OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 10 June 1987 *

Mr President,
Members of the Court,

A — The facts

1. The case on which I now deliver my Opinion also concerns the application of the provisions of the Belgian Royal Decree of 21 December 1967, which has already been considered in Case 197/85, according to which, when a Belgian survivor's pension overlaps with an old-age pension, even a foreign old-age pension, benefits may not exceed a certain maximum amount.

2. Those provisions assume importance for Mrs van Gastel whose late husband, a Netherlands national resident in Belgium, had received from November 1976 a Belgian old-age pension solely by virtue of Belgian law and a Netherlands old-age pension from October 1976. The latter pension was based on voluntary contributions which he had paid from January 1957 and which continued to be paid until the 65th birthday of Mrs van Gastel in August 1979.

3. After the death of her husband in February 1983, Mrs van Gastel at first continued to receive her husband's Netherlands pension and then, from May 1983, received her own Netherlands old-age pension on the basis of the voluntary contributions already mentioned. Initially, she also received a Belgian survivor's pension from March 1983. However, in April 1984 the Belgian rules against overlapping benefits were applied with the effect that, in view of the maximum limit on overlapping benefits, the Belgian pension ceased to be paid and the repayment was demanded of the sums already paid.

4. This is the background to the proceedings pending before the Arbeidsrechtbank, Antwerp. Considering that an interpretation of Community law was necessary before it could give its judgment, that court stayed the proceedings by order of 6 February 1986 [1] and referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'Should or should not the following be regarded as benefits of the same kind within the meaning of Article 12 (2) of Regulation No 1408/71 entailing possible consequences with regard to the application of Article 46 of Regulation No 1408/71 and Articles 7 and 46 of Regulation No 574/72: a "survivor's pension" awarded under the Belgian legislation on employed persons' pensions to the surviving spouse on the basis of the period in employment of the deceased spouse or of the periods of insurance completed by him or her and an "old-age pension" granted under the Netherlands pensions legislation (General law on old age) to a woman who has been married and who attains the age of 65 but has not been employed herself or completed periods of insurance in the Netherlands but whose deceased husband has completed periods of insurance under the pensions legislation of the Netherlands?'

5. After studying the observations submitted on behalf of the defendant in the main proceedings, the Netherlands Government and the Commission of the European Communities, my views are as follows.

* Translated from the German.

1 — Entered in the Register of the Court of Justice on 12 February 1986.

B — Opinion

6. *1.* Considering the wording of the question referred to the Court — after altering it if only because in a reference for a preliminary ruling the law may not be applied but only Community law interpreted — no particular problems emerge concerning the concept of 'benefits of the same kind' within the meaning of Article 12 of Regulation No 1408/71 (or the related exclusion of the application of national rules against overlapping benefits).

7. In this regard reference may be made to the case-law (for example, the judgment in Case 171/82 *Valentini*[2]), according to which social security benefits must be regarded, irrespective of characteristics peculiar to the various national laws, as being of the same kind when their purpose and object together with the basis on which they are calculated and the conditions for granting them are identical. However, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits. It should also be added, as the Commission has correctly pointed out, that several judgments have made it clear that the concept concerned should be interpreted in a broad manner. Of relevance in this respect is Case 4/80,[3] according to which invalidity benefits converted into an old-age pension and invalidity benefits not yet converted into an old-age pension are to be regarded as benefits of the same kind. Equally pertinent is the judgment in Case 238/81,[4] which established that an English old-age pension (retirement pension) and a widow's pension awarded under the Netherlands widows and orphans law were also to be regarded as benefits of the same kind. Besides the judgments in Case 180/78 and in Joined Cases 116, 117, 119 to 121/80, one can also recall the judgment in Case 171/82, mentioned above, in which, although the Court ruled than an Italian old-age pension and the benefits under the French guaranteed income retirement scheme could not be regarded as benefits of the same kind, it was clearly demonstrated that characteristics specific to the various national laws were irrelevant and that classification of such benefits could not be based on purely formal characteristics.

