old-age pension acquired under the legislation of another Member State are 'benefits of the same kind' within the meaning of Article 12 (2) of Council Regulation No 1408/71 in so far as both pensions are intended to ensure that the surviving spouse who has attained a certain age and to whom the pensions are awarded on the basis of the periods of insurance completed by the deceased spouse has the means of subsistence.

2. When a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not prevent that legislation from being applied to him in its entirety, including the national rules against overlapping benefits. If, however, the application of that national legislation is less favourable to the worker than the application of Article 46 of Regulation No 1408/71, the provisions of that article must be applied. On the latter supposition, Article 46 (3), which seeks to limit the overlap of acquired benefits, by the means provided in paragraphs (1) and (2) of that article, is applicable, to the exclusion of rules against overlapping laid down by national legislation.

REPORT FOR THE HEARING
delivered in Case 37/86 *

I — Facts and written procedure

1. The case referred for a preliminary ruling concerns the interpretation of Article 12 (2) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, as amended (Official Journal 1983, L 230, p. 8).

The first sentence of Article 12 (2) provides as follows: 'The provisions of the legislation of a Member State for reduction, suspension or withdrawal 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, the second sentence provides that: '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 of two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60 (1) (b)'.

2. Mr van Gastel, the deceased husband of Mrs Johanna van Gastel, née Coenen, was a Netherlands national resident in Belgium.

* Language of the Case: Dutch.

From 1 November 1976 he had been awarded a Belgian employed person's retirement pension pursuant to a decision of the Rijksdienst voor Werknemerspensioenen (National Pension Office for Employed Persons, hereinafter referred to as 'the Pension Office'). The retirement pension was calculated for a household on the basis of a period in employment of 17/45ths applying *inter alia* Article 46 of Regulation No 1408/71.

From 1 October 1976 the Netherlands Sociale Verzekeringsbank (Social Insurance Bank) also awarded Mr van Gastel, on the basis of *inter alia* voluntary contributions, a Netherlands old-age pension pursuant to the Netherlands Algemene Ouderdomswet (General law on old age).

On 20 February 1983 Mr van Gastel died and his widow, Mrs van Gastel, née Coenen, obtained a pension of HFL 1 091.13 per month on the basis of the Netherlands old-age law. This pension, which was payable from 1 May 1983, was awarded on the basis that Mrs van Gastel had been insured up to her 65th birthday on 13 August 1979 by voluntary contributions.

By a provisional decision of 8 July 1983 the Pension Office granted Mrs van Gastel a survivor's pension from 1 March 1983. The sum of that pension was fixed at BFR 72 644 per annum, which represented 80% of the retirement pension of her deceased husband.

However, by decision of 20 April 1984, the Pensions Office informed Mrs van Gastel that, following her award of a Netherlands old-age pension, her Belgian survivor's pension had to be reduced under the rules against overlapping benefits contained in Article 52 of the Royal Decree of 21 December 1967, Article 12 of Regulation No 1408/71 and Article 7 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended (Official Journal 1983, L 230, p. 86). Article 52 of the Royal Decree of 21 December 1967 provides that: 'A survivor's pension granted under Royal Decree No 50 may overlap with one or more retirement pensions or any other benefits in its stead awarded under Belgian or foreign legislation . . . only up to a sum equal to 110% of the amount of the survivor's pension awarded to the widow multiplied by the inverse fraction thereof . . . used to calculate the retirement pension forming the basis for calculating the survivor's pension'. In the instant case, the ceiling on overlapping was BFR 211 522 (which is BFR 72 644 × 45/17 × 1.1).

On 16 May 1984 Mrs van Gastel appealed against the Pension Office's decision of 20 April 1984 to the Arbeidsrechtbank (Labour Tribunal), Antwerp.

On 29 August 1984 the Rijkskas voor Rust- en Overlevingspensioenen (National Fund for Retirement and Survivors' Pensions, hereinafter referred to as 'the Fund'), acting pursuant to the abovementioned decision of the Pension Office, demanded the repayment of BFR 113 993, the sum allegedly overpaid.

On 13 September 1984 Mrs van Gastel also appealed against the Fund's decision to the Arbeidsrechtbank, Antwerp.

