OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 17 JANUARY 1980 [1]

Mr President,
Members of the Court,

According to Article 36 of Regulation No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, (Official Journal, English Special Edition 1972 (1), p. 159), as amended by Regulation No 878/73 of 26 March 1973 (Official Journal 1973 L 86, p. 1) "in order to receive benefits under Articles 14 and 51 of the Regulation" (that is to say, invalidity benefits) ". . . the person concerned shall submit a claim to the institution of the place of residence in accordance with the procedure provided for by the legislation administered by that institution". According to paragraph (4) of that provision "A claim for benefits sent to the institution of one Member State shall . . . involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies . . .". According to Article 41 of that regulation "Claims for benefit shall be investigated by the institution . . . to which they have been sent or forwarded in accordance with Article 36 of the Implementing Regulation". Article 41 (2) provides that:

"The investigating institution shall forthwith notify claims for benefits to all the institutions concerned on a special form, so that the claims may be investigated simultaneously and without delay by all these institutions".

Further, Article 45 of that Regulation requires the investigating institution, if it establishes that the claimant is entitled to benefits under the legislation which it administers without having recourse to insurance periods or periods of residence completed under the legislation of other Member States, to pay such benefits "immediately on a provisional basis". Finally, Article 45 (4) provides as follows:

"The institution required to pay benefits under paragraphs (1), (2) or (3) shall forthwith inform the claimant of the fact, drawing his attention explicitly to the provisional nature of the measure taken and to the fact that it is not open to appeal".

The claimant in the main action is an Italian citizen residing in Belgium. After being in employment for some time in Italy he worked as a miner in Belgium from 1948 onwards. Since February 1961 he has been drawing an Italian invalidity pension. In addition, he received a miner's invalidity pension as from 1961 and a pension in respect of occupational disease from January 1972, both under Belgian law.

On 10 February 1975 he submitted a claim for a miner's retirement pension to the Office National des Pensions pour Travailleurs Salariés [National Workers' Pensions Office] (hereinafter referred to as the O.N.P.T.S.), the defendant in the original proceedings. He was subsequently informed that his claim was acknowledged in full but that the pension could only be paid subject to deduction of the Italian invalidity pension. A decision would be taken thereon as soon as the amount of the Italian pension was known. As there was

1 — Translated from the German.

a delay in issuing the formal decision the claimant brought proceedings on 25 March 1976 before the Tribunal du Travail [Labour Tribunal], Mons, for recognition of his entitlement to a retirement pension. Although his entitlement was recognized the action was rejected in a judgment of 26 November 1976 as being without foundation, on the ground that payment of the miner's pension could only be made after deduction of the Italian pension.

Thereupon the claimant appealed in January 1977 to the Cour du Travail [Labour Court], Mons. While those proceedings were in progress he was informed of a decision of the O.N.P.T.S., in May 1977, according to which he was to receive as from 1 March 1975 a provisional pension — apparently amounting to the difference between the full Belgian pension and the Italian invalidity pension. At the time it was expressly stated that no appeal could be lodged against that decision pursuant to Article 45 (4) of Regulation No 574/72. In the light of that decision the claimant altered his appeal and lodged a claim for payment by the O.N.P.T.S. of interest at a rate to be fixed by the court as from the date on which his entitlement was recognized. The outcome of the appeal was a judgment dated 13 January 1978 in which it was held that in the event of a failure to adopt a measure under Article 45 (1) of Regulation No 574/72 an appeal was allowable in principle, because that provision gave rise to a duty to pay benefits immediately on a provisional basis from such time as the competent institution had at its disposal all the necessary information. In that respect the court might take the place of the administrative authority even if the content of the measure adopted under Article 45 (4) could not form the subject-matter of legal proceedings. The appeal was, however, declared to be without foundation, so far as a decision as to the duty to pay was concerned, on account of the decision adopted on 16 May 1977. However, the appellate court went on to hold that because Article 45 (1) of Regulation No 574/72 provides for immediate payment, in view of the delay in producing a decision to that effect the claimant was entitled to receive interest at a rate to be fixed by the court according to Belgian law. The interest was to be paid on the amount of the benefits granted on a provisional basis, but only from the date on which the appeal was lodged, that is, 25 March 1976.

