OPINION OF ADVOCATE GENERAL LENZ

delivered on 29 April 1993 *

Mr President,
Members of the Court,

A — Introduction

1. The plaintiff in the main proceedings, Mr Larsy, lives in a Belgian municipality near the French border. He worked as a self-employed nursery gardener and cultivated land in Belgium and France until his retirement in 1989. Throughout his working life he paid contributions under Belgian pension insurance scheme.

2. The order for reference states that he paid social security contributions in both Belgium and France in the period from 1 January 1964 to 31 December 1977.

3. Unfortunately, the order for reference contains no further information in this regard. Nevertheless, the documents in the case before the national court show that Mr Larsy originally had to pay social security contributions only in Belgium on the income earned in Belgium and France. In 1967 the French authorities informed him that he had to pay contributions in France, backdated to 1 January 1964, in respect of the land situated in France. He challenged this decision in the courts, but ultimately without success, on the basis of the social security convention signed by Belgium and France on 17 January 1948. On the conclusion of the action in 1975 he was ordered to pay the social security contributions claimed by the French authorities. On 12 October 1978 Belgium and France signed a supplementary agreement to the abovementioned convention which came into effect on 1 January 1978. After that date, social security contributions on Mr Larsy's entire income from his work as a nursery gardener in Belgium and France were (once again) payable only in Belgium.

4. It is clear from the documents in the file that he had to pay contributions to the relevant pension insurance institutions in both Belgium and France between 1 January 1964 and 31 December 1977. It appears that during at least part of that time (from 1964 to 1975) income arising in France was subject to a double charge in that pension contributions were payable on it in both France and Belgium.

5. The defendant in the main proceedings, the Belgian institution responsible for the statutory pension insurance scheme for self-employed persons, set the pension payable to Mr Larsy at BFR 222 333 in 1989. This was based on the fact that his periods of insurance (from 1 January 1944 to 31 December

* Original language: German.

1988) totalled the period of 45 years necessary for the grant of a full pension, and he was therefore entitled to the full amount (45/45ths).

6. At the beginning of 1991 Mutualité Sociale Agricole (the competent French pension insurance institution for Mr Larsy) notified the defendant in the main proceedings that Mr Larsy had been covered by the French social security scheme for 14 years. The defendant then amended the amount of the Belgian pension to BFR 156 225, that is 31/45ths of the full amount, [1] with effect from 1 October 1989. It referred in this connection to the provision against coexisting benefits in Article 19 of Royal Decree No 72 of 10 November 1967. [2] This decision is the subject of the main proceedings.

7. The Tribunal du Travail (Labour Tribunal), Tournai, referred the following questions to the Court for a preliminary ruling:

'1. Is Article 19 of Royal Decree No 72 of 10 November 1967 on retirement and survivors' pensions for self-employed persons compatible with the objective of Article 12 of Regulation (EEC) No 2001/83 of 2 June 1983?

2. Is Article 19 of Royal Decree No 72 of 10 November 1967 compatible with Article 51 of the Treaty of Rome?'

B — Analysis

I — *Interpretation of the questions from the national court*

8. The questions referred for a preliminary ruling are formulated in such general terms that it could appear that the national court is seeking a reply to the question whether the application of a national provision against overlapping benefits, such as Article 19 of Royal Decree No 72, is compatible with Regulation (EEC) No 1408/71 [3] and with the EEC Treaty. As is well-known, the Court has delivered rulings concerning this problem on several occasions. [4]

9. From the context it may be inferred, however, that in reality the national court seeks clarification of the question whether the application of such a provision is compatible with Community law in the light of the particular circumstances of the present case. The documents in the file of the national court confirm this interpretation. In the main proceedings the Auditeur du Travail proposed seeking a preliminary ruling from the Court of Justice. The questions he

1 — The calculation was obviously based on the full amount in effect at the time of the change, which was slightly higher than the amount applying in 1989 (see paragraph 21 below).

2 — In the version resulting from Article 142 of the Law of 15 May 1984 (*Moniteur Belge*, 22 May 1984, p. 7035, at p. 7093). The text of this provision is reproduced in the Report for the Hearing.

