2. However, if the application of the relevant national legislation is less favourable than that of the system of aggregation and apportionment, the latter system must be applied.

Kutscher Sørensen Bosco

Mertens de Wilmars Pescatore O'Keeffe Touffait

Delivered in open court in Luxembourg on 5 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 20 SEPTEMBER 1978

My Lords,

This scase comes to the Court by way of a reference for a preliminary ruling by the Cour du Travail of Mons.

Signor Antonio Viola, the respondent in the proceedings before that Court, was born in April 1908. So far as one can discern from the papers, he worked in Italy from 1930 to 1935, in Germany for a short period in 1938 and 1939, and in Belgium from 1947 to 1960. He then fell ill. He still lives in Belgium. In 1961 he became entitled to invalidity pensions in both Belgium and Italy. He has never been entitled to such a pension in Germany.

The amount of pension due to him in Belgium has been the subject of protracted and complex litigation there between himself and the Belgian social security institutions concerned, namely the Institut National d'Assurance Maladie-Invalidité (or "INAMI") and the Union Nationale des Fédérations Mutualistes Neutres (or "UNFMN"). They are the appellants before the Cour du Travail of Mons.

I need not, I think, trouble Your Lordships with all the details of that litigation. The respondent's position under Belgian law was much clarified by a Judgment of the Cour du Travail of Mons dated 25 June 1976, and the issues arising in the litigation were thereby considerably narrowed down.

That Judgment hinged largely on Article 70 (2) of the Belgian statute of 9 August 1963 on sickness and invalidity benefits. (I propose to refer to that statute, for short, as "the Belgian statute of 1963" or simply as "the statute of 1963"). This Court has been concerned with Article 70 (2) of it on at least two previous occasions, namely in Case

1 — Translated from the French

75/76 *Kaucic* v *INAMI* [1977] ECR 495 and, more recently, in Case 83/77 *Naselli* v *CAAMI and INAMI* [1978] ECR 683.

Article 70 (2) reads, so far as directly material here, as follows:

"Les prestations prévues par la présente loi ne sont accordées que dans les conditions fixées par le Roi, lorsque le dommage pour lequel il est fait appel aux prestations est couvert par le droit commun ou par une autre législation. Dans ce cas, les prestations de l'assurance ne sont pas cumulées avec la réparation résultant de l'autre législation; elles sont à charge de l'assurance dans la mesure où le dommage couvert par cette législation n'est pas effectivement réparé. . ."

In its Judgment of 25 June 1976 the Cour du Travail of Mons held:

(1) that the respondent was entitled to his Belgian invalidity pension by virtue of the relevant Belgian legislation alone (that legislation being of "Type A"), so that he did not need to invoke Community law in order to establish a right to the pension;

(2) that, under Belgian law, and in particular by virtue of Article 70 (2) of the statute of 1963, there was deductible from the pension the amount received by the respondent in respect of his Italian pension, because the expression "une autre législation" in Article 70 (2) included foreign legislation;

(3) that, accordingly, in so far as the respondent had been paid his Belgian pension without such deduction, he was *prima facie* liable to refund the equivalent in Belgian francs of the amounts received by him in respect of his Italian pension;

(4) that, however, the appellants' claim to such refund was time-barred as regards any period earlier than 1 May 1969.

The Cour du Travail accordingly adjourned the proceedings in order to enable the parties to supply particulars of the amounts paid to the respondent by the Italian authorities between 1 May 1969 and 30 April 1971 — the latter being the date as from which the UNFMN had, on paying the respondent's Belgian pension to him, deducted from it the amount of his Italian pension.

As a result, there was produced on behalf of the Appellants a letter dated 31 May 1977 from the competent Italian institution, namely the Istituto Nazionale della Previdenza Sociale (or "INPS"), setting out the relevant figures. This disclosed that the Respondent had been entitled in Italy to two supplements to his pension, namely a monthly supplement in respect of a dependent spouse and a Christmas supplement equal to 1/12th of the annual amount of the pension (described as the "13th month").

Having then heard further argument, the Cour du Travail, on 10 February 1978, made an Order referring to this Court two questions:

"1. Does the supplementary allowance for a dependent spouse granted by the Italian legislation in force between 1 May 1969 and 30 April 1971 form an integral part of the Italian invalidity pension for the purpose of applying the rules about overlapping benefits laid down in Articles 11 of Regulation No 3 and 9 of Regulation No 4?