The O.N.P.T.S. appealed against that judgment to the Cour de Cassation. It claimed that Article 45 (1) of Regulation No 574/72 was not applicable to the claimant's case. He had no entitlement under Belgian law because of the Italian invalidity pension which had been granted to him, since Article 25 (1) of the Belgian Royal Decree No 50 of 24 October 1967 provides that:

"Save in cases and subject to conditions determined by the King, the retirement pension and survivor's pension are payable only if the claimant does not pursue a professional or trade activity and if he is not in receipt of allowances for sickness, invalidity or involuntary unemployment in application of Belgian or foreign social security provisions".

Thus the payments made on a provisional basis pursuant to the decision of 16 May 1977 represented no more than a mere administrative concession ("simple tolérance administrative"). Under Belgian law there could be no question of interest in respect of such payments. Lastly, Article 45 (4) of Regulation No 574/72, mentioned above, in fact excludes the possibility of any court order to pay pensions on a provisional basis; it is therefore equally impossible for a court to order payment of interest.

By a judgment of 19 March 1979 the Cour de Cassation suspended the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 177:

"Where the investigating institution referred to in Article 45 (1) of Regulation (EEC) No 574/72 of the Council of the European Communities of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community establishes that the claimant is entitled to benefits under the legislation which it administers without having recourse to insurance periods completed under the legislation of other Member States and where it does not immediately pay such benefits on a provisional basis and where, after the claimant has brought proceedings against it before the national court having jurisdiction in order to obtain an interim decision, the investigating institution decides to grant the benefits on a provisional basis as from a date prior to the date on which legal proceedings were brought, do the provisions of Article 45 (1) and (4) of the above-mentioned regulation prevent the court before which the proceedings are brought from granting, at the request of the claimant and in application of national law, interest at a rate to be fixed by the court on the amount of the benefits payable on a provisional basis from the date on which legal proceedings were brought?"

My opinion on this question is as follows:

1. I must first examine a number of objections which have been made by the O.N.P.T.S. as to the admissibility or usefulness of the request for a preliminary ruling.

(a) The O.N.P.T.S. observes that it relied on several arguments before the Cour de Cassation in support of the proceedings entered there, including some which related purely to national law. If the latter were accepted — though admittedly the court has not examined them — the reference for a preliminary ruling would serve no purpose. It could therefore be said that it was inopportune to raise the question which is set out in the judgment making the reference.

I can deal with the objection as to the relevance of the question to the decision of the court fairly briefly. The Court of Justice has made it clear on many occasions that it does not, on principle, concern itself with this kind of consideration, which is the province of the national courts. It is solely a matter for the national courts to decide in what order of precedence questions of law raised in national proceedings shall be examined. Therefore, we cannot consider the reference to be inadmissible on the ground that it might be possible to decide the original proceedings without having to answer the questions which have arisen concerning Community law. It seems quite impossible to refer the question back to the court making the reference with a request that it should first elucidate certain questions which depend solely on national law, especially as it seems most probable — witness the fact that the problems relating to Community law have been stated to require clarification — that this has already tacitly been done.

(b) The O.N.P.T.S. has also objected that the question which has been asked is based on an error of law as it assumes that Article 45 (1) of Regulation No 574/72, mentioned above, applies to the present case. But the fact is that that is not an inescapable conclusion. Because

the claimant is drawing a foreign invalidity pension he has in fact no right to an old-age pension under the provisions of Article 25 of the Belgian Royal Decree No 50 of 24 October 1967, referred to above. The decision which was nevertheless adopted on 16 May 1977 can only be considered as a concession on the part of the administration, for it was made on the basis of a directive of the Minister of Social Security of 26 May 1972 which lacks any legal foundation.

