Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the amount of the advance payments made to the recipient recovered by the competent institution in Member State A to exceed the amount of pension or arrears of pension transferred to that institution by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 14 May 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 20 NOVEMBER 1980

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Tribunal du Travail of Brussels.

The plaintiff in the proceedings before the Tribunal is Mr. Giuseppe Romano, who is an Italian citizen resident in Belgium. The defendant is the Belgian Institut National d'Assurance Maladie-Invalidité (or "INAMI").

The question at issue in those proceedings is, in substance, how as between the parties an exchange loss, caused by the diminution in the value of the Italian lira between the time when an Italian pension to which Mr Romano was entitled accrued due and the time when it was actually paid, is to be borne.

The facts are these.

Mr Romano, who was born on 20 December 1910, was employed successively in Italy and in Belgium. He became incapacitated from work on 29 August 1969. As a result he became entitled, by virtue of Belgian law alone, to an invalidity pension from 29 August 1970 to 31 December 1975. Thereafter he was entitled in Belgium to a retirement pension.

Mr Romano's Belgian invalidity pension was paid to him in full. It is common ground that such payment was made on a provisional basis, pending the ascertainment of his rights in Italy. Counsel for the INAMI told us at the hearing that Mr Romano was entitled to such provisional payment in full under Article 45 (1) of Council Regulation No 574/72, but that, in the absence of that provision, he would have been entitled to it under Belgian law anyway.

By what was described as a decision addressed to the INAMI on 6 April 1976 and completed on 1 July 1976, the competent Italian social security institution, the INPS, awarded Mr Romano, pursuant to the provisions of Council Regulations No 1408/71 and No 574/72, an ivalidity pension as from 1 September 1970. The INPS, however, made no payment in respect of that pension until more than a year later.

In the meantime, on 24 September 1976, the INAMI addressed to Mr Romano a letter in which it informed him of the decision of the INPS and told him that, by virtue of article 70 (2) of the Belgian statute of 9 August 1963 on sickness and invalidity insurance, his Belgian pension must be reduced by the amount of his Italian pension. It went on:

"Toutefois, étant donné qu'en attendant la décision étrangère, votre organisme assureur belge vous a versé les indemnités journaliers (sic) complètes à titre provisionnel, nous avons calculé le montant qui vous a été versé en trop (voir annexe) et nous avons demandé à l'institution étrangère de verser à notre compte les arrérages de sa prestation dus jusqu'au 31. 12. 1975.

Dans le cas ou le versement effectué à notre compte ne couvrirait pas exactement le montant des indemnités servies à titre provisionnel, nous chargerons votre organisme assureur de procéder, en accord avec vous, à la récupération de la différence; si, par contre, il existait un solde en votre faveur, celui-ci vous serait versé par nos soins."

It is common ground that the amounts shown in the annex to that letter as having been "versé en trop", which totalled BFR 107 848, had been calculated on the basis of the exchange rate between the lira and the BFR obtaining on 1 January 1975, i. e. BFR 0.05784 to the lira.

Article 70 (2) of the Belgian statute of 9 August 1963 relied upon by the INAMI is, as amended in 1971, so far as material in these terms:

"Les prestations prévues par la présente loi ne sont accordées que dans les conditions fixées par le Roi, lorsque le dommage pour lequel il est fait appel aux prestations est couvert par le droit commun ou par une autre législation. Dans ces cas, les prestations de l'assurance ne sont pas cumulées avec la réparation résultant de l'autre législation; elles sont à charge de l'assurance dans la

mesure où le dommage couvert par cette législation n'est pas effectivement réparé. Dans tous les cas, le bénéficiaire doit recevoir des sommes au moins équivalentes au montant des prestations de l'assurance.

L'organisme assureur est subrogé de plein droit au bénéficiaire."

It is common ground, so I understand, that the expression "une autre législation" is there apt to cover both other Belgian legislation and any foreign legislation.

