits.'

3. The Community rules concerning overlapping of benefits are contained in Article 11 (2) of the said Regulation No 3 and in Article 9 (2) of Regulation No 4 of the Council of 3 December 1958 on implementing procedures and supplementary provisions in respect of Regulation No 3 concerning social security for migrant workers (JO 1958, p. 597).

The articles in question read as follows:

Article 11 of Regulation No 3

'2. Provisions in the legislation of one Member State for the reduction or suspension of benefit where there is plurality with other social insurance benefits, or other income, or because of gainful employment, shall apply to a beneficiary even in respect of benefits acquired under a scheme in another Member State, or in respect of income derived from, or employment in, the territory of another Member State; provided that this rule shall not apply where benefits of the same kind are acquired in accordance with the provisions of Articles 26 and 28 of this regulation.'

Article 9 of Regulation No 4

'2. The provisions of the preceding paragraph notwithstanding and, subject to the provisions of the second sentence of Article 11 (2) of the regulation, where implementation of the provisions of the first sentence of Article 11 (2) of the regulation would entail reduction or suspension of an invalidity, old-age or death benefit (pensions), calculated according to the provisions of Article 28 of the regulation by the institution of a Member State, that institution shall take into account, for the purposes of the reduction or supension, only a fraction of the benefits or income or remuneration giving rise to the reduction or suspension. Such fraction shall be determined in proportion to the length of the periods completed in accordance with Article 28 (1) (b) of the regulation: in calculating the amount for accounting purposes according to the said provision, the benefit or income or remuneration giving rise to the reduction or suspension of the pension shall not be taken into account.'

4. Since Mr Kaucic disagreed with the Institution's method of calculation he lodged an application before the Tribunal du Travail (Labour Tribunal), Brussels. He requested the Tribunal to declare that the invalidity allowance payable by the Belgian social insurance institution should not be reduced by the Austrian invalidity pension. In particular he maintained in this connexion that:

— since the insurance periods completed in Austria are invalid with regard to the acquisition and determination of the right to the Belgian allowance, the pension payable for those same insurance periods should not affect the amount of the Belgian allowance;
— the decision of the abovementioned Administrative Commission of the EEC does not state that the Member State which has not entered into a bilateral convention with a third country is entitled to take account of the benefits granted by that third country in order to reduce the benefit payable by the Member State pursuant to EEC regulations.

The Ministère Public observed before the Tribunal that:

— since Belgium and Austria had not entered into any international convention it was impossible to take into account periods of employment completed in Austria in calculating the proportionate amount payable by Belgium.
— Article 70 (2) of the Belgian Law of 9 August 1963 had to be applied to the present case.

The Tribunal found against Mr Kaucic on the ground that, since Belgium and Austria were not bound by a bilateral agreement, it was impossible to take account of benefits paid in Austria in calculating the proportionate amount of pension payable by Belgium. Accordingly the Institution acted quite regularly in calculating the proportionate amount of pension payable by Belgium by aggregating only periods of employment completed in the Member States of the EEC, that is, Belgium and Italy. From 1 January 1964 there is scarcely any doubt, according to the Tribunal, that Article 70 (2) of the Belgian Law of 9 August 1963 must be applied.

5. In the meantime Mr Kaucic died on 17 December 1973. His daughters, Silvana and Anna Maria Kaucic, brought an appeal before the Cour du Travail (Labour Court), Brussels. The appellants adopted the arguments submitted by Mr Kaucic before the Tribunal du Travail and added in particular that

— Article 28 (1) (b) of Regulation No 3 does not permit the Institution to take account of the Austrian pension in calculating the proportionate amount of the pension;
— Article 11 (2) of Regulation No 3 applies to the present case. Consequently the provision for

reduction contained in Article 70 (2) of the Belgian Law of 9 August 1963 cannot be applied.