3 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6)

4 See section II below.

formulated are identical to those referred to the Court. He [5] explained that they were framed for a situation in which the person in question had had to pay pension insurance contributions in two States in one and the same period. [6]

10. It would nevertheless have been desirable for the national court to set out the purpose and context of its questions more clearly in the order for reference. As the Court of Justice has previously indicated, the information furnished in decisions making references serves not only to enable the Court to give helpful answers but also 'to enable the Governments of the Member States and other interested parties to submit observations in accordance with Article 20 of the Protocol on the Statute of the Court'. [7] Under that article, Member States and other interested parties are notified only of the order for reference. The right it gives them to submit statements of case or written observations can be exercised only if the meaning and scope of the questions are sufficiently clear from the order for reference. In my opinion, the order for reference to be examined here still satisfies these requirements. It is true that the Government of the Federal Republic of Germany has informed the Court that it was unable to submit observations as the order on its own was incomprehensible. In response it must be said that the order for reference states the essential circumstances required for understanding the questions, albeit in an extremely concise and succinct manner. [8]

11. The questions from the Tribunal du Travail ask whether the application of the Belgian rule against overlapping benefits is compatible with Community law. In this connection it must be noted that

'The Court has consistently held that, whereas it is not for the Court, in the context of Article 177 of the Treaty, to rule on the compatibility of a national law with Community law, it does have jurisdiction to provide the national court with all the elements of interpretation under Community law to enable it to assess that compatibility for the purpose of deciding the case before it.' [9]

12. In its questions for reference the national court seeks in essence to establish whether Regulation No 1408/71 prevents the application of a national rule against overlapping benefits if the person in question had to pay pension insurance contributions in two Member States during one and the same period.

13. With regard to Regulation No 1408/71, the questions mention only Article 12. Nevertheless, the Commission has rightly

5 — The Auditeur du Travail is a representative of the public interest who assists the Tribunaux du Travail in the performance of their duties (see Articles 145 and 152 of the Belgian Code Judiciaire and, for more detail, J. Petit, 'De rechtspleging voor de arbeidsgerechten', No 75 ff. in: R. Blanplain (ed.), *Arbeidsrecht* (as at September 1992)).

6 — In his submissions, the Auditeur du Travail commented on the proposed questions as follows: 'In other words, is the application of a national rule against coexisting benefits compatible with Community law where a person who has been covered by the social security schemes of two Member States concurrently for a given period can claim old-age benefits from each of them in respect of that same period?'

7 — Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, paragraph 6.

8 — See the remarks of the Court in the *Holdijk* case (cited above in footnote 7), paragraph 7.

9 — Case 369/89 *Piageme* [1991] ECR I-2971, paragraph 7.

pointed out that Article 46 of that regulation must also be considered in order to decide the case before the national court. In this connection it should be remembered that the Court of Justice is required

'to interpret all the provisions of Community law required by the national courts in order to decide disputes pending before them, even if these provisions are not expressly indicated in the questions put to the Court by those national courts'. [10]

II — National rules against overlapping benefits and Community law

14. On several occasions the Court has ruled on the relationship between rules in the Member States against overlapping benefits and Community law in the field of pension insurance. Among more recent case-law, I would cite in particular the *Pian*, [11] *Di Prinzio* [12] and *Di Crescenzo and Casagrande* [13] cases.

15. These judgments were delivered on the basis of Regulation No 1408/71 in the version prior to amendment by Regulation (EEC) No 1248/92 of 30 April 1992 [14] which, *inter alia*, amended Articles 12 and 46 to 51 of Regulation No 1408/71. The first paragraph of the new Article 95a added to Regulation No 1408/71 provides that under Regulation No 1248/92 no right shall be acquired for a period prior to 1 June 1992. [15] The change in the calculation of the pension by the defendant in the main proceedings was made in 1991 and must therefore be examined on the basis of the old version of Regulation No 1408/71. However, I shall come back to the new legal situation later.

16. The Court's case-law shows that:

'so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation (EEC) No 1408/71 do not prevent the national legislation alone, 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 to the worker than the application of the rules laid down by Article 46 of Regulation (EEC) No 1408/71 the provisions of that article must be applied'. [16]

17. The competent institution must therefore in each case compare the pension which would be due under national law (including the rules against overlapping benefits) with the pension which would be due on the basis of Community law. The recipient is then to

10 — Settled case-law; see most recently Case 280/91 *Viessmann* [1993] ECR I-971, paragraph 17.

11 — Case 108/89 [1990] ECR I-1599.

12 — Case 5/91 [1992] ECR I-897.

