OPINION OF ADVOCATE GENERAL LÉGER

delivered on 4 May 1999 *

1. The Arbeidshof (Higher Labour Court) te Antwerpen (Belgium) has referred questions to the Court, requesting it to specify the scope of the *Van Munster* [1] judgment. That case concerned the difficulties faced by Community nationals with regard to pension rights in respect of a non-working spouse, where the former are subject to Belgian and Netherlands legislation on the matter.

The legal framework

The Belgian legislation

2. Article 3(1) of the Belgian Law of 20 July 1990 [2] provides that entitlement to a retirement pension is acquired on a calendar year basis at the rate of a fraction of the relevant flat-rate gross notional salary. That salary is taken into account up to a maximum of 75% if the worker's spouse has ceased all gainful employment and is not in receipt of a retirement pension or equivalent benefit ('the household rate'), and up to a maximum of 60% in other cases ('the single rate').

3. Article 3(8) of that law derogates from those principles, providing that when a spouse is in receipt of a retirement pension — or benefit — amounting to less than the difference between the pension at the household rate and the other spouse's pension at the single rate, the latter is entitled to a retirement pension at the household rate. However, in that case, the pension — or benefit — of the first spouse is to be deducted from that of the second.

The Netherlands legislation

4. Pursuant to the Algemene Ouderdomswet (General Law on Old Age Benefits, hereafter 'the AOW'), [3] anyone who resides in the Netherlands between their 15th and 65th birthday is compulsorily insured under the old age insurance scheme. In some cases, the AOW allows non-residents to join the said scheme voluntarily.

* Original language: French.

1 — Case C-165/91 *Van Munster* [1994] ECR I-4661.

2 — *Staatsblad* of 15 August 1990.

3 — *Staatsblad* 1956, 281.

5. Until 1985, the AOW was, like the Belgian legislation, based on the principle of family support. It granted to married men only the right to an old age pension up to the maximum of 100% of the statutory minimum net salary. The wife acquired the right to a personal pension — equal to 50% of the minimum net salary — only from the age of 65 and after her husband's death.

6. In 1985, the Netherlands legislature amended the law [4] so as to guarantee equal treatment for men and women, in conformity with Directive 79/7/EEC. [5]

7. In the version which came into force on 1 April 1985, the AOW confers entitlement on all married persons, once they reach the age of 65, to a personal pension corresponding to 50% of net minimum salary. When one spouse is not working and has not yet reached the age of 65, the other spouse receives, in addition to the personal pension, a supplement which may also amount to 50% of net minimum salary. When the non-working spouse reaches 65, the amount receivable under the personal pension is deducted from that received by the other spouse, so that the overall household income remains unchanged.

4 — By a Law of 28 March 1985 (*Staatsblad* 1985, 180).

5 — Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

The Community rules

8. Article 12(2) of Council Regulation (EEC) No 1408/71, [6] in the version set out in Regulation (EEC) No 2001/83, [7] states:

'The provisions of the legislation of a Member State for reduction... of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions or two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60(1)(b).'

6 — Regulation (EEC) No 1408/71 of 14 June 1971 of the Council on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

7 — Council Regulation No 2000/83 of 2 June 1983 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1983 L 230, p. 6).

9. That article was amended by Regulation (EEC) No 1248/92, [8] which came into force on 1 June 1992. This currently provides:

'Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction... of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.'

10. Regulation No 1248/92 also inserted Article 46a into Regulation No 1408/71, which provides:

'1. For the purposes of this Chapter, overlapping of benefits of the same kind shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. For the purposes of this Chapter, overlapping of benefits of different kinds means all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.

3. The following rules shall be applicable for the application of provisions on reduction... laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or with other income:

...

(c) no account shall be taken of the benefits acquired under the legislation of another Member State which are awarded on the basis of voluntary insurance or continued optional insurance;

...'

The Van Munster Case

11. The *Van Munster* case, cited above, concerned the compatibility with Commu-

8 — Council Regulation (EEC) No 1248/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 7).

nity law of the Belgian legislation in force at the time. [9]

12. It is worth recalling the facts giving rise to the case.

13. Mr Van Munster had worked in both Belgium and the Netherlands. His wife, who was younger, did not work. At the age of 65, he received a Belgian pension at the household rate as well as a Netherlands pension calculated on the basis of 100% of minimum net salary. When his wife turned 65 she received a Netherlands personal pension calculated on the basis of 50% of minimum net salary. Accordingly, the higher pension which Mr Van Munster had received until this time was withdrawn, so that the joint household income did not increase.

14. However, under Belgian legislation Mrs Van Munster had begun to receive an 'advantage equivalent to' a retirement pension. [10] Consequently, the Belgian authorities reduced her husband's pension by converting it from the household rate to the single rate. Mr Van Munster appealed against the decision which effected that reduction and the national court hearing the case asked the Court to examine two questions.

15. The first question concerned the compatibility of the Belgian legislation with Community law. In that regard, the Court noted that 'the provision of Belgian legislation at issue applies without distinction both to Belgian nationals and to nationals of the other Member States. Consequently, it cannot be regarded as constituting, in itself, a barrier to freedom of movement for workers'. [11] The Court concluded that Articles 48 to 51 of the EEC Treaty did not preclude such a provision. [12]

16. The second question concerned the concrete application of the provision in question to a situation such as that of the Van Munsters.

17. Having stressed certain specific aspects of that situation, [13] the Court pointed out that, 'the aim of Articles 48 to 51 of the Treaty would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community

9 — The legislation in question was Article 10(1) and (4) of Belgian Royal Decree No 50 of 24 October 1967 (as amended by the Law of 15 May 1984). Those provisions were, in substance, identical to those in Article 3(1) and (8) of the Law of 20 July 1990. However, pursuant to Royal Decree No 50, the non-working spouse had the right to waive any pension or 'equivalent advantage' in order to allow the retired worker to continue receiving a pension at the household rate. The Law of 20 July 1990 has abolished that option.

