THE COURT

in answer to the questions referred to it for a preliminary ruling by the judgment of 5 January 1967 of the Cour Supérieure de Justice of Luxembourg sitting as a Cour de Cassation, hereby rules:

1. **The introductory provisions and subparagraph (b) of Article 28 (1) of Regulation No 3 are not applicable for the purposes of determining the amount of an old-age pension based on a contribution period and acquired solely under national law without recourse to Article 27, unless the same contribution period is used at the same time to determine the amount of other pensions in other Member States;**

2. **The decision as to costs in these proceedings is a matter for the Cour Supérieure of Luxembourg.**

Trabucchi Monaco

Donner Lecourt Strauß

Delivered in open court in Luxembourg on 5 July 1967.

A. Van Houtte
Registrar

A. Trabucchi
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 JUNE 1967[1]

Mr President,
Members of the Court,

The present proceedings initiated by a question from 'the Cour Supérieure de Justice of Luxembourg sitting as a Cour de Cassation' provides me for the first time with the opportunity of giving my opinion on social security for migrant workers, a somewhat obscure subject which is difficult to grasp.
My opinion is based on the following facts.

The plaintiff in the Luxembourg proceedings during his working life was a commercial traveller successively in Germany, Belgium and Luxembourg and affiliated to the old-age insurance schemes in each of those countries. When on 24 January 1958—at which time resident and working in the Grand Duchy of Luxembourg (Bertrange)—he attained the age of 65 and thereby reached the age limit under the laws of the said three Member States, he could not apply to the Caisse de Pen-

1 — Translated from the German.

sion Luxembourgeoise des Employés Privés for an old-age pension, because he had not completed the requisite minimum insurance period of ten years. He complied with this condition precedent —after continuing to be gainfully employed—on 1 July 1959. When as a result the competent insurance institutions of the three Member States determined the amount of the old-age pension, they followed Regulation No 3 of the Council concerning social security for migrant workers. It must be mentioned in this connexion that whereas under Luxembourg and Belgian law the plaintiff acquired the right to benefit without having aggregate insurance periods completed in the various Member States, under the German system of social security, which provides for a minimum insurance period of 15 years, his claim depended upon insurance periods in other Member States being taken into account.

Applying Article 28 (1) of Regulation No 3 the Luxembourg insurance institution (cf. the decision of the 'Sous-Commission des Pensions' of 24 October 1962) first calculated the amount of the benefit to which he would be entitled under Luxembourg law if all insurance periods in Luxembourg were taken into account. The Luxembourg social insurance benefit was then fixed on the basis of this 'notional' figure '*pro rata* with the length of the insurance periods completed under Luxembourg legislation before the risk materialized, as compared with the total length of the periods completed under the legislation of all the Member States concerned before the risk materialized'. This method of calculation—I have quoted it almost word for word from Article 28 of Regulation No 3—is commonly called 'Proratisiering' ('Proportional calculation').

The effect of this method of calculation on the plaintiff's claim was that a smaller Luxembourg insurance benefit was payable than would have been the case if the calculation had been effected solely under Luxembourg law by taking into account the insurance periods in Luxembourg, because a Luxembourg old-age pension consists of a fixed amount ('part fondamentale' or 'basic pension'), which has no connexion with the insurance period and a supplementary amount calculated according to the length of the insurance period.

The plaintiff understandably decided to challenge this result by lodging an appeal with the Conseil Arbitral des Assurances Sociales in Luxembourg. He asked first of all that his case should be dealt with solely under Luxembourg law and by taking into account the insurance periods in Luxembourg, because adding together insurance periods in other Member States (that is, an 'aggregation' within the meaning of Article 27 of Regulation No 3), was unnecessary in his case. If this was done there would be no question of applying a proportional calculation. If this method of proportional calculation was used, it was in any event inadmissible under Article 28 (1) (e) of Regulation No 3 to take into account insurance periods and benefits completed and payable in Belgium, because the Belgian proportion of the pension under the Belgian Law of 12 July 1957 (as amended by the Law of 3 April 1962) is not paid even if the age limit has been reached and all other conditions have been complied with, so long as the claimant, as in this case, continues to be gainfully employed.