13 — Joined Cases 90/91 and 91/91 [1992] ECR I 3851.

14 — OJ 1992 L 136, p. 7. A consolidated version of Regulation No 1408/71 is printed in OJ 1992 C 325.

15 — Regulation No 1248/92 came into force on this date in accordance with Article 4 of the regulation itself.

16 — Joined Cases 116/80, 117/80 and 119 121/80 *Celestre* [1981] ECR 1737, paragraph 9. This case law also applies to self employed persons (see Case 128/88 *Di Felice* [1989] ECR 923, paragraph 9).

be granted whichever benefit is greater in amount. [17]

18. When calculating pension benefits on the basis of Article 46 of Regulation No 1408/71, the national rules against overlapping benefits must *not* be applied. This is clear from the second sentence of Article 12(2) of Regulation No 1408/71.

19. The calculation of the pension in accordance with Article 46 is carried out in three stages:

(a) First, pursuant to the first subparagraph of Article 46(1), it is necessary to calculate the amount (the 'independent' amount) to which the worker would be entitled under national provisions if he were not entitled to a pension under the legislation of another Member State. National rules against overlapping benefits cannot therefore be applied in this connection. [18]

(b) Secondly, in accordance with the second subparagraph of Article 46(1), the benefit that would result from the application of Article 46(2) is then to be calculated.

To that end, it is necessary to calculate the theoretical amount of the benefit which the person concerned could claim if all the periods of insurance completed in different Member States had been completed in the State in question and under the legislation administered by the competent institution of that State at the time when the benefit is granted (Article 46(2)(a)).

However, the competent institution disregards any period by which the total length of these insurance periods exceeds the maximum period for the award of full benefit in the Member State in question (Article 46(2)(c)). If the person concerned is already entitled to full benefit on the basis of the insurance periods completed in *one* Member State (as is Mr Larsy with regard to his Belgian pension), it is not 'necessary' to add on insurance periods completed in other Member States. In such cases, therefore, the competent institution calculates the theoretical amount without taking into consideration periods of insurance completed in other Member States. [19]

The 'actual amount' must then be calculated on this basis. This amount is determined from the theoretical amount in the ratio which the length of the insurance periods completed under the legislation of the Member State in question bears to the total length of all the insurance periods (Article 46(2)(b)). [20]

The actual amount (Article 46(2)) is to be compared with the independent amount (Article 46(1)). Only the higher of these two

17 — *Di Prinzio* (cited in footnote 12), paragraph 18.

18 — *Di Prinzio* (cited in footnote 12), paragraphs 34-35.

19 — *Di Prinzio* (cited in footnote 12), paragraphs 25-26 and 43-44.

20 — This calculation may be illustrated by an example: If the person concerned has worked in Member State A for 30 years and in Member State B for 10 years (and completed corresponding periods of insurance), the amount to be calculated in accordance with Article 46(2)(b) in Member State A is three-quarters of the theoretical amount (to be determined by reference to the law of Member State A in conjunction with Article 46(2)(a)) and in Member State B one-quarter of the theoretical amount, to be calculated according to the law of Member State B in conjunction with Article 46(2)(a).

amounts is taken into consideration (second sentence of the second subparagraph of Article 46(1)).

This calculation is to be carried out for all Member States under whose legislation the person concerned has completed periods of insurance.

(c) Finally, the competent institution must ensure that the total of the amounts that the worker may receive on the basis of the calculations described above does not exceed the limit laid down in the first subparagraph of Article 46(3). Under this provision, the highest theoretical amount calculated according to Article 46(2)(a) constitutes the upper limit. If this limit is exceeded, benefits are to be reduced accordingly (second subparagraph of Article 46(3)). [21]

20. If the amount resulting from the application of Article 46 of Regulation No 1408/71 is higher than the amount resulting from the application of national law, the former amount is to be granted. On the other hand, if the amount resulting from the application of national regulations alone (including the rules against overlapping benefits) is greater, it is that amount which is to be granted.

21. In reply to a question regarding the method of calculating the pension in the present case, the Belgian Government produced to the Court a letter from the defendant in the main proceedings. This states that, pursuant to Article 46 of Regulation No 1408/71, the defendant in the main proceedings calculated an actual amount within the meaning of this provision of BFR 226 778. [22] Mr Larsy was granted this amount as it exceeded the amount calculated on the basis of Belgian legislation alone.

