the Member State of that institution is compensated for by the retirement pension rights acquired under the regulation in the second Member State.

REPORT FOR THE HEARING
in Joined Cases C-113/92, C-114/92 and C-156/92 *

I — Legal Background

1. *National legislation*

Article 10 of Royal Decree No 50 of 24 October 1967 [1] on retirement and survivors' pensions for employed persons, as amended, provides as follows:

'§1 Entitlement to a retirement pension shall be acquired, for each calendar year, on the basis of a fraction of the gross remuneration, whether real, notional or calculated on a flat-rate basis ...

...

The fraction corresponding to each calendar year shall have as its numerator the number one and as its denominator the number of calendar years in the period starting on 1 January in the year in which the worker reached the age of 20, but no earlier than 1 January 1926, and ending on 31 December in the year preceding the first day of the month following that in which the worker reached the age of 65 in the case of a man or 60 in the case of a woman.

However, the denominator may not be greater than 45 for a man or 40 for a woman.

...

§2 By way of derogation from the second subparagraph of paragraph 1, a worker:

1 who was habitually and principally employed as a mine worker for at least 20 years may obtain a retirement pension acquired on the basis of 1/30th per calendar year of employment as a mine worker.

If he has not completed a total of 30 calendar years' habitual and principal employment as a face worker or as a miner in underground quarries, but has completed at least 25 years, he shall receive a pension for such years as are substantiated and for a certain number of additional notional years.

* Language of the case: French

1 *Moniteur Belge* of 27 October 1967, p. 11258

The number of additional notional years shall be equal to the difference between 30 and the number of years for which habitual and principal employment in that capacity is established.

That number of additional notional years shall, however, be reduced by the number of years for which the worker is entitled to claim a retirement pension or benefit in its stead under another Belgian scheme, other than that for the self-employed, under the scheme of a foreign country or under a scheme applicable to the staff of an institution governed by public international law.'

Article 10a of the royal decree mentioned above provides as follows:

'Where an employed worker is entitled to claim a retirement pension under this decree and a retirement pension or benefit in its stead under one or more other schemes and 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 shall 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" shall be deemed to be any other Belgian retirement pension 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.'

Article 11a of the royal decree provides as follows:

'Where the retirement pension referred to in Article 10(1) actually becomes payable for the first time no earlier than 1 January 1977, it shall be determined, by way of derogation from Article 11, on the basis of the number of years of employment established and a number (of additional notional years.)

...'

Furthermore, Article 11b of the royal decree provides as follows:

'Where the retirement pension referred to in Article 10(1) actually becomes payable for the first time no earlier than 1 January 1981, the number [of additional notional years] which may be granted under Article 11a shall, however, be limited to the difference between, on the one hand, the number appearing as the denominator of the fraction referred to in the second subparagraph of Article 10(1), and, on the other, the total number of years of habitual and principal employment as an employed worker together with the number of years for which the worker is entitled to claim a retirement pension or benefit in its stead under another Belgian scheme, other than that for the self-employed, under the scheme of a foreign country or under a scheme applicable to the staff of an institution governed by public international law.'

Article 26 of Royal Decree No 50, cited above, provides as follows:

'Pensions paid in respect of invalidity sustained on account of war or by way of compensation for wartime events, pensions for active service and prisoners of war and pensions attaching to the award of a national decoration shall in no circumstance affect the grant or payment of the benefits provided for in this decree.'

Article 34 of the Royal Decree of 21 December 1967 laying down general rules on the scheme of retirement and survivors' pensions for employed workers [2] provides, *inter alia*, as follows:

'§1 The following periods shall be treated as periods of employment, subject to the conditions laid down in paragraph 2:

F. periods of non-employment as a result of being called up to perform military service in the Belgian army ... .

...

§2...

3 Periods covered by paragraph 1 ... F... may not be treated as periods of employment unless the person concerned was employed at the time of the event giving rise to the treatment of such periods as periods of employment or was not employed at the time, such non-employment being treated as a period of employment.

Periods (covered by ... F) of paragraph 1 are also to be treated as periods of employment where the person concerned had the status of a worker during the three years following the end of those periods and continued to be habitually and principally employed in that capacity for at least a year.'

2. *Community legislation*

Article 12(2) of Regulation (EEC) No 1408/71 provides:

'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, 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).'