In this respect it suffices to say that the objection relies on the interpretation and correct application of national law, a subject on which the Court of Justice cannot, in principle, pronounce. Besides that, however, doubts may be raised, as the representative of the Commission did in the course of the oral proceedings, as to whether the meaning of the Belgian provisions which were introduced really is to exclude the possibility of old-age pensions in the event of the grant of a foreign invalidity pension of little value, which according to the relevant law — as appears to be the case in Italy — cannot be converted into an old-age pension; in order to avoid such an unfair result it should perhaps be assumed that all that is provided for is a reduction in the Belgian old-age pension to take account of foreign invalidity pensions. In any event the O.N.P.T.S. did in fact issue a provisional decision to grant a pension, and in that decision it even expressly referred to Article 45 (4) of Regulation No 574/72, which must mean that in that respect the conditions laid down in Article 45 (1) have been met. It may readily be supposed, moreover, that since it has raised the question concerning the interpretation of Community law which is set out in the order making the reference, the Cour de Cassation is itself of the opinion that the claimant is entitled under Article 45 (1) of Regulation No 574/72 to receive immediate payment of certain provisional benefits.

There are therefore no compelling reasons why the Court should not investigate the question which has been raised.

2. In relation to that question, which I now propose to examine, one must first consider whether the benefits payable under Article 45 (1) of Regulation No 574/72 are actionable, for that is a pre-requisite for any award of interest at a rate to be fixed by the court.

This the O.N.P.T.S. appears to doubt, on the ground that Article 45 (4) mentions that the measures to be adopted under paragraph (1) thereof are of a provisional nature and are not subject to appeal.

In my opinion, however, the Commission and the claimant are correct in rejecting this argument. A logical interpretation of that provision can only be reached if the whole scheme of the regulation is taken into account, if the sense and purpose of the whole of Article 45 is considered and if, in addition to that, attention is also given to general principles of law which are important to legal relationships such as these.

It is quite clear that in cases where the laws of more than one Member State govern entitlement to social security and insurance institutions in several Member States must be actively involved, the final settlement of claims to benefits may in some circumstances require a considerable amount of time. On the other hand, too long a waiting period should not be imposed on the person making the claim, who is normally in

urgent need of such benefits. That is why — as the claimant has rightly pointed out — various provisions in Regulation No 574/22 (apart from Article 45, Articles 41 and 50) impose a duty on the institutions involved to *expedite* their inquiries. Thus, Article 45 (1) requires in particular the immediate payment of benefits which may be granted even though the case is not yet completely defined — that is to say, benefits to which entitlement exists under the law administered by the investigating institution "without having recourse to insurance periods completed under the legislation of other Member States". That provision makes it clear that there is, in this respect, no question of administrative discretion, but a *duty* to provide benefits on a provisional basis. This is supported by the precision of the wording: it identifies the institution which must grant the benefits, the time for payment ("immediately", once the necessary facts have been established) and the amount to be paid. That is shown in the wording of this provision by the use of the imperative, often employed in legislative provisions. It is to the same effect that Article 45 (4) expressly refers to the institution *required* to pay benefits. But if Article 45 (1) clearly concerns a *duty*, which naturally corresponds to a *right* on the part of the recipient of the benefits, then — even if there is no express mention in the Community regulation of a right of appeal — it must be assumed that such a right exists. This brings into play in fact the general maxim that in principle, whenever a legislative provision affords a right, there must also exist the possibility of ensuring its effective enforcement.