The reasoning of the INAMI, by which it justifies or seeks to justify the choice of the exchange rate between the lira and the BF obtaining on 1 January 1975, is, so it seems, as follows. Mr Romano was entitled to his Belgian invalidity pension by virtue of Belgian law alone. The second sentence of Article 12 (2) of Regulation No 1408/71 was therefore inapplicable. It follows, having regard to the dicta of this Court in Case 22/77 the first *Mura* case [1977] 2 ECR 1699 (paragraph 14 of the judgment) and in Case 37/77 the *Greco* case [1977] 2 ECR 1711 (paragraph 10 of the judgment), that the first sentence of Article 12 (2) must be taken to apply in relation to article 70 (2) of the Belgian statute. That entails the application of Article 107 of Regulation No 574/72, relating to conversion rates, as amended by Council Regulation No 2639/74. That, in its turn, entails the application of Decision No 101 of the Administrative Commission on Social Security for Migrant Workers (OJ No C 44/3 of 26. 2. 1976) under paragraph 5 of which:

"For pensions to which a right was acquired before 1 January 1975 and which have not been put into payment by the date of entry into force of the present Decision [i. e. 1 March 1976], the rate of conversion to be taken into consideration shall be that applicable on 1 January 1975 . . ."

On 7 October 1976 Mr Romano lodged an appeal to the Tribunal du Travail of Brussels against the decision of the INAMI embodied in its letter of 24 September 1976. He accepted that the amount of his Italian pension should be deducted from his Belgian pension but objected to the rate of exchange adopted by the INAMI. He contended that the INAMI could claim the amount that would be paid to it by the INPS, no more and no less.

On 29 July 1977, while the appeal was pending, the INPS remitted to the INAMI the arrears of Mr Romano's Italian pension down to 30 June 1977 — although, Your Lordships remember, the Belgian invalidity pension, with which the INAMI was concerned, ceased on 31 December 1975. We were told that the remittance was made by the INPS under Article 111 and Annex 6 of Regulation No 574/72. Be that as it may, the total amount of it, converted into BFR at the rate of exchange obtaining on the date of payment, i. e. BFR 0.040355 to the lira, came to BFR 125 491. That was BFR 17 643 more than the amount claimed by the INAMI, so the INAMI paid the excess over to Mr Romano. But BFR 17 643 was less than the fraction of the total remittance of BFR 125 491 that represented Mr Romano's Italian pension for the period 1 January 1976 to 30 June 1977. So the real effect of what the INAMI did was to deprive Mr Romano of part of his Italian pension for that period.

Mr Romano accordingly re-formulated his claim in the proceedings before the Tribunal as a claim, essentially, for payment by the INAMI to him of the BFR equivalent, on the basis of the exchange rate obtaining on 29 July 1977, of what was due to him by the INPS for the period 1 January 1976 to 30 June 1977, less the BFR 17 643 that he had already received.

Before the Tribunal it was argued on behalf of Mr Romano, among other things, that Decision No 101 of the Administrative Commission was incompatible with Article 7 of Regulation No 574/72. That is a lengthy and complex Article relating to the implementation of Article 12 of Regulation No 1408/71. As Your Lordships may remember from previous cases, it deals in particular, by paragraph 1 (a), with the situation arising where anti-duplication provisions contained in the laws of several Member States apply concurrently.

Such are the circumstances in which the Tribunal has referred to this Court the question whether Decision No 101 is lawful and, if so, how it is to be interpreted "having regard to the provisions of Article 7 of Regulation (EEC) No 574/72 which", the Tribunal says, "provides in effect that sums recovered may not exceed the amount actually received under another legislation".

The INAMI and the Commission both submitted to us that Article 7 of Regulation No 574/72 was not in point. I propose to defer comment on that till later (By "the Commission" I mean of course the Commission of the European Communities, to which I shall refer, as usual, as "the Commission" *simpliciter,* and so distinguish it from "the Administrative Commission" which was the author of Decision No 101).