10 — According to the case-law of the Belgian Cour de cassation, an old age pension granted by the AOW constitutes an 'advantage equivalent to' a retirement pension within the meaning of the Belgian legislation (Cass. 30 June 1980, *Rechtskundig Weekblad*, 1980-81, 2182-2186).

11 — Paragraph 19.

12 — Paragraph 20.

13 — Paragraphs 22 to 26.

workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom...'. [14] The Court stated that, '[i]n the present case, it appears that application of national legislation to a migrant worker in the same way as to a non-migrant worker gives rise to unforeseen consequences, hardly compatible with the aim of Articles 48 to 51 of the Treaty and attributable to the very fact that the migrant worker's pension entitlement is governed by two different bodies of legislation'. [15]

18. The Court then defined the obligations incumbent on competent authorities when faced with such a divergence of legislation. The Court pointed out that 'the principle of cooperation in good faith laid down in Article 5 of the EEC Treaty requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 48 of the Treaty' [16] and that '[t]hat requirement implies that those authorities should ascertain whether their legislation can be applied literally to migrant workers, in exactly the same way as non-migrant workers, without ultimately causing migrant workers to lose a social security advantage and, consequently, discouraging them from actually exercising their right to freedom of movement'. [17] In order to assist the national court, the Court stated, by reference to its earlier case-law, [18] that '[w]hen applying domestic law, the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law'. [19]

19. In response to the second question, the Court held that: 'When, for the purpose of applying a provision of its domestic law, a national court has to characterise a social security benefit awarded under the statutory scheme of another Member State, it should interpret its own legislation in the light of the aims of Articles 48 to 51 of the EEC Treaty and, as far as is at all possible, prevent its interpretation from being such as to discourage a migrant worker from actually exercising his right to freedom of movement'. [20]

Facts and procedure

20. The factual background to the main proceedings is similar to that in the above-cited *Van Munster* case.

21. Mr Engelbrecht worked in Belgium from 1958 to 1993. During that time he made voluntary contributions to the Sociale Verzekeringsbank — the Netherlands Social Insurance Scheme (hereafter the

14 — Paragraph 27.

15 — Paragraph 30.

16 — Paragraph 32.

17 — Paragraph 33.

18 — Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26.

19 — Paragraph 34.

20 — Point 2 of the operative part.

'SVB') — with a view to receiving an old age pension pursuant to the AOW. His wife, who is younger, did not work.

22. Mr Engelbrecht turned 65 on 8 May 1993.

23. In Belgium, the Rijksdienst voor Pensioenen/Office National Belge des Pensions — the Belgian National Office for Pensions (hereafter the 'ONP') — granted him a retirement pension with effect from 1 June 1993. That pension was at the household rate because his spouse had not worked and was not in receipt of a retirement pension or benefit equivalent to such a pension.

24. In the Netherlands, the SVB granted him an old age pension from 1 May 1993, which was increased by a supplement because his wife was not yet 65 at that time.

25. Mrs Engelbrecht turned 65 on 16 August 1994.

26. Subsequently, the SVB granted her a personal old age pension from 1 August 1994, calculated on the basis of her periods of residence in the Netherlands and the voluntary insurance scheme to which her husband subscribed. The SVB specified that that voluntary insurance accounted for 88% of Mrs Engelbrecht's pension. As a corollary, the SVB discontinued the pension increase that Mr Engelbrecht had been receiving and granted him a pension of the same amount as that granted to his wife. The overall household income did not therefore increase as a result of the pension awarded to Mrs Engelbrecht.

27. However, considering that Mrs Engelbrecht was in receipt of a 'benefit equivalent to' a retirement pension within the meaning of the Belgian legislation, the ONP, by a decision taken on 20 October 1994, reduced the amount of the pension allocated to her husband by substituting the single rate for the household rate. This resulted in a 15% reduction in the income which Mr Engelbrecht received from his Belgian pension.

28. Mr Engelbrecht appealed against that decision to the Arbeidsrechtbank (Labour Court) te Turnhout. He claimed that his wife's old age pension should be considered overall to be the result of voluntary insurance even though it was calculated on the basis of both compulsory and voluntary insurance periods. He argued that, pursuant to Article 46a(3)(c) of Regulation No 1408/71, as amended by Regulation No 1248/92 (hereinafter 'Regulation No 1408/71, as amended'), the ONP could not take his wife's pension into account when calculating his pension.

29. The Arbeidsrechtbank te Turnhout rejected that argument on the ground that Article 46a did not relate to a situation, as in this case, where retirement or old age benefits were paid to two different people. However, it considered that the reduction of Mr Engelbrecht's Belgian pension constituted an obstacle to freedom of movement for workers. Referring, in particular, to the *Van Munster* judgment, the court held that Mrs Engelbrecht's pension could not be classified as a 'retirement pension' or 'equivalent benefit' within the meaning of the Belgian legislation. The court consequently upheld Mr Engelbrecht's right to a pension at the household rate.

30. The ONP brought an appeal against that decision before the Arbeidshof te Antwerpen. This latter considered the conditions under which the Belgian legislation could apply to Mrs Engelbrecht's Netherlands pension.