22. Mr Larsy was on that basis granted more than he had originally claimed. When this was pointed out by the Court, the national court nevertheless confirmed that it wished the questions to stand. In this connection it should be noted that, save in exceptional cases, it is solely for the national courts to determine both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. [23]

III — Calculation of pensions when contributions have been paid in more than one Member State during the same period

23. The problems in the present case do not end there, however. The national court's

21 — *Di Prinzio* (cited in footnote 12), paragraphs 60 et seq.

22 — The Belgian institution calculated the actual amount due by taking the periods of insurance completed under Belgian law and in total to be 45 years and applying the resulting ratio (45/45ths) to the theoretical amount, so that here the independent, theoretical and actual amounts are identical. I consider this to be correct. The remark made by the Court in *Di Prinzio* (cited above in footnote 12), paragraph 58, that in such a case the actual amount is 'of necessity' less than the independent amount, is not, in my opinion, generally true.

23 — See Case 186/90 *Durighello* [1991] ECR I 5773, paragraph 8. Incidentally, it should be noted that the letter from the defendant in the main proceedings produced by the Belgian Government is inaccurate on at least one point: it states that application of the national rule against coexisting benefits led to a pension of BFR 126 549, or 28.21/45ths of the full amount (see paragraph 6 above).

questions refer only to the Belgian rule against overlapping benefits. As I have already said, this rule can be applied only if the pension granted under national legislation is higher than the amount calculated on the basis of Article 46 of Regulation No 1408/71. In the final analysis, the national court wishes to ascertain whether the pension to be granted to Mr Larsy in Belgium may be reduced owing to the fact that he simultaneously draws a pension from another Member State, although he paid pension insurance contributions in both Member States during one and the same period. Such reduction may also result from the application of Article 46(3) of Regulation No 1408/71. For that reason a proper reply to the questions from the national court cannot, in my opinion, be given until this provision has been examined more closely.

24. In the case in point, Mr Larsy is entitled to a pension under French law in respect of the 14 years during which he was covered — against his will — by the French pension insurance scheme, although the amount does not appear from the file. At the same time, according to the statements by the defendant in the main proceedings (in the letter produced by the Belgian Government), he is entitled to a pension calculated according to Article 46(1) and (2). The amount of this pension corresponds to the theoretical amount within the meaning of Article 46(2), as Mr Larsy completed in Belgium all the periods of insurance required for a full pension. For the calculation of the total entitlement under Article 46, however, the highest theoretical amount constitutes the upper limit, pursuant to paragraph 3 of that article. Assuming that the theoretical maximum under Belgian law is higher than that resulting from the application of French law, Mr Larsy could never receive more than the full amount of the Belgian pension. However, he would also have received the full Belgian pension if he had not worked in France and paid contributions there. This would mean that the fact that Mr Larsy paid contributions in France for 14 years had no effect on the level of his pension.

25. The absurdity of this result is obvious. In this way a person who exercised his right to freedom of movement would be treated less favourably than a person who had not done so. The detrimental effect stems from the fact that the person concerned had to pay contributions to the pension insurance schemes of more than one Member State during the same period without the additional contributions ultimately leading to a corresponding increase in pension. The circumstances of the present case suggest that such cases must be exceptional. Nevertheless, it should be observed that the application of Article 46(3) in such cases has consequences which could deter a person from exercising his right to freedom of movement.

26. The Court of Justice has already ruled that provisions of secondary Community legislation may not be interpreted in such a way that they deprive persons who exercise their right to freedom of movement of the advantages afforded to them under the

legislation of a single Member State. [24] The present case, however, relates to benefits accorded by Community law itself in Article 46(1) and (2) of Regulation No 1408/71.

27. The setting of an upper limit in Article 46(3) serves to 'avoid unjustified overlapping of benefits, which could result in particular from the duplication of insurance periods or other periods treated as such'. [25] It seems clear that, while Mr Larsy paid contributions in two Member States, he did so during the same period (1964 to 1977), so that there was a 'duplication' of insurance periods. However, under those circumstances it certainly cannot be said that overlapping benefits would be *unjustified*. If a person is compelled to pay contributions to pension schemes in two Member States for one and the same period, he should also be able to receive the resulting advantages without curtailment. [26]

28. It is true that in the *Collini* judgment the Court ruled that:

'the anti-overlapping rule in Article 46(3) applies in *all* cases in which the total sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the limit of the highest theoretical amount of pension, even if the exceeding of that limit is not due to the duplication of insurance periods'. [27]

This could be understood as meaning that Article 46(3) must be applied in all the cases covered by its wording. Such an interpretation would, however, go further than the purpose of this provision requires.

