moreover, preventing those concerned, in the absence of legislation applying to them, from remaining without protection in the matter of social security. It therefore does not authorize a national insurance organization either expressly or by implication to reduce the benefits which are due to a worker or those entitled under him under national legislation alone.

3. The aggregation and apportionment of insurance periods completed within the meaning of Articles 27 and 28 of Regulation No 3 do not apply when the legislation of a Member State entitles the person concerned to a benefit.

4. There is no duplication of insurance periods within the meaning of Article 27 of Regulation No 3 and, similarly, there is no unjustified cumulation of pensions if a special increase provided for by the law of one of the States for the benefit of the survivors of an insured person is awarded or calculated, not in relation to an insurance period, whether actual or fictitious, but for the duration of a certain period which bears no direct relation to the insurance period completed by the deceased.

In case 50/75

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Cour supérieure de justice du Luxembourg sitting as a cour de cassation for a preliminary ruling in the action pending before that court between

CAISSE DE PENSION DES EMPLOYÉS PRIVÉS, whose registered office is in Luxembourg

and

HELGA MASSONET, widow of Bernard Weber, residing at Colmar-Berg (Luxembourg)

on the interpretation of Regulation No 3 of the Council concerning social security for migrant workers (OJ 30 of 16 12. 1958, p. 561), and especially Articles 12, 27 and 28,

THE COURT

composed of: R. Lecourt, President, H. Kutscher, President of Chamber, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen and A. F. Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under 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. Mr Bernard Weber of Luxembourg nationality, who was born on 25 July 1930, died on 14 September 1967 leaving a widow, Mrs Helga Weber née Massonet and two children born in 1963 and 1965. He had worked from 1954 to 1962 in the Grand Duchy of Luxembourg where he paid contributions for 67 months; from October 1965 to 1 September 1967 he was affiliated to the Bundesversicherungsanstalt für Angestellte, Berlin, in respect of employment in Germany for 13 months.

The Bundesversicherungsanstalt granted the widow a pension with effect from 1 September 1967. It based the calculation of that pension on the Law known as the Angestelltenversicherungsgesetz and on Regulations Nos 3 and 4 (EEC) concerning social security for migrant workers. In the first place it decided that in accordance with paragraph 45 (2) of that Law, the widow had a right to an increased pension, known as 'erhöhte Hinterbliebenenrente' since the widow was responsible for at least one child who had a right to an orphan's pension. For that reason it took into account not only the insurance months actually completed by Mr Weber, but also the number of months remaining between the date of his death and the date on which he would have attained 55 years of age, a period called the 'Zurechnungszeit', which is in the present case 215 months. The Bundesversicherungsanstalt first determined the amount of the benefit to which Mrs Weber would have been entitled if all the previous periods had been completed under its own legislation and then fixed the amount which it was its duty to pay in proportion to the duration of the periods actually completed under German legislation in relation to the total duration of the periods completed under the legislation of the two Member States concerned.

The Caisse de pension des employés privés, Luxembourg, for its part granted Mrs Weber a pension as from the same date. Whilst calculating advances of this pension it had taken into account the special increases provided for in case of premature death, in accordance with Article 4 of the Law of 25 October 1968 which was concerned with the reform of invalidity and death insurance within the contributory pension schemes. Later the Caisse de pension changed its mind and refused to include the special increases in question in the calculation of the Luxembourg pension. The latter are due to a widow who is bringing up a child and whose husband dies before attaining 55 years of age. They are granted for all complete calendar months remaining from the beginning of the entitlement to a pension until the completion of the fifty-fifth year of age. They are fixed at 1·6 % of the normal monthly minimum social wage during the periods preceding the completion of the thirty-fifth year of age and at 1·6 % of the minimum monthly social wage increased by 20 % for the subsequent period, subject to certain special provisions.

Mrs Weber then made an appeal against the decision of the Caisse de Pension to

the Conseil arbitral des assurances sociales which by a judgment of 20 December 1972 decided that she was entitled to the special increases. By order of 4 July 1974, the Conseil supérieur des assurances sociales upheld the judgment of the Conseil arbitral des assurances sociales.

The Caisse de pension appealed against that order to the Cour supérieure de Justice, which decided, in a judgment of 15 May 1975 to stay the proceedings and in accordance with Article 177 of the EEC Treaty to ask the Court of Justice to give a preliminary ruling on the following questions:

1. (a) Can Regulation No 3 of the EEC concerning social security for migrant workers and more particularly Article 12, according to which wage earners employed in the territory of a Member State are subject to the legislation of that State, affect (and if so in what conditions and to what extent) a provision of the domestic legislation of a Member State of the EEC providing that in case of successive, alternate or cumulative affiliation to contributory pension schemes, special increases in pension on the grounds of the premature death of an affiliated person must be paid by the pension institution to which the insured person was last affiliated, and can it, where appropriate, have the effect of releasing the institution thus designated from the internal point of view by domestic legislation wholly or partially from its obligation to bear the cost of the special increases applicable?

