institution, when converted into national currency, exceed the amount of the advance payments or allowances paid on a provisional basis, the balance is not to be paid over if the difference is due either to the difference in the exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the value expressed in foreign currency, or to the adjustment of the allowances to the cost of living, is incompatible with Regulation No 574/72.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 14 May 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 15 JANUARY 1981

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Tribunal du Travail of Mons.

The plaintiff in the proceedings before the Tribunal is Mr. Pietro Fanara, who is an Italian citizen resident in Belgium. The defendant is the Belgian Institut National d'Assurance Maladie-Invalidité (the "INAMI").

The question at issue in those proceedings is, shortly stated, whether the INAMI is entitled to retain the whole or only part of a remittance made to it by the Italian Istituto Nazionale della Previdenze Sociale (the "INPS") in respect of an Italian invalidity pension to

which Mr Fanara is entitled. The remittance was made pursuant to Article 111 (1) of Council Regulation (EEC) No 574/72, which is so far as material in these terms:

"If, when awarding or reviewing benefits in respect of invalidity ... the institution of a Member State has paid to a recipient of benefits a sum in excess of that to which he is entitled, that institution may request the institution of any other Member State responsible for the payment of corresponding benefits to that recipient to deduct the amount overpaid from the arrears which it pays to the said recipient. The latter institution shall transfer the amount deducted to the creditor institution."

The facts are these.

Mr Fanara, who was born on 14 September 1930, was employed in Italy for three years, in Germany for six months and in Belgium for twelve years. In October 1975 he became incapacitated from work owing to ill-health. As a result he became entitled, under Belgian law alone, to an invalidity pension as from 1 November 1976. That pension was, from that date to 28 February 1979, paid to him in full on a provisional basis under Article 45 (1) of Regulation No 574/72, which reads:

"If the investigating institution establishes that the claimant is entitled to benefits under the legislation which it administers without having recourse to periods of insurance or residence completed under the legislation of other Member States, it shall pay such benefits immediately on a provisional basis."

In the meantime the INAMI, in accordance with Article 41 (2) of Regulation No 574/72, took steps to ascertain Mr Fanara's rights in Germany and in Italy. The competent German institution replied that he was entitled to no benefit in Germany because he had been employed there for less than a year. The INPS on the other hand, on the basis of aggregation and apportionment under Article 46 (2) of Council Regulation No 1408/71, awarded Mr Fanara an invalidity pension as from 1 November 1976.

At the starting date, 1 November 1976 in each case, Mr Fanara's Belgian pension amounted to 242 823.36 Belgian francs per annum whilst his Italian pension amounted to 166 170 lire per annum. Over the period between that date and 28 February 1979, however, both pensions increased in amount. Belgian pensions are linked to the cost-of-living index and so subject to periodic adaptations. We were told by Counsel for the INAMI at the hearing that they had increased by about 20% between the two dates. Italian pensions are subject to annual adaptations and Counsel for the INAMI told us that, according to figures that the INPS had recently supplied to the INAMI, they had, during the period, been multiplied more than tenfold. He added that the INAMI doubted whether such an increase could reflect mere indexation; it seemed to reflect a more fundamental change.

During the same period, again according to Counsel for the INAMI, the lira depreciated by about 20% in relation to the Belgian franc.

On 27 December 1978 the INPS made to the INAMI the remittance in question. It was of a sum of 846 865 lire and it represented the amount of Mr Fanara's Italian pension for the period

1 November 1976 to 31 December 1978. It was changed into Belgian francs at the rate of exchange then prevailing, 0.0348 Belgian francs to the lira, and yielded 29 538 Belgian francs.

On 16 March 1979 the INAMI wrote to Mr Fanara to inform him of the result of its definitive calculation of the benefits to which he was entitled.

The starting point of that calculation was an error that was admitted to us on behalf of the INAMI at the hearing. The error was induced by the wording of the rulings of this Court in Case 22/77 the *first Mura* case [1977/2] ECR 1699 and in Case 37/77 the *Greco* case, ibid. p. 1711. The judgments in those cases had, Your Lordships remember, been delivered on 13 October 1977. The INAMI apparently overlooked that the effect of those rulings had been corrected by the Court in Case 98/77 the *Schaap* case [1978] ECR 707 and Case 105/77 the *Boerboom-Kersjes* case, ibid. p. 717, the judgments in which were delivered on 14 March 1978. The significance of the correction was not, it seems, realised by the INAMI until the Court delivered judgment in Case 236/78 the *second Mura* case [1979] ECR 1819 on 16 May 1979.

