

OPINION OF MR ADVOCATE-GENERAL LAGRANGE
 DELIVERED ON 4 JUNE 1964¹

*Mr President,
 Members of the Court,*

Once again the Centrale Raad van Beroep (Central Court of Appeal) has brought a request before you under Article 177 of the EEC Treaty for the interpretation of certain provisions of Regulation No 3 concerning social security for migrant workers. The main point at issue is Article 28 of the Regulation, concerning the so-called 'proportional calculation' of insurance periods completed by wage-earners in several countries of the Community, in this case the Netherlands and Federal Germany.

The facts are that in the ten cases brought before the Centrale Raad the persons concerned had worked successively in those two countries. Thus, when they died, their widows could claim benefits both under the Nederlandse Algemene Weduwen- en Wezenwet (AWW) (Dutch General Widows' and Orphans' Insurance Law), which you are well acquainted with, and under the German legislation on the granting of benefits to survivors. Applying Articles 27 and 28 of the Regulation, the German authorities granted these widows such a portion of the pension calculated in relation to the total of the periods of affiliation in the two countries as corresponded to the length of their affiliation to the German scheme. The Netherlands authorities in turn did exactly the same in order to calculate the proportion of the pension to be paid under the AWW.

The widows contested both these decisions before the courts and at first instance the majority of them were successful, as it was held that Article 28 did not apply to an insurance scheme such as the AWW, being a scheme, based

on risk, providing a set amount of benefit irrespective of the duration of the insurance. Therefore 'insurance periods' are not involved. Accordingly these courts restored the total amount of pension payable under the AWW, namely 1512 florins.

On appeal the Centrale Raad van Beroep, or, to be more precise, the acting president, as is the normal procedure, puts the following questions to you:

First Question: Does the term 'legislation' appearing in Article 1 (b), Article 2 (1) (d) and Article 3 of Regulation No 3 include the general law on pensions for widows and orphans (AWW) although this Law was not passed until after the entry into force of the Regulation and was not the subject of a notification under Article 3 (2)?

To this question the answer can only be yes. It is given by the text of the Regulation itself; Article 1 (b) provides as follows:

'the term "legislation" shall mean all laws, regulations and other enforceable provisions (*dispositions statutaires*) present and future of each Member State relating to the social security schemes and branches of social security set out in Article 2 (1) and (2) of this Regulation.'

As for Article 2, to which we are thus referred, it is as follows:

'This Regulation shall apply to all legislation governing — . . .

(d) survivors' benefits other than those paid in respect of industrial accidents or occupational diseases;

. . .'

The words 'present and future' themselves sweep away the objection that as between the Regulation and the AWW

¹—Translated from the French.

the Regulation is prior in time. As for the absence of notification of the AWW by the Netherlands Government, this does not in my opinion constitute an infringement of Article 3 (2) of the Regulation. In fact, like paragraph (1) of this same Article, paragraph (2) envisages *legislation* in general, not particular laws. Annex B (page 585 of the Official Journal, French edition) mentions, for the Netherlands, 'legislation respecting . . . insurance against premature death, including increases', which clearly includes a law like the AWW. Furthermore, this is expressly mentioned in Appendix G to the Regulation, as amended, with retroactive effect to 1 January 1959, by Article 7 of Regulation No 130 of 18 December 1963 (Official Journal of 28 December 1963, p. 2999). Therefore it is not necessary to take up a position on the legally delicate question of the effects of a possible infringement of the obligations imposed on the Member States by Article 3 (2).

Second question: If the answer to the first question is in the affirmative (as it is in my opinion), are the provisions of Article 28 (1) (b) of the Regulation relating to 'proportional calculation applicable for the payment of a widow's pension granted under the AWW?' The question arises because this Law does not make the amount of the pension depend on the length of the insurance period, which means that one cannot look to the provisions of Article 27 (1) since it deals with 'the aggregation of insurance periods' with a view to 'the acquisition, maintenance or recovery of the right to benefit' as mentioned therein.

This question is, in itself, very delicate and one can understand how it has caused the courts of first instance to hand down opposing decisions. It certainly appears in fact, that Articles 27 and 28, when looked at in isolation, are interdependent and that the machinery for apportionment provided in Article

28 must be applied only when there are two systems, *both* of which make the right to a pension, and its amount, dependent on the duration of the period of service. Doubtless, as the Commission observes, Article 28 (1) applies to the 'insured person covered by Article 27 of this Regulation', that is, in the very words of this latter Article, to the insured person who 'has been successively or alternately subject to the legislation of two or more Member States', without a distinction being made between legislation which is based solely on risk and that which takes account of the duration of the period of service, and consequently without its being necessary for the aggregation provided in Article 27 to have had to play a part as regards each legislative system. In other words, in the express terms of Article 28 there is reference to Article 27 only for the purposes of determining the insured person concerned (the insured person covered by Article 27).