Article 46 is worded as follows:

'Award of benefits

2 *Moniteur Belge* of 16 January 1968

1. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefit have been satisfied, without application of the provisions of Article 45 ... being necessary, the competent institution of that Member State shall, in accordance with the provisions of the legislation which it administers, determine the amount of benefit corresponding to the total length of the periods of insurance or residence to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph 2(a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefits are not satisfied unless account is taken of the provisions of Article 45 and/or Article 40(3), the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to which the employed or self-employed person has been subject had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount referred to in this subparagraph;

(b) the institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph, and in the ratio which the length of the periods of insurance or residence completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance and residence completed under the legislation of all the Member States concerned before the risk materialized;

(c) if the total length of the periods of insurance and residence completed before the risk materializes under the legislation of all the Member States concerned is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers;

(d) the procedure for taking into account overlapping periods, when applying the rules of calculation laid down in this paragraph, shall be laid down in the implementing regulation referred to in Article 98.

3. The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2(a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with the provisions of paragraph 1.

...'

Regulations Nos 1408/71 and 574/72 were amended with effect from 1 June 1992 by Regulation (EEC) No 1248/92, [3] some provisions of which are designed to authorize the application of national provisions against overlapping only in specific cases where benefits of the same kind overlap.

II — Facts and procedure

Mr Fabrizii (Case C-113/92) was a face worker in a mine in Belgium for 26 years. On the basis of the second and third subparagraphs of Article 10(2)(1) of Royal Decree No 50, cited above, that period of employment entitled him to four additional notional years, as a result of which his actual insurance record came to 30 years.

Mr Fabrizii was therefore granted a retirement pension for mine workers, calculated on the basis of a full employment record (30/30ths) as from 1 April 1975.

Mr Fabrizii, who had done his military service in Italy for 294 weeks between 1940 and 1945, a period corresponding to four years under the Belgian scheme for miners, also received an Italian old-age pension as from 1 January 1980.

The Office National des Pensions ('the defendant') then reassessed the applicant's entitlement and, under the fourth subparagraph of Article 10(2)(1) of Royal Decree No 50, cited above, reduced the number of additional notional years to (4 -4 =) 0.

The annual amount of Mr Fabrizii's Belgian retirement pension was therefore calculated, as from 1 January 1980, on the basis of an insurance record of 26/30ths and was reduced accordingly.

Mr Neri (Case C-114/92) was a worker in Belgium for 34 years. He was provisionally granted a Belgian retirement pension as from 1 January 1985, on the basis of an insurance record amounting to 39/45ths, including five additional notional years granted under Article 11a of the aforementioned royal decree.

The final decision to award him a pension granted him only 38/45ths, since one fictitious year was deducted on the ground that he had since obtained an Italian old-age pension on account of 368 weeks' military service performed in Italy, corresponding to seven years in Belgium. This was because the total number of years taken into account in Belgium (39) and in Italy (7) exceeded by one year the full insurance record which is limited to 45 years in Belgium. On the basis of Article 11b of the royal decree cited above, the number of notional years was

3 Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7).

therefore reduced from five to four and the amount of the Belgian pension reduced on the basis of an insurance record of 38/45ths.

Mr Del Grosso (Case C-156/92) completed in Belgium an actual insurance period of 41 years between 1946 and 1987.

By provisional decision, the defendant awarded him, with effect from 1 January 1988 under Belgian legislation alone, an annual old-age pension calculated on the basis of 44 years of insurance: 41 years of actual insurance plus three additional notional years of insurance, that is to say a pension coefficient of 44/45ths.

On the basis of Article 10a of Royal Decree No 50 cited above, the defendant subsequently deducted the three least advantageous years (1947, 1948 and 1949) from the applicant's insurance record on the ground that he could claim the benefit of seven years' insurance in Italy (109 weeks of actual employment completed as a worker and 234 weeks treated as years of employment in respect of military service performed in that country), on the basis of the following calculation:

— 41 years of actual insurance in Belgium,

— 7 years of actual insurance in Italy,

that is to say 48 years, less three years of actual insurance, to arrive at the full record of 45/45ths. The defendant accordingly reduced the amount of the Belgian pension.

In proceedings before the national courts, the plaintiffs contest the reductions in their pensions and claim the benefit of their respective Belgian pensions without any reduction.

The Tribunal du Travail, Charleroi, and the Tribunal du Travail, Brussels, considered that the disputes raised questions relating to the interpretation of Community law. By judgments of 2 and 30 April 1992 respectively, they decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until such time as the Court of Justice had given a preliminary ruling on the following questions:

A — *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?'

