Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Court of Appeal, Paris, by order of that court dated 3 May 1973, hereby rules:

The application by analogy of Articles 27 and 28 of Regulation No 3 to the cases referred to by Article 26 (1) implies that apportionment of benefits may only take place if it has been necessary, in order to give rise to entitlement, to aggregate beforehand the periods completed under different legislations.

Lecourt Sørensen Monaco

Mertens de Wilmars Pescatore Kutscher Ó Dálaigh

Delivered in open court in Luxembourg on 6 December 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 21 NOVEMBER 1973[1]

Mr President,
Members of the Court,

The question of interpretation of Articles 27 and 28 of Regulation No 3, referred to us by the Court of Appeal of Paris, concerns the extent to which the guide-lines and principles laid down by this Court for the calculation of old-age pensions are applicable to invalidity pensions.

Although our practice when giving preliminary rulings requires us to concentrate attention on questions of

1 — Translated from the Italian.

law rather than the particular features of any given case, on this occasion, in order to form a clear picture of the problem, I regard it as necessary to dwell a little on the facts.

Mrs Mancuso had, with effect from 25 November 1955, been granted a group 2 invalidity pension in France. This is the pension provided under French legislation for workers whose state of health renders them unfit for work. From the file sent to us by the national court, it appears that subsequently, from 1957 to 1964, Mrs Mancuso was working in Italy as an employed person. On account of this development she was granted, with effect from 1 May 1964, a new invalidity pension under Italian legislation, first as a separate entitlement and then, according to evidence given before the French court, on a *pro rata* basis. The French social security organization concerned testified before the national court that the Italian pension had been granted on precisely the same ground of invalidity as that on which the lady was already in receipt of the separate French pension. This statement was unreservedly endorsed by the Public Minister in the opinion he submitted before the Paris Court of Appeal.

It is, as I said, important to bear these circumstances in mind because they help us to appreciate the true significance of the problem which the national court has to solve. The problem before this Court today is to determine whether, faced with a case of overlapping invalidity benefits in respect of substantially the same personal situation in which the worker concerned finds himself, the national authorities can make use of the rules on aggregation and apportionment in order to avoid 'double liability' for a single contingency of invalidity with consequential duplication of benefits, special regard being paid to the need to distribute responsibility for the insurance benefits amongst the various social security agencies. Leaving aside for the present the case of a subsequent invalidity pension being granted in respect of a subsequent aggravation of a previous incapacity for work, as this deserves separate consideration, let us study the question mainly in relation to insurance schemes under which benefits are as a rule calculated without reference to the length of the periods completed; this means legislations of type A within the meaning of Article 24 (1) (a) of Regulation No 3, which in fact includes the French insurance scheme whose application is the subject of the proceedings pending before the court which referred the question of interpretation to us. As is clear from Annex F to Regulation No 3, the Italian insurance scheme on the basis of which the lady obtained a second invalidity pension is, however, of type B within the meaning of Article 24 (1) (b) of the Regulation, in that case, the invalidity benefits are, as a rule, calculated on the basis of the length of the periods completed.

To complete, in its essentials, the picture of the factual position, it must be noted that, on the basis of the insurance periods completed by the lady concerned in, respectively, France and Italy, the French insurance institution recalculated the pension due on a *pro rata* basis; this amounted to 3 878 French francs per annum, and it was reduced accordingly to 2 645 French francs, inclusive of the supplement provided for under Article 28 (3) of Regulation No 3 and granted in order to prevent the total benefits paid to the insured as a result of applying Article 28 from being lower than the total benefits to which he would have been entitled in France if there had been no *pro rata* recalculation.

For cases where the various national legislations on the basis of which the worker has completed insurance periods are not all of type A, Article 26 (1) of Regulation No 3 lays down that the provisions of Articles 27 and 28 are applicable by analogy.