It would therefore not be permissible to conclude from the above-quoted portion of Article 45 (4) ("the measure taken ... is not open to appeal") that the possibility of an appeal is totally excluded, even when the right under paragraph (1) is not satisfied, or is satisfied only after a delay; in other words, if the provision is incorrectly applied. That kind of provision, which runs counter to the general legal maxim referred to above, calls for a narrow interpretation. That means that it is relevant exclusively in relation to the provisional nature of measures which are actually adopted, and which may be taken without the required investigations being properly completed. Thus, in any event Article 45 (4) must be taken to mean that, because the provisional measures may not prejudice the final outcome, it excludes any legal dispute which touches on the substance of questions concerning which no actionable measure has yet been taken.

In so far as the question referred to the Court by the Cour de Cassation includes the subsidiary question whether in the event of a misapplication of Article 45 (1) of Regulation No 574/72 it is possible to bring legal proceedings which are the condition precedent for the award of interest by the court, the answer must quite clearly be in the affirmative. We do not need to concern ourselves further with how the right of appeal is viewed in domestic law. That is a matter for the national courts which may, in the absence of special rules, rely on general principles of constitutional law or proceed by way of analogy.

3. As to the problem of whether Article 45 of Regulation No 574/72 excludes

the possibility, where payment of provisional benefits is not made immediately and on that basis legal proceedings are instituted in the national courts, that interest may be awarded by the court under national law from the date on which the appeal was lodged, it must be admitted that Community law says nothing directly to the point.

As the Commission has rightly remarked that is not, however, decisive in itself. What is relevant is that Community law confers an actionable right to provisional benefits. The necessary legal protection of that right must be guaranteed by the national courts, so that national law is important in organizing such protection and must be responsible for ensuring its effectiveness. That may include the grant of interest by the court to compensate for loss of purchasing power in the case of delayed benefits. It must therefore be taken as settled that the award of interest by the court in the context of Article 45 of Regulation No 574/72 conforms to national law, that the regulation in no way precludes it and that in fact the award of such interest represents no more than the most effective application of the Community regulation.

In that context the Commission rightly referred to the judgment in Case 35/74 (judgment of 12 November 1974, *Alliance Nationale des Mutualités Chrétiennes and Institut National d'Assurance Maladie-Invalidité* v *Thomas Rzepa* [1974] ECR 1241) which concerned Article 34 (3) of Regulation No 4 (which was replaced by Regulation No 574/72). With respect to the similar problem of the expiry of the period of limitation in the case of repayments of advances it was explained there that in the present state of the law the question must be settled by national social security law.

As to the argument of the O.N.P.T.S., on the other hand, that neither the Royal Decree of 24 October 1967 nor the implementing provisions relating thereto contemplates the award of interest by that court, and its doubts as to whether Article 1153 of the Belgian Civil Code is applicable to duties other than those governed by civil law, they are no more pertinent than the assertion that Article 45 (4) of Regulation No 574/72 can be taken to mean that in any case no alteration in the amount of the provisional benefits can be achieved by taking legal action. It should be noted here that in the context of proceedings under Article 177 it is not for this Court to debate questions of national law. We may content ourselves with declaring that at all events Community law does not preclude the award of interest by the Court, and leave all other details to the national court which is competent to decide what opportunities for this are provided by its legal order. Moreover, the construction placed by the O.N.P.T.S. upon Article 45 (4) appears to be too restrictive. In my opinion the exclusion of the right of appeal does not mean that in legal proceedings the proper application of Article 45 (1) cannot be discussed. Once it is accepted that there is a right of appeal in this wider sense, however, then that right clearly covers the question on what date the duty to pay benefits under that provision arises and whether the disadvantage to the claimant arising from any misapplication may be compensated for by remedies afforded by national law, which include the award of interest by the court.

4. In my opinion the question which has been referred to the Court must therefore be answered to the effect that Article 45 (4) of Regulation No 574/72 does not preclude a national court, in which proceedings have been instituted on the ground of failure to perform duties under Article 45 (1) correctly, from ordering the defendant social security institution to pay interest under national law at a rate to be fixed by the court on the benefits which it must pay on a provisional basis.