As a result of that error the INAMI, instead of comparing the pension to which Mr Fanara was entitled under Belgian law alone with the pension to which he was entitled under Article 46 of Regulation No 1408/71 and its ancillary provisions in their entirety, compared it with the pension to which he would be entitled in Belgium under paragraph 2 of Article 46 if the process of aggregation and apportionment were applied there. On that footing, the INAMI concluded that Mr Fanara would be better off on the basis of Belgian law alone. On that basis the amount of Mr Fanara's Italian pension was deductible from the amount of his Belgian pension by virtue of article 70 (2) of the Belgian statute of 9 August 1963 on invalidity insurance, a provision with which Your Lordships are familiar as a result of previous cases, including Case 98/80 *Romano* v *INAMI* which Your Lordships have at present under consideration.

The INAMI proceeded on the view that the benefits to which Mr Fanara was entitled in right of his pensions should be calculated as at their starting date, 1 November 1976. It also took the view that, by virtue of paragraph 1 of Decision No 101 of the Administrative Commission on Social Security for Migrant Workers — the Decision of which, in the *Romano* case, I expressed the opinion that it could have no legal effect — the amount of Mr Fanara's Italian pension should, for the purposes of the calculation, be converted into Belgian francs at the rate prescribed for the last quarter of 1976 by Article 107 of Regulation No 574/72 as amended by Council Regulation (EEC) No 2639/74. That rate was 0.04744 Belgian francs to the lira. In order to ascertain the sum that was deductible from Mr Fanara's Belgian pension for the period 1 November 1976 to 28 February 1979, the Inami accordingly converted into Belgian francs at that rate the amount of his Italian pension for that period at its original rate of 166 170 lire per annum. The INAMI made the result 19 627 francs. On behalf of Mr Fanara it is said that in fact the INAMI miscalculated the figure and that it should have been 18 422 francs. This Court is not however, of course, concerned to resolve disputes of that kind between the parties. I shall, for convenience, refer to the amount in question as 19 627 francs,

which is the figure mentioned in the order for reference.

The amount remitted by the INPS to the INAMI came, Your Lordships remember, to 29 538 francs. The difference between that amount and 19 627 francs, i. e. 9 911 francs, is the sum at issue in the proceedings before the Tribunal du Travail. That difference arises from the increases in the amount of Mr Fanara's Italian pension over the period 1 November 1976 to 31 December 1978, offset to some extent by the depreciation of the lira over the same period.

By a letter dated 25 April 1979 the INAMI told Mr Fanara that it was entitled to retain the 9 911 francs. In claiming that right, the INAMI relied and it still relies on paragraph 2 of article 241 ter of a Belgian arrêté royal of 4 November 1963 as amended by an arrêté royal of 14 December 1978. Paragraphs 1 and 2 of that article are as follows:

"§ 1er. Lorsque les arrérages reçus d'un organisme étranger, convertis en monnaie belge, ne couvrent pas le montant des avances ou des indemnités payées à titre provisionnel, la différence n'est pas récupérée lorsque cette différence est due, soit à la différence des taux de change respectifs appliqués pour le calcul du montant des sommes dues par l'organisme étranger et pour la réalisation de la valeur exprimée en monnaie étrangère soit à l'adaptation conjoncturelle des indemnités.

§ 2. Lorsque les arrérages reçus d'un organisme étranger, convertis en monnaie belge, sont supérieurs au montant des avances ou des indemnités payées à titre provisionnel, le solde n'est pas versé lorsque la différence est due, soit à la différence des taux de change respectifs appliqués pour le calcul du montant des sommes dues par l'organisme étranger et pour la réalisation de la valeur exprimée en monnaie étrangère, soit à l'adaptation conjoncturelle des indemnités."

Mr Fanara initiated the present proceedings, in which he claims the sum in question, by an application dated 7 May 1979 to the Tribunal du Travail. His contention is that paragraph 2 of article 241 ter of the arrêté royal is incompatible with Articles 46 and 51 of Regulation No 1408/71. Article 46 is familiar to Your Lordships. Article 51 provides as follows:

"1. If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the States concerned are altered by a fixed percentage or amount, such percentage or amount must be applied directly to the benefits determined under the provisions of Article 46, without the need for a recalculation in accordance with the provisions of that Article.