8. *2.* The Commission has also correctly pointed out that the fact that the point that for the purpose of applying Article 12 (2) of the regulation, invalidity, old-age and widows' pensions were to be regarded as benefits of the same kind was inserted in Annex VI to Regulation No 1408/71 after the accession of Denmark, the United Kingdom and Ireland (in the case of Denmark under B point 8, in the case of Ireland under F point 4 and in the case of the United Kingdom under J point 9) is of no assistance in resolving the present problem. From that fact it cannot in fact be concluded that the benefits of other Member States, which are not similarly specified, can never be regarded as being of the same kind as the abovementioned benefits. In this respect, reference may be made to the judgment in Case 238/81 *Van der Bunt-Craig* in which the Court first dealt with the abovementioned point concerning the United Kingdom and then stressed that, irrespective of the characteristics peculiar to the various national laws, social security

2 — Judgment of 5 July 1983 in Case 171/82 *Biagio Valentini* v *Assedic, Lyon* [1983] ECR 2157, paragraph 13 at p. 2170.

3 — Judgment of 15 October 1980 in Case 4/80 *Remo d'Amico* v *Office national des pensions pour travailleurs salariés* [1980] ECR 2951, at p. 2954.

4 — Judgment of 5 May 1983 in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385, at p. 1397 *et seq.*

benefits had to be considered as being of the same kind when their purpose and basis of calculation were the same (see paragraphs 12 and 13 of the decision). Also relevant is the judgment in Case 171/82 *Valentini*, in which, as regards the legal position in France, the Court did not simply conclude that benefits were not of the same kind merely because there was no corresponding provision in Annex VI but, as already shown, laid down criteria for determining when benefits are benefits of the same kind within the meaning of Article 12 of Regulation No 1408/71.

9. *3.* The Netherlands Government and the Commission take the view that the question whether the benefits claimed by Mrs van Gastel under Belgian and Netherlands social security law are benefits of the same kind should be answered in the affirmative. On the other hand, the defendant, the Pension Office, is firmly in favour of the question being answered in the negative, pointing out that under Netherlands law a widow's pension depending on her husband's insurance is only paid until the widow's 65th birthday and thereafter is replaced by a personal old-age pension, whereas under Belgian law a widow's pension is paid until the widow's death. The defendant also relied on the following facts: that Mrs van Gastel herself should be regarded as being personally insured on the basis of the contributions paid by her husband (which were paid on the basis of their joint income), that voluntary contributions were made on her account even after her husband had reached the age of 65, and that the purpose of the Netherlands old-age pension to which the wife is personally entitled is to ensure a sufficient income whereas the Belgian widow's pension does not have that purpose but is assessed purely on the basis of the period during which the husband paid contributions and on the basis of his gross salary.

10. Since the Court does not have to make such an assessment, I would merely suggest that several factors support the argument of the Commission which focuses on the fact that the benefits concerned basically have the same object and the same basis for calculation and regards the differences pointed out by the Pension Office as inessential and characteristics peculiar to the national laws involved which may be disregarded. The Commission's view is closer to the basic position adopted by the Court whose assessment is based on broad criteria; that position seems to be appropriate in order to avoid problems with respect to basic rights or general principles of law. (Such problems might otherwise be difficult to resolve in a case such as this, which involves a right to a pension arising under compulsory insurance and a right acquired in the Netherlands on the basis of voluntary contributions.)

11. The Commission was also able to rely on an opinion of the Administrative Commission for Social Security of Migrant Workers which, coming from such an expert body, carries great weight. When in the spring of 1982 the Belgian representative drew attention to the fact that under Netherlands law a widow who had attained the age of 65 would no longer receive a widow's pension but a personal old-age pension instead and that this could lead to a considerable reduction of a Belgian widow's pension because of the Belgian rules against overlapping benefits which apply only to old-age pensions, the Administrative Commission came unanimously to the conclusion in July 1982 that, in order to avoid any financial loss, a Belgian widow's

pension and a Netherlands widow's pension converted into an old-age pension should be regarded as benefits of the same kind (see the minutes of the meetings of the Administrative Commission held on 22 and 23 April and on 7 and 8 July 1982 submitted to the Court). One can agree with the Commission's suggestion that this sensible conclusion should also apply in cases when the Netherlands widow's pension has never been paid but an old-age pension was paid immediately because the wife was widowed only after her 65th birthday.

12. *4.* However, as the Commission has also shown, the matter cannot be left to rest with the observations made so far.

13. (a) In view of the facts made known to the Court — a Belgian widow's pension is payable solely on the basis of Belgian law without reference to Community law or the taking into account of periods of insurance abroad — it is appropriate to refer to the case-law, according to which, in such cases, national legislation, including the national rules against the overlapping of benefits, may be applied in its entirety. [5] Accordingly, in a case such as this, Article 12 of Regulation No 1408/71 and in particular the scope of the second sentence of Article 12 (2) are, initially at least, irrelevant, and it is the task of the national court, when applying national law, to examine whether or not the relevant rules against overlapping benefits go too far as regards the protection of fundamental rights or the respect of basic principles of law.