The Institution, with the support of the Ministère Public, maintained in particular before the Cour du Travail that

— according to Article 28 (1) of Regulation No 3, Mr Kaucic's pension must be calculated as if all the insurance periods had been completed under Belgian legislation and that, consequently, Article 70 (2) of the Belgian Law of 9 August 1963 must be applied;
— there are no Community provisions which enable Belgium to disregard Article 70 (2) of the Belgian Law of 9 August 1963;
— the derogation laid down in Article 11 (2) of Regulation No 3 is only applicable where benefits of the same kind are acquired and calculated in accordance with the rules relating to proportional calculation laid down in the Community rules and in the present case it is impossible to calculate the proportional amounts payable by Belgium and Austria.

The Cour du Travail found against Mr Kaucic's daughters, upholding in particular the arguments put forward before it by the Institution and the Ministère Public.

6. Silvana and Anna Maria Kaucic appealed before the Cour de Cassation against the judgment of the Cour du Travail. They maintained in particular that Articles 27 and 28 of Regulation No 3 prevent the application of Article 70 (2) of the Belgian Law of 9 August 1963.

Since the Cour de Cassation considered that the dispute gives rise to questions of interpretation of Community law it stayed the proceedings by a judgment of 16 June 1976 and requested the Court of Justice, pursuant to Article 177 of the EEC Treaty, to give a preliminary ruling on the following question:

'Do Articles 27 (1) and 28 (1) of Regulation No 3 of 25 September 1958 of the Council of the European Economic Community concerning social security for migrant workers preclude the application by the institution of a Member State of the rules under its own legislation relating to the overlapping of the benefit payable under this legislation and a benefit granted under the legislation of a third country and, in particular, do they preclude the application of Article 70 (2) of the Belgian Law of 9 August 1963 to the overlapping of the benefit payable by the Belgian institution and the benefit payable by Austria, with which Belgium has not entered into a bilateral convention relating to social security, especially in the sense that the Belgian institution could not apply the said Article 70 (2) in order to determine, for accounting purposes, the amount to which the person concerned would be entitled if all the insurance periods or assimilated periods, aggregated in accordance with Article 27 of Regulation No 3, had been completed exclusively under Belgian law?'

7. The judgment of the Cour de Cassation was entered in the Court Register on 28 July 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by Silvana and Anna Maria Kaucic, represented by Daniele Rossini, Director of the Welfare Department of the Associazioni Cristiane Lavoratori Italiani (Christian Associations of Italian Workers), by the Institution, represented by Adolf Houtekier, Advocate at the Belgian Cour de Cassation and by the Commission, represented by its Legal Adviser, Marie-José Jonczy.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. The *appellants in the main action* point out that, since Belgium is not bound to Austria either by a convention or under the abovementioned Regulations Nos 3 and 4, the insurance periods completed in Austria which were invalid with regard to the acquisition of the right to and to the determination of the Belgian pension cannot be taken into consideration in order to alter the calculation, on the basis of Community provisions, of the Belgian pension.

In accordance with Article 28 (1) (b) of Regulation No 3 the Belgian institution should simply have calculated the proportionate amount of the pension on the basis of the insurance periods completed by Mr Kaucic in Italy and in Belgium without concerning itself with the decision adopted by the Austrian insurance institution within the framework of a bilateral convention which does not relate to Belgium. Accordingly the Belgian institution is not entitled to apply the national provisions against overlapping of benefits in order to deduct from the pension payable pursuant to the Community regulations the benefits granted by a third country.

Since the Belgian institution is intervening in the payment of a benefit which has been calculated proportionately it seems illogical to apply Article 70 (2) of the Belgian Law of 9 August 1963 in order to reduce further a benefit which by the very fact that it has been calculated proportionately is already less than the full amount.

2. The *respondent in the main action* submits as its principal observation that the Community rules relating to overlapping, Article 11 (2) of Regulation No 3 and Article 9 (2) of Regulation No 4, do not apply to the present case because Austria is not a Member State of the EEC.

