JUDGMENT OF THE COURT
13 DECEMBER 1967[1]

Jules Guissart
v Belgian State
(Reference for a preliminary ruling by the Belgian Conseil d'État)

Case 12/67

Summary

1. *Free movement of persons — Migrant workers — Old age and death (pensions) insurance — Calculation of benefits — Application of the system provided for by Articles 27 and 28 of Regulation No 3 — The beneficiary's objective situation to be considered*

2. *Free movement of persons — Migrant workers — Old age and death (pensions) insurance — System based on insurance periods — Amount of retirement pension varying solely according to insurance periods completed — Right to a pension acquired by a claimant without aggregation of completed periods — Articles 27 and 28 of Regulation No 3 not applicable*

3. *Free movement of persons — Migrant workers — Old age and death (pensions) insurance — Right to a pension acquired by a claimant without aggregation of completed periods — Accumulation of benefits as a result of overlapping of insurance periods actually completed in one State with notional periods in another State — Possibility for that second State to deduct notional periods from periods actually completed — Exclusive competence of the national authority*

1. Cf. paragraph 1, summary, Case 11/67.

2. Cf. paragraph 2, summary, Case 11/67.

3. When a migrant worker acquires a right to a pension without aggregation of the periods completed and when benefits in respect of insurance periods actually completed in one State are payable in relation to one single period at the same time as benefits in respect of notional periods in another Member State, it must be permissible for a State whose legislation provides for notional periods in favour of the insured person to deduct from such periods the periods actually completed in another Member State, without its being possible to consider this procedure as contrary to Article 51 of the Treaty. However, it is for the national authority to which the social security institution is responsible and not the Community authority to decide on this on the basis of its own legislation.

In Case 12/67

Reference to the Court under Article 177 of the EEC Treaty by the Belgian

1 — Language of the Case: French

Conseil d'État for a preliminary ruling in the action pending before that court between

JULES GUISSART,

plaintiff,

and

BELGIAN STATE, represented by the Ministre de la Prévoyance Sociale (Minister for Social Security) (Caisse Nationale des Pensions pour Employés),

defendant,

on the interpretation of Article 28 of Regulation No 3 of the Council of the EEC, concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.),

THE COURT

composed of: R. Lecourt, President, A. M. Donner, President of Chamber, A. Trabucchi, R. Monaco and J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Mr Jules Guissart, who was born on 15 June 1896, was employed in Luxembourg and Belgium where he completed the following periods:

in *Luxembourg*:

from 1.6.31 to 30.9.40	112 months
from 1.10.40 to 31.12.43	39 months
from 1.1.44 to 30.9.44	9 months
from 1.10.44 to 31.12.44	3 months
from 1.1.45 to 31.5.49	53 months

that is, 216 months or 18 years of insurance;

in *Belgium*:

from 1.6.49 to 31.12.49	7 months
from 1.1.50 to 31.12.60	11 years
from 1.1.61 to 30.6.61	6 months

that is, 145 months or 12 years and one month of insurance.

Mr Guissart thus completed a total of 361 insurance months, or 30 years and one month.

On 1 July 1961, having attained the age

of 65 years, he gave up his employment and submitted an application for a pension to the institution of his place of permanent residence which was situated in Belgium.

The Belgian Conseil d'État states that this application led to the payment of a pension in Luxembourg calculated *pro rata* at 76 416 BF, an amount which was less than the sum of 84 240 BF which he would have been able to claim, without the application of Regulation No 3, in respect of the 216 months completed under the Luxembourg legislation.

The Commission of the European Communities states that these two sums amount to 55 994.34 BF and 63 326.72 BF respectively.

The effect of this *pro rata* calculation was to reduce the amount of the Luxembourg pension, since the pension includes a fixed sum of 15 000 BF which is not proportional to the length of insurance.

Following this application of 1 July 1961, the Belgian Ministre de la Prévoyance Sociale (the Minister for Social Security) in pursuance of Article 28 (1) (b) of Regulation No 3 granted Mr Guissart a proportion of his pension payable under Belgian legislation corresponding to 11/28ths of the pension for accounting purposes of 49 200 BF, which he would have obtained if he had spent all his working life in Belgium, that is, *19 329 BF* per annum at 1 July 1961.

In order to arrive at the figure of 11 years in Belgium and at a total of 28 years this decision intentionally omitted to take into account

— the seven insurance months completed in 1949 and the six months completed in 1961 under Belgian legislation;
— the seven months completed in 1931 and the five months completed in 1949 under Luxembourg legislation.

