# JUDGMENT OF THE COURT (Second Chamber)
15 December 1993 *

In Joined Cases C-113/92, C-114/92 and C-156/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail, Charleroi (Belgium), for a preliminary ruling in the proceedings pending before that court between

**Enrico Fabrizii (C-113/92)**

**Pietro Neri (C-114/92)**

and

**Office National des Pensions (ONP),**

on the interpretation of Article 46(2)(a) and (b) of 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

and

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail, Brussels (Belgium), for a preliminary ruling in the proceedings pending before that court between

* Language of the case: French

**Aldo Del Grosso (C-156/92)**

and

**Office National des Pensions (ONP),**

on the interpretation of Articles 7, 48 and 51 of the EEC Treaty and of Articles 12 and 46 of Council Regulation No 1408/71, cited above,

THE COURT (Second Chamber),

composed of: G. F. Mancini, President of the Chamber, F. A. Schockweiler and J. L. Murray, Judges,

Advocate General: M. Darmon,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— E. Fabrizii, P. Neri and A. Del Grosso, by D. Rossini, union representative of the Confédération des Syndicats Chrétiens,

— the Office National des Pensions (ONP), by R. Masyn, General Administrator of the ONP,

— (in Case C-156/92), the Belgian Government, by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by M. Wolfcarius, of its Legal Service, and T. Margellos, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Office National des Pensions, represented by J.-P. Lheureux, Administratrive Secretary of the ONP, acting as Agent, and of the Commission, at the hearing on 1 April 1993,

after hearing the Opinion of the Advocate General at the sitting on 13 May 1993,

gives the following

## Judgment

1 By two judgments of 2 April 1992, received at the Court on 10 and 13 April 1992, the Tribunal du Travail (Labour Court), Charleroi, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 46(2)(a) and (b) of Council Regulation 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter 'the regulation').

2 By judgment of 30 April 1992, received at the Court on 7 May 1992, the Tribunal du Travail (Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7, 48 and 51 of the EEC Treaty and Articles 12 and 46 of the regulation.

3 These questions were raised in proceedings between three Italian migrant workers and the Belgian Office National des Pensions (Belgian National Pensions Office, hereinafter 'the ONP') concerning the calculation of their retirement pensions.

4 Mr Fabrizii, the plaintiff in the main action in Case C-113/92, was a face worker in a Belgian mine for 26 years, a period of employment which entitled him to four additional notional years of insurance in that Member State. Initially, therefore, the ONP granted Mr Fabrizii a retirement pension provided for under that State's national legislation for the benefit of miners, calculated on the basis of a full insurance record of 30 years.

5 Subsequently, Mr Fabrizii obtained an Italian retirement pension on account of his military service in Italy from 1940 to 1945, a period corresponding to four years under the Belgian miners' scheme.

6 The ONP then reassessed Mr Fabrizii's entitlement and reduced his period of insurance in Belgium to 26 years, under the fourth subparagraph of Article 10(2)(1) of Belgian Royal Decree No 50 of 24 October 1967 on retirement and survivors' pensions for employed persons (*Moniteur Belge* of 27 October 1967, p. 1125, hereinafter 'the royal decree'), as subsequently amended.

7 Under that provision, the number of additional notional years of insurance is reduced by the number of years for which the employee may claim a retirement pension under another Belgian scheme, other than the scheme for the self-employed, or under a foreign scheme.

8 Mr Neri, the plaintiff in the main action in Case C-114/92, worked in Belgium for 34 years. Initially he was awarded five additional notional years by the ONP and granted a Belgian retirement pension on the basis of an insurance record of 39 years.

9 The ONP finally granted him a pension based on 38 years' contributions only. One notional year was deducted on the ground that he had in the meantime obtained an Italian retirement pension on account of his military service in Italy, which corresponded to seven years' contributions in Belgium. The total number of years initially taken into account in Belgium (39), then in Italy (7), exceeded by

one year the full insurance record which is limited to 45 years in Belgium under Article 11b of the royal decree.

10 Mr Del Grosso, the plaintiff in the main action in Case C-156/92, was actually employed in Belgium for 41 years. The ONP initially granted him, under Belgian legislation alone, an annual retirement pension based on 44 years' contributions, having added three notional years of insurance to the 41 years of actual insurance.