But the subsequent part of Article 28 (1), and especially subparagraph (a), shows that the system of apportionment *pro rata temporis*, provided for by the text, can only apply where *both* legislative systems are based on the length of the period of service and, therefore, for the application of both aggregation has some meaning. Here, in fact, is how subparagraph (a) expresses it:

'The institution of each of the Member States shall, in accordance with its own legislation, determine whether the person concerned satisfies the conditions for entitlement to the benefits prescribed in that legislation taking into account the aggregation of periods, as set out in the preceding Article.'

One could doubtless imagine interpreting the final phrase, 'taking into account the aggregation of periods, as set out in the preceding Article', as meaning: 'taking this aggregation into account, *where appropriate* . . .', that is to say that there would be no need to take it into

account when the legislative system in question does not require it. But such an interpretation would result in Article 28 being rendered quite inoperative in such a case. In fact, it is not only a question, as the Commission's representative said during the oral procedure, of dividing the financial burden but of *establishing the right* to a pension; in the express words of Article 28 (1) (b), it is only *'where the right is acquired by virtue of subparagraph (a) above'* that the machinery for dividing the financial burden is brought into play. Subparagraph (a) is no less categorical: the right does not arise unless the conditions laid down by the national legislation for entitlement to the benefits prescribed in that legislation are satisfied.

One of two things follows in the case of the AWW: either the right to a pension is established by virtue of the Law, that is to say, when the worker resides in the Netherlands at the moment of his death, in which case he has the right to the whole of the pension, as was decided by the majority of the courts of first instance in the present disputes; or the right is not established ('acquired' in the words of Article 28) because he was no longer residing in the Netherlands at his death, in which case there is no longer any 'proportional calculation' for the simple reason that there is no longer any right to a pension under any legislation. That, and the Commission has no difficulty in emphasizing it, is a deplorable result since it leads according to circumstances either to arbitrarily increasing the total amount of the benefit or to no less arbitrarily reducing that amount; it is easy to imagine extreme cases (for example that of the wage-earner who has worked for many years in the Netherlands and only for a very brief time in another country of the Community where he dies after establishing his residence there) in which the solution would be profoundly unjust. It is, however, to such a solution that the wording of Articles 27 and 28 seems

inevitably to lead.

For it to be otherwise, it is necessary to apply the AWW *as if* it involved a system based on the duration of the period of service and to do so as regards the establishment of the right as well as for the *pro rata* apportionment. This is a problem of coordination which figured pre-eminently in the task entrusted to the Council in Article 51 of the Treaty and which was only imperfectly resolved by Regulation No 3.

However, as you know, it seems that today the problem can be regarded as solved by the adoption of Regulation No 130/63, Article 7 of which amends Annex G to Regulation No 3 in its Part III concerning the application of Netherlands legislation. I say 'it seems' because this amendment is only indirect and does not, as would have been preferable by far, bear on Articles 27 and 28 themselves. Here is the text:

'In applying Articles 27 and 28 of the Regulation, the Netherlands authorities shall take account of the following provisions:

.....

- (b) In determining the amount of benefit payable by virtue of the Netherlands legislation on general insurance in favour of widows and orphans there shall be assimilated as completed insurance periods for the purposes of that legislation the completed periods during which, prior to 1 October 1959, contributions were made or premiums were paid in accordance with the Netherlands legislation on insurance relating to invalidity, old age, and survivors (or wage-earners).'

Article 7 (2) adds that the amendments thus made to Annex G 'shall come into effect on 1 January 1959'.

Thus this new text does not declare expressly that, in the case of the application of Articles 27 and 28, the right to a pension under the AWW is capable of arising even when the person con-

cerned was not affiliated to that insurance system at the moment of his death because he no longer resided in the Netherlands. However, the text brings out in the clearest manner the fact that the AWW is treated as a system involving the 'completion of insurance periods' and thereby subject to the application of Articles 27 and 28.

It is no longer conceivable in these circumstances that the right to benefit should be determined by a condition other than that of *having been* affiliated to that scheme at some time, without its necessarily being at the date when the risk materialized, that is, the date of death. Perhaps one could say that an interpretation of Article 28 contrary to its wording is henceforth enjoined by the *combination* of that Article with the new text of Appendix G which, legally, has the same value as the Regulation itself. Or one might perhaps say (and this is the argument of the Commission) that the new text of Appendix G *confirms* an interpretation of Articles 27 and 28 which is already defensible in itself. For my part I think that Articles 27 and 28 are very clear and only involve schemes where the duration of the period of service is taken into account, but that, with a view to coordination, Annex G (as amended) brings the AWW into the fold of such systems in such a way as to bring it within the scheme of Articles 27 and 28. The coordination is thus correctly carried out but only with regard to the Netherlands legislation and not on a general level.