This calculation was based on Article 6 (1) of the Royal Decree of 30 July 1957 issuing a general regulation concerning the system governing retirement pensions and the rights of the survivors of employees, according to which insurance periods of less than 200 days or eight months per annum are not taken into consideration, periods of 200 days or more, on the other hand, counting as a complete year.

Mr Guissart referred the decision of the Ministre de la Prévoyance Sociale to the Commission d'Appel Spéciale, with the request not that all the actual insurance months be taken into account, but that the Belgian pension be calculated on the proportion of $\frac{27}{45}$.

He based his claim on Article 11 (1) of the Law of 12 July 1957 and Article 10 of the above-mentioned Royal Decree of 30 July 1957—according to which employees who attain the age at which they acquire a right to a pension before 31 December 1961 and who can show evidence of 12 years of insurance during the 15 years preceding the first payment of the pension are deemed to have completed the full insurance period of 45 years—in order to maintain that the denominator of the *pro rata* fraction ought therefore to be 45 and the numerator 45 minus 18 (the insurance periods spent in Luxembourg), namely 27.

Still taking 1 July 1961 as the reference date, Mr Guissart would have been entitled, according to the calculation, to $\frac{27}{45}$ths of 49 200 BF, namely *29 520 BF* per annum.

However, the Commission d'Appel confirmed the administrative decision.

Without acceding to Mr Guissart's request the Commission Supérieure des Pensions annulled the decision of the Commission d'Appel by a decision of 20 March 1964 and awarded him a proportion of the pension calculated, not on the basis of the insurance years valid under Belgian law, but on the basis of all the insurance months completed,

which therefore amounted to $\frac{145}{361}$ sts of 49 200 BF, namely *19 760 BF* per annum at 1 July 1961.

Mr Guissart appealed against the decision of the Commission Supérieure des Pensions to the Belgian Conseil d'État, which referred the following four questions to the Court by judgment of 24 March 1967.

First question

Does a worker who has completed successively or alternately insurance periods under the legislation of two or more Member States and who does not have to aggregate these periods in order to acquire the right to benefit in any of these Member States have the right to elect either the method of calculation provided by Article 28 of Regulation No 3 or the method of calculation resulting from the application of the legislation under which he has completed the insurance periods or does the fact that the method of calculation provided by Article 28 of Regulation No 3 may be applicable to him exclude the application of the legislative systems under which he has completed his insurance periods?

Second question

If the worker has the option which is the subject matter of the first question and, having regard to the fact that Regulations Nos 3 and 4 do not lay down rules for the exercise of this option, how must a pension application made to the competent social insurance institution of one only of the Member States and based on the insurance periods completed under the legislative systems of two or more Member States be interpreted? In particular, must such an application be regarded as an abandonment by the claimant of the right to avail himself of the application of the legislation of these States which may produce a more favourable result? Or must it be interpreted as necessarily involving the application of the most favourable system?

Third question

If an application such as the one described in the second question must be interpreted as involving the application of the most favourable system, must it necessarily be regarded as an application made in proper form to each national social insurance institution with the object of obtaining the determination of benefits which may be more favourable under the national legislation which this institution is under a duty to apply, rather than a claim based on the applicability of the system of proportional calculation provided for by Regulation No 3?

Fourth question

If the worker has the option which is the subject-matter of the first question and if an application such as the one described in the second question must be deemed to be made to each national institution so that, where appropriate, the legislation of each of the States is applied, when must he exercise his option? Can he wait for a final determination, that is to say, until all legal remedies have been exhausted or not exercised, of the claims which he has under both Article 28 of Regulation No 3 and the various national legislative systems?

The reference for a preliminary ruling was received at the Court Registry on 21 April 1967.

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 Belgian Conseil d'État, the Commission of the European Communities and the Member States were invited to submit their written observations.

Only the Belgian Government and the Commission filed statements of case.

During the oral procedure the oral submissions of the Commission of the Euro-

pean Communities were heard on 17 October 1967.
The Advocate-General delivered his opinion at the hearing on 8 November 1967.