The solution is thus to be sought in the wording of Article 28 of Regulation No 3.

Article 28 establishes a fiction whereby the worker is deemed to have completed his entire working life in the same country. Belgian legislation is accordingly applicable unconditionally to the present case. The fact that the insurance periods completed by Mr Kaucic in Austria could not be taken into account for the purposes of the acquisition of the right in no way affects the calculation of the amount of the Belgian benefit determined 'for accounting purposes'. On the other hand the fact that the insured person must be notionally deemed to have been insured throughout his working life in Belgium and that, consequently, the amount determined 'for accounting purposes' must be calculated on the basis of Belgian legislation means that the Belgian institutions must apply all the provisions for the calculation of this benefit and that consequently they may not disregard the provisions of Article 70 (2) of the Belgian Law of 9 August 1963.

The respondent in the main action adds that Regulation No 3 allowed separate schemes to continue under which beneficiaries are directly entitled either under national law alone or under national law supplemented, if necessary, by the system of aggregation of periods. In the present case the Kaucic sisters are entitled to the benefits provided under Belgian national law in implementation of European regulations. Nevertheless Belgian law remains applicable and EEC Regulations Nos 3 and 4 do not entail any derogation from the application of the Belgian provisions on the restriction of overlapping of benefits when the damage in respect of which the benefits are claimed is partially covered by the legislation of a third country.

In this connexion the respondent relies upon the judgment of the Court of 5 July 1967 in Case 2/67, *De Moor* v

Caisse de Pension des Employés Privés ([1967] ECR 197).

The respondent in the main action considers, in the alternative, that if the Court rules that the Community provisions preclude the contested application of Article 70 (2) of the Belgian Law of 9 August 1963, the latter provision cannot be applied in calculating the Belgian amount determined 'for accounting purposes'. Accordingly the Belgian institutions are obliged to apply Article 70 (2), thereby deducting the amount of the Austrian pension from the amount of the Belgian benefit which was calculated proportionally. In fact Belgian law remains applicable in so far as the EEC regulations do not derogate from the application of its provisions.

Furthermore the respondent in the main action recalls that, pursuant to Article 8 of Regulation No 3 concerning equality of treatment, an insured foreigner, permanently resident in the territory of a Member State and to whom the Community regulations with regard to the grant of a proportion of a Belgian benefit apply is subject to the same obligations as Belgian nationals. This means that Article 70 (2) of the Belgian Law of 9 August 1963 may be applied to all insured persons who are in receipt of Belgian benefits in respect of incapacity for work without its being necessary to resort to aggregation of insurance periods, whilst it may not be applied to an insured person who is in receipt of the same benefits by virtue of aggregregation which would no doubt be contrary to the spirit of Article 8 of Regulation No 3.

3. The *Commission* observes that it is possible to reply to the preliminary question submitted to the Court not only on the basis of the interpretation of Articles 27 and 28, the only provisions of Regulation No 3 to which the national court refers, but rather on the basis of the interpretation of Article 11 (2) of the regulation and of Article 9 (2) of Regulation No 4.

It consequently considers that the questions which the Court is requested to answer should be worded as follows:

'1. Must Article 11 (2) of Regulation No 3 be interpreted to mean that the provisions for reduction in the legislation of a Member State may be applied to the beneficiary of an invalidity pension payable under such legislation and pursuant to Articles 27 and 28 of Regulation No 3 if such beneficiary is in receipt of an invalidity pension pursuant to the legislation of a third county?

2. Must Article 9 (2) of Regulation No 4 which establishes the procedures for the implementation of Article 11 (2) of Regulation No 3 be interpreted to mean that the benefit giving rise to the reduction must be taken into account in determining the amount calculated for accounting purposes?'