11 When Mr Del Grosso was granted an Italian retirement pension on account of seven years of insurance which he had completed in Italy, the ONP deducted the notional years of insurance from his record, and then reduced the 48 remaining years by three years of actual insurance contributions to arrive at the full insurance record of 45/45ths, under Article 10a of the royal decree; it calculated the Belgian pension on the basis of an insurance record of 38 years (45 -7) to take account of the Italian pension.

12 Article 10a of the royal decree, cited above, provides that when an employed worker is entitled to claim a retirement pension under the decree and a retirement pension or benefit in its stead under one or more other schemes, and when the total of the fractions expressing the size of each of those pensions exceeds one, the work record which is taken into consideration in order to calculate the retirement pension as an employed worker is to be reduced by the number of years needed in order to bring that total down to one. For the purposes of the implementation of this article, the expression 'other scheme' is deemed to be any other Belgian retirement and survivor's pension scheme, other than that for the self-employed, and any other analogous scheme of a foreign country or a scheme applicable to the staff of an institution governed by public international law.

13 The periods of insurance completed in Italy by the three plaintiffs would not, by themselves, have conferred entitlement to a retirement pension in that Member

State. However, the Italian institution was able to grant them a retirement pension taking into account, under Article 46 of the regulation, all the periods of insurance completed by the plaintiffs in Italy and in Belgium.

14 In the proceedings before the national courts, Mr Fabrizii and Mr Neri claimed that their Belgian pensions should be granted to them in full. Mr Del Grosso considered himself entitled to a Belgian retirement pension based on the 41 years of actual insurance which he had completed in Belgium.

15 Taking the view that those disputes raised certain questions concerning the interpretation of Community law, the two national courts referred the following questions to the Court for a preliminary ruling:

**Cases C-113/92 and C-114/92**

'1. Having regard to the wording of Article 46(2)(a) of Regulation No 1408/71, is it not the case that, in order to establish the theoretical amount of the pension, the competent institution must apply its own legislation, such as in particular the statutory provisions relating to the requirements for recognizing, or deeming to be equivalent, periods claimed for the purposes of calculating the pension, in order to determine whether the periods of insurance or residence completed and recognized as such under the legislation of other Member States may be used to calculate the benefit in question?

2. If so, and if the competent institution finds that certain periods of insurance or residence completed in another Member State may not be taken into consideration in order to calculate the theoretical amount of the pension, must it not be considered that there is a failure to comply with the principle of aggregation?

3. Having regard to the wording of Article 46(2)(b) of Regulation No 1408/71, more specifically for the purposes of determining the total length of the periods of insurance or residence completed before the risk materialized, does the competent institution not have to take account of all periods of insurance and residence completed and recognized as such under the legislation of all the Member States?

4. With a view to establishing the ratio of the length of periods completed under its national legislation, may the competent institution apply its own rules against overlapping foreign benefits?'

Case C-156/92

'Having regard to Articles 7, 48 and 51 of the Treaty and Articles 12 and 46 of Regulation (EEC) No 1408/71, together with the objectives and principles which those provisions underlie and the case-law of the Court of Justice of the European Communities, is the Belgian State permitted, under Community law to reduce a pension due on an actual insurance record completed in that State on the ground that the total number of years worked in Belgium and in another Member State exceeds the maximum insurance record (45 years for men and 40 years for women) laid down in Article 2 of Royal Decree No 205 of 29 August 1983 (inserting Article 10a into Royal Decree No 50) although (a) the record completed in Belgium alone does not exceed 45 years and (b) no recourse was made to notional years?'

16 By order of the President of the Court of 30 April 1992, Cases C-113/92 and C-114/92 were joined for the purposes of the written procedure, the oral procedure and the judgment.

17 By order of 28 January 1993, Case C-156/92 was joined to the other two cases for the purposes of the oral procedure and the judgment.

18 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to Court, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

**Legislation to be applied when determining the periods of insurance to be taken into account for the purposes of calculating benefit under Article 46(2)(a) of the regulation**

19 In its first question, the Tribunal du Travail, Charleroi (Cases C-113/92 and C-114/92), seeks primarily to ascertain under which legislation military service completed by migrant workers under the legislation of a Member State other than that of the awarding institution should qualify as a period of insurance for the purposes of calculating the amount of benefit to be paid under Article 46(2)(a) of the regulation.

20 Under Article 13(2)(e) of the regulation, a person called up or recalled for service in a Member State is to be subject to the legislation of that State.