B — *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?'

The orders for reference were received at the Registry of the Court on 10 April and 7 May 1992 respectively.

Since Cases C-113/92 and C-114/92 are related cases concerning the same subject-matter, they were joined in accordance with Article 43 of the Rules of Procedure for the purposes of the written procedure, the oral procedure and the judgment.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted in the three cases: on 6 and 30 July 1992 by the defendant, represented by R. Masyn, General Administrator of the Office National des Pensions; on 10 and 20 July 1992 by the plaintiffs in the main proceedings, represented by D. Rossini, trade-union representative of the CSC, Brussels; on 20 July and 7 August 1992 by the Commission of the European Communities, represented by M. Wolfcarius, of its Legal Service, and T. Margellos, Avocat, lecturer at the University of Picardy, seconded to the Legal Service, acting as Agents.

On 10 August 1992, the Belgian Government represented by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent, submitted written observations in Case C-156/92 only.

For the purposes of the oral procedure and the judgment, Case C-156/92 was joined to Joined Cases C-113/92 and C-114/92 by order of the President of the Court of 28 January 1993.

Upon hearing the report of the judge-rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry. It decided however to put written questions to the Office National des Pensions, the plaintiffs, the Belgian Government and the Commission.

By decision of 1 February 1993, the Court decided to assign the cases to the Second Chamber.

III — Summany of the written observations submitted to the Court

A. The *plaintiffs in Cases C-113/92 and C-114/92* argue essentially that in so far as under subparagraph 3 of Article 34(2) of the Royal Decree of 21 December 1967 the periods of military service which they completed in Italy would not be taken into account if they had been completed in Belgium, they should logically be left out of the calculation of their theoretical pensions for the purposes of Article 46(2)(a) of Regulation No 1408/71.

Furthermore, in so far as the Italian pension was granted exclusively on the basis of a period of military service, it should have no effect on the pension due under the Belgian legislation alone, regard being had to Article 26 of Royal Decree No 50.

The periods of military service would be taken into account under the Italian insurance scheme only if that were expressly requested by the insured person. [4] The person concerned could therefore very well refrain from asking for such periods to be taken into account if he knew that the pension advantage granted would be deducted from the pension to which he was entitled by virtue of periods of compulsory insurance.

Moreover, the Italian pension granted to Mr Fabrizii includes a special supplement awarded to him as an ex-combatant under Article 6 of Law No 140 of 15 April 1985. That supplement is an advantage which in any event falls outside the scope of the rules against overlapping by virtue of Article 26 of Royal Decree No 50, cited above.

Under those circumstances, the periods of military service taken into account at the express request of the person concerned should be regarded as periods of voluntary insurance and the pension granted in respect thereof should not be taken into consideration for the purposes of applying Article 46(3) of Regulation No 1408/71, as is expressly provided for in Article 46(2) of Regulation No 574/72, according to which the amounts of benefit corresponding to periods of continued voluntary or optional insurance are not to be taken into account.

The *defendant* in the *Fabrizii* case proposes, as from 1 January 1981, the date when the Belgian rule against overlapping external benefits came into force, the grant of an annual benefit of BFR 271 055 under the Community rules, which is more advantageous than the benefit of BFR 249 599 payable at that time under the Belgian domestic scheme.

In the *Neri* case, the defendant advocates the grant of an annual pension of BFR 244 864 under the Belgian domestic scheme, which is more advantageous than the benefit of BFR 238 886 payable under the Community rules.

4 — Article 49 of Law No 153 of 30 April 1969.

According to the Court's case-law [5] the most favourable rules should be applied, that is to say either the national domestic rules, by virtue of which the domestic legislation alone is it applied in its entirety, including the rules against overlapping external benefits, or the Community rules, by virtue of which the national rules against overlapping benefits cannot be relied upon in the event of the grant of benefits, which however are calculated and reduced in accordance with the relevant Community provisions.

The independent Belgian benefits calculated under Article 46(1) of Regulation No 1408/71 correspond to the total duration of the insurance periods taken into account under Belgian domestic legislation alone, without applying the rules on overlapping external benefits, and therefore an unlimited number of additional notional years may be granted.

