OPINION OF ADVOCATE GENERAL JACOBS
delivered on 14 April 1994 *

My Lords,

1. In this case the Tribunal du Travail, Mons, seeks a preliminary ruling on the interpretation of Articles 46 and 51 of Council Regulation (EEC) No 1408/71 (as codified by Council Regulation (EEC) No 2001/83 [1]) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

2. The plaintiff in the main proceedings, Mr Lio Bettaccini, has been receiving an invalidity pension in Belgium since 1 March 1962. He has also been receiving an invalidity pension in Italy. In Belgium he satisfied all the conditions laid down by national legislation for acquisition of the right to an invalidity pension without its being necessary for him to rely on periods of insurance completed in another Member State. His Italian invalidity pension is a *pro rata* benefit, acquired by virtue of the aggregation of insurance periods completed in Italy and Belgium. From the outset the Belgian national rules against the overlapping of benefits were applied, with the result that the amount of the Belgian pension was reduced in order to take account of the Italian pension. The pension calculated on that basis was paid until December 1989.

3. In June 1992 the Commission Administrative de la Caisse de Prévoyance (hereafter 'the Administrative Commission'), was informed that from 1 January 1990 Mr Bettaccini had been receiving, in addition to his Italian invalidity pension, a new Italian benefit called the *assegno per il nucleo familiare* (family unit allowance) at the rate of LIT 90 000 per month.

4. Taking the view that the family unit allowance constituted an integral part of the Italian invalidity pension, the Administrative Commission considered that it was appropriate, in the light of Article 51(2) of Regulation No 1408/71, to re-examine Mr Bettaccini's rights to the Belgian invalidity pension with effect from 1 January 1990. In the course of that re-examination the Administrative Commission applied a Belgian rule against the overlapping of benefits laid down in Article 23(1) of the Arrêté Royal of 19 November 1970, which provides that an invalidity pension granted under that Arrêté Royal may not overlap with one or more

* Original language: English.

1 — OJ 1983 L 230, p. 6. For a consolidated version of the regulation, see OJ 1992 C 325, p. 1.

retirement or invalidity pensions granted under Belgian or foreign legislation so as to result in the payment of a total amount exceeding the annual amount of the pension. The Administrative Commission decided that Mr Bettaccini's invalidity pension must be reduced in order to take into account the family unit allowance that he had been receiving in Italy since 1 January 1990. It also decided that the reduction should be applied retroactively and demanded repayment of BFR 450 729 in respect of the period from 1 January 1990 to 31 October 1992. It will be noted that the amount reclaimed by the Administrative Commission greatly exceeded the amount actually received by Mr Bettaccini, in the period in question, by way of family unit allowance.

5. Mr Bettaccini contested the decision of the Administrative Commission before the Tribunal du Travail, Mons. He contended that the family unit allowance was a family benefit which did not form part of the Italian invalidity pension and that Article 51 of Regulation No 1408/71 did not permit a recalculation of his Belgian invalidity pension.

6. The Tribunal du Travail has referred the following questions to the Court:

'(1) In making the calculation required by Article 46(3) of Regulation No 1408/71, may the Belgian State include in the amount of the Italian invalidity pension the part of the family unit allowance granted in Italy for a dependent spouse pursuant to Law No 153 of 13 May 1988?

(2) Does the replacement of family allowances or additional family allowances by the family unit allowance instituted by Law No 153 of 13 May 1988 permit, pursuant to Article 51 of Regulation No 1408/71 a fresh, comparative calculation to be made and the amounts of pensions to be updated on the basis of national law and European law, in particular Article 46 of Regulation No 1408/71?'

7. I propose to deal with question (2) first. The purpose of that question is to ascertain whether, as a result of Mr Bettaccini's becoming entitled to the family unit allowance from 1 January 1990, the Administrative Commission was entitled, or indeed required, by virtue of Article 51(2) of Regulation No 1408/71, to recalculate Mr Bettaccini's Belgian invalidity pension in accordance with Article 46 of that regulation. Article 51 of the regulation provides as follows:

'1. If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the States concerned are altered by a fixed percentage or amount, such per-

centage or amount must be applied directly to the benefits determined under Article 46, without the need for a recalculation in accordance with the provisions of that Article.

2. On the other hand, if the method of determining or the rules for calculating benefits should be altered, a recalculation shall be carried out in accordance with Article 46.'