31. Firstly, it rejected Mr Engelbrecht's submission that his wife's pension resulted from voluntary insurance. It considered that only the greater part of that pension — 88% of the amount allocated — was awarded on the basis of 'voluntary insurance or continued optional insurance' within the meaning of Article 46a(3)(c) of Regulation No 1408/71, as amended. Next, the Arbeidshof te Antwerpen set aside the first court's conclusion and held that that provision could be applied when the retirement or old age benefits were awarded to two separate people. The Court concluded that the part of Mrs Engelbrecht's pension referred to above could not be taken into account when determining the level of her husband's Belgian pension.

32. However, as regards the part of Mrs Engelbrecht's pension that was awarded on the basis of periods of compulsory insurance — namely 12% of the amount allocated — the Arbeidshof te Antwerpen had doubts as to how to interpret the Court's *Van Munster* judgment, Article 5 of the EC Treaty (now Article 10 EC), Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC) Article 50 of the EC Treaty (now Article 41 EC) and Article 51 of the EC Treaty (now, after amendment, Article 42 EC).

33. Those doubts arise essentially from a divergence of case-law as between the national court and the Belgian Cour de cassation (Court of Cassation). In similar cases the Arbeidshof te Antwerpen had noted that application of the Belgian legislation led, for the spouses concerned, to loss of a social security advantage and therefore constituted an obstacle to the free movement of workers. Consequently, it had decided to disapply the provisions of its legislation in question. The Belgian Cour de cassation quashed that conclusion.[21] It pointed out that, according to the *Van Munster* judgment, Community law did not preclude the provisions in issue. The Cour de cassation considered that, in so far as Community law did not require it to do so, the national court was not entitled to

21 — Judgments of the Belgian Cour de cassation of 13 January 1997, *Office national des pensions/Swolfs*, and of 10 February 1997, *Bannink/Office national des pensions* (cited in paragraph 16.1 of the order of reference).

disapply those provisions in order to remedy the adverse consequences of a lack of coordination between national social security schemes, although, in interpreting the said provisions, it could, as far as at all possible, promote the free movement of migrant workers.

The questions referred for a preliminary ruling

34. Taking the view that resolution of the dispute in the main proceedings depended on the precise scope of the Court's judgment in the *Van Munster* case, the Arbeidshof te Antwerpen:

'(1) refers the following questions of interpretation to the Court of Justice for a preliminary ruling on the basis of the aforementioned provisions and any other provisions which that Court may consider to apply in this case:

Is the view that a national court which concludes that an applicable national provision requires a migrant worker's pension to be reduced (such as Article 3(1) and Article 3(8) of the Belgian Law of 20 July 1990 requiring the amount of the pension received by a migrant worker's spouse to be deducted from that worker's household pension, on the ground that the spouse's pension is a benefit equivalent to a pension) and considers that it is impossible to interpret that national rule in such a way, in the interest of free movement of workers, as to eliminate the unforeseen adverse effects of the lack of coordination between social security schemes, or holds that the application of that rule in the case in point constitutes an obstacle to free movement of workers, may not disapply the relevant Belgian legislation, compatible with Community law, in particular Articles 5, 48 and 51 of the Treaty of 25 March 1957 establishing the European Economic Community and, more specifically, the principles of free movement of workers and cooperation in good faith between the competent authorities?

(2) asks the Court of Justice for an interpretation of the scope of its judgment in Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661 in the light of those rules of European law:

(a) Does the reasoning set out in paragraphs 21 to 31 of that judgment in respect of Question 2 cover "unforeseen adverse effects of the lack of coordination between social security schemes"?

(b) In the light of paragraphs 32, 33 and 34 of that judgment, is point 2 of the operative part of that judgment to be interpreted as meaning that, where it is impossible to interpret an applicable provision of national law in such a way as to eliminate the adverse effects of its application, in a specific situation, on free movement of workers, the national court must apply that rule in full, or that the national court must disapply that rule of national law?

(3) In the light of point 2 of the operative part of the judgment in *Van Munster* v *Rijksdienst voor Pensioenen* and the case-law of the Court of Justice, is it compatible with Community law, more particularly Articles 5, 48 and 51 of the Treaty, to take the view that the national court may not disapply express, binding provisions of national law in order to eliminate the adverse effects:

— of the application of the rule of national law to migrant workers who have exercised their right to free movement,

— of the lack of coordination between social security schemes of different Member States?'

Preliminary observations

35. Before considering those questions, I would make two preliminary observations.

36. First, the Belgian Government and the ONP submit that the questions referred for a preliminary ruling are identical to those already dealt with in the *Van Munster* judgment. In accordance with the judgment in *Da Costa*, [22] there is therefore no need to give a further interpretation of Community law.

37. I do not consider that argument to be well founded.

38. It is true that certain questions — namely, Question 2(a) — overlap with the arguments contained in the *Van Munster* judgment. [23] However, most of the questions referred are new.

39. In *Van Munster* the Court ruled that the Belgian court should interpret its own legislation in the light of the aims of Articles 48 to 51 of the Treaty. In this case, the national court states that such an interpretation is not possible. It asks,

22 — Joined Cases 28/62 to 30/62 *Da Costa* [1963] ECR 31.

23 — See points 70 to 71 of this Opinion.

essentially, whether, in such a situation, it should disapply its national legislation.

40. That question was not resolved in the *Van Munster* judgment.

41. Consequently, I consider that a further interpretation of Community law is necessary.

42. Secondly, the reasoning articulated in the order for reference indicates that the court in the main proceedings considered the interpretation of Article 46a of Regulation No 1408/71, as amended, and concluded that it should apply to the Engelbrechts' situation. [24]

43. Interpretation of that provision is clearly of relevance for the decision in the main proceedings.

44. If Article 46a is interpreted as being inapplicable to the Engelbrechts' situation, the ONP will be entitled, when calculating Mr Engelbrecht's Belgian retirement pension, to take account of the entire Netherlands pension awarded to his wife. In that case, the amount of Mrs Engelbrecht's pension will be greater than the difference between her husband's pension at the household rate and that at the single rate. Accordingly, in its application of Article 3(1) of the Law of 20 July 1990, the ONP will reduce Mr Engelbrecht's retirement pension by simply converting the household rate into the single rate.