The theoretical Belgian benefits calculated under Article 46(2)(a) of Regulation No 1408/71 correspond to the total duration of the insurance periods completed in Belgium and in Italy, to which the worker could lay claim if all those insurance periods had been completed in Belgium under the Belgian legislation applied at the dates when the benefits were calculated.

The actual periods of insurance or periods treated as periods of insurance, together with the notional or presumed years, should be taken into account without any national abatement rule being applied, although the maximum duration required for entitlement to the full benefit may not be exceeded.

In this case, therefore, the periods of military service completed in Italy and taken into account as periods treated as if they were covered by the Italian general scheme should be taken into account as such for the purposes of aggregation in order to calculate the theoretical Belgian pension under Article 13(2)(e), *in fine*, of Regulation No 1408/71, which takes precedence over Articles 34 and 35 of the Royal Decree of 21 December 1967, cited above.

Furthermore, it is clear from the general scheme of the provisions of Article 45 of Regulation No 1408/71 that under the principle of the aggregation of insurance periods to be taken into account under the legislation of each Member State after they have been determined in accordance with the legislation under which they were completed, the nature of those periods as previously determined may not be altered. Accordingly, the theoretical Belgian benefits could have been determined in this instance on the basis of the full benefit after aggregating the insurance periods to be taken into account under the relevant Belgian and Italian legislation.

The pro rata Belgian benefits calculated under Article 46(2)(b) of Regulation No 1408/71 correspond to the theoretical amounts previously calculated in the ratio which the duration of the insurance periods completed in Belgium bears to the total duration of the insurance periods completed in Belgium and in Italy. In that connection, the Court stated in its judgment in *Di Prin-*

5 — Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, Case 236/78 *FNROM* v *Mura* [1979] ECR 1819, Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679, Case 117/84 *ONPTS* v *Ruzzu* [1985] ECR 1697, Case 296/84 *Smatra* v *FNROM* [1986] ECR 1047, Case 37/86 *Van Gastel* v *Rijksdienst and Rijkskas* [1987] ECR 3589, Case 323/86 *Collini* v *ONPTS* [1987] ECR 5489, Case 128/88 *Di Felice* v *INASTI* [1989] ECR 923, Case 199/88 *Cabras* v *INAMI* [1990] ECR I 1023, Case C 108/89 *Pian* v *ONP* [1990] ECR I 1599, Case C 109/89 *ONP* v *Bianchin* [1990] ECR I 1619, Case C 5/91 *Di Prinzio* v *ONP* [1992] ECR I 897, and Joined Cases C 90/91 and C 91/91 *ONP* v *Di Crescenzo and Casagrande* [1992] ECR I 3851

zio, cited above, that where the theoretical amount of the benefit is equal to that of the independent benefit, the actual pro rata amount must be less than the amount of the independent benefit.

The next step in accordance with the second sentence of the second subparagraph of Article 46(1) of Regulation No 1408/71 is to compare the independent and the pro rata benefits and to take the higher of the two amounts in order to apply the Community rule against overlapping benefits laid down in Article 46(3).

The defendant therefore suggests that the answer to the first question should be that, in accordance with Article 46(2)(a) of Regulation No 1408/71, the theoretical amount of the benefit depends on all the eligible periods of insurance, as previously established in accordance with the legislation under which they were completed, as if those periods of insurance had been completed only under the legislation applied by the competent institution at the date on which the benefit is calculated.

The answer to the second question should be that, if the conditions laid down by more than one legislative system are satisfied, the theoretical amount of the benefit is equal to that of the entire amount of the independent benefit payable in the Member State in question, without its being necessary however to rely on periods completed under the legislation of other Member States in order to determine the theoretical amount of benefit in accordance with Article 46(2)(a), on the ground that to take into consideration only periods completed under the legislation of the competent institution yields a more favourable result.

The answer to the third question should be that, in accordance with the provisions of Article 46(2)(b) of Regulation No 1408/71, the actual amount of the benefit depends on the ratio which the periods completed and allowed under the legislation of the competent institution bears to the total length of the periods completed and allowed under the legislation of all the Member States.

The defendant's suggested answer to the fourth question is that in order to determine the proportional length of the periods completed under national legislation, the competent institution may not apply its own rules against the overlapping of foreign benefits.

In the *Commission's* view, the first question raises the point whether the period of military service completed by the persons concerned in Italy should be assessed under Belgian or Italian law for the purposes of aggregation with a view to the application of Article 46(2)(a) of Regulation No 1408/71 concerning the amount of the theoretical calculation.