According to the precedents established

by this Court in regard to old-age pensions, the apportionment of a benefit is possible only if aggregation of insurance periods completed by the worker in various Member States is an essential condition of entitlement to a pension in the State concerned (see Judgment in Case 1/67, Ciechelski, Rec. 1967, p. 219; Judgments in Case 2/67, De Moor, Rec. 1967, p. 243; Judgement in Case 27/71, Keller, Rec. 1971 p. 809). When, on the other hand, application of Article 27 of Regulation No 3 is not an essential condition of entitlement, it would be contrary to the spirit of Article 51 of the Treaty to apply Article 28 of the Regulation. But this does not affect the case where separate and simultaneous application of different national schemes leads to an overlapping of benefits in respect of the same period; when that is the position, the Court has recognized the right of the national authority to deduct the periods actually completed in one Member State from the national insurance periods with which the insured has been credited in another (see Judgment in Case 12/67, Guissart, Rec. 1967 p. 512).

It now remains to establish whether, and if so how, these rules are also to be applied to invalidity pensions. The respondent in the case pending before the Paris Court of Appeal, the French insurance institution, maintains that the principle of apportionment can apply in the case of invalidity pensions even if it is not necessary to make use of Article 27 to create an entitlement; this is on account of what it regards as fundamental differences between the certainty of old age and the risk of invalidity which are reflected in the qualifications for the two types of pension. Acquisition of the right to an invalidity pension is usually conditional upon a comparatively short period of affiliation (in France barely a year), with the result that extension of the abovementioned restrictive rule, recognized by the Court in relation to old-age pensions, to invalidity pensions, could in many cases produce an unwarranted overlapping of benefits.

While noting that straightforward addition to a type B pension of a total invalidity pension under a Type A legislation can lead to an over-generous duplication of benefit, in some cases even in excess of the salary to which the worker was entitled before the risk materialized, the Commission nevertheless maintains that the principles embodied in previous decisions of this Court must preclude apportionment of the invalidity pension in cases where, to create an entitlement, it is not necessary to have recourse to aggregation in accordance with Article 27.

The Italian Government, intervening in the preliminary proceedings, rejects the contention that there are differences between the invalidity and the old-age pension such as to justify different treatment under Community law. Taking its stand on the abovementioned provisions in Article 26 (1) concerning the application by analogy of the old-age pension rules to invalidity pensions and on the relevant precedents in this Court, it reaches the same conclusion as the Commission.

I am unable to follow the argument of these two interveners.

We have seen that, in connexion with old-age benefits, the exception created by the Court to the aggregation rule in the case of separately acquired rights to benefit is concerned solely with the case where there is an overlap between notional insurance periods credited to the worker under a national legislation and insurance periods actually completed by him in another State.

Unlike the normal situation as regards old-age benefit, the level of invalidity pension of the type with which we are now concerned is really determined on the basis not on the length of affiliation to the insurance scheme but of the degree of the worker's invalidity considered in relation to his future earning capacity.

Against this background, therefore, the principle laid down for old-age pensions, prohibiting overlap of benefits resulting from a coincidence of insurance periods on which, when aggregated, the amount of pension is based, is not, technically speaking, applicable to an overlap of invalidity pensions of the type with which we are concerned. Account must however be taken of the *purpose* behind the reservation, which creates an exception to the special machinery designed to suit the normal pattern of old-age benefits, in view of which the reservation itself was defined. The object of this reservation is to avoid an overlap of benefits arising from one and the same insurance situation which, under the normal methods used in calculating old-age pensions, has been identified with the length of the period of insurance. The need to avoid overlap of benefits in respect of one and the same situation so far as the insured worker is concerned is even greater in regard to invalidity pensions, at least in the context of type A legislation, because the state of invalidity, on the basis of which the benefit is calculated is, unlike the insurance periods for old-age pension, in its nature one and indivisible. As, therefore, the decisive factor in determining the amount of benefit is not the period of insurance but the degree of incapacity for work, it is not possible to identify any overlap of benefit without taking this element into account. The social legislation of the Community is not intended to enable migrant workers to collect, in the various Member States, full invalidity pensions for one and the same incapacity for work. If this happened it would undoubtedly encourage a movement of workers but this is not in the spirit of the principle of free movement. The Community legislators were trying to remove obstacles which, even in the social field, militated against the movement of labour but they cannot possibly have intended to put a premium on the movement of invalid workers from place to place by rewarding it in the form of more than one pension for one and the same contingency.

As was expressly stated in the judgment cited (case 2/67, De Moor) the Court did not regard the overlap of old-age pensions as unjustified when they were related to different periods of time, because, under the schemes involved, entitlement to a pension was made dependent on fulfilling 'a considerable minimum period of insurance'. This condition does not apply to acquisition of the right to an invalidity pension.