The national court considered that the dispute raised a question of Community law and that consequently a decision of the Court of Justice was necessary to enable it to give judgment. It therefore stayed the

proceedings and in accordance with Article 177 of the EEC Treaty referred the following question to the Court:

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

3. The judgment making the reference was lodged at the Court Registry on 12 February 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Pension Office, represented by its general director, R. Masyn, by the Netherlands Government, represented by E. F. Jacobs, acting General Secretary at the Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by its Legal Adviser, J. Griesmar, assisted by F. Herbert, of the Brussels Bar.

After hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court, by decision of 19 November 1986, assigned the case to the Third Chamber pursuant to Article 95 of the Rules of Procedure and opened the oral procedure without any preparatory inquiry.

II — Written observations

The Pension Office considers that the preliminary question should be answered in the negative, to the effect that 'benefits of the smae kind' within the meaning of Article 12 (2) of Regulation No 1408/71 are not involved in this case. The Netherlands Government and the Commission, however, suggest that an affirmative response should be given to the question.

1. The Pension Office observes that Mrs van Gastel receives a Belgian survivor's pension and a Netherlands old-age pension. Regulation No 1408/71 regards invalidity, old-age and widows' pensions as benefits of the same kind only for the purposes of the application of Article 12 (2) to Danish, Irish and United Kingdom legislation (Annex VI, Title B (Denmark), point 8; Title F (Ireland) point 4; Title J (United Kingdom), point 9). Since no particularity of this kind is mentioned as regards the application of Article 12 (2) to the legislation of the other Member States, it must be concluded that the Belgian survivor's pension and the Netherlands old-age pension are not of the same kind.

Furthermore, in the instant case the survivor's pension was reduced pursuant to a Belgian reduction clause which limits overlapping where that pension overlaps with a retirement pension acquired under Belgian or foreign legislation (Article 52 of the Royal Decree of 21 December 1967) without it being necesssary to have recourse to Article 12 (2) of Regulation No 1408/71 to reduce the survivor's pension by a benefit acquired abroad. The Court has recognized

in its judgment of 13 October 1977 in Case 22/77 *Fond nationale de retraite des ouvriers mineurs* v *Mura* [1977] ECR 1699 and of 14 March 1978 in Case 98/77 *Schaap* [1978] ECR 707 that 'so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and appportionment, those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied'.

The Pension Office confirms that the survivor's pension was calculated under the Belgian legislation and the retirement pension under the Netherlands legislation so that Mrs van Gastel received benefits under national legislation alone, without Article 46 of Regulation No 1408/71 being applied. Consequently, she cannot rely on Article 12 (2) of that regulation to claim exemption from the national reduction clauses. Therefore Article 52 of the abovementioned royal decree is applicable.

Moreover, it may be deduced from the file that the Netherlands old-age pension was granted on the basis of contributions, the payment of which was to continue after Mrs van Gastel's husband obtained his pension and that consequently at least part of the premiums had been paid by Mrs van Gastel herself.

Furthermore, pursuant to the Netherlands legislation (Decree of 22 December 1971), the husband paid premiums according to both spouses' total income so that both were insured under the Netherlands old-age law. However, the woman's right could only arise after her 65th birthday and once her husband, by reason of his death, no longer obtained the family pension. The Netherlands old-age pension should therefore be considered as a retirement pension which the wife obtains by reason of insurance contracted by herself, through her husband.

It follows that the old-age pension paid to Mrs van Gastel under the Netherlands old-age law and the survivor's pension paid to her under the Belgian legislation should on no account be regarded as benefits of the same nature. They do not arise from the insurance of the same person and do not cover the same risk.

Finally the Pension Office suggests that the preliminary question should be answered as follows:

'(1) The Belgian survivor's pension and the Netherlands old-age pension are not benefits of the same kind within the meaning of Article 12 (2) of Council Regulation (EEC) No 1408/71.

(2) The recipient may not rely on the exceptions mentioned in Article 12 (2) of the abovementioned regulation to the application of the provisions of Belgian law providing for reduction, suspension or withdrawal of benefits, when the survivor's pension awarded to him or her was calculated solely on the basis of Belgian legislation and the old-age pension was awarded solely on the basis of Netherlands legislation.

(3) It is the task of the national court to decide on the application of the Royal Decree of 21 December 1967 since

both the Belgian survivor's pension and the Netherlands old-age pension were awarded exclusively on the basis of national legislation — the survivor's pension on the basis of Belgian legislation and the old-age pension on the basis of Netherlands legislation; in so doing the national court must assume that the old-age pension which the person concerned receives on account of voluntary contributions paid under a foreign scheme of compulsory insurance is to be regarded as a benefit instead of a retirement pension within the meaning of the abovementioned Article 52 in view of the general wording of that provision.'