By its judgment of 27 November 1963 the Conseil Arbitral made an award in favour of the plaintiff and accordingly varied the decision of the Caisse. However that was not the end of the matter. On the contrary the Caisse appealed to the Conseil Supérieure des Assurances Sociales, which by a judgment of 19 November 1964 restored the original decision of the Sous-Commission des Pensions de Vieillesse. The judgment emphasized in particular that having

regard to Article 28 (1) (e) of Regulation No 3 it was impossible not to take the Belgian insurance periods into account, because under Belgian law the conditions for the *acquisition* of a claim have been fulfilled and it is only the *payment* of the pension wich is *suspended* as the claimant has continued to be gainfully employed.

The matter, thanks to the efforts of the plaintiff, was brought before the highest court in Luxembourg, the Cour Supérieure de Justice, sitting as a Cour de Cassation. This court held that in order to decide the case it was essential to determine certain questions of Community law. For this reason, following the conclusions of the Procureur Général d'État, this court decided to stay the proceedings and, in accordance with Article 177 of the EEC Treaty, to refer to the Court of Justice the question whether 'Article 28 (1) (b) of Regulation No 3 of the Council of the EEC of 25 September 1958, concerning social security for migrant workers, is applicable for the purpose of determining the amount of old-age pensions payable by the Caisse de Pension des Employés Privés in Luxembourg, even in those cases where its application would not lead to the acquisition, maintenance or recovery of the right to benefit referred to in Article 27 (1) of the said Regulation No 3 and, in addition, whether Article 28 of Regulation No 3, if it is regarded as being applicable without distinction even in cases other than the acquisition, maintenance or recovery of a right to benefit, is in conformity with the provision upon which the said Article 28 is based, that is to say, Article 51 of the Treaty of Rome of 25 March 1957 and whether it is therefore fully valid'.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the parties to the proceedings before the national courts, the Member States, the Commission and the Council were given the opportunity to state their views. The Caisse de Pension Luxembourgeoise and the Commission submitted written observations. In addition the plaintiff in the proceedings in Luxembourg made a brief statement during the oral procedure. In the light of these observations and of the earlier decided cases of the Court relating to Regulation No 3 I will now endeavour to answer the questions which have been referred.

The answers to the questions referred

1. *Objections raised by the defendant in the proceedings in the Luxembourg court*

We must first of all examine certain objections which the defendant in the Luxembourg proceedings raised in its observations. They are that the Court should declare that it has no jurisdiction to answer the questions which have been referred, because the actual dispute does not relate to Community law but to the interpretation of a point of Belgian law. It should also be assumed that the objectives of Article 51 of the Treaty do not cover cases such as this, which concerns an insured person, who was almost 65 years of age when the EEC Treaty was signed, and who can no longer take advantage as a migrant worker of the freedoms secured for workers under the Treaty and acquire supplementary rights to benefit.

In my opinion these objections are not valid.

First with regard to the last question, it can—as the Commission showed during the oral procedure—be clearly inferred from the wording of many of the provisions of Regulation No 3 that it not only aims at cases where migrant workers acquired rights *after the entry into force* of the Regulation but that, on the contrary, it also covers contracts of employment terminated before its

entry into force. This is proved by the provisions of Articles 4, 27 and 28 (in the Chapter on old-age and death) and also of Article 53. The interpretation which the Court is asked to give can therefore be of the utmost importance in the case pending before the Luxembourg court, which has to be decided under Community law and for the determination of which facts also have to be considered which no longer lead to the acquisition of rights, provided only that they are relevant under one of the applicable national laws. In fact the questions of interpretation which have been referred are consequently material to the ultimate decision of the national court.