45. On the other hand, if Article 46a is interpreted as being applicable to a situation such as that at issue in the main proceedings, the ONP will not, pursuant to Article 46a(3)(c), be permitted to take into account the proportion of Mrs Engelbrecht's Netherlands pension calculated on the basis of periods of compulsory insurance — namely 12% of the amount allocated. Unless I am mistaken that proportion will be less than the difference between Mr Engelbrecht's pension at the household rate and his pension at the single rate. Subsequently, application of Article 3(8) of the Law of 20 July 1990 will allow Mr Engelbrecht to retain his right to a pension at the household rate subject to the deduction of the proportion mentioned above from his wife's pension (12% of the amount allocated).

46. The interpretation of Article 46a of Regulation No 1408/71, as amended, adopted by the national court appears to me to be incorrect.

24 — See, in particular, paragraphs 9 to 10.8 of the order for reference.

47. For that reason I would suggest that the Court interpret that provision, in accordance with its settled case-law, with a view to providing the Arbeidshof te Antwerpen 'with all the relevant elements of Community law which are necessary to enable [it] to give judgment'. [25]

The answer to the questions referred

48. I shall begin by examining the question relating to the interpretation of Article 46a of Regulation No 1408/71, as amended. The questions referred to the Court will then require it to be ascertained whether, on the one hand, the reduction of Mr Engelbrecht's retirement pension constitutes an obstacle to the free movement of workers and, on the other hand, whether the national court is bound to disapply its domestic legislation.

Article 46a of Regulation No 1408/71, as amended

49. It is clear from the grounds of the order for reference [26] that the Arbeidshof te Antwerpen is seeking to establish whether Article 46a(3)(c) of Regulation No 1408/71, as amended, precludes (when the amount of the retirement pension paid to an individual under the legislation of a Member State is being determined) account being taken of the amount of old age benefit acquired by that person's spouse under the legislation of another Member State on the basis of voluntary or continued optional insurance.

50. During the main proceedings argument focused essentially on the Court's *Bakker* judgment. [27]

51. In that judgment the Court held that the Belgian legislation [28] did not constitute a 'provision for reduction [of benefit]' [29] within the meaning of Article 12(2) of Council Regulation No 1408/71, in the version set out in Regulation No 2001/83. [30] According to the Court, 'the anti-overlapping provisions referred to by that provision only concern cases where a single person is in receipt of more than one benefit'. [31] The Belgian legislation 'relates to a situation different... [since it] does not concern cases where different benefits awarded to the same person overlap but cases where retirement or survivors pensions are paid to two different persons'. [32]

25 — Case 126/80 *Salonia* [1981] ECR 1563, paragraph 8.

26 — See, in particular, paragraphs 9 to 10.8.

27 — Case 151/87 *Bakker* [1988] ECR 2009.

28 — Article 10(1) to (4) of Royal Decree No 50 was in issue.

29 — 'Provisions for reduction [of benefit]' are also called 'Anti-overlapping provisions'.

30 — Paragraph 15.

31 — Paragraph 12.

32 — Paragraph 14.

52. In the instant case the main proceedings specifically address a situation where retirement or old age benefits are payable to two different persons — in the circumstances of this case, Mr Engelbrecht and his wife.

53. It is appropriate, therefore, to consider whether, given the judgment in *Bakker*, Article 46a(3)(c) of Regulation No 1408/71, as amended, may be applied to the situation where there is an overlap of several benefits payable to two separate persons.

54. To that end the scope of Article 12(2) of Regulation No 1408/71 should be defined at the outset.

55. I consider, for two reasons, that the term 'provisions... governing the reduction... of benefits' in Article 12(2) of Regulation No 1408/71, as amended, means exactly the same as 'provisions... for reduction... of benefit' in Article 12(2) of Regulation No 1408/71, in the version set out in Regulation No 2001/83.

56. First, Regulation No 1248/92 amended Article 12(2) by deleting the second sentence of that paragraph and stating that the principle that national provisions against anti-overlapping may be invoked against a recipient of social security benefits applies '[s]ave as otherwise provided'. In that connection, Regulation No 1248/92 inserted into Title III, Chapter 3, entitled 'Old age and death (pensions)', Articles 46a, 46b and 46c. Those articles lay down the conditions governing the application of national anti-overlapping rules applicable to invalidity, old age and survivors' benefits. It follows that the amendments effected by Regulation No 1248/92 to Regulation No 1408/71, in the version set out in Regulation No 2001/83, simply specified the precise limits for the application of national rules against overlapping in the context of the calculation of pensions. [33] They therefore affected neither the principle of Article 12(2) [34] nor the meaning of 'provisions... for reduction... of benefit' referred to in that provision. [35]

57. Secondly, the amendments effected by Regulation No 1248/92 do not, in my view, cast doubt on the Court's finding in *Bakker*.