With regard to the first question which it has formulated the Commission maintains that the wording of Article 11 (2) of Regulation No 3 does not prevent the Belgian institution from applying its rule against overlapping of benefits in order to reduce the benefit payable by it if it is drawn concurrently with an invalidity benefit payable by a third country: since the person concerned is in receipt of a benefit acquired under Regulation No 3 and since the Austrian pension was by definition not calculated pursuant to Articles 27 and 28 of Regulation No 3 the provisions for reduction laid down by the Belgian Law are applicable to him, the more so since such reduction does not adversely affect the freedom of movement of the worker since it arises from his employment in a third country.

The Commission adds nevertheless that such provisions for reduction may only be applied if Regulation No 3 is beneficial to the worker. The Court of Justice has indeed made this clear when,

in its judgment of 15 May 1974 in Case 184/73 *(Bestuur van de Nieuwe Algemene Bedrijfsvereniging* v Kaufmann, [1974] ECR 517), it stated that the limitations referred to in Article 11 (2) are applicable to insured persons only as regards benefits acquired under those regulations.

Nevertheless the Commission thinks that those considerations do not take fully into account all the factors in the present case. In its opinion a Member State of the EEC cannot invoke a bilateral convention concluded between another Member State and a third country in order to reduce a benefit which, but for that convention, could not have been reduced.

In this respect it refers to the opinion of Mr Advocate-General Mayras in Case 14/72, *Heinze* v *Landesversicherungsanstalt Rheinprovinz* ([1972] ECR 1117).

With regard to the second question which it has formulated the Commission observes that in so far as the Belgian institutions, on the basis of the foregoing statements, are entitled to reduce the benefit payable to Mr Kaucic, there is no doubt that such a reduction may only be made in accordance with the Community regulations, that is Article 11 (2) of Regulation No 3 completed by Article 9 (2) of Regulation No 4.

According to the latter provision, the Belgian institution may only reduce its benefit by a fraction of the benefit giving rise to the reduction and only when the amount of the benefit payable pursuant to the Belgian legislation and Articles 27 and 28 of Regulation No 3 has been finally determined.

Article 9 (2) of Regulation No 4 thus expressly excludes the possibility of making a reduction when calculating the amount determined 'for accounting purposes'. This principle, which was recalled in a statement appearing in the minutes of the Council at the time of the adoption of Regulation 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 (OJ, English Special Edition 1971 (II), p. 416) according to which: 'Generally speaking, the reductions to be made pursuant to the provisions against overlapping may only be made if the benefit payable by each of the Member States has been finally determined', was restated in Article 7 (1) (b) and (c) of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 159).

At the hearing on 8 December 1976 the appellants, represented by Daniele Rossini, Director of the Welfare Department of the Associazioni Cristiane Lavoratori Italiani, the respondent, represented by Adolf Houtekier, Advocate at the Belgian Cour de Cassation, and the Commission, represented by its Legal Adviser, Marie-José Jonczy, acting as Agent, presented oral argument.

The following submissions *inter alia* were put forward in addition at this hearing.

The *appellants in the main action* pointed out that they would have concurred the application of Article 70 (2) of the Belgian Law of 9 August 1963 if the invalidity of Mr Kaucic had been caused, for example, by an accident at work or an occupational disease occurring in Austria and accordingly compensated pursuant to Austrian legislation, in other words, if the overlapping of benefits of a different kind were involved. Since the proceedings relate not only to benefits of the same kind but also to benefits calculated proportionally it is necessary to apply the last sentence of Article 11 (2) of Regulation No 3 which expressly authorizes overlapping of benefits of the same kind. This provision is applicable

by analogy even though in the present case one of the three benefits to which the person concerned is entitled is paid by a third country.

With regard to the submission of the respondent in the main action that, if the Court were to hold that the Community regulations preclude the disputed application of Article 70 (2) of the Belgian Law of 9 August 1963, the Belgian institutions would be obliged to apply this article and deduct the amount of the Austrian pension from the amount of the Belgian benefit calculated proportionally, the appellants in the main action observed that such a calculation would be even more unfavourable to the insured person than deducting the Austrian pension from the Belgian amount calculated 'for accounting purposes'.