2. The Netherlands Government recalls that under the Court's case-law benefits may be considered to be of the same kind when their purpose and basis of calculation are the same (see the judgment of 5 May 1983 in Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385).

As regards the basis of calculation, the Netherlands Government explains that the Belgian old-age pension and the Belgian survivor's pension both directly related to the insurance contributions paid by the deceased spouse. Moreover, the Netherlands pension for married persons, provided for by the Netherlands old-age law, and the pension for unmarried persons are both granted on the basis of the social security insurance and contributions of the deceased spouse. Under the provisions of the Netherlands old-age law as in force at the material time a married woman was also insured on the basis of the voluntary insurance of her husband, without any requirement for her to have been in gainful employment herself. The Netherlands benefit and the Belgian benefit are consequently identical as regards their basis of calculation.

As regards the purpose of the benefits in question, it must be stressed that, when a husband dies, both the Belgian old-age benefits and the Netherlands old-age benefits which were paid to the worker concerned and his spouse are converted into benefits for the widow. Therefore the purpose of those benefits is to provide a widow, who no longer enjoys the income of her deceased spouse, with the means of subsistence.

In conclusion, the Netherlands Government considers that in the instant case the benefits concerned are identical, with the consequence that under Article 12 (2) of Regulation No 1408/71, the Belgian rules against overlapping benefits cannot be applied to the Netherlands old-age pension when the benefits have been determined in acccordance with Article 46 of Regulation No 1408/71.

3. The Commission, like the Netherlands Government, submits that upon the application of the criteria laid down by the Court, the Belgian survivor's pension and the Netherlands old-age pension may be considered as being 'benefits of the same kind' within the meaning of Article 12 (2) of Regulation No 1408/71.

The purpose of the Belgian survivor's pension is to ensure that an elderly woman, who has lost the income of her deceased husband, has the means of subsistence; the sum of this pension is determined on the basis of the spouse's insurance. The purpose of the benefits awarded under the Netherlands old-age law is also to ensure that elderly people have the means of subsistence; however, they are based exclusively on the personal insurance record of the persons concerned. This follows from Article 13 of the Decree of 22 December 1971 adopted pursuant to Article 35 of the Netherlands old-age law, under the terms of which a woman, who during the material time was married to the person who paid

the contributions on the basis of a right to continued voluntary insurance, is considered the insured person under the Netherlands old-age law for the period in which she was married, provided that this period is between her 15th and 65th birthdays.

The differences between the two schemes are therefore due to the particular characteristic of the Netherlands legislation which provides that a widow's pension is only awarded up to the 65th birthday of the person concerned and that women who are widowed after reaching this age do not receive a widow's pension (Article 8 of the Algemene Weduwen- en Wezenwet (General law on widows and orphans) of 9 April 1959). Thus, from the age of 65 a widow is no longer permitted under Netherlands legislation to claim rights under the insurance of her deceased husband but is entitled only to rights based on her own insurance record under the Netherlands old-age law. Since such differences are a result of 'characteristics peculiar to the various national laws' (judgment of 5 July 1983 in Case 171/82 *Valentini* [1983] ECR 2157), they do not prevent the two benefits from having the same purpose and object.

In this context the Commission recalls that the characteristics of national law whereby a Netherlands widow's pension is converted into an old-age pension when the widow reaches the age of 65 played an important part in the way in which the Administrative Commission for the Social Security of Migrant Workers defined the concept of 'benefits of the same kind'. Belgian legislation has no provision against overlapping when a foreign widow's pension is granted; the rules against overlapping become applicable, however, from the moment when the widow receives a foreign old-age pension in addition to her Belgian survivor's pension. Therefore, the conversion of the Netherlands widow's pension into an old-age pension which occurs in the Netherlands causes a considerable reduction in the total sum of the benefits received by a widow who also is in receipt of a Belgian survivor's pension. For those reasons, the Administrative Commission considered that, having regard to the objective of Article 51 of the Treaty, it was appropriate to consider a Netherlands widow's pension converted into an old-age pension a benefit of the same kind.

This must also be the case when the benefits involved are, on the one hand, a Belgian survivor's pension and, on the other hand, a Netherlands old-age pension awarded to a woman who has become a widow after the age of 65, since the same reasoning applies as in the case of women who have become widows before the age of 65.