This Court has found it possible to allow a fair measure of overlap between old-age pension benefits because it had authority to do this under a general rule in Regulation No 3 which is highly relevant in the present case; I refer to Article 11 (1) which is concerned with precisely this type of benefit and expressly provides for an exception to the general principle therein laid down, under which 'the provisions of this Regulation shall not confer *or maintain* entitlement, under the legislation of the Member States, *to more than one benefit of the same kind,* or more than one benefit in respect of one insurance period or assimilated period'.

On the subject of invalidity insurance, however, this rule, whose importance in making the scheme clear deserves attention, gives a worker the right to more than one benefit under national legislations only if they result in *shared liability* between the insurance institutions of the Member States concerned (Article 11, introductory phrase).

And, so far as Community law is concerned, we can also stop here, with the application of Article 11, which before making any reference to the idea of apportionment, in principle rules out double liability.

The difference in the treatment of old-age and invalidity pensions embodied in Community legislation reflects the difference in their nature.

While, generally speaking, the old-age pension, at least as regards one of its elements, represents a *quid pro quo* for a

working life lasting for a comparatively long time (indeed qualification for benefit is usually dependent on a period of some length), the invalidity pension is designed to compensate for the loss of the insured's normal earning capacity occurring, for reasons other than an industrial accident, before retirement age. While the old-age pension is fixed 'once and for all' because it is tied exclusively to a completed period of work, this does not apply to the invalidity pension, which is subject to revision at any time in accordance with changes for the better or for the worse in the actual earning capacity of the insured, to which benefit is tied.

Even under schemes in which the amount of pension is related to the period of insurance, invalidity benefit can never constitute a *quid pro quo* for work performed but only a form of compensatory payment for loss of capacity. For this reason the qualifying period for benefits is normally a short one.

While there is no objection, therefore, to overlap of more than one old-age pension based on separate insurance payments, because each of them is a recognition of work performed by the insured at various times during his life, there could be no justification for a straightforward overlap of invalidity benefits associated with one and the same situation in the insured's circumstances when at least one of the benefits is granted under Type A legislation. In fact, when, to a full invalidity pension, granted unconditionally under this type of legislation, are added benefits of the same kind associated with the same set of circumstances as those which gave rise to the first pension, there is no 'sharing' of liability within the meaning of Article 11. There is, however, a duplication of liability. Because the invalidity position is the same in each case, this creates an overlap of a kind which would occur in the case of old-age pensions if the amount of pension were calculated on a basis which took account of notional insurance periods covering the same period of time as that during which the insured actually completed periods of insurance in another Member State and, thereby, with or without the help of Article 27, acquired the right to other benefits of the same kind.

Accordingly, on the subject of invalidity, Article 11 recognizes plurality of benefits on the basis of liability being shared between the national institutions concerned; this can be carried out on the basis of the rules contained in Article 28, and, of course, in conformity with the prohibition, laid down for the worker's benefit in paragraph 3, of any recalculation which would place him in a less favourable position and to which the second question of the French court refers.

The conclusion I am suggesting can be reached by another line of reasoning. Given the clearly compensatory character of the benefits provided for invalidity under all workers' social security schemes, it follows that the legal, not to mention simple, logic of *'ne bis in idem'* presents us with two possible solutions in a situation in which the contingency giving rise to compensation is the same and, therefore, the only contingency. There must be an exclusion of *either:*

(a) The benefit from the first social security institution, in our case, the French one, because it is shown that there was no loss of earning capacity on which the insurance benefit was based and whose absence is a condition precedent for maintaining benefit; *or*

(b) The benefit from the second organization, in our case the Italian because the risk has already been completely compensated for, as invalidity occurred earlier when the worker was subject to a Type A insurance scheme in another Member State.

The alternative, which could consist in applying the separate national rights to benefit, each invoked independently of the other, would in this way work to the substantial disadvantage, and certainly not to the advantage, of the migrant worker. I repeat, this would only be applying the plain commonsense principle, *'ne bis in idem'*, which one or other of the insurance institutions is at liberty to invoke; it would thus be possible for the worker to suffer loss because, as the result of the principle, in theory applicable on the basis of the national law alone, that benefits should not be granted in excess of those due, he could lose the benefit of greater value.