With regard to the Commission's argument that Belgium is relying upon the Austro-Italian Treaty in order to reduce the benefits payable by the latter the *respondent in the main action* maintains that this misrepresents the problem: Belgium should have applied the Belgian provision prohibiting overlapping.

Furthermore the Commission is mistaken in invoking the opinion of Mr Advocate-General Mayras in Case 14/72, *Heinze* v *Landesversicherungsanstalt Rheinprovinz*. The Institution considers that the opinion means that it may invoke the provision for reduction laid down in the Belgian legislation. If the Commission's argument were followed the claim against Belgium would be in excess of that permitted under Community law alone. In this respect the Institution also relies upon the judgment of the Court of 16 November 1972 in Case 16/72, *Allgemeine Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein* ([1972] ECR 1141).

After the above-mentioned hearing Mr Advocate-General Mayras was indisposed and had to be replaced by Mr Advocate-General Capotorti.

On this ground the Court ordered the oral procedure to be reopened.

At the new hearing on 16 February 1977 the parties presented no oral argument, declaring that they referred to the submissions, arguments and conclusions which they had put forward at the hearing on 8 December 1976.

The Advocate-General delivered his opinion at the hearing on 16 February 1977.

Law

1 By a judgment of 16 June 1976, which was received at the Court of Justice on 28 July 1976, the Belgian Cour de Cassation referred to the Court under Article 177 of the EEC Treaty a question concerning the interpretation of certain provisions of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (JO of 16. 12. 1958, No 30, p. 561).

2 The Cour de Cassation asks whether Articles 27 (1) and 28 (1) of Regulation No 3 preclude the application by the institution of a Member State of the

rules under its own legislation relating to the overlapping of the benefit payable under this legislation and a benefit granted under the legislation of a third country and, in particular, whether they preclude the application of Article 70 (2) of the Belgian Law of 9 August 1963 to the overlapping of the benefit payable by the Belgian institution and the benefit payable in Austria, with which Belgium has not entered into a bilateral convention relating to social security, especially in the sense that the Belgian institution could not apply the said Article 70 (2) in order to determine, for accounting purposes, the amount to which the person concerned would be entitled if all the insurance periods or assimilated periods, aggregated in accordance with Article 27 of Regulation No 3, had been completed exclusively under Belgian law.

3 During the procedure it was suggested that in order to reply to the question submitted Article 11 (2) of Regulation No 3 and Article 9 (2) of Regulation No 4 of the Council of 3 December 1958 on implementing procedures and supplementary provisions in respect of Regulation No 3 (JO of 16. 12. 1958, No 30, p. 597) must be taken into consideration.

4 The question submitted comes within the context of a dispute concerning the amount payable by way of an invalidity pension to the successors of an Italian worker who died in Italy, having worked not only in Italy and Belgium but also in Austria, which is not a Member State of the Community, and who had been granted an invalidity pension by the Austrian institution calculated in accordance with the provisions of the bilateral social security agreement concluded between Italy and Austria.

5 Nevertheless the competent Belgian institution, in calculating the Belgian pension, not only applied the provisions of Regulation No 3 in order to aggregate the insurance periods completed in Italy and in Belgium but also, relying on Article 70 (2) of the Belgian Law of 9 August 1963, took into account the Austrian pension in order to reduce the benefit payable by it with regard to the period after 1 January 1968.

6 Under Article 70 (2) of the Belgian Law, Belgian insurance benefits shall not be added to the compensation payable in respect of the same damage under another legislation; however in every case the beneficiary must receive amounts which are not less than the amount of the insurance benefits.

7 It is clear from the judgment making the reference that the Belgian courts on the one hand have finally established that the provision must be interpreted to mean that it is also applicable when the damage is covered by a foreign law and, on the other, that the damage suffered by the worker in question was in fact covered by the pension granted under the Austrian law.