The Commission adds that, according to the Court's case-law, so long as a worker is receiving a pension by virtue of national legislation alone, Article 12 (2) of Regulation No 1408/71 does not prevent the national legislation, including the rules against the overlapping of benefits, in this case Article 52 of the Royal Decree of 21 November 1967, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules laid down by Article 46 of Regulation No 1408/71, the provisions of that article must be applied. Thus, the benefit determined on the basis of national legislation, including its rules against the overlapping of benefits, must be compared with the result arising under the provisions of Community law, bearing in mind that under Article 46 (2) of Regulation No 574/72, benefits corresponding to periods of voluntary or optional continued insurance are not to be taken into account for the purposes of applying Article 46 (3) of Regulation No 1408/71.

Finally, the Commission suggests that the question referred for a preliminary ruling should be answered as follows:

'Article 12 (2) of Council Regulation (EEC) No 1408/71 should be interpreted as meaning that when a widow asserts her rights to an old-age pension based on her own insurance against the competent authority of a Member State whose legislation provides that a widow is not entitled or no longer entitled to a widow's pension from a certain age and asserts her rights to a widow's pension based on her husband's insurance against the competent institution of another Member State, the old-age pension and the widow's pension must be considered to be benefits of the same kind.

So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including its rules against oerlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules laid down by Article 6 of Regulation No 1408/71 the provisions of that article must be applied.

For the purposes of Article 46 (3) of Regulation No 1408/71 the amounts of benefit corresponding to periods of voluntary or optional continued insurance may not be taken into account by virtue of Article 46 (2) of Regulation No 574/72'.

III — Replies to the Court's questions

The Netherlands Government and the Commission were requested by the Court to reply to the following question:

'What conclusions do they draw from the fact, referred to by the Pension Office, that Annex VI (Special procedure for applying the legislations of certain Member States) to Regulation (EEC) No 1408/71 regards invalidity, old-age and widows' pensions as benefits of the same kind within the meaning of Article 12 (2) only for the purpose of applying that article to Danish, Irish and United Kingdom legislation?'

1. In reply to that question the Netherlands Government states that Article 12 (2) of Regulation No 1408/71 is not relevant in this case, since the Netherlands rules aginst overlapping benefits already cover benefits provided for by the legislation of other countries. Therefore, the designation in Annex VI to Regulation No 1408/71 of the benefits to be regarded as 'benefits of the same kind' within the meaning of Article 12 (2), when the Netherlands legislation is applied is therefore unnecessary. Annex VI does not deal with the application of Belgian legislation in this matter either.

The fact that special procedures are not mentioned in Annex VI either for applying Netherlands legislation or for applying Belgian legislation only allows the conclusion that when Article 46 is applied in order to calculate benefits of the same nature, the provisions in the first sentence of Article 12 (2) may not be invoked. However, it cannot be deduced from this that where no such mention is made in Annex VI there can be no question of benefits being of the same nature.

2. The Commission explained that the provisions of Annex VI concerning the application of Article 12 (2) to Danish, Irish and United Kingdom legislation were added

when the three Member States concerned acceded to the Communities. It is not possible to base an *a contrario* argument on the existence of those express provisions.

The absence of such express provisions in the case of the other Member States has not prevented the Court from deciding in favour of a broad interpretation of the concept of 'benefits of the same kind' (judgment of 19 June 1979 in Case 180/78 *Brouwer-Kaune* v *Bestuur van de Bedrijfsvereniging voor het Kledingbedrijf* [1979] ECR 2111; of 15 October 1980 in Case 4/80 *D'Amico* v *ONPTS* [1980] ECR 2951; of 2 July 1981 in Joined Cases 116, 117, 119 to 121/80 *RWP* v *Celestre and Others* [1981] ECR 1737; of 5 May 1983 in Case 238/81 *Van der Bunt-Craig* cited above, and of 5 July 1983 in Case 171/82 *Valentini* cited above). From those judgments it must be inferred that the Court rejects the *a contrario* argument mentioned above.

The Commission also points out that the Administrative Commission for the Social Security of Migrant Workers has recently unanimously expressed the view, at the request of Belgium, that it is justified within the objectives of Article 51 of the Treaty to consider a Netherlands widow's pension converted into an old-age pension and a Belgian widow's pension as being benefits of the same kind. That viewpoint is expressed in the chapter concerning pensions, as revised, which is currently being prepared at the Commission.

U. Everling
Judge-Rapporteur