21 Under Article 1(r) of the regulation, however, periods of contribution or period of employment, defined or recognized as such by the legislation under which they were completed, are to be regarded as periods of insurance for the purposes of the application of the regulation.

22 It follows that the periods of insurance to be taken into consideration for the purposes of calculating the theoretical amount of the benefit, within the meaning of Article 46(2)(a) of the regulation, must be determined by reference to the legislation under which they were completed, without there being any need for those periods to be recognized as periods of insurance under the legislation of the State of the competent institution.

23 This interpretation is confirmed by Article 46(2)(b) of the regulation, by virtue of which the competent institution must establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph, and in the ratio which the length of the periods of insurance completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance completed under the legislation of all the

Member States concerned before the risk materialized (see Case C-5/91 *Di Prinzio* [1992] ECR I-897, paragraph 49).

24 As the Tribunal du Travail, Charleroi, itself noted in the wording of its second question, if only periods of insurance considered as such under the legislation of the Member State of the competent institution were taken into account for the purposes of calculating the theoretical amount of the pension, that would preclude the application of the principle of aggregation and apportionment set out in Article 46(2)(a) and (b).

25 It follows that, for the purposes of calculating the theoretical amount of the benefit to be awarded pursuant to Article 46(2)(a) of the regulation, the competent institution must consider as periods of insurance within the meaning of that provision, periods of military service completed by the worker and recognized as such by the legislation of another Member State, even if those periods did not have to be taken into account in the Member State of the competent institution.

26 However, in a case such as that of Mr Fabrizii, a migrant worker is already entitled, under Article 46(1) of the regulation, to an independent benefit equal to the full pension provided for under the legislation of the Member State of the competent institution, pursuant to that legislation alone, without taking into account periods completed under the legislation of other Member States applicable to that worker. There is clearly no need to take those periods into account in order to complete the periods worked under the legislation of the Member State of the competent institution, for the acquisition of entitlement to benefits. The theoretical amount of the benefit within the meaning of Article 46(2)(a), regard being had to subparagraph (c) of that provision, is in any event equal to that of the independent benefit within the meaning of the first subparagraph of Article 46(1), with the result that the application of Article 46(2) of the regulation would not produce a more favourable result (see *Di Prinzio*, mentioned above).

27 In those circumstances, the theoretical amount of the pension must accordingly be determined by the competent institution whose legislation confers entitlement to the full pension, without taking account of periods of insurance completed by the worker in another Member State.

28 The answer to the question submitted by the Tribunal du Travail, Charleroi, must therefore be that for the purposes of calculating the amount of the benefit under Article 46(2)(a) of the regulation, the competent institution must aggregate all the periods completed under the legislation of the Member States to which the worker has been subject, even if those periods did not have to be taken into account under the law of the Member State of the competent institution. However, where the worker is already entitled, under Article 46(1) of the regulation, to an independent benefit equal to the full pension granted by the legislation of the Member State of the competent institution, without taking into account periods completed under the legislation of other Member States to which the worker has been subject, those periods need not be taken into account in order to complete the periods worked under the legislation of the Member State of the competent institution for the acquisition of entitlement to benefits.

29 In view of the answer to the first question referred by the Tribunal du Travail, Charleroi, there is no reason to answer the second question.

**Methods of calculating the actual amount of the benefit within the meaning of Article 46(2)(b) of the regulation**

30 In its third and fourth questions, the Tribunal du Travail, Charleroi, asks whether, for the purposes of determining the actual amount of the benefit referred to in Article 46(2)(b) of the regulation, the competent institution must take account of all the periods of insurance recognized as such by the national legislation to which the migrant worker has been subject, and whether it may apply its own rules against overlapping foreign benefits in order to determine the actual amount, in accordance with Article 46(2)(b) of the regulation.

31 With respect to the question of taking periods of insurance into account, the Court has already ruled that the competent institution is to calculate, in accordance with Article 46(2)(b) of the regulation, the actual amount of the benefit on the basis of the theoretical amount, and in the ratio which the length of the periods of insurance completed before the risk materializes under the legislation administered by it bears to the total length of the periods of insurance completed under the legislation of all the Member States concerned before the risk materialized.

32 As for the application of the competent institution's rules against overlapping foreign benefits, the Court has consistently held (see Case 58/84 *Romano* [1985] ECR 1679, paragraph 15, and Case 117/84 *Ruzzu* [1985] ECR 1697, paragraph 16) that a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12(2) of the regulation.