2. On the other hand, if the method of determining, or the rules for calculating benefits should be altered, a recalculation shall be carried out in accordance with the provisions of Article 46."

Such are the circumstances in which the Tribunal du Travail has referred to this Court the following question:

"Do the provisions of Community law and especially Article 51 of the Treaty of Rome, Articles 46 and 51 of Regulation No 1408/71, and Articles 107 and 111 of Regulation No 574/72 leave to Member

States, and if so to what extent, power to decide by means of internal legislation not to pay over in cases of the present kind the balance arising from the fact that arrears received from a foreign institution, when converted into national currency, exceed the amount of advance payments or benefits paid on a provisional basis, if the difference is due either to a difference in the exchange rates respectively applied to calculate the amount of the sums due from the foreign institution and to realise the value of a credit expressed in foreign currency, or to the adjustment of benefits to the cost of living?"

The argument on that question in this Court seems to me, if I may say so, to have proceeded to some extent on a false basis.

The principle that is laid down in the *Schaap, Boerboom-Kersjes* and *second Mura* cases is that a person in Mr Fanara's position is entitled in any Member State to whichever are the greater of —

(i) the benefits that he can claim under the legislation of that Member State alone, in its entirety, including any anti-duplication provision that it may contain; and

(ii) the benefits that he can claim under Article 46 of Regulation No 1408/71 and the provisions of Community law ancillary thereto, in their entirety.

I will, for short, call the former "the national law benefits" and the latter "the Community law benefits". The twin reasons why such a person is entitled to the greater of them are that, on the one hand, Article 51 of the Treaty does not empower the Council to legislate so as to take away from migrant workers rights that they have under national law and that, on the other hand, national legislation cannot take away rights conferred by Community law.

In the computation of the national law benefits provisions like article 70 (2) of the statute of 9 August 1963 and article 241 ter (2) of the arrêté royal of 4 November 1963, as amended, are free to play their part; no question as to their compatibility with Community law arises. In the computation of the Community law benefits, however, the application of such provisions is excluded; it is excluded by the second sentence of Article 12 (2) of Regulation No 1408/71. The only anti-duplication provision that can apply in the computation of the Community law benefits is paragraph 3 of Article 46 itself.

This Court cannot, on a reference under Article 177 of the Treaty, give guidance to the national court as to how the national law benefits should or should not be computed. On such a reference this Court can give guidance only as to how the Community law benefits should be computed. It is for the national court to make the comparision between the national law benefits and the Community law benefits to see which are the greater.

Strictly speaking that is enough to answer the question referred to the Court by the Tribunal du Travail in this case. Having regard, however, to the

way in which the case has been presented to the Tribunal du Travail and to the arguments that were put forward before us, I fear that to leave it at that would leave unresolved for the Tribunal a number of further questions of Community law to which the case gives rise. I therefore think it right to deal with those questions.

I have, after some hesitation, come to the conclusion that the parties and the Commission were right in approaching the case on the footing that the definitive calculation of Mr Fanara's benefits should be made on the basis of his rights as at 1 November 1976. It is difficult to see how, in practice, the machinery for cooperation between the social security institutions of different Member States established by Regulation No 574/72 could work if, in a case where benefits had, during a period, been paid on a provisional basis under Articles 45 (1) of that Regulation, the definitive calculation had to be made on the basis of the beneficiary's rights over that period or at the end of it.

The starting point of the INAMI's calculation of Mr Fanara's Community law benefits should have been, in accordance with Article 46 (1) of Regulation No 1408/71, and as I understand the INAMI now accepts, the full amount of his Belgian pension. Having been informed by the INPS of Mr Fanara's rights in Italy, the INAMI had then to apply Article 46 (3) of the Regulation. In order to do so, it had to ascertain which, of the Belgian and the Italian, was the higher "theoretical amount" of benefit. We know that the Belgian "theoretical amount" was the full amount of the Belgian pension, 242 823.36 francs per annum. We do not know what the Italian "theoretical amount" was. Since Mr Fanara had worked for three out of the fifteen relevant years in Italy, it may be that that amount was five times the amount of his original Italian pension or, say, about 830 000 lire per annum. At all events, in order to make the comparison, the INAMI had to apply a rate of conversion of lire into Belgian francs. Decision No 101 pointed to the rate prescribed for the last quarter of 1976 by Article 107 of Regulation No 574/72, as amended. As Your Lordships know, that Decision has in my opinion no legal effect, but it does not follow that Article 107 itself (as amended), in so far as it prescribes conversion rates for particular periods, is ineffective, and it is difficult to see what other rate than that so prescribed could logically be used for the present purpose. If, as is in fact most probable, the INAMI, applying that rate, found that the higher "theoretical amount" was the Belgian, the effect of Article 46 (3) would be to render the original amount of Mr Fanara's Italian pension deductible from the original amount of his Belgian pension. If, more improbably, it was found that the Italian "theoretical amount" was the higher, the deduction would be smaller. In either case, Article 51 of Regulation No 1408/71 applied as regards subsequent alterations in the amount of either pension. Alterations in the amount of the Belgian pension attributable to what that Article calls "an increase in the cost of