58. That finding was premissed as much on the wording as on the aims of Article 12(2) of Regulation No 1408/71, in the version set out in Regulation No 2001/83. With regard to its wording, the Court noted that the first sentence of that provision referred, in the French version, to the 'bénéficiaire' (recipient of benefit) and the second re-

33 — Case C-366/96 *Cordelle* [1998] ECR I-583, paragraph 12.
34 — Ibid.
35 — Case C-143/97 *Conti* [1998] ECR I-6365, paragraph 19.

ferred to the situation where 'the person concerned receives' benefits of the same kind. [36] The Court stated that the anti-overlapping provisions referred to in Article 12(2) only concerned cases where a single person was in receipt of more than one benefit. [37] As for the aim of Article 12(2), the Court held that the article 'forms the counterpart of the advantages which Community law affords workers in enabling them to require the social security legislation of more than one Member State to be applied simultaneously. The purpose of Article 12 is to prevent a worker from being able to derive from the simultaneous application of different bodies of legislation advantages considered unjustified in both national and Community law'. [38]

59. In my view, those considerations are equally applicable to Article 12(2) of Regulation No 1408/71, as amended. On the one hand, even though Regulation No 1248/92 has deleted the second sentence of that provision, it remains the case that the first sentence [of the French version] continues to refer to the 'bénéficiaire' of social security benefits. On the other hand, as we have seen, [39] the amendments effected by Regulation No 1248/92 have not undermined the principle of Article 12(2). That principle has, in Regulation No 1408/71, as amended, the same purpose as that pursued in the version of Regulation No 1408/71 set out in Regulation No 2001/83.

60. Consequently, I consider that the provisions against overlapping referred to in Article 12(2) of Regulation No 1408/71, as amended, concern only the cases where one and the same person is in receipt of more than one social security benefit.

61. In those circumstances, Article 46a(3)(c) of Regulation No 1408/71, as amended, does not seem to me to be capable of applying to the situation where there is an overlap of more than one benefit received by two separate persons.

62. To the extent that it determines the conditions for the application of national rules against overlapping in respect of invalidity, old age and survivors' benefits, Article 46a(3)(c) constitutes a limit on the principle laid down in Article 12(2) of Regulation No 1408/71, as amended, that provisions against overlapping may be invoked. Consequently, its scope cannot be wider than that of the principle from which it derogates.

63. Moreover, I share the ONP's view that the concept of 'overlapping of benefits of the different kinds', referred to in Article 46a(2), cannot cover a case where two separate individuals have more than one overlapping benefit. It follows from the 21st recital in the preamble to Regulation No 1248/92 that that term must be interpreted 'in accordance with the case-law of the Court of Justice'. The Court's case-law states that there are overlapping benefits of

36 — Paragraph 11.
37 — Paragraph 12.
38 — Paragraph 13.
39 — Point 56 of this Opinion.

a different kind when an individual is in receipt of more than one benefit calculated or provided on the basis of periods of insurance completed by different people. [40]

64. It follows that for the purpose of determining the amount of the retirement pension paid to a person under the legislation of a Member State, Article 46a(3)(c) of Regulation No 1408/71, as amended, does not preclude the amount of old age pension acquired by that person's spouse under the legislation of another Member State on the basis of voluntary insurance or continued optional insurance being taken into account.

Question 2(a)

65. First of all, Question 2(a) is not easy to understand. In order to identify its import, reference to the other questions and the order for reference is helpful.

66. In the other questions referred by the Arbeidshof te Antwerpen, that court appears to envisage two situations.

67. In the first situation the national court 'concludes that a national provision... requires a migrant worker's pension to be reduced... and considers that it is impossible to interpret [that national rule in such a way as] to eliminate... the adverse consequences... of the *lack of coordination* between social security schemes'. [41] The national court could disapply that provision so as to 'eliminate the adverse effects... of *the lack of coordination* between [those] schemes'. [42] In that case, the reduction of Mr Engelbrecht's retirement pension would constitute an obstacle to the free movement of workers which results from the lack of coordination between national social security schemes. In the present state of Community law, such a reduction would not therefore be incompatible with Articles 48 to 51 of the Treaty.

68. In the second situation, the national court 'holds that the *application* of that [national] rule... constitutes an obstacle to the free movement of workers'. [43] It could disapply that provision 'in order to eliminate the adverse effects... of [its] *applica-*

40 — With regard to Article 12(2) of Regulation No 1408/71, in the version set out in Regulation No 2001/83, see Case 197/85 *Stefanutti* [1987] ECR 3855. In that case Mrs Stefanutti was in receipt firstly of an invalidity pension on the basis of her employment record in one Member State and, secondly, a survivor's pension on the basis of her deceased husband's employment record in another Member State. With regard to Article 46a of Regulation No 1408/71, as amended, see Case C-98/94 *Schmidt* [1995] ECR I-2559. In that case Mrs Schmidt was in receipt of a retirement pension awarded on the basis of insurance periods which she had completed in one Member State and also a retirement pension obtained — in her capacity as a divorced spouse — on the basis of periods of insurance completed by her former husband in another Member State.

41 — Question 1 (my emphasis).

42 — Question 3 (my emphasis).

43 — Question 1 (my emphasis).

tion to migrant workers'.[44] In that case, the reduction of Mr Engelbrecht's pension would constitute an obstacle to free movement of workers, prohibited by Articles 48 to 51 of the Treaty.

69. Moreover, in the grounds of its order for reference, the Arbeidshof te Antwerpen adds that 'It could be concluded that... Article 3(1) and (8), of the Law of 20 July 1990... produces... the consequences which... the Court of Justice, ... in its judgment in *Van Munster* — paragraph 27... considers to constitute an *obstacle* to freedom of movement for workers'.[45]

70. I would conclude that, in essence, in Question 2(a) the Arbeidshof te Antwerpen is seeking to ascertain whether the reduction in the retirement pension required by Article 3(1) and (8) of the Belgian Law of 20 July 1990, in a situation such as that of the Engelbrechts, constitutes an obstacle to the free movement of workers or whether it results from the disparities between the Belgian and Netherlands social security schemes.