33 Moreover, for the purposes of calculating benefits under Community law, the provisions of the regulation must be applied in their entirety, with the result that the competent institution must also take account of Article 12(2) of the regulation (see *Di Prinzio*, cited above, paragraph 46).

34 Pursuant to Article 12(2), the provisions for reduction of benefit laid down in the legislation of one Member State where a benefit overlaps with other social security benefits acquired under the legislation of another Member State are not applicable where the person concerned receives benefits of the same kind, including old-age benefits, paid in accordance with Article 46 of that regulation (see Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 18).

35 Accordingly, in circumstances such as those of Cases C-113/92 and C-114/92, where the notional periods recognized by the applicable national legislation are

prior to the materialization of the risk within the meaning of Article 46(2)(b) of Regulation No 1408/71, those periods must be included in the calculation of the actual amount of the benefit and the competent institution is not permitted to deduct the period of employment completed by the worker in another Member State from the notional years added to the actual years of employment by virtue of the legislation of the Member State of that institution.

36 It follows that the *pro rata* amount of the actual pension must be calculated by taking into account all the notional periods prior to the materialization of the risk that have been added to the years during which the worker was actually employed or years treated as such by the legislation of the Member State of the competent institution (see *Di Prinzio*, cited above, paragraphs 54 to 56).

37 Finally, it must be emphasized that, as Article 46 of the regulation must be applied in its entirety, the *pro rata* amount of the actual benefit must always be calculated, even in a situation such as that of Mr Fabrizii where the person concerned is entitled to a full pension in a Member State without recourse to periods of insurance completed in other Member States (see *Di Prinzio*, cited above, paragraphs 50 and 51).

38 The answer to the question submitted by the Tribunal du Travail, Charleroi, must therefore be that for the purposes of calculating the actual amount of the benefit within the meaning of Article 46(2)(b) of the regulation, the competent institution must take account of all the periods of insurance completed and recognized as such by the legislation of all the Member States and may not apply its own rules against overlapping foreign benefits in order to determine the actual amount.

**The rule concerning the full insurance record**

39 It apparent from the reasons set out in the order for reference that the Tribunal du Travail, Brussels, seeks essentially to ascertain whether, on the one hand, Articles 12(2) and 46 of the regulation and, on the other, Articles 7, 48 and 51 of the EEC Treaty preclude the application of a national provision such as Article 10a of the royal decree which limits the full insurance record of an employed worker to

45 years, in that the application of such a provision has the effect of reducing the actual insurance period completed by a migrant worker in the Member State concerned by the number of years worked under the legislation of another Member State, when the total number of years of insurance completed by the person concerned in the two States exceeds the full insurance record in question.

40 In answering that question, the first point to note is that a national provision of the kind at issue in the proceedings before the Tribunal du Travail, Brussels, constitutes a provision for reduction of benefit within the meaning of Article 12(2) of the regulation.

41 It is necessary to examine the circumstances in which the combined provisions of Articles 12 and 46 of the regulation allow the application of a national provision against the overlapping of benefits, such as the one at issue in the proceedings before the Tribunal du Travail, Brussels.

42 For the purposes of calculating the old-age benefits of an employed worker who has been subject to the legislation of several Member States, it is for the competent institution to compare the old-age benefits which would be payable under national law alone, including its rules against the overlapping of benefits, with those which would be payable under Community law in accordance with Article 46 of the regulation, including the rule against overlapping set out in paragraph 3 thereof, and to ensure that the migrant worker receives whichever benefit is the higher (see in particular *Di Crescenzo and Casagrande*, cited above, paragraph 17).

43 Where the person concerned is entitled to old-age benefits of the same kind calculated under Article 46 of the regulation, the national rules against the overlapping of benefits must be set aside under the second sentence of Article 12 (2) of the regulation. By contrast, where the retirement pension is calculated under national legislation alone, the national provisions against overlapping will be enforceable as against the beneficiary by virtue of the first sentence of Article 12(2) of the regulation.

44 It should be pointed out in this respect that the ONP has recommended, in its submissions to the Court, that Mr Del Grosso should be granted under the national scheme a Belgian pension which would be more advantageous than that to which he would be entitled under Article 46 of the regulation.

45 It follows that Articles 12(2) and 46 of the regulation do not preclude the application of a national provision for reduction of benefit of the kind at issue in the national proceedings, where benefits paid by the competent institutions of two or more Member States overlap and the retirement pension is calculated, as in the main proceedings, under national legislation alone.