II — Observations submitted under Article 20 of the Statute of the Court

The *Belgian Government* makes the preliminary observation that Questions 2, 3 and 4 are in the alternative and need only be answered if in fact the right to exercise an option could be granted to the worker. As regards *Question 1*, the Belgian Government considers that a negative answer must be given to the question whether a worker is entitled to choose between the method of calculation provided for by Article 28 of Regulation No 3 and that resulting from the application of the legislative systems under which he has completed the insurance periods, and an affirmative answer to the question whether the fact that the method of calculation provided by Article 28 of Regulation No 3 may be applicable to him excludes the application of the legislative systems under which he has completed his insurance periods. In fact, as the insured person satisfies the conditions required both in Belgium and in the Grand Duchy of Luxembourg, he may not have recourse to the application of Article 28 (1) (f) of Regulation No 3. It follows that, by virtue of Article 28 (4), whilst the person concerned may claim under the provisions of Chapter 3 of Regulation No 3, entitled 'Old Age and Death (Pensions)', he is not entitled to claim a pension calculated only on the basis of the two internal legislative systems in question. To accept any contrary reasoning would be to render the provisions of Article 28 (3) of Regulation No 3 superfluous.
As regards the *wording of the first section of Question 1*, the *Commission of the European Communities* observes that, in the opinion of the Conseil d'État, the aggregation of the insurance periods was not necessary in order to acquire a right to benefits in any State.
However, in order to be able to benefit under Belgian legislation alone from a pension corresponding to 45 insurance years, an insured person must show evidence of 12 insurance years during the 15 years preceding the first payment of the pension. As the worker concerned only has 11 years of insurance in Belgium, it was therefore necessary to apply the relevant Community regulations and take into account the insurance periods in Luxembourg in order to arrive at 12 years.
Therefore, as aggregation is necessary in Belgium, a *pro rata* calculation of the Belgian pension is possible and either from the point of view that he had completed 18 insurance years in Luxembourg or that these 18 years were completed under a different Belgian pension scheme, the Belgian pension of the person concerned must be calculated according to the following formula:
$\frac{45-18}{45} = \frac{27}{45}$ of 49 200 BF, or 29 520 BF per annum.
As regards the *first section of Question 1*, if, as the Conseil d'État states, aggregation was unnecessary in order to confer a right to benefit, one can but apply the case-law of the Court in its judgment of 15 July 1964 in Case 100/63 (*Kalsbeek, née Van der Veen*).
The person concerned is thus entitled to two pensions not calculated proportionately amounting to 112 526.72 BF per annum, namely:
— 63 326.72 BF in Luxembourg, that is in addition to that part of the pension which is proportional to 18 insurance years, the entire fixed portion;
— the complete pension of 45 years or 49 200 BF in Belgium, since under the Belgian legislation he was regarded as having completed 12 insurance years.

This results in an 'improper plurality of benefits' under first, the Luxembourg legislation and, secondly, the relevant Belgian provisions, in other words, it gives the insured person a double right to benefits for one single period of insurance.

Whilst stating that the *pro rata* calculation of the Belgian pension was possible, on the ground that aggregation was necessary in Belgium, the Commission then considers the problem raised by the *wording of the second part of Question 1* which dealt with the method of calculation provided for in Article 28 of Regulation No 3. In this instance the Caisse Nationale de Pensions pour Employés incorrectly applied this provision, by failing to take proper account of the national legislation in question when making this calculation. In fact, the number of insurance years adopted in calculating the pension for accounting purposes must be the same as that adopted in making the *pro rata* calculation. The amount of the pension for accounting purposes was calculated on the basis of 45 insurance years, but the fraction applied to this amount $\left(\frac{11}{28} \text{ or } \frac{145}{361}\right)$ was based solely on the actual insurance periods.

The amount for accounting purposes took into account transitional provisions in the Belgian legislation but the proportional fraction did not do so. On the contrary, during all the stages of the procedure which took place before the Belgian courts, Mr Guissart had requested that the Belgian proportion of the pension be calculated on the basis of the fraction $\frac{27}{45}$, the figure of 27 (45—18) resulting from the deduction of the 18 years completed in Luxembourg. The justification for Mr Guissart's claim—which he was unable to discover himself—is the obligation, both when calculating the sum for accounting purposes and when making the *pro rata* calculation to take into account all the insurance periods and the 'assimilated periods' defined in Article 1 (r) of Regulation No 3.

The concept of 'insurance period and assimilated periods' must be acknowledged to have a special significance within the Community.

If this were not so, each State would be able to modify the content of this concept and to limit its obligations under Article 51 of the EEC Treaty as it pleased.

However, by virtue of Article 27 of Regulation No 3, according to which periods shall only be aggregated in so far as they do not overlap, and the implementing provisions appearing in Article 13 (1) (c) of Regulation No 4, it must be noted that the assimilated period of 33 years, credited to Mr Guissart by virtue of Belgian legislation, partially overlaps the 18 years of insurance completed in Luxembourg.

There remains 33 years less 18, namely 15 years, which must be regarded as assimilated periods in Belgium and which, added to the 12 years of actual insurance, give 27 years under Belgian legislation.