The Commission questioned whether any provision of Comunity law could be relevant in this case. It pointed out that the INAMI's claim rested on Belgian law (article 70(2) of the statute of 9 August 1963) and suggested that the quantification of claim must therefore be a matter of Belgian law also.

To some extent, whether that is so or not depends upon precisely what this Court meant by the dicta in the *Mura* and *Greco* cases to which I have referred. It is well established, in relation at all events to Article 11 (2) of Regulation No 3, the precursor of Article 12 (2) of Regulation No 1408/71, that the first sentence of that provision can only be invoked against a person who claims a benefit by virtue of Community law and that it cannot be invoked against a person who claims a benefit by virtue of national law alone — see Case 34/69 the *Duffy* case [1969] ECR 597 and Case 83/77 the *Naselli* case [1978] ECR 683. The Court cannot have meant, in the *Mura* and *Greco* cases, that the position was different under Article 12 (2) of Regulation No 1408/71, for there is no reason in principle why it should be. In the opinion that I delivered in the *Naselli* case, I attempted an explanation of those dicta (see at pp. 695 and 704 of the report). It seemed to me that they must mean that, in a case such as this, the primary effect of the application of the first sentence of Article 11 (2) was merely permissive: Community law did not, in such a case, forbid the application of the national anti-duplication

provision. But I discerned a secondary effect: that in a case where there were competing national anti-duplication provisions, the application of the first sentence of Article 11 (2) in that manner could bring into play Article 9 (1) of Regulation No 4, which corresponded to Article 7 (1) (a) of Regulation No 574/72. No-one of course considered, in the *Naselli* case, whether a further secondary effect might be to bring into play the provisions of Regulation No 4 corresponding to Article 107 of Regulation No 574/72. I would be inclined to think that, if it were necessary to answer that question, the answer was to be sought by applying a familiar basic principle: since we are here concerned with a benefit due under national law alone, Community law cannot have the effect of cutting it down.

To complicate matters further, the INAMI told us that, at the time when Mr Romano's Belgian invalidity pension was payable, there was no Belgian legislation in force as to conversion rates. Such legislation was introduced for the first time by an Arrêté Royal of 2 June 1976, which entered into force on 1 July 1976. Therefore, said the INAMI, as I understood it, if Community law was not applicable directly, it must be applied by analogy, to fill the gap in Belgian law. Whether it is part of the function of this Court under Article 177 of the Treaty to help to fill gaps in national law is a matter that was not discussed.

It is not, however, in my opinion, necessary to pursue those questions to a conclusion, for this reason. If Mr Romano's entitlement under Belgian law alone falls short of his entitlement under Article 46 of Regulation No 1408/71 and its ancillary provisions, the latter represents his minimum entitlement. That is clear from the line of authorities in this Court that includes Case 98/77 the *Schaap* case [1978] ECR 707, Case 105/77 the *Boerboom-Kersjes* case, ibid. p. 717 and Case 236/78 the second *Mura* case [1979] ECR 1819. It is therefore incumbent upon the Tribunal to consider what Mr Romano's entitlement under Article 46 is. As was pointed out to us on behalf of the INAMI at the hearing, Article 107 of Regulation No 574/72, as amended, is expressed to apply in relation to paragraph 3 of Article 46 in exactly the same way as it is expressed to apply to Article 12 (2). It follows that the question referred to the Court by the Tribunal is relevant at least in that way.

So I turn to that question.

It gives rise *in limine* to a point of a constitutional nature, viz. whether it was compatible with the Treaty for the Council to confer a legislative power on the Administrative Commission. That question arises because, in adopting Decision No 101, the Administrative Commission acted or purported to act under paragraph 4 of Article 107 of Regulation No 574/72, as amended by Regulation No 2639/74 which reads:

"The date to be taken into account for determining the rates of conversion to be applied ... shall be fixed by the Administrative Commission on a proposal from the Audit Board."