The Commission draws a distinction in this connection between Mr Fabrizii, who is entitled to a full pension under Belgian legislation alone, and Mr Neri, who receives only a partial pension under Belgian law.

In the case of *Mr Fabrizii*, it follows from the judgment in *Di Prinzio* that the independent benefit under the first subparagraph of Article 46(1) is equal to the full pension.

Under those circumstances, the comparison referred to in the second subparagraph of Article 46(1) between the amount of the independent benefit and the amount of the pro rata benefit for the purposes of determining the most favourable amount is irrelevant since it has been established that the independent benefit is equal to the full pension.

In any event, for the purposes of the comparison referred to in the second subparagraph of Article 46(1), it should be noted that, in such a case, the theoretical amount of the benefits must be set by the defendant without taking into account periods of insurance completed by the worker in another Member State.

Furthermore, Article 46(2)(c) provides that the sum of the periods of insurance may not exceed the maximum period required for the receipt of full benefit under the legislation governing the competent institution which is making the calculation.

It is clear from the wording of Article 46(2)(a) that the competent institution is to apply the national legislation in its entirety. If that legislation provides that the benefit is to be calculated on the basis not only of actual periods or periods treated as such, but also of a number of notional or presumed years, those years should also be taken into consideration for the purpose of calculating the theoretical amount of the benefit. [6]

The next point is that under Article 12(2) the competent institution must, when determining the theoretical amount, disregard any national abatement rule, [7] such as the national provision reducing in this case any additional notional years of employment to which the worker may be entitled under national law, depending on the number of years for which he is entitled to claim a pension in another Member State. [8]

It follows that, in Mr Fabrizii's case, the theoretical amount of the pension is equal to that of the full pension payable in the Member State in question and that the theoretical amount is equal to that of the independent benefit.

That means, of course, that the proportional calculation carried out under Article 46(2), cited above, cannot produce a more favourable result for the person concerned since the amount of the pro rata benefit is bound to be less than the amount of the independent benefit, which must therefore be awarded to the person concerned.

Accordingly, it is clear that the first question is irrelevant in Mr Fabrizii's case since in any event his military service will not be taken into consideration for the purposes of calculating the theoretical amount.

However, in the case of *Mr Neri*, who does not receive a full pension under Belgian legislation alone, the first question is still relevant because it is necessary to take his period of military service in Italy into account in

6 — *Casagrande*, cited above, paragraph 26.

7 — *Di Prinzio*, cited above, paragraph 19, in Case 4/80 *D'Amico v ONPTS* [1980] ECR 2951, paragraph 18, and in Joined Cases 116/80, 117/80, 119/80, 120/80 and 121/80 *Celestre and Others v RWP* [1981] ECR 1737, paragraph 12.

8 *Casagrande*, cited above, paragraph 21

order to complete his Belgian periods of employment.

Military service performed in Italy should be treated as if it were military service performed in Belgium and taken into account as a period of employment by virtue of the principle laid down to that effect. [9]

Moreover, it follows perforce from the wording of Article 46(2) that aggregation must apply to all the periods of insurance completed by the worker in all the Member States as if they had been completed under the legislation of the Member State which carries out the aggregation.

The periods of insurance to be taken into consideration are defined, in accordance with Article 1(r) of Regulation No 1408/71, by reference to the legislation under which they were completed.

Furthermore, Article 13(2)(e) of Regulation No 1408/71 provides that a person called up for service in the armed forces or for civilian service in a Member State is to be subject to the legislation of that State.

It is clear that Italian legislation recognizes the periods in question as periods of insurance.

The competent Belgian institution should therefore take the period of military service completed by the person concerned in Italy into consideration for the purposes of calculating the theoretical amount in so far as military service is recognized as a period of insurance under the Italian legislation, and may not exclude such periods on the basis of the Belgian legislation.

In the light of the proposed answer to the first question, the national court's second question concerning the principle of aggregation is devoid of purpose.

However, it should be noted that the aggregation mechanism, and hence the apportionment mechanism, still apply since the provisions of Article 46 of Regulation No 1408/71 should be applied in their entirety. [10]

In reply to the national court's third question, the Commission states that the wording of Article 46(2)(b) confirms the proposed answer to the first question, to the effect that aggregation must apply to all the periods of insurance *as recognized* by the legislation of the Member States in which they were completed.