   (b) What, more particularly, is the reply to be given when in a first State the right to the increase is acquired solely under domestic legislation and without its being necessary to have recourse to the process known as aggregation, whilst in a second State in which there has been later affiliation, the right is available only through recourse to aggregation, it being furthermore established that the amount of the increase to be paid by the social institution of the first State is not dependent upon the duration of affiliation but is constituted by a fixed sum of money payable for each month still remaining until the time when the deceased person would have attained fifty-five years of age?

2. Do Article 51 of the Treaty of Rome and Articles 27 and 28 of Regulation No 3 of the EEC concerning social security for migrant workers prevent a widow from receiving simultaneously the special increase mentioned above under paragraph (b) of the first question, granted in the first State, and another benefit granted in the second State, the two allowances being payable during the same period, that is to say until the time when the deceased husband would have attained the age of fifty-five years?

3. Do Article 51 of the Treaty of Rome and Articles 27 and 28 of Regulation No 3 of the EEC concerning social security for migrant workers prevent the widow who is receiving from the second State an increased pension determined by aggregation and on a *pro rata* basis, from receiving simultaneously in the first State a special increase of pension such as that specified above under paragraph (b) of the first question, without the latter increase being determined on a *pro rata* basis?

2. In the order making the reference, the Cour Supérieure de Justice summarized the three submissions in the appeal of the Caisse de Pension in the following manner:

'The first ground of appeal is to the effect that the decisions at earlier stages of the case infringed Articles 4 and 6 of the Law of 25 October 1968, whereas, in

view of the situation of the late Weber and of his dependant, Mrs Weber, these articles do not impose on the Luxembourg Caisse de pension the liability to pay special increases.

Since Weber was in fact affiliated to a German social security institution at the time of his death — and as Article 12 of Regulation No 3 provides in general that wage-earners or assimilated workers employed in the territory of one Member State shall be subject to the legislation of that State even if they reside in the territory of another State — it follows from this that he was not insured with the Luxembourg Caisse de pension so that his dependants cannot claim from the Caisse the benefit of the special increase introduced by the combined provisions of Article 6 of the Law of 25 October 1969 and Article 8 of the Law of 16 December 1963 which had as their object the coordination of pension schemes, according to which in case of successive, alternate or cumulative affiliation to contributory pension schemes, the special increase granted in case of disablement or death of the person insured before having reached the age of 55 years is the responsibility of the institution paying the pension, to which the insured was affiliated in the last instance, on condition that the affiliation was for 12 months, excepting accidents.

.....

The second ground of appeal is that the decisions at earlier stages of the case infringed Article 51 of the Treaty of Rome and Articles 27 and 28 of EEC Regulation No 3 in that the decision accepted by the contested judgment would result in adding the pension known as 'erhöhte Hinterbliebenenrente' to the special Luxembourg increase, the widow benefiting simultaneously from two benefits for one and the same period, that is until the time when her deceased husband would have attained the age of 55 years.

According to the appellant such a plurality of benefits is forbidden by the aforementioned Community rules since instead of supplementing one another the benefits are superimposed on one another.

.....

The appellant also puts forward a third submission based on the infringement of Article 51 of the Treaty of Rome and of Articles 27 and 28 of EEC Regulation No 3, in that the decisions in the earlier stages of the case wrongly failed to require that the special increase in Luxembourg should be determined *pro rata* with the insurance periods completed in the Grand Duchy of Luxembourg and in the Federal Republic of Germany, whilst 'both natural justice and a wide interpretation of the expression 'benefits' included in Article 51 of the Treaty of Rome and Article 27 of Regulation No 3 and the prohibition of overlapping of insurance periods require that the special increase should be determined *pro rata* on the basis of the periods completed by Weber in Germany and in the Grand Duchy of Luxembourg.'

3. The order making the reference was registered at the Court Registry on 5 June 1975.

The Commission of the European Communities, represented by its Legal Adviser, Miss Marie-José Jonczy, submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice.

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

II — Written observations lodged with the Court

According to the *Commission of the European Communities, the first*

question amounts to whether, when there has been successive affiliation to a pension scheme in Member State A and then to a pension scheme in Member State B, Member State A can, under Article 12 of Regulation No 3, apply the provisions of its own legislation to the scheme of Member State B.