14. (b) However, it must be borne in mind that the abovementioned case-law also contains a reservation: it is expressly stipulated that the rules laid down by Article 46 of Regulation No 1408/71 must be applied 'if the application of such national legislation proves less favourable to the worker' than the application of those rules. [6] In this way Article 12 of Regulation No 1408/71 becomes relevant again (as is made clear at the end of paragraph (2) thereof) and this has important implications for the application of the national rules against overlapping.

15. As was made clear in Case 238/81 *Van der Bunt-Craig* and Case 296/84 *Sinatra* v *Fond national de retraite des ouvriers mineurs* [1986] ECR 1047, the national court must make a comparison. On the one hand, it must calculate the amount of benefit payable under national law, taking into account national rules against overlapping benefits. On the other hand, the amount of benefit must be calculated in accordance with Article 46 of Regulation No 1408/71. First of all, the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State is calculated (in other words, this calculation excludes the national provisions against overlapping benefits). [7] Then, the *pro rata* benefit under Article 46 (2) must be calculated. If the sum of both amounts exceeds the highest theoretical amounts calculated in accordance with Article 46 (2) (a), a corresponding reduction must be made, and, according to the judgment in Case 238/81, Article 46 (3) must be applied to the exclusion of provisions of national law against overlapping benefits (paragraph 15).

5 — Judgment of 2 July 1981 in Joined Cases 116, 117, 119 to 121/80 *Rijksdienst voor Werknemerspensioenen* v *Celestre and Others* [1981] ECR 1737, at p. 1753.

6 — See paragraph 9 of the decision in Joined Cases 116, 117, 119 to 121/80, cited above.

7 — Judgment in Joined Cases 116, 117, 119 to 121/80, *Celestre*, paragraph 12.

16. (c) Finally, reference must also be made to Article 46 (2) of Regulation No 574/72, which was specifically mentioned in the question referred to the Court.

17. It is clear from that article that for the purposes of applying Article 46 (3) of Regulation No 1408/71 the amounts of benefit corresponding to periods of voluntary or optional continued insurance are not taken into account, that is to say that they are not included in the amounts to be reduced. In Case 98/77 [8] this point was stressed in the case of voluntary buying-in of insurance contributions.

18. In this connection reference must also be made to the judgment in Case 176/78. [9] It was made clear in that case that for the purpose of the calculation of the actual amount of benefit in accordance with Article 46 (2) of Regulation No 1408/71, a period of insurance completed under voluntary or optional continued insurance under the legislation of a Member State which coincides with a period of insurance or residence completed under compulsory insurance under the legislation of another Member State may not be taken into account for the purposes of the aggregation of periods without this, however, depriving the worker of the benefit of that period.

19. (d) From the point of view of Community law, this should complete the examination of all the points relevant to the case submitted.

C — Conclusion

In summary I would suggest that the question referred to the Court should be answered as follows:

20. Article 12 (2) of Council Regulation (EEC) No 1408/71 is to be interpreted as meaning that benefits are of the same kind when their aim, purpose, basis of calculation and the conditions for awarding them are identical. The broad criteria applicable do not exclude the possibility of benefits being of the same kind where a widow's pension is awarded in one country and an old-age pension in another country (because the widow's pension is in fact payable only up to a certain age and thereafter converted into a personal old-age pension).

21. If pensions are payable solely on the basis of one Member State's legislation (without reference to Community law and to periods of insurance completed in another Member State), Regulation No 1408/71 does not exclude the application

8 — Judgment of 14 March 1978 in Case 98/77 *Schaap* v *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1978] ECR 707, at p. 713.

9 — Judgment of 5 April 1979 in Case 176/78 *Schaap* v *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1979] ECR 1673, paragraph 10 at p. 1685.

of national law in its entirety, including its rules against overlapping benefits. However, if this leads to a result which is less favourable than that produced by the application of Article 46 of Regulation No 1408/71, Article 46 is applicable.

22. For the purposes of Article 46 (3) of Regulation No 1408/71, benefits which correspond to a period of optional insurance may not be taken into account in accordance with Article 46 (2) of Regulation No 574/72.