2. Should the payment of a '13th month' made to the Respondent by the INPS, in 1969 and 1970, under the Italian legislation of 4 April 1952, be treated as part of the pension for the purpose of applying the rules about overlapping benefits laid down in European Regulations No 3 and No 4?"

That Order for Reference was of course made before this Court delivered its Judgment in the *Naselli* case. In my opinion that Judgment makes it plain that, as indeed the Commission submitted, the questions thus referred to the Court by the Cour du Travail are beside the point.

Article 11 of Regulation No 3 (JO L 30 of 16 December 1958) has two paragraphs.

The first reads as follows:

"Sauf en ce qui concerne l'assurance vieillesse-décès (pensions), d'une part, et l'assurance invalidité lorsqu'elle donne lieu à répartition de la charge entre les institutions de deux ou de plusieurs États membres, d'autre part, les dispositions du présent règlement ne peuvent conférer ni maintenir le droit de bénéficier, en vertu des législations des États membres, de plusieurs prestations de même nature ou de plusieurs prestations se rapportant à une période d'assurance ou période assimilée."

That is clearly not in point, if only because the Respondent was entitled to his Belgian invalidity pension by virtue of Belgian law alone and not by virtue of the provisions of Regulation No 3, so that no relevant right was conferred on him by "les dispositions du présent règlement".

The second paragraph of Article 11 reads as follows:

"Les clauses de réduction ou de suspension prévues par la législation d'un État membre, en cas de cumul d'une prestation avec d'autres prestations de sécurité sociale ou avec d'autres revenus, ou du fait de l'exercise d'un emploi, sont opposables au bénéficiaire, même s'il s'agit de prestations acquises sous un régime d'un autre État membre ou s'il s'agit de revenus obtenus, ou d'un emploi exercé, sur le territoire d'un autre État membre. Toutefois, cette règle n'est pas applicable aux cas où des prestations de même nature sont acquises conformément aux dispositions des articles 26 et 28 du présent règlement."

That paragraph and the corresponding provision of Regulation No 1408/71, namely Article 12 (2), have been considered by this Court in a number of cases, in particular in Case 34/69 the *Duffy* case [1969] ECR 597, Case 184/73 the *Kaufmann* case [1974] ECR 517, Case 22/77 the *Mura* case [1977] ECR 1699, Case 37/77 the *Greco* case, ibid. p. 1711, Case 98/77 the *Schaap* case (not yet reported), Case 105/77 the *Boerboom* case (not yet reported), and of course in the *Naselli* case.

The following propositions, among others, are, in my opinion, established by the Judgments of the Court in those cases.

Where a Member State's legislation contains a provision designed to prevent duplication of social security benefits but that provision applies, by its own force, only in relation to benefits conferred by the law of that State itself, Article 11 (2) of Regulation No 3 (or Article 12 (2) of Regulation No 1408/71) cannot be invoked so as to make that provision apply also in relation to a benefit conferred by the legislation of another Member State in a case where the person concerned is entitled to the relevant benefit in the former Member State under the law of that State alone and without resort to Community law. Thus, in the *Duffy* case, an anti-duplication provision contained in French legislation which, as a matter of French law, applied only in relation to other benefits conferred by French law, could not, where the person concerned was entitled to a pension under French law taken by itself, be invoked by virtue of Article 11 (2) of Regulation No 3 to reduce her pension by reference to a benefit to which she was entitled under Belgian legislation. Article 11 (2) of Regulation No 3 (or Article 12 (2) of Regulation

No 1408/71) can only be invoked to extend the scope of such a provision of the law of a Member State where the person concerned needs to rely on the Community Regulation in order to establish a right to benefit in that Member State. So, in the *Kaufmann* case, where the person concerned needed to rely on Regulation No 3 in order to establish a right to benefit in the Netherlands, Article 11 (2) of that Regulation could be invoked in order to extend the scope of a Dutch anti-duplication provision so that it applied in relation to a benefit payable in Germany.