With regard to the fourth question, the Commission states that, according to the legislation and the case-law of the Court, [11] for the purposes of the calculation provided for in Article 46(2)(b) of Regulation No 1408/71, where the legislation applied by the competent institution of a Member State provides for the grant of a notional period with a view to conferring entitlement to a

9 — Case 15/69 *Südmilch* v *Ugliola* [1969] ECR 363.

10 — *Di Prinzio*, cited above, paragraph 50.

11 — *Celestre*, *Ruzzu*, *Romano* and *Casagrande*, cited above.

pension, periods completed in another Member State need not be deducted from that notional period.

The Commission also states that Articles 12(2) and 46 of Regulation No 1408/71 were amended by Council Regulation (EEC) No 1248/92 [12] of 30 April 1992 amending Regulation No 1408/71 and Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71.

The new regulation provides, *inter alia*, that if the application of national legislation, including its rules against overlapping benefits, proves ultimately to be less favourable than the application of the rules on aggregation and apportionment, the latter rules should be applied. Furthermore, the application of the national provisions against overlapping benefits is permitted only under strict conditions and in specific cases.

The provisions of the new regulation, which are mandatory, were to come into immediate effect on the date fixed by the Community legislature. However, under the transitional provisions inserted in Article 95a by Article 51 of Regulation No 1248/92, it is incumbent upon claimants to request the application of Regulation No 1248/92 if they wish the calculation of their pension to be reviewed as from 1 June 1992.

B. The *plaintiff in Case C-156/92, Mr Del Grosso*, considers the withdrawal of additional years of notional insurance, but not the withdrawal of years of actual insurance, to be acceptable. He considers himself to be entitled to an old-age pension corresponding to 41 years of actual insurance completed under the Belgian legislation.

A national rule such as Article 10a of the Belgian royal decree constitutes a barrier to the free movement of workers in so far as it results in a reduction of his Belgian insurance record, and consequently in a reduction of his pension, on the basis of periods of insurance completed under the legislation of another State. A worker who is a national of a Member State could thus be dissuaded from leaving his country in order to seek employment in another State in the knowledge that he will receive, when he reaches pensionable age, a pension calculated on the basis of a shorter insurance record than the number of years actually completed.

The plaintiff considers that, regard being had to the aims of Articles 48 and 51 of the EEC Treaty, Articles 12 and 46 of Regulation No 1408/71 preclude the application of a national rule against overlapping benefits which would have the effect of reducing the migrant worker's insurance record and thereby deprive him of part of the benefits corresponding to actual periods of insurance.

The *defendant* argues that the rule against the overlapping of foreign benefits which is based on the principle of a single insurance record as provided for under the Belgian domestic legislation is applicable under national law but cannot be relied upon under Community law.

The *Belgian Government* states that the case-law of the Court validates the procedure applied in the matter by the defendant, that is to say the comparison of the

12 OJ 1992 L 136, p. 7

amount of the benefit granted under Belgian legislation alone, including its rules against overlapping benefits, with the amount resulting from the application of Article 46(3), and the award of the higher amount resulting from that comparison.

Therefore, the question submitted by the Tribunal du Travail, Brussels, should be answered in the affirmative.

The *Commission* considers that Article 10a of the royal decree contains a rule against overlapping benefits within the meaning of Article 12(2) of Regulation No 1408/71, in so far as it entails a reduction in the number of actual years of insurance and not only in the number of additional years of notional employment as in the *Romano*, *Ruzzu*, *Di Prinzio* and *Di Crescenzo and Casagrande* cases, cited above.

Article 12(2) of Regulation No 1408/71 precludes the application of Article 10a for the purpose of calculating the pension payable under Community law but not for the purpose of calculating the retirement pension in accordance solely with the national legislation of the competent institution.

Whilst it is for the national legislature to decide whether national rules against overlapping benefits are appropriate, there are nevertheless certain limits flowing from the principle of freedom of movement for workers, which is safeguarded primarily by the prohibition of discrimination on grounds of nationality.

A national rule against overlapping benefits would be incompatible with Articles 48 to 51 of the Treaty and with Article 3(1) of Regulation No 1408/71 if it introduced patent discrimination on the basis of the migrant worker's nationality or if it placed that worker at a *de facto* disadvantage in comparison with a worker who had completed all his years of employment in a single Member State.