Therefore, as Mr Guissart claims, the Belgian proportion of the pension must amount to $\frac{27}{45} \times 49\,200$ BF, or 29 520 BF per annum.

The Commission states that by means of a correct *pro rata* calculation the insured person would have received exactly the sum to which he was entitled through the application of the relevant Belgian legislation alone if he had completed the 18 insurance years in question in Belgium rather than in Luxembourg and provided that he satisfied the requirement of 12 years in the pension scheme for employees.

In conclusion, the Commission is of the opinion that the reply to *the first section of Question 1 and to Questions 2 and 4* must be that Regulation No 3

does not include the right of a beneficiary of a pension to choose between the application of the regulation and the application of the relevant national legislation; as a result, a correct interpretation of the provisions of this regulation must be applied and it is unnecessary to make a *pro rata* calculation in every case.

The Commission considers that the reply to the question appearing in *the wording of the second section of the first Question* put by the court referring the matter must be that the method of calculation provided for in Article 28 of Regulation No 3 must adopt the same number of years in calculating the amount of the pension for accounting purposes as in making the *pro rata* calculation, namely all the insurance periods and assimilated periods.

At the hearing on 17 October 1967, the Commission of the European Communities commented upon the judgment in Cases 1/67 (*Ciechelski*) and 2/67 (*de Moor*) given by the Court on 5 July 1967, after the Commission's written observations had been drafted.

The Commission concluded from the decisions in the before mentioned cases and the judgment of 15 July 1964 in Case 100/63 (*Kalsbeek, née Van der Veen*) that proportional calculation of a pension payable by an institution of one Member State is only admissible *pro rata* in two cases.

The first case arises when the right to a pension payable by the institution is not acquired solely on the basis of the insurance periods completed under the legislation which it is applying and it is thus necessary to resort to the *aggregation* of insurance periods completed under the legislation of other Member States for such a right to be acquired.

The second case arises when the right to a pension payable by an institution is acquired *without aggregation,* solely on the basis of the insurance periods completed under the legislation which it is applying but where *insurance periods have overlapped,* that is to say, where the benefit relates 'to insurance periods which have already been used in the calculation of the amount of benefit paid by the competent institution of another State' in order to avoid a plurality of benefits covering the same period.

The Commission, after applying these decided cases to the present case, concludes that aggregation was not necessary in order for a right to a pension to be acquired in Luxembourg.

This finding is without practical effect, since the fact that aggregation was necessary in Luxembourg cannot alone justify the *pro rata* calculation made in Belgium.

The question whether aggregation was necessary in order for a right to a pension to be acquired in Belgium is disputed.

Whilst the Conseil d'État considers that aggregation was not necessary, the Commission holds the contrary view on the ground that in order to grant a complete pension in respect of a period of 45 years the Belgian institution takes into account 12 insurance years although legally Mr Guissart may only claim 11.

The minimum period of 12 years was thus attained only by means of aggregation of the periods completed in Luxembourg.

However, by reason of an overlap between the Belgian and Luxembourg insurance periods, the question whether aggregation was necessary in Belgium is not conclusive in this instance.

In fact, for 11 or 12 actual insurance years, the person concerned benefits from a pension corresponding to 45 years of insurance in Belgium, that is, from 33 years of 'assimilated periods'.

During this period of 33 years he completed 18 years of actual insurance in Luxembourg, for which he receives a corresponding pension.

Thus, if no *pro rata* calculation were made, the worker concerned would receive a plurality of benefits in respect of the same period.
The reduction in the Belgian pension is therefore justified, even if the right to the pension is acquired in Belgium without aggregation of the periods completed in other Member States, that is to say, if the person concerned is regarded as having actually completed 12 years of insurance in Belgium.

Grounds of judgment

By judgment of 24 March 1967, received at the Court Registry on 21 April 1967, the Belgian Conseil d'État, Administrative Law Division, 6th Chamber, referred to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 28 of Regulation No 3 of the Council of Ministers of the EEC.

The first question in this request for interpretation is whether the above-mentioned Article 28 must be construed as conferring upon a migrant worker in certain circumstances 'the right to elect either the method of calculation provided by Article 28 or the method of calculation resulting from the application of the legislation under which he has completed the insurance period'.

It is clear from the terms of the three subsequent questions that this request concerns in particular the question whether, and to what extent, social security institutions are empowered: (1) in pursuance of Article 28 of Regulation No 3, to calculate *pro rata* the pensions which they grant by virtue of the legislation which they apply; and (2) in the case of a migrant worker who does not require aggregation in any Member State in order to acquire a right to benefit, to deduct from the notional periods with which the legislation applied by them credits the person concerned those periods which have already been employed in determining the amounts of other pensions in other Member States.