The Administrative Commission is not of course a creature of the Treaty. It is the creature of Article 80 of Regulation No 1408/71, which provides that it "shall be attached to the Commission"; that it shall be "made up of a government representative of each of the Member States, assisted, where necessary, by expert advisers"; that "a representative of the Commission" shall attend its meetings "in an advisory capacity"; and that secretarial services shall be provided for it by the Commission. Article 81 defines its duties in the following terms:

"(a) to deal with all administrative questions and questions of interpretation arising from the provisions of this Regulation and subsequent Regulations, or from any agreement or arrangement concluded thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by this Regulation or by the Treaty;

(b) to carry out all translations of documents relating to the implementation of this Regulation at the request of the competent authorities, institutions and tribunals of the Member States, and in particular translations of claims submitted by persons who may be entitled to benefit under the provisions of this Regulation;

(c) to foster and develop cooperation between Member States in social security matters, paricularly in respect of health and social measures of common interest;

(d) to foster and develop cooperation between Member States with a view to expediting, taking into account developments in administrative management techniques, the award of benefits, in particular those due under the provisions of this Regulation for invalidity, old age and death (pensions);

(e) to assemble the factors to be taken into consideration for drawing up accounts relating to the costs to be borne by the institutions of the Member States under the provisions of this Regulation and to adopt the annual accounts between the said institutions;

(f) to undertake any other function coming within its competence under the provisions of this and of subsequent Regulations or any agreement or arrangement made thereunder;

(g) to submit proposals to the Commission of the European Communities for working out subsequent Regulations and for the revision of this and subsequent Regulations."

Probably the power conferred by the Council on the Administrative Commission by Article 107(4) of Regulation No 574/72, as amended, was intended to be conferred under paragraph (f). It does not however follow that the conferment of it, at all events as a legislative power, was valid.

The Council is enabled, by the last paragraph of Article 155 of the Treaty, to confer legislative powers on the Commission, but there is nothing in the Treaty to suggest that the Council may delegate legislative power to a body such as the Administrative Commission. Moreover Article 173 of the Treaty gives

this Court jurisdiction to review the legality of acts of the Council and of the Commission, whilst Article 177 gives it jurisdiction to rule on the validity and interpretation of acts of the institutions of the Community. The Administrative Commission is not an institution of the Community as defined by the Treaty (Article 4 and Part Five). So it would seem that this Court has no jurisdiction to pronounce, except indirectly, upon the lawfulness of an act of the Administrative Commission — and therefore indeed no jurisdiction to answer directly the question referred to it by the Tribunal in the present case. The idea that there may be set up for the Community an administrative body empowered to make binding decisions, but whose decisions are, in themselves, incapable of review by this Court seems to me incompatible with the scheme of the Treaty. Nor does it seem to me that the concept of an administrative body whose decisions are incapable of judicial review is reconcilable with constitutional principles that are accepted in all the Member States and, I think, in every other civilized country.

I would therefore hold, even unaided by authority, that the Council was unable to confer legislative power on the Administrative Commission. The matter is not, however, free from authority.

In Case 19/67 the *Van der Vecht* case [1967] ECR 345 (Rec. 1967, p. 445) this Court had to consider a decision of what was in strict law the precursor of the Administrative Commission, namely the corresponding body set up by Regulation No 3. What was there in question was only an interpretative decision of that body adopted under Article 43 (a) of Regulation No 3, which was the provision of that Regulation corresponding to Article 81 (a) of Regulation No 1408/71. The Court found no difficulty in holding that that provision had effect according to its tenor, i. e. that such a decision could not prejudice "the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by this Regulation or by the Treaty". The Court added, however, that any other interpretation of Article 43 (a) would be incompatible with the Treaty, and in particular with Article 177 of it, "which", the Court pointed out, "establishes a procedure to ensure the uniform judicial interpretation of the rules of Community law". It would hardly be consistent with that judgment to accept that the Administrative Commission could be given power to enact rules of Community law.