8. It is clear from the wording of Article 51(2) that it would only be appropriate to carry out a recalculation in accordance with Article 46 if there had been an alteration in 'the method of determining or the rules for calculating benefits'. It is necessary first of all to determine what benefits are referred to here. Does Article 51(2) require a recalculation when there is an alteration in the method of determining, or in the rules for calculating, *any* type of benefit received by the person concerned? Or must the alteration affect benefits governed by Chapter 3 of Title III of Regulation No 1408/71 (the chapter to which Article 51 belongs), the amount of which was originally fixed under Article 46 of the regulation?

9. In my view, it is clear from the scheme and purpose of Article 51, as well as from its wording, that the provision is concerned solely with benefits governed by Chapter 3 (i. e. old-age pensions and death benefits, survivors' pensions and also — by virtue of Article 40(1) of the regulation — invalidity benefits).

10. Article 51 is entitled 'revalorization and recalculation of benefits'. The object of the article, which has been interpreted in numerous judgments of the Court, [2] is to determine the circumstances in which benefits calculated in accordance with Chapter 3 must be recalculated. The article distinguishes between two situations. Paragraph (1) deals with the situation in which old-age or invalidity benefits are adjusted by a fixed percentage or amount in order to take account of a change in the cost of living or changes in the level of wages or salaries: when such an adjustment (known as 'index-linking of benefits') occurs in one of the countries concerned, the fixed percentage or amount is applied to the benefits payable in that country and no recalculation in accordance with Article 46 is effected either in that country or in any other country in which the person concerned receives old-age or invalidity benefits. Paragraph (2) applies when there is a change in the method of determining the benefits in question or in the rules for calculating them, as opposed to a mere index-linked adjustment: when such a change

2 — See in particular: Case 7/81 *Sinatra* v *FNROM* [1982] ECR 137; Case 104/83 *Cincuolo* v *Union Nationale des Fédérations Mutualistes Neutres* [1984] ECR 1285; Case C-85/89 *Ravida* v *Office National des Pensions* [1990] ECR I-1063 and Case C-93/90 *Cassamali* [1991] ECR I-1401.

occurs a full recalculation must be carried out in accordance with Article 46. According to the *Sinatra* judgment, [3] paragraph (2) applies, not just when benefits are altered as a result of an amendment to the relevant legislation, but also when benefits are adjusted as a result of a change in the personal circumstances of the person concerned.

11. There is nothing in the wording of Article 51 to suggest that it is concerned with anything other than the recalculation of benefits governed by the chapter in which it is located. In particular, there is nothing in the wording of Article 51(2) to suggest that the recalculation referred to there should be set in motion by anything other than a change in the method of determining, or the rules for calculating, the benefits governed by that chapter. If there is a change in the rules for calculating some other types of benefit, such as family benefits, that should not bring into play Article 51.

12. The Tribunal du Travail is aware of the Court's case-law on Article 51. It notes that the granting of the family unit allowance to Mr Bettaccini results from a far-reaching amendment of the Italian legislation and does not constitute an adjustment of his benefits due to an increase in the cost of living. It notes on the other hand that there has been no change in Mr Bettaccini's personal circumstances. It raises the question whether in those circumstances Article 51 permits a recalculation in accordance with Article 46.

13. The Tribunal du Travail discusses the nature of the family unit allowance in relation to its first preliminary question, rather than in relation to the second question. It notes that under Belgian legislation the part of the family unit allowance granted in respect of the spouse cannot be treated as a family allowance, but must instead be regarded as an integral part of the Italian invalidity pension. That characterization of the family unit allowance may have led the Tribunal du Travail to take the view that Article 51(2) may be applicable in the circumstances of the present case. Certainly, if the family unit allowance were to be regarded as an integral part of Mr Bettaccini's invalidity pension, it would be logical to treat the granting of that allowance as an alteration in the rules governing the calculation of his invalidity pension.

14. However, it is not in my view appropriate to characterize the family unit allowance by reference to Belgian law. If such a practice were followed, the scope of Article 51 — which occupies a pivotal role in the scheme established by Chapter 3, since it determines when an adjustment made to benefits in one country necessitates a full recalculation of benefits payable in all the countries concerned — would vary depending on the country whose institutions are applying it. For the purposes of Article 51, the family unit allowance should therefore be classified independently, in accordance with whatever rules of Community law are relevant and in the light of its objective characteristics.