71. As I have said,[46] that question has already been considered in the *Van Munster* judgment.[47] However, it is clear from the grounds of the order for reference[48] that, despite that judgment, the Arbeidshof te Antwerpen continues to experience some difficulty in determining whether or not application of the provision in issue to a situation such as that of the Engelbrechts constitutes an obstacle to the free movement of workers. I believe that that difficulty may arise from the fact that, in *Van Munster*, reference is made at one point to an 'obstacle'[49] and at another to 'unforeseen consequences *hardly compatible* with the aim of Articles 48 to 51 of the Treaty'.[50] Therefore, to eliminate any ambiguity, it seems to me appropriate to re-examine the question.

72. As we know, Regulation No 1408/71, as amended, does not set up a common social security scheme for workers and members of their family moving within the Community.[51] In that area, Article 51 of the Treaty provides for the coordination, not the harmonisation, of the legislation of the Member States.[52] It allows differences to remain between the social security schemes of each Member State and, consequently, between the rights of persons who work in them. The substantive and procedural differences between the social security schemes of the Member States are

44 — Question 3 (my emphasis).

45 — Paragraph 15.1 of the order for reference (my emphasis).

46 — Point 38 of this Opinion.

47 — Points 21 to 35.

48 — See in particular, paragraphs 14.5.1 to 14.5.4.

49 — Paragraph 27 (see also paragraphs 33 and 35).

50 — Paragraph 30 (see also paragraphs 31 and 32).

51 — Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7; Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23.

52 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 20.

therefore unaffected by Article 51 of the Treaty. [53]

73. Advocate General Darmon pointed out in his Opinion in *Van Munster* [54] that Articles 48 to 51 of the Treaty include two types of national social security rules.

74. First, social security rules that contain overt or disguised discriminatory provisions founded on the basis of nationality are incompatible with Articles 48 to 51 of the Treaty. The Court has held that 'The conditions governing the right or obligation to become a member of a social security scheme are... a matter to be determined by the legislation of each Member State, provided that there is no discrimination in that regard between the nationals of the host Member State and those of other Member States'. [55]

75. Secondly, national rules, even if they apply without distinction to a State's own nationals and nationals of other Member States, are incompatible with Articles 48 to 51 of the Treaty if they deprive a migrant worker of an advantage to which a non-migrant worker is entitled. The Court considers that 'the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State; such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom'. [56] To that end, the examination undertaken by the Court consists in determining whether the national rules are likely to place migrant workers at a disadvantage, in matters of social security, as compared with workers who have worked only in one Member State. [57]

76. In this case it is undisputed that the Belgian legislation — inasmuch as it provides for entitlement to a pension at the household rate in the situation where the spouse of a worker has ceased all gainful employment and does not receive either a retirement pension or equivalent benefit, but applies the single rate where a worker's spouse is in receipt of such a pension or benefit — contains no overt or disguised discrimination on the ground of nationality. In the *Van Munster* judgment the Court held that, 'the provision of Belgian legislation at issue applies without distinction both to Belgian nationals and to nationals of the other Member States. Consequently, it cannot be regarded as constituting, in itself, a barrier to freedom of movement for workers'. [58]

53 — Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 12.

54 — Opinion delivered 28 June 1994, paragraphs 16 to 18.

55 — Case C-12/93 *Drake* [1994] ECR I-4337, paragraph 26. See also Case C-320/95 *Ferreiro Alvite* [1999] ECR I-951, paragraph 23.

56 — Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22. See also Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 18 and Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraph 39.

57 — *Masgio*, paragraphs 19 to 23; *Paraschi*, paragraphs 24 and 25; and *Vougioukas*, paragraph 41. See also Case C-360/97 *Nijhuis* [1999] ECR I-1919, paragraph 31.

58 — Paragraph 19.

77. It is therefore necessary to ascertain whether the provision at issue deprives the migrant worker of a social security advantage that is enjoyed by a non-migrant worker.

78. In that regard, it is undeniable that Mr Engelbrecht, who exercised his right to free movement, is in a less favourable situation than a worker who also has a non-working 'dependent' spouse but who has worked only in Belgium. While the former loses his right to a retirement pension at the household rate, the latter is not faced with the threat of having his pension reduced.

79. However, that finding does not necessarily mean that the Belgian legislation is incompatible with Articles 48 to 51 of the Treaty.

80. Let me explain.

81. Let us imagine that Mr Engelbrecht had worked in Belgium and France. Like the Belgian legislation, French law grants a retired worker an increase in pension for a 'dependent' spouse. [59] At retirement age, Mr Engelbrecht would therefore have obtained a retirement pension at the household rate in the first State and an increased retirement pension in the second State. When his spouse reached the age of 65 she would have had no pension of her own. Consequently, Mr Engelbrecht's Belgian pension would have been maintained at the household rate.

82. Let us now imagine that Mr Engelbrecht had worked in Belgium and Ireland. Irish law gives retired workers a pension increased by a weekly supplement if their spouses have not engaged in any gainful employment and do not have an income of their own. [60] On reaching retirement age, Mr Engelbrecht would thus have obtained a pension at the household rate from the first State and a pension increased by way of statutory supplement in the second State. When his spouse reached the age of 65, she would not have received a retirement pension or equivalent benefit, so that Mr Engelbrecht's Belgian pension would not have been reduced.

83. Let us imagine, lastly, that the Engelbrechts' Netherlands pension was calculated pursuant to the AOW in the version in force prior to 1 April 1985. In that case, Mr Engelbrecht would have obtained, in Belgium, a retirement pension at the household rate and, in the Netherlands, an old age pension calculated on the basis of 100% of net minimum salary. Since his wife had no independent right to a pension, Mr Engelbrecht would have retained his right to a Belgian pension at the household rate.