Where, however, an anti-duplication provision contained in a Member State's legislation, correctly interpreted according to the law of that Member State, applies as well in relation to benefits conferred by foreign legislation as in relation to other benefits conferred by that Member State's own law — as the Cour du Travail of Mons has held that Article 70 (2), of the Belgian statute of 1963 does, on its true interpretation according to Belgian law — Article 11 (2) of Regulation No 3 (or Article 12 (2) of Regulation No 1408/71, as the case may be) has, where the right to a benefit has been acquired under the law of that Member State without resort to Community law, primarily only a permissive effect: it means that Community law does not in such a situation forbid the application of the national anti-duplication provision according to its tenor. All that Community law then does is to say that, if the application of the national anti-duplication provision to the benefit acquired under national law alone reduces it below the level of the benefit that the person concerned would be entitled to claim under the relevant Community Regulation, that person must be paid the latter benefit at least.

It follows in my opinion that the question whether the pension to which the respondent in the present case is entitled under Belgian law alone may be reduced, not only by the basic amount of his Italian pension, but also by the amounts of the supplements attached to that pension by Italian law (namely the monthly supplement in respect of his dependent spouse and the "13th month") is a question, not of Community law, but of interpretation of Article 70 (2) of the Belgian statute of 1963. Community law will only, as it were, intervene, if the effect of Article 70 (2), as correctly interpreted according to Belgian law, is to reduce the respondent's Belgian pension to an amount less than that of the pension to which he would be entitled in Belgium by the application of the relevant provisions of Community law. As to the computation of the latter amount the Cour du Travail of Mons has, however, asked us no question.

I said, a moment ago, that the primary effect of Article 11 (2), in a case such as this, was only permissive. In so doing I had in mind a secondary effect that that provision may have in certain cases. This was brought out by the Judgments of this Court in the *Mura* and *Greco* cases and I referred to it in my Opinion in the *Naselli*, *Schaap* and *Boerboom* cases. It is that, where Article 11 (2) applies, albeit only in that primarily permissive manner, a result of its application may be to bring into operation the provisions of Article 9 of Regulation No 4.

The relevance of that to the present case is, of course, that the Cour du Travail of Mons has referred, in the questions that it has asked this Court to answer, not only to Article 1 of Regulation No 3 but also to Article 9 of Regulation No 4.

I propose to spare Your Lordships a reading of Article 9 of Regulation No 4, which is fairly long, and to say only that:

— Plainly paragraph (1) of that Article applies only in a case where there

are competing anti-duplication provisions contained in the legislation of several Member States — that is not the case here, where there is no suggestion that there is any relevant anti-duplication provision contained in the Italian legislation;

— Paragraph (2) of Article 9 was considered by the Court in the *Naselli* case where it was held that that provision was so worded that it could apply only where the benefit in question had been awarded through the application of the processes of aggregation and apportionment — that, again, is not the case here;

— Paragraph (3) of Article 9 is concerned with the supply of information as between institutions of Member States;

— Paragraph (4) is about child allowances; and

— Paragraph (5) is about the rights to family allowances of a worker who has been in two Member States in the same month.

Article 9 cannot therefore be in point here.

The Court has imposed upon itself an obligation, as a general rule, not to enquire into the relevance of questions referred to it under Article 177 of the EEC Treaty by a national Court. I do not doubt that that is a salutary general rule. But it is a rule that is subject to exceptions. One exception is that that rule does not apply where the national Court concerned has referred to this Court a question of interpretation of a provision of Community law that is manifestly inapplicable to the case before it — see Case 13/68 *Salgoil* v *Italy* [1968] ECR at p. 459 (Rec. 1968 at p. 672). Nor will this Court, under the guise of ruling on a question of Community law, rule on what is really a question of national law. It is in particular beyond the jurisdiction of this Court to rule on the classification under the legislation of one Member State of a benefit awarded under the legislation of another Member State — see Case 93/75 *Adlerblum* v *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* [1975] 2 ECR 2147.

I am therefore of the opinion that, in answer to the questions referred to the Court by the Cour du Travail of Mons, Your Lordships should rule that neither Article 11 of Regulation No 3 nor Article 9 of Regulation No 4 limits the power of a Member State to legislate so as to reduce the pension rights of a migrant worker whose claim to such rights in that State is made under the law of that State alone without reference to Community law.