With regard to the defendant's first objection in the Luxembourg proceedings it must be noted that it does not relate to all the questions referred to the Court, but—if I am not mistaken—only to the second part, that is to say, to the interpretation of Article 28 (1) (e) and (f) of Regulation No 3. In any event the Court has to give its opinion on the question whether there can be a proportional calculation under Article 28, if the aggregation of different insurance periods is not necessary to establish a right to benefit in a particular Member State. However, the Court has jurisdiction to give the interpretation requested in the second question. It may indeed be assumed that the question whether the plaintiff definitely acquired a right to benefit under *Belgian* law and whether it has only been suspended because he continued to be gainfully employed, has been determined by a final decision of the court of first instance in Luxembourg as a question of interpretation of foreign law, that is to say, it can no longer be dealt with by the Cour de Cassation. This does not however provide the answer to the question what effect the legal consequences of this interpretation have on the application of Community law. To this extent there is clearly also a question of the interpretation of Community law and there is no doubt at all that the Court has jurisdiction to answer this question.

Finally I should mention in passing that certain questions were raised in the Luxembourg proceedings as a result of an application made by the Caisse, the defendant in the action, against the order of reference and for restoration of the *status quo ante*. These questions however are of no concern to us because the Luxembourg court has not asked for a stay of the proceedings before this Court. The conclusion to be drawn from the absence of such a request is that the Luxembourg court regards the questions it has referred as essential for its decision whatever the outcome of the said application for restoration of the *status quo ante*.

Therefore none of the points mentioned justifies a refusal to answer the questions which have been referred. Let us therefore examine in detail what problems of interpretation they raise.

2. The answer to the first question

There is no need for me to repeat the wording of the first question. It asks substantially for an answer to the question whether the determination on a *pro rata* basis provided by Article 28 (1) (b) of the amounts payable by a social security institution (the co-called 'proportional calculation') can be effected even if, in order to establish a right to benefit, aggregation of insurance periods completed in various Member States is not necessary under Article 27.

In the first place this question, which is stated in general terms, certainly requires—as the Commission rightly emphasizes—to be clarified to some extent in the light of the particular facts, which concern an insured person who does not have to rely on the aggregation of insurance periods in order to establish his claim to a *Luxembourg* pension, but must do so in order to

substantiate his claim to a pension under the *German* old-age insurance scheme. It is therefore appropriate to ask whether Article 28 applies to all rights to benefit of an insured person, even if aggregation in only *one* Member State of insurance periods is required to establish such a right.

In my opinion the interpretation of this Article would present no difficulties if it were only necessary to base it on the *wording* of Regulation No 3. For the application of Article 28 reference is only made to the 'insured persons covered by Article 27', who are defined there as persons who have been successively or alternatively subject to the legislation of two or more Member States. The essential criterion for the purposes of applying the Article is therefore the fact that the insured person was subject to the laws of more than one Member State and not the need to aggregate the insurance periods in various Member States in order to establish a right to benefit. If the latter meaning had been intended the introductory words of Article 28 (this at least can be said) would probably have been expressed differently.

However—as I have repeatedly emphasized—such a method of interpreting Community legal provisions is not adequate. For this reason, in previous cases where the Court had to interpret Regulation No 3 it looked first at the objectives which according to the Treaty itself were to be achieved by Council regulations concerning social security for migrant workers and then considered what meaning and purpose Regulation No 3 must have in this context.

Its answer, given in the proceedings instituted by a reference made by Centrale Raad van Beroep for a preliminary ruling in Case 100/63, was that the aim of Article 51 is to provide migrant workers with the right to benefit by aggregation of all periods of employment completed in various Member States. This aim would not be achieved if a migrant worker 'were obliged, in order to avail himself of the freedom of movement which is guaranteed to him, to find himself subjected to the loss of rights already acquired in one of the Member States'. Therefore with regard to the relationship between Articles 27 and 28 of Regulation No 3 the Court came to the conclusion that for Article 28 'the conditions for its application are the same as those for the application of Article 27'; it is only when the conditions for acquiring the right to benefit are fulfilled by aggregation of insurance periods completed in a number of Member States that the insurance benefits can be determined in proportion to the periods when the claimant was gainfully employed; Article 28 is therefore only applicable 'for the *acquisition*, maintenance or recovery of the right to benefit' under Article 27 of Regulation No 3.