In the light of the case-law of the Court, [13] the Commission considers that the principle of freedom of movement precludes a national rule against overlapping benefits which, albeit not discriminatory, impedes the free movement of workers, unless it can be justified by the protection of a matter of public interest and is not disproportionate in relation to the aim pursued.

Since its effect is to reduce the actual insurance record completed in a Member State on the basis of the record completed in another Member State, Article 10a of the royal decree tends to dissuade workers from exercising the right to freedom of movement.

Furthermore, that rule against overlapping benefits would, at least in the present case, lead to a reduction in the actual insurance record completed in Belgium (and not in the number of additional notional years) on the basis of which the recipient's pension is calculated by reference to an insurance period completed in another Member State, whereas the latter period does not overlap at all with

13 — Case 10/78 *Belbouab* v *Bundesknappschaft* [1978] ECR 1915, paragraph 5, Case 284/84 *Spruyt* v *Sociale Verzekeringsbank* [1986] ECR 685, paragraph 18, Case C-228/88 *Bronzino* v *Kindergeld Kasse* [1990] ECR I-531, paragraph 12, Case C-12/89 *Gatto* v *Bundesanstalt für Arbeit* [1990] ECR I-557, paragraph 12, Case C-293/88 *Winter-Lutzins* v *Bestuur van de Sociale Verzekeringsbank* [1990] ECR I-1623, paragraph 13, and Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraph 19.

the period of insurance completed in Belgium.

However, in the absence of information on the practical application of the contested rule against overlapping benefits, the Commission is unable to take a view on the discriminatory or restrictive nature of that rule *vis-à-vis* migrant workers.

Articles 48 to 51 of the EEC Treaty and Regulation No 1408/71 do not therefore preclude the application of national provisions against overlapping benefits where the calculation of a retirement pension is carried out in accordance with the relevant national legislation alone, provided that the amount so calculated is not less than the amount calculated on the basis of the relevant Community provisions.

Accordingly, it falls to the competent institution to draw up a comparison between the benefits which would be payable under the national legislation alone, including its rules against overlapping, and those which would be payable under Community law, including the provisions against overlapping set out in Regulation No 1408/71, and to award the migrant worker the higher amount of benefit.

IV — Replies to the questions pub by the Court

1. In reply to a question from the Court, the *Belgian Government* and the *Office National des Pensions* stated that they had no statistics on the application of the rules against overlapping benefits as regards their implementation under another Belgian social security scheme or under the scheme of another Member State of the Community.

2. In reply to a question from the Court, the *plaintiffs* stated that the periods of insurance completed in Italy were insufficient to entitle them to a pension under the Italian insurance scheme and that, for each of them, it had been necessary to have recourse to the aggregation of the Belgian and Italian periods of insurance in order to claim entitlement to a pro rata benefit.

3. The Court asked the *Commission* a question concerning the scope of the new provisions of Council Regulation No 1248/92 on the calculation of benefits and the national rules against overlapping benefits. The Commission replied that the aim of that regulation is to simplify the calculation of pensions for migrant workers in comparison with the previous situation, whilst protecting them against too strict an application of the national rules against overlapping benefits.

To that end, the new regulation provides that if the application of national legislation, including its rules against overlapping benefits, proves ultimately to be less favourable than the rules on aggregation and apportionment, the latter rules must be applied.

Under the new paragraph (3) of Article 46, the person concerned is entitled to receive from the competent institution of each Member State the highest amount of benefit calculated in accordance with paragraphs (1) and (2), without prejudice to the application, where appropriate, of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which the benefit is payable.

If that is the case, the comparison to be made relates to the amounts determined after applying those rules.

Article 46 no longer contains the reference to the highest theoretical amount which was originally set out in the previous version of the regulation.

The new Article 46b contains specific provisions on cases of overlapping benefits of the same kind. The application of national provisions against overlapping benefits remains prohibited, as it was in the previous version of the regulation, where the amount of the pension is calculated under the Community rules. However, the new rules only allow provisions against overlapping benefits to be applied in specific cases for the purposes of calculating the amount of the pension under national legislation.

Under the new Community rules, the relevant Belgian provisions against overlapping could not be applied for the purposes of calculating the benefits in question under Belgian legislation alone.

In reply to a question from the Court on the conditions for recognition in Belgium of military service performed in Italy, the Commission observes that, in the case of Mr Neri, the competent Belgian institution must take into consideration the period of military service completed in Italy under the same conditions as those for military service performed in the Belgian army.

J. L. Murray
Judge-Rapporteur