3 — Case 7/81, cited above in note 2.

15. On this point the judgment of the Court in *INAMI* v *Viola*, [4] which is cited in the order for reference, is not in my view relevant. There the Court held that, in applying national rules against the overlapping of benefits, it was for the national court to classify benefits granted in another Member State in accordance with the applicable national legislation 'taking account of the rules relating to the conflict of laws' and that the Community provisions were not relevant. It does not follow from that ruling that a benefit must be classified solely in accordance with national law for the purpose of applying a provision of Community law, such as Article 51 of Regulation No 1408/71.

16. Information about the family unit allowance is contained in the order for reference and in the observations of the Italian Government. The allowance was introduced into the Italian social security system by Decree-Law No 69 of 13 March 1988, which was subsequently converted into Law No 153 of 13 May 1988. It replaced family allowances, additional family allowances and any other family benefits of whatever designation, with regard to employed persons, persons entitled to pensions and contingency benefits of an economic nature as a result of their employment, workers receiving benefit from tuberculosis insurance, active and retired State employees, and employees and pensioned employees of public authorities. The 'family unit' consists of spouses who are not legally separated and children under 18 (though no age limit is fixed for handicapped children). Where the family unit allowance is paid to a person receiving an invalidity pension, the amount of the allowance is not dependent on the amount of the invalidity pension but is determined by the family's income and by the number of persons who constitute the family unit. The same amount would be paid to active workers, to unemployed persons and to persons entitled to an old-age pension, if their income and the composition of their family unit were the same.

17. In my view, the information provided in the order for reference and in the observations of the Italian Government shows that the family unit allowance cannot be regarded as an integral part of the invalidity pension. It is, on the contrary, in the nature of a family benefit within the meaning of Article 1(u)(i) of Regulation No 1408/71, according to which '"family benefits" means all benefits in kind or in cash intended to meet family expenses ... .' [5] It follows that the family unit allowance falls within Chapter 7 (entitled 'family benefits') of Title III of Regulation No 1408/71 and lies outside the scope of Chapter 3. The granting of the allowance to Mr Bettaccini does not therefore bring Article 51 of the regulation into

4 — Case 26/78 [1978] ECR 1771.

5 — See also the judgment in Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 22, where the Court held that 'a benefit which is granted automatically to families meeting certain objective criteria, relating in particular to their size, income and capital resources, must be considered a family benefit for the purposes of Article 4(1)(h) of Regulation No 1408/71'.

operation and does not require, or permit, the Administrative Commission to recalculate Mr Bettaccini's invalidity pension in accordance with Article 46 of the regulation. Question (2) must therefore be answered in the negative.

18. If question (2) is answered in the manner that I have proposed, question (1) will cease to be relevant, since there will be no reason to carry out any recalculation under Article 46 of Regulation No 1408/71. I will merely observe that it follows from what I have said in relation to question (2) that the family unit allowance cannot be included in the Italian invalidity pension for the purpose of applying the rule against the overlapping of benefits formerly laid down in the second paragraph of Article 46(3) of the regulation. It should be noted that that rule against overlapping has now been repealed as a result of Council Regulation (EEC) No 1248/92 of 30 April 1992, [6] which entered into force, in accordance with Article 4 thereof, on 1 June 1992. That regulation inserted into Regulation No 1408/71 Articles 46a, 46b and 46c, which contain new rules against overlapping. If a recalculation of Mr Bettaccini's pension were required by Article 51, the provisions of Article 46c would appear to be relevant, since they deal with overlapping between, on the one hand, benefits in respect of invalidity, old age and survivors and, on the other hand, benefits of a different kind. However, the national court has not referred any question about the interpretation of Article 46c and it would not, in my view, be appropriate to examine the possible effects of that provision on any recalculation of Mr Bettaccini's invalidity pension, especially since no such recalculation is necessary in view of my answer to question (2).

Conclusion

19. I am accordingly of the opinion that the questions referred to the Court by the Tribunal du Travail, Mons, should be answered as follows:

Where benefits paid in respect of an invalidity pension are calculated in accordance with Article 46 of Council Regulation (EEC) No 1408/71, Article 51 of the regulation must be interpreted as precluding a recalculation of those benefits in the event of the award of an allowance such as the family unit allowance at issue in these proceedings.

6 — OJ 1992 L 136, p. 7.