It would be wrong to conclude, however, that this is a complete answer to the question with which we are now concerned. First, the special feature in the present case must not be forgotten, which gives rise to the question whether the need to apply Article 27 in order to establish claims in *one* Member State is a sufficient justification for the proportional calculation of claims which are acquired in *another* Member State without aggregating various completed insurance periods. Even if this question is answered in the affirmative, that is to say, even if it is accepted that the connexion between Article 28 and Article 27 is not so close as the judgment in Case 100/63 appears to suggest, in fact it is possible—as the Commission has shown—in a case such as this (Belgian law can be disregarded, I will come to that later) to avoid the danger of granting migrant workers 'smaller benefits .... than the total of the benefits to which they would have been entitled by virtue of the legislation of each of the Member States, if the said

provisions had not been applied',[1] by adopting the system of supplementary benefits provided for by Article 28 (3) of Regulation No 3. Secondly, in a later case (Case 4/66), faced with a similar range of questions, the Court considered that an additional consideration for the interpretation of Regulation No 3 was necessary which would take into account its meaning and purpose. In that case it stated that the principle undoubtedly emerged from a general construction of Regulation No 3 and Article 51 of the Treaty that a change in the place of employment of a migrant worker must not be permitted to lead to a loss of benefits. However this must not on the other hand be taken to mean that a worker 'must of necessity succeed, by the mere interplay of various national legislative systems in obtaining a higher appregate sum in benefits than would accrue to him under Article 28 (3)'. This Article reads: 'If the amount of benefit which may be claimed independently of the provisions of Article 27, in respect of the insurance periods ... completed under the legislation of one Member State, is greater than the total benefits resulting from implementing the foregoing paragraphs of this Article, the person concerned shall be entitled to receive from the institution of that State a supplement equal to the difference'. Thus the Court has obviously acknowledged the need, when interpreting Regulation No 3, to avoid an improper plurality of insurance benefits, a need which is explained mainly by the fact that in social insurance the relationship between insurer and insured is not based upon reciprocal obligations and that the benefits are to a great extent financed out of public funds.

As the Commission showed, there is such a danger, which cannot be reconciled with the general intention of Regulation No 3 (cf. Article 11), in particular in systems of social insurance like the one adopted in Luxembourg, which provides only a short minimum insurance period or none at all and does not calculate the benefit according to the period of insurance (at least so far as the 'fixed part' of it is concerned). If a migrant worker, after participating for a considerable time in the social security scheme of a Member State where the determination of the right to benefit depends essentially upon the duration of the insurance period, works at a later date just for a short time in a Member State which has adopted one of the special systems I have mentioned, the straightforward aggregation of the rights to benefit would give the insured person an advantage which must be regarded as unjustified, because it can be assumed that the authors of the particular systems had in mind the *normal case* of a worker, who throughout his *entire working life* has participated in *one* insurance scheme. The claimant would in fact—if his case is based on this proposition—have a claim for two benefits for one and the same insurance period.

In order to avoid the effect of cumulating benefits in this way, since Regulation No 3 in its present form does not contain the right to exercise an option in favour of one system of social insurance accompanied by the abandonment of the right to benefit enforceable against other social insurance institutions (Article 28 (4) of Regulation No 3), the only solution which can be adopted is the principle of proportional calculation. As the Commission itself concedes, this solution does not indeed justify acceptance of the principle that the method of proportional calculation should be applied *generally* until the recently drafted scheme with its comprehensive provisions for the avoidance of loss of rights to benefit comes in force. It does however justify a rela-

1 — Cf. Case 100/63 [1964] E.C.R. 565.