On the other hand, the solution provided by Community law, which treats periods of work completed in the various countries as a single period, operates fairly for the worker by guaranteeing him an entitlement at least equal to the benefit most advantageous for him (Article 28 (3) of Regulation No 3) but not a straightforward overlap of benefits related to one and the same invalidity.

Against these two mutally exclusive alternatives, which for the reasons stated presuppose more effective coordination of national insurance schemes, Article 11 of Regulation No 3 provides Community law with an answer which lies somewhere between the two. As this Regulation tends to treat the position of the worker in relation to the various States and social security legislations as an integral one, steps are taken to share the liability for invalidity benefits between the various institutions concerned; this involves the principle of apportionment which constitutes the basis of the *pro rata* formula contained in Article 28. This process is carried out not after aggregation, which in the present case is unnecessary, but applying the same principle by analogy, in this case not in terms of affiliation periods but of periods of work completed in one of the States, i.e. under the scheme of one or other of the social security institutions.

Given that there is to be only one compensatory benefit for a single loss of earning capacity, and given that, in accordance with established principles, this benefit must be calculated on the most favourable basis for the migrant worker who has acquired the relevant entitlement in various countries, reinforced by the safeguard afforded him by the provision of Article 28 (3) already mentioned, the problem presented by the absence from the Community rules of a provision for an exclusive system in the sense indicated above, takes on different dimensions and boils down to establishing a fair division of liability between the various institutions in the various countries in which the worker has earned his, living, rather than finding the solution of greatest advantage to him.

The new system embodied in Regulation No 1408/71 is also clearly based on the principle of preventing double discharge of a single obligation in the field of invalidity benefit. Though Article 12 of that Regulation, which corresponds to Article 11 of Regulation No 3, lays down an exception to the prohibition against overlapping old-age and invalidity benefits without differentiating between them, the relevant rules relating to workers subject to legislation under which invalidity benefits have not been tied to the length of the insurance period expressly exclude all possibility of overlap. Indeed Article 39 (2) provides that the worker shall obtain the benefits *exclusively* from the institution of the Member State whose legislation is applicable at the time when incapacity for work followed by invalidity *occurred,* in accordance with the legislation which it administers. A worker may receive invalidity benefit in accordance with the legislation of another Member State only when he is not entitled to benefit under the legislation of the State in which invalidity occurred (Article 39 (3)).

It is true that, in cases where the worker has been subject successively or alternatively to Type A and Type B legislation, Article 40 of Regulation No 1408/71, like Article 26 of Regulation No 3, does no more than provide that the provisions on old-age pensions shall apply 'by analogy'.

This reopens the question that we tried to answer in the context of Regulation No 3. But, even under the new Regulation, to which I turn solely for help in understanding the rules subsisting previously, overlapping pensions are prohibited in cases where the worker has been subject exclusively to Type A legislations. Consequently, a straightforward overlap of different pensions, even full ones, as opposed to a fair 'division' within the meaning I have given to apportionment, simply because he has been subject not only to Type A legislations — which, let us not forget, could (and not only in theory) be two or more — but also to a Type B legislation, would be a logical contradiction. It is far from clear why the fact that the worker has been subject also to Type B legislation, in itself less favourable to him, should have such a magical effect!

It therefore seems to me to be in accordance with the spirit of these new Community rules to disallow, *in respect of one and the same state of incapacity* for work, a straightforward overlap of an invaldity pension of the type with which we are concerned (type A) and other invalidity pensions, even if not of this type.

For these reasons, I submit that the Court should answer the question from the Court of Appeal in Paris by ruling that, in the application of Regulation No 3 of the Council concerning social security for migrant workers, whenever a worker is entitled under different national legislations to more than one invalidity pension for precisely the same contingency, the institutions administering the type A legislation referred to in Article 24 (1) (a) of Regulation No 3 may calculate the obligation incumbent upon them by applying *by analogy* and on the basis of the length of working life completed by the insured in their respective territories, the principles laid down in Article 28, paragraph 3 included, even if there is no need to take advantage of Article 27 in order to qualify for entitlement.