Recalling that Article 12 is a rule of conflict of laws and referring to paragraphs 7 and 8 of the judgment of the Court of 5 December 1967 (Case 19/67, *Van der Vecht* [1967] ECR 345), the Commission claims that the Luxembourg legislation is applicable to Mr Weber for the period of work which he completed in Luxembourg and that as soon as he works in Germany, the German legislation is applicable to him. Article 12 therefore has the opposite effect to that relied upon by the Luxembourg Caisse de pension.

Further, it is undeniable that Article 6 of the Luxembourg Law of 25 October 1968 is a purely internal rule of coordination. To transpose it to the Community level, Regulation No 3, which itself lays down rules for the coordination of national legislation at the Community level, would have to contain either a similar provision or a provision referring the matter to the national legislations. It must be stated that such provisions do not exist in Regulation No 3.

The Commission therefore suggests that the Court should reply to the first question in the following manner:

'Article 12 of Regulation No 3 cannot, any more than any provision of this Regulation have the effect of exempting the institution appointed internally by national legislation totally or partially from its duty to bear the payment of benefits due under the said national legislation.

The fact that in a first Member State the right to benefit is acquired under national legislation alone and that in a second State in which there has been a later affiliation, the right is acquired only by aggregation and apportionment, in no way alters the reply which was given under 1 (a) above.'

The Commission illustrates its reply to the *second and third questions* by a summary of the Luxembourg and German legislation relating to the calculation of the survivor's pension, recalling *inter alia* that in the two countries the pension is calculated on the basis of the invalidity pension to which the deceased husband would have been entitled if, instead of dying he had become incapable of work.

As there is in the present case, in its view, a partial overlapping of periods since one part of the German pension is calculated on the basis of a fictitious insurance period, which is the same as that which is used as the basis of the calculation of the special increase provided for by the Luxembourg legislation, the Commission considers that the two questions concern the problem how far pension increases provided for by the legislation of two Member States which refer to the same fictitious insurance period, may be cumulated, particularly in the case where one of the pensions is calculated by aggregation and apportionment and the other is an independent pension.

Recalling that Article 27 of Regulation No 3 provides for aggregation only to the extent to which the periods in question 'do not overlap', it considers that it is possible to reply to the second question that Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation No 3 prohibit a widow from being able to benefit simultaneously from the special increase paid in a first State and from another benefit in a second State, since these two allowances refer to one and the same insurance period.

The problem nevertheless remains when, as in the present case, a pension is

obtained under national legislation alone, because the Court has forbidden generalized apportionment and it follows from this that, even if in one State aggregation has been necessary for the acquisition of the right to a pension, that does not justify apportionment in another State where the right is acquired without aggregation.

To reply to the third question, it suffices consequently, in the opinion of the Commission, to quote the Court which considers that 'The acquisiton of a right to benefit, conferred solely by virtue of the national law of one State and based on contribution periods completed in that State, in addition to another benefit acquired in another State by means of aggregation in a case where, as required by Article 27, the periods of insurance 'do not overlap', does not constitute an advantage contrary to Community law. (Judgments of 5 July 1967 in Cases 1/67, *Ciechelski,* [1967] ECR 181 and 2/67, *de Moor,* [1967] ECR 197 and 207)'.

It is necessary to state that in the present case the periods overlap and that amongst the Community rules there is no provision which furnishes an answer to this problem, since Article 11 of Regulation No 3 expressly provides that it does not apply to old-age and death insurance.

The Commission refers, however, to the case-law of the Court (Judgment of 6 December 1973 in Case 140/73, *Mancuso,* [1973] ECR 1149 and the Judgment of 13 December 1967 in Case 12/67, *Guissart,* [1967] ECR 425) from which it appears *inter alia* that Article 11 may be interpreted to the effect that it allows the application of national provisions in respect of the overlapping of periods. If it were accepted that in the present case there was a plurality of benefits amounting to an abuse and that Article 11 must apply it would mean that Luxembourg could rely on its national legislation designed to prevent a plurality of benefits when periods overlap. Further, it would be necessary for such legislation to exist in Luxembourg, which does not appear to be the case.

In a more general way, the Commission asks if it would be fair to apply Article 11 in such cases. It points out that with such a solution there would be no legal certainty; it would be difficult to establish what is the exact amount of the pension to be inferred and, since that would depend upon the state of the legislation of the Member States concerned, the result would be great uncertainty. The unfairness of such a result would be equalled only by its inconsistency. Such a solution would be exactly the opposite of what is intended both by Article 51 of the Treaty and by the regulations adopted in application of the latter.