59 — Articles L. 351-13 and R. 351-31 of the Code de la sécurité sociale (Social Security Code).

60 — Section 87 of the Social Welfare (Consolidation) Act 1993 for social insurance and Section 137 of the Social Welfare (Consolidation) Act 1993 for social assistance.

84. It follows from those examples that Belgian legislation does not establish a difference in treatment as between non-migrant workers and those who have exercised their right to free movement. It does not deprive the migrant worker of a social security advantage which only the non-migrant worker enjoys. It is true that, in theory, the reduction in retirement pension imposed by Belgian legislation affects only workers who have exercised their right to free movement. However, that reduction operates not by reason of the exercise of that right but because the migrant worker and non-working spouse fall simultaneously under Belgian and Netherlands pensions legislation.

85. In other words, I consider that the reduction in Mr Engelbrecht's pension results from fundamental divergences between the Belgian and Netherlands social security schemes. As the Court noted in the *Van Munster* judgment, '[t]hose differences can be traced to the fact that one of the two retirement schemes provides for a higher pension rate for a worker whose spouse is not in receipt of a retirement pension or equivalent benefit, it being assumed that such a pension or benefit increases the couple's total income... while the other scheme, in the same circumstances, awards each spouse, on reaching retirement age, a... pension of an equal amount, without however implying any increase at all in the couple's total income'. [61]

61 — Paragraph 31.

86. I conclude that the reduction in retirement pension required by Article 3(1) and (8) of the Belgian Law of 20 July 1990 in a situation such as that in issue in the main proceedings does not constitute an obstacle to the free movement of workers, but results from the existing disparities between the Belgian and Netherlands social security schemes.

The other questions

87. Given the conclusion outlined above, the other questions — which it is appropriate to consider together — can be formulated as follows:

'When, for the purposes of applying a provision of domestic law, a national court has to characterise a social security benefit awarded under the statutory scheme of another Member State, and concludes that its own legislation cannot be interpreted, in the light of the aims of Articles 48 to 51 of the Treaty, in such a way as to avoid the adverse effects for the migrant worker of the lack of coordination between national social security schemes, is the court required to disapply its national legislation?'

88. Let us deal right away with the question whether the Belgian legislation is capable of being interpreted in a manner that is consistent with the objectives of Articles 48 to 51 of the Treaty.

89. Mr Engelbrecht argued before the Court that such an interpretation was possible. By refusing to classify Mrs Engelbrecht's Netherlands pension as a 'benefit equivalent to' a retirement pension, the Arbeidsrechtbank te Turnhout showed that the Belgian legislation could be interpreted in a manner that would avoid discouraging a migrant worker from exercising his right to free movement.

90. For its part, the ONP pointed out that, under the case-law of the Belgian Cour de cassation, an old age pension provided under the AOW should be considered to be a 'benefit equivalent to' a retirement pension. Therefore, to refuse to classify Mrs Engelbrecht's pension as such is tantamount to interpreting the Belgian legislation *contra legem*. [62] The method of interpretation in conformity with Community law cannot compel a national court to give an interpretation *contra legem*.

91. Clearly, the Court cannot examine that question. It involves an interpretation of Belgian law and is, accordingly, beyond the Court's jurisdiction. [63] It is therefore appropriate to proceed on the assumption — expressly referred to by the national court — that the legislation in question is not capable of being interpreted in a manner consistent with the aims of Articles 48 to 51 of the Treaty.

92. In those circumstances, is the national court required to disapply its national legislation?

93. Fairness would demand a reply in the alternative.

94. The reduction of Mr Engelbrecht's Belgian retirement pension, effected without any real quid pro quo for his wife, constitutes an injustice which is hard to accept. It is all the harder because the adverse consequences of the disparities between the Belgian and Netherlands legislation are well known to the competent authorities. Thus, it is clear from the documents before the Court that, since October 1984, the Belgian and Netherlands social security bodies had been examining the repercussions of the AOW's reform on the Belgian rules. [64] In that context, they had already found that the grant, pursuant to Netherlands legislation, of their own pension to non-working spouses would prevent the Belgian pension of retired workers being maintained at the household rate. [65] Furthermore, those consequences were highlighted in the *Bakker* case [66] and in the *Van Munster* judgment.

62 — The ONP cites Advocate General Van Gerven's Opinion in the *Barber* case, C-262/88 [1990] ECR I-1889, point 50. That view is shared by the Belgian and Netherlands Governments and by the Commission.

63 — See, in particular, Cases C-57/93 *Vroege* [1994] ECR I-4541, paragraph 34, and C-128/93 *Fisscher* [1994] ECR I-4583, paragraph 42.

64 — Paragraphs II.B.20 and II.D.37 and 38 of the ONP's observations.

65 — Ibid., paragraph II.B.20(c) and paragraph II.D.38.

66 — See points 15 to 33 of Advocate General Darmon's Opinion in the *Bakker* case.

95. The fact remains, however, that the Court's case-law does not authorise such an answer.

96. On the one hand the Court has consistently held that, in the absence of harmonisation in social security matters, Member States remain competent to define the conditions for granting social security benefits, provided that the conditions adopted do not give rise to overt or disguised discrimination between Community workers. [67] It is equally clear that Article 48 of the Treaty is not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality. [68]

97. On the other hand, since the *Simmenthal* judgment, [69] the Court has considered that every national court must apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law [70] which may conflict with it.

67 — See, for example, Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 45.

68 — Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18.

69 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21.

70 — See also Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713, paragraph 27; Joined Cases C-10/97 to C-22/97 *IN. CO. GE.'90 and Others* [1998] ECR I-6307, paragraph 20.