tively *liberal* interpretation of Article 28 in its application to cases like the present one where no loss of rights is apprehended. Such an interpretation is in fact appropriate having regard to the need for a *uniform* application of Regulation No 3 to cases which bring into operation the social insurance laws of several countries. In a certain sense, claims by a migrant worker on various social security schemes form one complete claim. It would therefore be unacceptable to evaluate his working life spent in several Member States on a different basis in each state and to take into consideration in one country part only of the period he worked there and in another—pursuant to Article 27 of Regulation No 3—the whole of his working life. If a migrant worker benefits from the advantages of Regulation No 3 through the application of Article 27, with the inevitable result that proportional calculation is adopted under Article 28, he cannot expect Article 28 to be applied differently in another Member State. Finally this interpretation is confirmed by a comparative analysis of sub-paragraphs (f) and (g) of Article 28. Although in fact under subparagraph (f) the amount of benefit payable to a claimant, who has fulfilled the conditions laid down by the law of *one* Member State without having to take into account insurance periods completed under the laws of other Member States, is determined solely on the basis of the legal provisions under which the right to benefit has been acquired and, what is more, by taking into account only the insurance periods completed in accordance with those provisions, subparagraph (g) provides for a review of the benefits granted under subparagraph (f) *in accordance with the provisions of subparagraph* (b) (that is to say by *proportional calculation*) 'as and when the conditions required by one or more of the other legislative systems are satisfied, taking into account the aggregation of benefits as provided in the preceeding Article'.

The first question should therefore be answered as follows:

In calculating old-age pensions under Regulation No 3, Article 28 (1) (b) also applies to the social security institution of a Member State, under the relevant laws of which a right to benefit is acquired without taking into account insurance periods completed in another Member State, if under the law of another Member State the aggregation of such periods is necessary for the acquisition of a right to benefit.

This answer forces us to examine the second question which—if I am not mistaken—it would only be necessary to answer if the possibility of adopting the method of proportional calculation were to be *ruled out* in this case.

3. *The answer to the second question*

In the second question the Court is asked to state whether Article 28 of Regulation No 3 is compatible with Article 51 of the Treaty, that is to say, whether it is valid, if it is held to be applicable in cases other than those when a right to benefit is *acquired* by aggregating several completed insurance periods.

On this point the Commission, with reference to some of the wording of the judgment containing the reference and of the conclusions of the Luxembourg Procureur Général, has first of all raised the question whether in fact it is a preliminary ruling on the *validity* or only on the interpretation of the said provision which has been requested.

However, in my opinion this question does not arise because it is the *intention* expressed in the judgment containing the reference which has to be considered and which can clearly be inferred from its last question. It emerges in any event from an *objective* consideration of all the facts of the case which have been brought to our notice. We can, however, confirm that the doubts expressed by the court making the refer-

ence as to the validity of Article 28 of Regulation No 3 are based on a particular interpretation of this provision which is clearly regarded as well established and unchallengable. The Court came to this conclusion after considering the wording of some of the provisions of Belgian social insurance law relating to rights to benefit and the suspension of the payment of benefits when a claimant continues to be gainfully employed. In fact we are not just concerned only with the interpretation of a point of Belgian law, decided by the tribunals judging the facts in Luxembourg, which is binding on the Cour Supérieure of Luxembourg sitting as a Cour de Cassation, but also with the interpretation of Community law with reference to the legal consequences which undoubtedly flow from this point of Belgian law. We must therefore ask whether, when the Court is requested to give a preliminary ruling, it simply proceeds to interpret Community law, which the Luxembourg Court of Justice considers is the correct procedure, or whether it has power to extract from the question as to the validity of the said Regulation a question of its interpretation, which if answered in one way can make the question as to its validity irrelevant. In my opinion there can be no doubt that the Court can undoubtedly take the latter course and that we have therefore in the first instance to endeavour to answer the question of *interpretation,* which in this case must with reference to Article 28 of Regulation No 3 be regarded as having been raised by implication.