46 With regard to the question whether Articles 7, 48 and 51 of the EEC Treaty preclude the application of a provision for reduction of benefit of the kind at issue in the national proceedings, it should be recalled at the outset that, according to established case-law (see Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13), Article 7 of the EEC Treaty applies independently only to situations governed by Community law in regard to which the Treaty does not lay down any specific rules.

47 With respect to the free movement of workers, that provision has been put into effect in practical terms by Articles 48 to 51 of the EEC Treaty.

48 Furthermore, a provision for reduction of benefit of the kind at issue in the main proceedings operates independently both of the nationality of the workers and of the Member State under whose retirement scheme the periods of insurance which exceed the full insurance record were completed.

49 In those circumstances, the prohibition of discrimination on grounds of the workers' nationality does not preclude a provision for reduction of benefit of the kind at issue in the main proceedings.

50 The Tribunal du Travail, Brussels, has also asked whether Article 51 of the EEC Treaty precludes the application of a provision for reduction of benefit of the kind at issue in the main proceedings, in that such a provision would undermine the rights, whether acquired or in the process of being acquired, of migrant workers to old-age benefits and would therefore be likely to hinder their freedom of movement.

51 On this point it should be noted that, in a case such as this, the application of the rules against overlapping of the Member State of the competent institution has the effect of reducing the retirement pension rights acquired by the person concerned under the national law of the said institution, by the retirement pension rights acquired in another Member State only by virtue of the application of the regulation, without however the sum of the two pensions paid in the two Member States being lower than the pension that would be payable under the national law of the competent institution alone, if the person concerned had completed the whole of his insurance record in the Member State of that institution.

52 In those circumstances, Article 51 does not preclude the application of a national provision for reduction of benefit where the reduction of the pension paid by the competent institution is compensated for by the advantages which Community law confers on the person concerned by enabling him to rely on the concomitant application of the social security legislation of several Member States.

53 It follows from the foregoing considerations that the answer to the question submitted by the Tribunal du Travail, Brussels, is that neither Articles 12(2) and 46 of the regulation, nor Articles 48 and 51 of the EEC Treaty, preclude the application of a national provision against the overlapping of benefits which limits to 45 years the full insurance record of employed persons and which has the effect of reducing the period of insurance actually completed by a migrant worker in the Member State of the institution which calculates the benefit by the years of insurance completed in a second Member State, provided that the reduction of the rights acquired by the migrant worker in the Member State of that institution is compensated for by the retirement pension rights acquired under the regulation in the second Member State.

## Costs

54 The costs incurred by the Commission of the European Communities and the Belgium Government, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions submitted to it by the Tribunal du Travail, Charleroi, and the Tribunal du Travail, Brussels, by orders of 2 and 30 April 1992 respectively, hereby rules:

1. **For the purposes of calculating the amount of the benefit under Article 46(2)(a) of 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, the competent institution of a Member State must aggregate all the periods completed under the legislation of the Member State to which the worker has been subject, even if those periods did not have to be taken into account under the law of the Member State of the competent institution. However, where the worker is already entitled, under Article 46(1) of the regulation, to an independent benefit equal to the full pension granted by the legislation of the Member State of the competent institution without taking into account periods completed under the legislation of other Member States to which the worker has been subject, those periods need not be taken into account in order to complete the periods worked under the legislation of the Member State of the competent institution for the acquisition of entitlement to benefits.**

2. **For the purposes of calculating the actual amount of the benefit within the meaning of Article 46(2)(b) of Regulation No 1408/71, the competent institution must take account of all the periods of insurance completed and rec-**

ognized as such by the legislation of all the Member States and may not apply its own rules against overlapping foreign benefits in order to determine the actual amount.

3. Neither Articles 12(2) and 46 of Regulation No 1408/71, nor Articles 48 and 51 of the EEC Treaty, preclude the application of a national provision against the overlapping of benefits which limits to 45 years the full insurance record of employed persons and which has the effect of reducing the period of insurance actually completed by a migrant worker in the Member State of the institution which calculates the benefit by the years of insurance completed in a second Member State, provided that the reduction of the rights acquired by the migrant worker in the Member State of that institution is compensated for by the retirement pension rights acquired under the regulation in the second Member State.

Mancini Schockweiler Murray

Delivered in open court in Luxembourg on 15 December 1993.

J.-G. Giraud G. F. Mancini

Registrar President of the Second Chamber