Furthermore although it appears certain that in the case of overlapping of periods the benefit must be reduced, and although it is true that the Court has taken the view that it was for the national authority to decide how to carry out this reduction in accordance with its own legislation, that assertion must nevertheless be qualified. That statement of the Court must be understood as leaving to the national institutions the possibility of applying the principle that periods must not overlap in accordance with the procedures laid down by their national legislation in the absence of procedures laid down by Community rules which in fact do not exist.

Consequently, the Commission suggests that the Court should reply to the second and third questions in the following manner:

'Article 51 of the Treaty and Articles 27 and 28 of Regulation No 3 prohibit an insured person from being able to claim benefits relating respectively to one and the same insurance period from the institutions of a number of Member States.

Article 51 of the Treaty and Articles 27 and 28 of Regulation No 3 do not prohibit a benefit being obtained in a Member State by aggregation and apportionment with a benefit obtained in another Member State under the national legislation alone, without having recourse to aggregation and apportionment, as long as the periods which have been used as a basis for the calculation of the benefits do not overlap.'

At the hearing on 21 October 1975 the Caisse de pension des employés privés, represented by P. Beghin of the Luxembourg Bar, Mrs Weber, represented by J. Lucius of the Luxembourg Bar, and the Commission, represented by its Legal Adviser, Miss M.-J. Jonczy, presented oral argument, after the representative of the Caisse de Pension had put forward and elaborated his submissions before the Cour de Cassation and the representative of Mrs Weber had referred to his pleadings before the Cour de cassation.

The Advocate-General delivered his opinion at the hearing on 13 November 1975.

Law

1 By a judgment of 15 May 1975, received at the Court on the following 5 June, the Cour supérieure de justice du Luxembourg, sitting as a cour de cassation, raised three questions, under Article 177 of the EEC Treaty, concerning the interpretation of Article 51 of the Treaty and of Articles 12, 27 and 28 of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (No 30 of 16. 12. 1958, p. 561).

2 These questions are raised within the context of proceedings concerning the calculation of the benefits by way of a survivor's pension of the widow of a Luxembourg citizen who, after working first in Luxembourg and then until the time of his death in the Federal Republic of Germany, had completed 67 insurance months in the first State and 13 in the second.

3 The German insurance institution, because of the fact that the widow was bringing up children, awarded her an increased pension calculated on the basis, not only of the insurance months actually completed by the deceased, but also of the number of months remaining between the date of his death and the date on which he would have attained the age of 55 years.

4 The amount which the German institution was required to pay was then fixed in proportion to the period actually completed under German legislation in relation to the total duration of the periods completed under the legislation of the two States concerned.

5 The Luxembourg institution, although awarding the widow a survivor's pension, refused to grant with it the special increase which the law allows in favour of a widow bringing up a child where the husband dies before the age of 55 years and which consists of a fixed sum of money payable for each month which has still to run until the time when the deceased would have attained the age of 55 years.

6 In order to justify this refusal, the Luxembourg institution relied before the Cour supérieure de justice sitting as a cour de cassation on three submissions based on the one hand on Article 12 of Regulation No 3 and on the other hand on Article 51 of the Treaty and Articles 27 and 28 of the same regulation.

7 The three questions raised by the Cour supérieure de justice are directed towards obtaining an interpretation of these provisions in order to evaluate the three submissions relied upon by the Luxembourg institution.

8 Before commencing an examination of each of the questions raised, certain remarks of a general nature should be made.

9 In order to define the meaning and scope of Regulation No 3, it must be interpreted in the light of Articles 48 to 51 of the Treaty which constitute the basis, the framework and the bounds of the social security regulations.

10 Since those articles are intended to ensure freedom of movement for workers by conferring on them certain rights, to reduce the rights of workers without conferring upon them the compensating benefits prescribed in the regulations would be to depart from the purpose and framework of the said provisions.

11 In cases in which the regulations confer on workers social security benefits which they would otherwise be unable to obtain, limitations may be imposed on them corresponding to the advantages which they derive therefrom.

12 In the absence of such a counterbalance, such limitations cannot be justified since they would result in placing the worker in a situation less favourable than that which, were it not for the regulations, would follow from the application of national law.

The first question

13 The first question asks whether Regulation No 3 and more especially Article 12 according to which wage-earners employed in the territory of one Member State shall be subject to the legislation of that State may affect a provision of the internal legislation of a Member State providing that in case of successive alternative or cumulative affiliations to contributory pensions schemes, special increases in pensions because of the premature death of a person affiliated must be paid by the pensions institution to which the insured person was last affiliated, and, according to the circumstances, have the effect of freeing the institution thus designated at national level by national legislation, from its obligation to bear the relevant special increases.