This question refers to the interpretation of subparagraphs (e) and (f) which read as follows:

'(e) If, after taking account of the aggregation of periods as set out in the preceding Article, the person concerned does not at a given date satisfy the conditions required by all the legislative systems applicable to him, but only satisfies the conditions of one or more of them, the amount of benefit shall be determined in accordance with the provisions of subparagraph (b) of this paragraph; provided that, if the entitlement is thus opened under not less than two legislative systems, and there is no need for recourse to periods completed under the legislative systems whose conditions are not satisfied, those periods shall not be reckoned for the purposes of subparagraph (b) of this paragraph;

(f) If the person concerned does not at a given date satisfy the conditions required by all the legislative systems applicable to him, but satisfies the conditions of one of them without need of recourse to periods completed under one or more of the other legislative systems, the amount of benefit shall be determined solely in accordance with the legislation under which the right to benefit is opened and taking account only of the periods completed under that legislation'.

As you know the Luxembourg court takes the view that these provisions cannot be relied on in this case, because a right to benefit in fact *exists* under Belgian law and it is only its *implementation* which is *suspended,* as the claimant continues to be gainfully employed. Therefore the actual problem of interpretation is to ascertain the meaning of the words 'legislative systems whose *conditions* are not satisfied'. The question is whether they only mean the conditions as to *time,* that is to say, the existence of a legally laid down minimum period of insurance (which the plaintiff has completed under Belgian law), or whether they mean *all* legal conditions upon which the payment of insurance benefits depends (that is to say, that they include the condition under Belgian law that on attaining the age limit the claimant must no longer be gainfully employed).

On the face of it anyone—basing his view on the wording of this provision—would be inclined to answer the question as the Luxembourg court of first instance did, that is to say, by concluding that the application of subparagraphs (e) and (f) is based *in principle* on the establishment of a right to benefit according to the number of completed insurance periods. But, quite apart from the fundamental objection to attaching too much importance to the literal wording when interpreting a Community regulation, this interpretation can be challenged on the ground that a contribution of Regulation No 3 must take into account the aims of Article 51 of the Treaty. In doing so an interpretation is to be preferred which ensures that these aims are achieved and permits the Council regulation, in the light of the Treaty, to appear valid. In particular account must be taken in this connexion of the principle, which has been stressed in the case-law of the Court, of avoiding an interpretation of regulations concerning social security for migrant workers, which causes an insured person to suffer any loss of rights by comparison to the rights which would accrue to him in the absence of such regulations. Effect can be given to this requirement in the present case, without doing violence to the wording of Article 28 which in fact is not very precise or clear. In fact subparagraphs (e) and (f) do not draw the fine distinction made by the Luxembourg court between the *establishment* of a right to benefit and *suspension* of payment of the benefit but only refer in general terms to the *fulfilment of the conditions* of certain provisions. Among them can be included without any hesitation the condition that the claimant must not be gainfully employed after attaining the age limit as provided by the Belgian law of 12 July 1957. Any other decision would in fact mean that a disadvantage under Belgian law arising out of the method of proportional calculation provided by Article 28 would adversely affect the determination of claims to benefit in Luxembourg, that is to say, the insured person in Luxembourg would suffer a loss of rights by reason *only* of the fact that he was a migrant worker.

I therefore agree with the Commission that an interpretation of Article 28 (1) (e) is acceptable which permits insurance periods not to be taken into account in a Member State where payment of the old-age pension is refused under its law temporarily or permanently for any reason.

This opinion at the same time shows that the question of the validity of Article 28 is of no importance.

4. *Summary and opinion*

My opinion may be summarized as follows:

The answer to the first question referred to the Court is that, in calculating old-age pensions under Regulation No 3, Article 28 (1) (b) also applies to insurance institutions of a Member State under the legislation of which a right to a benefit arises without taking into account insurance periods completed in other Member States, provided that in *another* Member State the acquisition of a right to benefit under its legislation depends upon the aggregation of such periods.

The second question, directed to the examination of the validity of Article 28, includes by implication the question of the interpretation of this Article.

The answer to be given to it is that, according to Article 28 (1) (e), when determining old-age pensions with regard both to the notional amount and the proportional calculation of insurance periods completed in other Member States, it is permissible to ignore insurance periods spent in another Member State if, under the law of that State, the benefit is not paid for any reason whatsoever.

The Court does not have to make an order as to costs, since the decision as to costs is a matter for the court making the reference.