8 The provisions of Regulations Nos 3 and 4 concerning the aggregation of insurance periods refer only to periods completed under the legislation of the Member States.

9 Periods completed in a third country, whether or not such country has entered into a social security convention with one or more of the relevant Member States, are not covered by any provision of the Community regulations relating to the harmonization by the Member States of their systems of social security.

10 In particular the last part of Article 11 (2) of Regulation No 3 which prohibits the application to beneficiaries of provisions in the legislation of a Member State for the reduction of benefit refers only to cases where benefits of the same kind are acquired in accordance with the provisions of Articles 27 and 28 of the regulation and accordingly does not prohibit the application of provisions for reduction where one of the benefits was acquired pursuant to the legislation of a third country.

11 It follows that the case in which a benefit has been acquired pursuant to the legislation of a third country falls outside the scope of Article 9 (2) of Regulation No 4 which states that in calculating the amount for accounting purposes according to Article 28 of Regulation No 3 the benefit giving rise to the reduction shall not be taken into account.

12 It must thus be concluded that when Article 28 provides for the calculation for accounting purposes of the amount of benefit to which the person concerned would be entitled if all insurance periods or assimilated periods had been completed exclusively under the legislation of the relevant Member State, it permits account to be taken of national rules providing for the reduction of the benefit on the basis of a benefit received by the person concerned from a source outside the Community.

13 Accordingly it is necessary to reply to the question submitted that the provisions of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, and in particular Article 28 (1) thereof, and of Regulation No 4 of the Council of 3 December 1958 do not preclude the application by the institution of a Member State, when calculating 'for accounting purposes' the amount of the benefit to which the person concerned would be entitled if all the insurance periods had been completed exclusively under the legislation of that Member State, of a rule laid down under its own legislation in order to reduce the theoretical amount by the benefit received by the person concerned from a source outside the Community.

Costs

14 The costs incurred by the Commission of the European Communities which submitted observations to the Court are not recoverable.

15 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, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the question submitted to it by the Belgian Cour de Cassation by a judgment of 16 June 1976, hereby rules:

The provisions of Regulation No 3 of the Council of 25 September 1958, concerning social security for migrant workers, and in particular Article 28 (1) thereof, and of Regulation No 4 of the Council of 3 December 1958 do not preclude the application by the institution of a Member State, when calculating 'for accounting purposes' the amount of the benefit to which the person concerned would be entitled if all the insurance periods had been completed exclusively under the legislation of that Member State, of a rule laid down under its own legislation in

order to reduce the theoretical amount by the amount of a benefit received by the person concerned from a source outside the Community.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxemburg on 10 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 16 FEBRUARY 1977 [1]

Mr President,
Members of the Court,

1. The gist of the question of interpretation referred to the Court in this case may be summarized as follows: do the Community provisions concerning social security for migrant workers permit or prohibit the application by a Member State of a rule under its own legislation against the overlapping of social insurance benefits in the case of a worker who has acquired both the right to an invalidity pension under Community rules and the right to another pension of the same kind payable by a third State?

The basic facts are as follows:

Mr Kaucic, an Italian national, had worked in three countries: in Belgium for 501 weeks between 1929 and 1940; in Austria for 42 months between 1941 and 1945; and in Italy for 323 weeks from 1949 to 1957. In 1957 he became unfit for work and was in receipt of two invalidity pensions: one (with effect from 1 October 1957) which was payable by the competent Austrian institution and which was covered by a bilateral Austro-Italian convention enabling aggregation of the periods of employment completed in the two countries and the other (effective from 1 January 1958) which was payable by the Italian and Belgian social security institutions in application of Community Regulations Nos 3 and 4. In accordance with a decision of principle adopted at its fifty-first session (January 1964) by the EEC Administrative Commission on Social Security for Migrant Workers, the proportion of this second pension payable by the Italian institution, which

1 — Translated from the Italian.