However, in its statement of case the Commission has put forward the view that in order to take advantage of the transitional provisions of Article 11 (1) of the Belgian Law of 12 July 1957 and of the Royal Decree of 30 July 1957 —according to which employees who attain the age at which they acquire a right to a pension before 31 December 1961 and who can show evidence of 12 years' insurance during the 15 years prior to the payment of the pension are deemed to have completed a full period of insurance of 45 years in Belgium—Mr Guissart was obliged to have recourse to Luxembourg insurance periods to supplement the 11 years taken into consideration by the Belgian legislation in order to attain the minimum of 12 years required by the transitional provisions referred to above.

This point of view must not, therefore, be excluded from the interpretation requested.

As regards the first question

Neither Regulation No 3 nor Regulation No 4 provides for an option within the meaning suggested by the Conseil d'État in its first question.

Although Articles 14 and 14A of Regulation No 3 and Articles 12, 12A and 13 of Regulation No 4 provide for such an option, it is only granted to a limited number of migrant workers, for example those employed at diplomatic posts or in the personal service of officials of such posts and the auxiliary staff of the European Communities.

Moreover, the option is restricted to a choice between the legislation of the country of employment and that of the country of origin.

The application of the system established by Articles 27 and 28 of Regulation No 3 depends therefore only on the objective conditions and circumstances in which the migrant worker concerned is situated.

As regards questions 2, 3 and 4

Article 51 of the Treaty is essentially intended to cover cases in which the legislation of a Member State does not by itself confer on the person concerned a right to benefit because he has not completed a sufficient number of insurance periods under that legislation.

To this intent it provides, for the benefit of a migrant worker who has been successively or alternately subject to the legislation of several Member States, that the insurance periods completed under the legislation of each of the Member States shall be aggregated. It follows from the foregoing that the provisions of Articles 27 and 28 of Regulation No 3 only apply in certain specific cases and that they have no application in the case of a Member State in which the objective sought by Article 51 is achieved by virtue of national legislation alone. At least under those systems based on insurance periods under which the amount of a retirement pension varies in proportion solely to the insurance periods which have been completed, these provisions do not apply to a migrant worker who does not have to resort to the aggregation of insurance periods in order to acquire the right to benefit in any of the Member States in which he has completed insurance periods.

However, the complexity of the problems posed by the co-ordination of national legislative systems prevents this interpretation from becoming an absolute principle. In certain circumstances it might lead to the grant of unjustified advantages which the national legislature may wish to avoid. This might be the case where, as in this instance, benefits in respect of insurance periods actually completed in one State are payable in relation to one single period at the same time as benefits in respect of notional periods in another Member State. In these circumstances it must be permissible for a State whose legislation provides for notional periods in favour of the insured person to deduct from such periods the periods actually completed in another Member State, without its being possible to consider this procedure as contrary to Article 51 of the Treaty. However, it is for the national authority to which the social security institution is responsible, and not the Community authority, to decide on this on the basis of its own legislation.

On the other hand, as the Commission suggests, in the case of a migrant worker who has had to aggregate periods completed abroad in order to acquire a right to benefit, Articles 27 and 28 of Regulation No 3 apply.

Costs

The cost incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Belgian Conseil d'État, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 48 to 51 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), especially Articles 27 and 28.

Having regard to Regulation No 4 of the Council of the EEC on implementing procedures and supplementary provisions in respect of Regulation No 3 referred to above (Official Journal of 16 December, 1958, p. 597 et seq.), especially Articles 12, 12A and 13;
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 Belgian Conseil d'État, Administrative Law Section, 6th Chamber, by judgment of that court dated 24 March 1967, hereby rules:

1. **The application to a migrant worker of the provisions of Articles 27 and 28 of Regulation No 3 does not depend upon the free choice of the person concerned but on his objective situation;**
2. **At least in those systems based on insurance periods under which the retirement pension varies in proportion solely to the insurance periods which have been completed, Articles 27 and 28 of Regulation No 3 do not apply to a migrant worker who, in order to acquire the right to benefit, does not have to resort to aggregation in any of the Member States in which he has completed insurance periods;**
3. **The decision as to costs is a matter for the Belgian Conseil d'Etat.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 13 December 1967.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 8 NOVEMBER 1967[1]

Mr President,
Members of the Court,

In the reference for a preliminary ruling in Case 12/67 which has been made to us by the Belgian Conseil d'État, the Court must again interpret the regulations of the Council on social security for migrant workers. This time the facts are as follows.

1 — Translated from the French version.