14 More specifically it is asked what is the reply to be given when in a first State the right to the increase is acquired by virtue of national legislation alone, and without there being any need to have recourse to the so-called aggregation procedure, whilst in a second State in which there has been a subsequent affiliation, the right is acquired only through recourse to aggregation.

15 The purpose of Article 12 of Regulation No 3, according to which the worker is subject to the legislation of the State where he is employed, is to avoid any plurality or purposeless overlapping of contributions and liabilities which would result from the simultaneous or alternate application of several legislative systems and, moreover, preventing those concerned, in the absence of legislation applying to them, from remaining withourt protection in the matter of social security.

16 That provision, which is designed to settle conflicts of laws both positive and negative, which may arise in the field of the application of the regulation, does not authorize a national insurance institution either expressly or by implication to reduce the benefits which are due to a worker or those entitled under him under national legislation alone.

17 A provision of the legislation of a Member State providing that in case of successive, alternative or cumulative affiliations to contributory pension schemes of this same State a special increase on the ground of the premature death of a person affiliated to it must be paid by the pensions institution to which the insured person was last affiliated, can therefore govern only the relationships between the insurance institutions of that State.

The second and third questions

18 The second question asks whether Article 51 of the EEC Treaty and Articles 27 and 28 of Regulation No 3 prohibit a widow from benefiting simultaneously from the special increase, paid in a first State without aggregation of insurance periods, and from another benefit awarded in a second State after aggregation, the two allowances being payable over the same period.

19 The third question asks whether these Community provisions prohibit the widow who in the second State obtains an increased pension calculated by aggregation and apportionment from benefiting simultaneously in the first State from a special increase such as that specified above, without this latter increase being apportioned.

20 Article 51 of the Treaty and Article 27 of Regulation No 3 refer in essence to the case where the legislation of a Member State on its own does not entitle the person concerned to a benefit by reason of the insufficient time completed under this legislation.

21 To remedy this situation these rules provide, for the benefit of the worker who has been subject successively or alternately to the legislation of two or more Member States, for the aggregation of periods of insurance completed under the legislation of each of these States.

22 As regards old-age and death pensions, Articles 27 and 28 of Regulation No 3 apply to this situation, but not when in a State the object sought by Article 51 is attained under the national legislation alone.

23 The provisions referred to cannot therefore have the effect of depriving those entitled under a deceased insured person of a benefit to which they are entitled by virtue of the provisions of the applicable national legislation alone.

24 It was claimed in the course of the proceedings that the Luxembourg insurance institution could avoid paying the special increase because a duplication of insurance periods was involved.

25 Although, however, it follows from Article 27 that insurance periods completed under the legislation of two or more Member States are not aggregated to the extent to which the periods are duplicated, there is no duplication of periods within the meaning of that article if a special increase provided for by the law of one of the States for the benefit of the survivors of an insured person is awarded or calculated, not in relation to an insurance period, whether actual or fictitious, but for the duration of a certain period which bears no direct relation to the insurance period completed by the deceased.

26 It is the same as regards Community law in a case where a Member State, as it is entitled to do even if a right to benefit arises without recourse to the procedure of aggregation, takes measures under its own legislation in order to avoid unjustified cumulation resulting from the overlapping of insurance periods.

27 If this interpretation is capable of leading in certain cases other than that of a duplication of insurance periods, to an accumulation of pensions, this consequence follows not from the interpretation of Community law but from the system at present in force, which, in the absence of a common social security scheme, rests on a simple coordination of national legislations which have not yet been harmonized.

28 It follows from Article 11 of Regulation No 3 that the national legislations could deal with this situation if it is a question of benefits acquired outside the application of Articles 27 and 28 of this regulation.

29 Therefore the three questions raised should be answered to the effect that Article 51 of the EEC Treaty and Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, especially

Articles 12, 27 and 28 must be interpreted as meaning that they do not authorize a national insurance institution to reduce the benefits which are due to a worker or those entitled under him by virtue of national legislation alone and without recourse to the procedure of aggregation.

Costs

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

31 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour supérieure de justice du Luxembourg, sitting as a cour de cassation, by judgment of 15 May 1975, hereby rules:

Article 51 of the EEC Treaty and Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, especially Articles 12, 27 and 28, must be interpreted as meaning that they do not authorize a national insurance institution to reduce the benefits which are due to a worker or to those entitled under him by virtue of national legislation alone and without recourse to the procedure of aggregation.

Lecourt Kutscher Donner

Mertens de Wilmars Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 25 November 1975.

A. Van Houtte
Registrar

R. Lecourt
President