29. The *Collini* case involved an Italian worker who had worked for seven years in Italy and 35 years in Belgium. The Italian insurance institution granted him a pension of BFR 23 829 on the basis of Article 46(2)(b) of Regulation No 1408/71. The 35 years in Belgium would in themselves have entitled him to a pension of BFR 326 389. The competent institution had calculated this pension by adding a notional insurance period of 8 years to the 35 working years. Because of the time spent working in Italy, this notional figure was reduced from eight to three, leading to a pension of BFR 300 490. The theoretical amount payable in Belgium in accordance with Article 46(2) was BFR 336 748 in this case. The Court of Justice ruled that this amount constituted the limit within the meaning of Article 46(3) and the person concerned could not receive more than this in total.

24 — See Case 302/90 *Faux* [1991] ECR I 4875, paragraphs 27 28

25 — Eighth recital in the preamble to Regulation No 1408/71 (see OJ, English Special Edition 1971 (II), p. 416).

26 — Whether the disadvantageous effect for Mr Larsy could have been compensated for in some other way, for example by a refund of his contributions to the French institution, is not under examination here.

27 — Case 323/86 [1987] ECR 5489, paragraph 13 (emphasis added)

30. The present case does not, however, relate to notional years of insurance and their relationship to periods of insurance under the legislation of other Member States. The plaintiff in the main proceedings worked in two Member States during the period in question and had to pay pension contributions in each. The situation is therefore quite different from that in the *Collini* case. Consequently the position remains that Article 46(3) is not applicable in the absence of 'unjustified' overlapping.

31. It seems useful in this connection to draw attention to one of the provisions added to Regulation No 1408/71 by Regulation No 1248/92. According to Article 46a(3)(c) in the new version, 'no account shall be taken of the amount of benefits acquired under the legislation of another Member State which are awarded on the basis of voluntary insurance or continued optional insurance' for the application of national anti-overlapping rules. The same should apply if the person concerned has to pay pension contributions in another Member State at the same time as contributions in his own State.

32. It must therefore be concluded that Article 46(3) of Regulation No 1408/71 is not applicable if the person concerned had to pay pension contributions during the same period in more than one Member State.

IV — Legal situation after entry into force of Regulation (EEC) No 1248/92

33. As I have already mentioned, Regulation No 1248/92 cannot be the basis of a claim for the period prior to 1 June 1992. Article 95a(4) of Regulation No 1408/71 nevertheless provides that the rights of a person to whom a pension was awarded prior to 1 June 1992 may, on application, be reviewed on the basis of Regulation No 1248/92. For that reason it seems useful to consider the new legal situation briefly.

34. According to the new version of Article 46(1)(a)(i), the 'independent' amount resulting from the application of national provisions is to be calculated as before. The anti-overlapping rules of national legislation may be applied in only two particular cases (Article 46b(2)(b) in the new version). The 'actual amount' of the benefit is to be calculated (Article 46(1)(a)(ii) in conjunction with paragraph 2 in the new version), for which purpose the anti-overlapping rules of national legislation cannot be applied (Article 46b(1) in the new version).

35. The new version of Article 46(3) reads as follows:

'The person concerned shall be entitled to the highest amount calculated in accordance with paragraphs 1 and 2 from the competent institution of each Member State without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which this benefit is due.

Where that is the case, the comparison to be carried out shall relate to the amounts determined after the application of the said provisions.'

It appears that the application of these new provisions leads to the same conclusion as I have reached on the basis of the former version of Regulation No 1408/71.

C — Conclusion

I therefore propose that the Court reply as follows to the questions submitted by the national court:

(1) Articles 46 and 12(2) of Regulation (EEC) No 1408/71 in the version in force before the last amendment by Regulation (EEC) No 1248/92 are to be understood as meaning that they do not preclude the application of a national provision against overlapping benefits if a pension is determined on the basis of national law alone. On the other hand, if the pension is determined on the basis of Article 46, a national provision against lapping benefits must not be applied.

(2) When the pension is calculated in accordance with Article 46, paragraph 3 thereof is not applicable where the person concerned was compelled to pay pension insurance contributions in more than one Member State during the same period.