However, that principle applies solely to the case where the national court is faced with a provision of domestic law which is *in itself* incompatible with Community law.

98. Is it appropriate to extend this principle to a situation such as that in issue in the main proceedings?

99. I do not think so.

100. Firstly, as both the Netherlands and United Kingdom Governments have pointed out, such a solution would be difficult to reconcile with the principle of legal certainty.

101. It would imply that a provision of domestic law, in itself compatible with Community law, could nevertheless be disapplied by national courts on the sole ground that its application in conjunction with the application of another Member State's legislation, gives rise to consequences that are hardly compatible with the objectives of the Treaty. In other words, such a solution would amount to making application of a Member State's legislation — that is compatible with Community law — depend on the content of another

Member State's rules — that are equally consistent with Community law.

102. Significant difficulties would result both for the competent authorities and for citizens when they sought to determine the exact circumstances in which their social security rules could be applied. Those difficulties would be even harder to resolve where a migrant worker's situation was governed, not by the legislation of two Member States, as in this case, but by the legislation of three separate Member States, or even more. [71]

103. Secondly, if the case-law in *Simmenthal* were to be extended to cover a situation such as that in the main proceedings, the Court would be conferring on the national courts the delicate task of ensuring better coordination of national social security schemes; the sole instrument of coordination available to them would be the obligation to disapply a provision of their domestic law.

104. It is beyond question that disparities between social security schemes that are liable to discourage migrant workers from exercising their freedom of movement must be abolished. Freedom of movement for migrant workers 'is one of the foundations of the Community'. [72] Hence the objective of Article 51 of the Treaty is to contribute to the 'establishment of the greatest possible freedom of movement for migrant workers...'. [73] The terms of the *Van Munster* judgment are clear: where there is a divergence between national legislation in matters of social security, 'the principle of cooperation in good faith laid down in Article 5 of the EEC Treaty requires the competent authority in the Member States to use all the means at their disposal to achieve the aims of Article 48 of the Treaty'. [74]

105. I doubt, however, that national courts and the principle of 'inapplicability' of a provision of domestic law that is incompatible with Community law constitute the proper authorities and instrument to ensure the removal of obstacles to free movement which originate in the disparities between the national rules relating to social security. The coordination of social security schemes generally requires an in-depth knowledge and comprehensive examination of the rules in question. It also demands a solution appropriate to the difficulties encountered, in keeping with the particular characteristics of the schemes concerned.

106. In those circumstances, I consider that, when a national court is faced with

71 — One need only imagine how difficult it would be to determine the conditions of application of the relevant rules if Mr Engelbrecht had worked in Belgium, France, Ireland and the Netherlands.

72 — Case 284/84 *Spruyt* [1986] ECR 685, paragraph 18.

73 — Cases 254/84 *De Jong* [1986] ECR 671, paragraph 14; C-293/88 *Winter-Lutzins* [1990] ECR I-1623, paragraph 13.

74 — Paragraph 32.

a divergence between national rules on social security that are in conformity with Community law, it can only be required to interpret its legislation in the light of the aims of Articles 48 to 51 of the Treaty and to avoid, as far as possible, giving an interpretation that might discourage migrant workers from effectively exercising their right to free movement. That obligation is laid down in the *Van Munster* judgment and should be confirmed. However, in a situation where such an interpretation proves impossible, the national court cannot, in my view, be required to disapply its national legislation.

107. To conclude this point, I would add, for the sake of completeness, that the difficulties raised by the main proceedings can be resolved by other means.

108. Thus, the Community legislature could, on the basis of Article 89 of Regulation No 1408/71, as amended, insert a provision in Annex VI thereto for the purpose of laying down special rules for the application of the Belgian and Netherlands legislation to migrant workers who have a non-working 'dependent' spouse.

109. Similarly, the Administrative Commission on Social Security for Migrant Workers is competent to address the problem. According to the wording of Article 81 of Regulation No 1408/71, as amended, it is the duty of that commission 'to deal with all administrative questions and questions of interpretation arising from the provisions of this Regulation...' and also to 'submit proposals to the Commission... for working out... revision of this... Regulation'.

110. I would therefore suggest that the Court's reply to the Arbeidshof te Antwerpen should be that when, for the purposes of applying a provision of domestic law, a national court has to characterise a social security benefit awarded under the statutory scheme of another Member State, and concludes that its own legislation cannot be interpreted, in the light of the aims of Articles 48 to 51 of the Treaty, in such a way as to avoid the adverse effects for the migrant worker of the lack of coordination between national social security schemes, it is not required to disapply its national legislation.

Conclusion

111. On the basis of the preceding analysis I propose that the Court rule:

(1) Article 46a(3)(c) of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983, as last amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, must be interpreted as not precluding, for the purpose of determining the amount of the retirement pension paid to a person under the legislation of a Member State, the amount of old age pension acquired by that person's spouse under the legislation of another Member State on the basis of voluntary insurance or continued optional insurance being taken into account.

(2) The reduction in the amount of a retirement pension required by Article 3(1) and (8) of the Belgian Law of 20 July 1990 in a situation such as that in issue in the main proceedings does not constitute an obstacle to the free movement of workers, but results from the disparities between the Belgian and Netherlands social security schemes.

(3) When, for the purpose of applying a provision of domestic law, a national court has to characterise a social security benefit awarded under the statutory scheme of another Member State, and concludes that its own legislation

cannot be interpreted in the light of the aims of Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC), Article 50 of the EC Treaty (now Article 41 EC) and Article 51 of the EC Treaty (now, after amendment, Article 42 EC) in such a way as to avoid the adverse effects for the migrant worker of the lack of coordination between national social security schemes, it is not required to disapply its national legislation.