As for the retroactive effect, this is expressly carried back to 1 January 1959, which is sufficient in view of the time of entry into force of the AWW (in principle 1 October 1959) and in view of the amendments to Annex G concerning the taking into account of previous periods completed under other systems.

It is true that in its brief observations the Council (I quote) 'thinks that it should draw attention to the fact that, in putting

this provision (retroactive effect to 1 January 1959) into Article 7 (of Regulation No 130) the Council did not intend to intervene in the disputes which are at present being considered in Case 100/63 (the one before you), which concerns the rights of the persons concerned accrued before the entry into force of Regulation No 130/63'.

The Council is here doubtless alluding to a problem of *acquired rights*, but that is a question on which you do not have to give a decision. It is certain that if, for example, definitive pensions had been granted before the publication of Regulation No 130/63 on the basis of the AWW, without reduction under Article 28, the question of acquired rights might arise. But such is not the case because the competent authorities have, on the contrary, carried out this reduction and the judgments in favour of certain of the persons concerned have been brought to appeal. Another hypothetical question is whether the new rule, whose effect only goes back to 1 January 1959, would apply if the date when the right to benefit was established, that is, the date of death, were prior to 1 January 1959. It is true that at that time the AWW was not yet in force, but, as you are well aware, other insurance schemes were, which were replaced by the AWW. But once again these problems of acquired rights are not submitted to you and it is for the national courts to resolve them if and when they arise.

Third Question: When there is a widow's pension granted under the AWW, can the insurance periods completed under the Netherlands legislation on invalidity insurance be considered as insurance periods for the application of Article 28 (1) (b) of the Regulation?

I think that as things were before the changes made by Regulation No 130, and for the reasons which I have stated when dealing with the second question, the answer would have been in the negative. Now that Regulation No 130

has come into force the answer can only be a positive one. Article 7 (1) (b) of this Regulation, which I read out to you a few moments ago, is precisely and directly aimed at deciding that 'the completed periods during which, prior to 1 October 1959, contributions were made or premiums were paid in accordance with the Netherlands legislation on insurance relating to invalidity, old age and survivors' shall be taken into account 'in determining the amount of benefit payable by virtue of the Netherlands legislation on general insurance in favour of widows and orphans'. So I advise that your reply to the Centrale Raad van Beroep should go so far as to say that, in accordance with the express wording of this text (which as you know applies with retroactive effect from 1 January 1959 and therefore covers the whole period of validity of the AWW since the latter came into force on 1 October 1959) the periods with which it deals not only *may* but *must* be taken into account.

The Commission has explained to you

— and its reasoning seems relevant here — that the application of Regulation No 130 combined with that of Article 28 usually works to the advantage of the person concerned and can never be less favourable than if these provisions were not applied. In any event they must be applied because this is what the text says.

Fourth Question: Does Article 28 (1) (g) of the Regulation, which is concerned with 'benefits already paid' relate solely to benefits already paid on 1 January 1959, the date when the Regulation entered into force?

I do not wish to take you through a word by word reading of the texts yet again. But these give the answer in themselves. It is clear that subparagraphs (e) and (f) of Article 28 (1), to which subparagraph (g) refers, are of permanent application and that the review provided for in subparagraph (g) should be made, when necessary, whatever the date on which the benefits have been paid.

In conclusion I would advise that the following replies be given to the questions put by the Centrale Raad van Beroep:

First question:

The term 'legislation' appearing in Article 1 (b), Article 2 (1) (d) and Article 3 of Regulation No 3 includes the Netherlands law on general insurance in favour of widows and orphans.

Second question:

The provisions of Article 28 (1) (b) of the Regulation are, by virtue of Article 7 of Regulation No 130, applicable to the payment of the widows' pensions granted under the heading of general insurance in favour of widows and orphans.

Third question:

The periods of insurance completed by virtue of the Netherlands law on insurance relating to invalidity, old age and survivors should be considered, in compliance with Article 7 of Regulation No 3, as periods of insurance for the application of Article 28 (1) (b) of Regulation No 3 to the payment of

widows' pensions granted under the heading of general insurance in favour of widows and orphans.

Fourth question:

The provisions of Article 28 (1) (g) of Regulation No 3 are of permanent application.

I am also of the opinion that the decision as to the costs of these proceedings should be a matter for the Centrale Raad van Beroep.