Also in point are Case 25/70 the *Köster* case [1970] 2 ECR 1161 and Case 30/70 the *Scheer* case, ibid. p. 1197. The Court there had to consider whether the "Management Committee procedure" instituted by Council Regulations establishing the common organization of agricultural markets was compatible with the provisions of the Treaty.

The Court held that it was because, under that procedure, the role of a Management Committee was, in the correct analysis, only consultative. Actual legislative power was reserved to the Commission or, alternatively, to the Council, so that Article 155 was not

infringed, nor was the jurisdiction of the Court itself under Articles 173 and 177 impaired. Again, it would not be consistent with those judgments to accept that a body such as the Administrative Commission could have legislative powers conferred on it by the Council.

In the result I am of the opinion that Article 107 (4) of Regulation No 574/72, as amended by Regulation No 2639/74, is void, so that Decision No 101, which was purportedly adopted under it, has no legal effect.

It is for consideration by Your Lordships whether so to rule is within the proper scope of the responsibilities of a Chamber of this Court or whether Your Lordships should, under Article 95 (4) of the Court's Rules of Procedure, refer the question to the full Court. My own view is that the answer is so clear that such a reference is not called for.

That is not, however, the end of the case.

The Commission submitted, on the footing that Decision No 101 could have no legal effect, that it might be regarded, alternatively, as an effective administrative decision, taken jointly by the Member States, to fill a legal lacuna. The Commission however drew a distinction between the normal case, where it was necessary for a social security institution in a Member State to calculate in advance the amount of benefit to which a particular person would be entitled, and a case of the present kind where the institution was seeking to recover past overpayments of benefit. In the former type of case, the Commission said, if the calculation necessitated taking into account an amount to which the beneficiary would become entitled in another Member State, some rate of exchange must be applied to that amount, which would not necessarily be the rate of exchange obtaining as and when each instalment of the benefit fell to be paid. Where, however, as here, what was involved was a retrospective adjustment, there was no need to depart from the rate of exchange at which the amount received from the other Member State was in fact converted.

It is not in my opinion necessary in the present case to express any view as to whether the Commission is right about what it described as the normal case. The Commission is clearly right in saying that, in this case, there was no need to resort to an artificial rate of exchange. The INPS did not in fact reach its decision until after Mr. Romano's Belgian invalidity pension had ceased. There was therefore no need for the INAMI to calculate the amount it was entitled to recover before it had received the resultant payment from the INPS, and no need for it, once the payment had been received, to treat it as worth any more or less than it actually was worth.

That in my opinion is enough to answer the question referred to the Court by the Tribunal, without enquiring into the relevance of Article 7 of Regulation No 574/72. I agree however with the INAMI and the Commission that that provision is not really in point. What is in point is the fundamental principle, enshrined in Article 51 of the Treaty and in numerous judgments of this Court, that a migrant worker should not, so far as can be avoided, be disadvantaged by reason of his having been a migrant worker. If here Mr Romano had never been employed in Italy, he would have

been entitled to his Belgian invalidity pension in full. It may be right that he should not get more by reason of his having worked in Italy. But no valid reason has been advanced why he should get less.

In the result I am of the opinion that, in answer to the question referred to the Court by the Tribunal, Your Lordships should rule that Article 107 (4) of Regulation No 574/72 as amended by Regulation No 2639/74 is invalid, with the consequence that no decision of the Administrative Commission on Social Security for Migrant Workers purportedly adopted thereunder can have any legal effect.

I should perhaps mention, for the sake of completeness, that Article 107 of Regulation No 574/72 was amended again, as from 28 November 1979, by Council Regulation No 2615/79. Paragraph 4, as introduced by Regulation No 2639/74, was thereby retained. But that cannot, in my opinion, affect the outcome of this case.