living or changes in the level of wages or salaries or other reasons for adjustment" were to be applied to what was left of that pension after the deduction authorized by Article 46 (3). Similar alterations in the amount of the Italian pension did not affect the amount of the deduction. On the other hand alterations in "the method of determining, or the rules for calculating benefits" would necessitate a recalculation of it.

The next step is to determine, on that footing, how much of the 846 865 lire received from the INPS the INAMI was entitled to retain. For the sake of simplicity I propose to assume, in considering how that should be done (a) that the higher "theoretical amount" was the Belgian and (b) that none of the alterations in the amount of Mr Fanara's Italian pension after 1 November 1976 were of such a kind as to entail a recalculation pursuant to Article 51 (2) of Regulation No 1408/71.

It seems to me, in the first place, that the INAMI was not entitled to retain anything in respect of the instalments of Mr Fanara's Italian pension due for January and February 1979. The language of Article 111 appears to me such as to authorize only the deduction, from arrears of a pension due in one Member State, of amounts overpaid in another Member State in the past. It does not authorize the deduction from such arrears of the amount of prospective overpayments. Accordingly, in my opinion, on the assumptions I have made, what the INAMI was entitled to retain consisted of two elements:

(i) an amount, readily ascertainable by the INAMI though not known to us, representing the sums overpaid to Mr Fanara in the period 1 November 1976 to 31 December 1978 owing to cost-of-living adjustments to Belgian pensions having been applied to the full amount of his Belgian pension instead of to the amount of it as reduced under Article 46 (3); and

(ii) the amount of Mr Fanara's Italian pension for the period 1 November 1976 to 31 December 1978 at its original rate of 166 170 lire per annum. We do not know what that amount is either, though it may be simply 25/12ths of 166 170 lire, which, according to my arithmetic, is 346 190 lire.

The first of those elements presents no currency conversion problem. It is an amount ascertainable from the start in Belgian francs. The second element, however, must be converted into Belgian francs and I can see no reason why it should be converted at any rate other than that at which the 846 865 lire received from the INPS were actually changed into Belgian francs. The point here is akin to that in the *Romano* case, though it is to be observed that Article 107 (as amended) of Regulation No 574/72 is not expressed to apply for the purposes of Article 111 of that Regulation.

If Your Lordships share my views, the task of the Tribunal du Travail will be to ascertain whether or not the result of giving effect to them is to entitle the INAMI to retain the whole of the proceeds of the 846 865 lire and, if not, how much, according to that result, it is entitled to retain.

It would not, so it seems to me, be appropiate for Your Lordships to seek to summarize all that in formal rulings given in answer to the narrow question referred to the Court by the Tribunal du Travail. I accordingly suggest that, by way of formal ruling, Your Lordships should say simply that:

(1) In a case of the present kind the worker is entitled to whichever are the greater of, on the one hand, the benefits that he can claim under the legislation of the Member State concerned alone, in its entirety and, on the other hand, the benefits that he can claim under Article 46 of Regulation No 1408/71 and the provisions of Community law ancillary thereto, in their entirety.

(2) No provision of Community law excludes the application, in the ascertainment of the benefits that the worker can claim under the legislation of the Member State concerned alone, of any provision of that legislation relating to the treatment of arrears received from a foreign institution. The application of any such provision is however excluded in the ascertainment of the worker's rights under Community law.

(3) It is for the competent national court or tribunal to make the comparison between the rights of the worker under the national legislation alone and his rights under Community law and to give effect to whichever are the more favourable to him.