4. Social security for migrant workers — Aggregation and apportionment — Community rules — Application of national rules less favourable to the worker — Not permissible (Regulation (EEC) No 574/72 of the Council, Arts 15 and 46)

1. So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation (EEC) No 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation (EEC) No 1408/71 the provisions of that article must be applied.

2. Where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind. Consequently, the provisions of Chapter 3 of Regulation (EEC) No 1408/71 are applicable and, by virtue of the last sentence of Article 12 (2) of the regulation, the application of national rules against overlapping is precluded.

3. Where a worker is in receipt of benefits of the same kind in respect of invalidity or old age which are awarded by the institution of two or more Member States in accordance with the provisions of Article 46 of Regulation (EEC) No 1408/71, the national legislative provisions for reduction, suspension or withdrawal do not apply. It follows that the amount referred to in Article 46 (1) is the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State. If under the national legislation a worker who is able to establish a certain number of years of insurance is entitled to a full pension, it is the amount of that full pension which must be taken into account.

4. It is not permissible for the institution of a Member State to apply national rules for the aggregation and apportionment of periods of insurance which are less favourable to the worker than those contained in Regulation (EEC) No 574/72.

In Joined Cases 116, 117, 119, 120 and 121/80

REFERENCES to the Court under Article 177 of the EEC Treaty by the Fourth Chamber of the Arbeidshof Antwerpen [Labour Court, Antwerp], Hasselt Division, for a preliminary ruling in the actions pending before that court between

RIJKSDIENST VOOR WERKNEMERSPENSIOENEN [National Pensions Office for Employed Persons], Brussels,

and

GIORGIO CELESTRE (Case 116/80),

GÜNTHER DREILICH (Case 117/80),

OTTO BOHNEFELD (Case 119/80),

KUNIGUNDE RYDLAKOWSKI, NÉE LEX, a widow, (Case 120/80),

and between

NATIONAAL PENSIOENFONDS VOOR MIJNWERKERS [National Pension Fund for Miners], Brussels,

and

JOZEF STREHL (Case 121/80)

on the interpretation of Article 51 of the Treaty and Article 46 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The judgments making the references and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

1. The facts which are the subject of the main proceedings are not described in the interlocutory judgments. As they emerge from the other documents contained in the files on the cases and from the written observations submitted to the Court, they may be summarized as follows:

Mr Celestre, an Italian national, Mr Dreilich and Mr Bohnefeld, both German nationals, were occupied as miners underground in Belgium for 27, 28 and 27 years respectively. Previously, they had been employed in their countries of origin. They found that they were granted a retirement pension by the Rijksdienst voor Werknemerspensioenen (hereinafter referred to as "the National Office"), the competent Belgian institution, on the basis of the periods of insurance completed in Belgium. In addition, they also receive a retirement pension in their countries of origin. Mrs Rydlakowski, a widow, for her part receives a survivor's pension under German law and under Belgian law, because her husband was employed in Germany and then worked as a miner underground in Belgium for 25 years.

The persons concerned brought proceedings before the Arbeitdsrecht-banken [Labour Tribunals] Hasselt and Tongeren, which held that Mr Celestre, Mr Dreilich, Mr Bohnefeld and Mrs Rydlakowski could claim retirement and survivor's pensions calculated on the basis of the full insurance record of a miner underground corresponding to 30 years' service. Before the Arbeidshof Antwerpen, Hasselt Division, the National Office appealed against the judgments at first instance. It claimed that Article 10 (2) of Belgian Royal Decree No 50 lays down a rule against overlapping benefits under which workers who can establish an insurance record partly as a miner and partly as an ordinary worker may obtain a retirement pension equal to the result obtained by multiplying the number of years worked as a miner by 1.5 with a maximum of $^{45}/_{45}$, and that only a retirement pension (or survivor's pension) corresponding to the years worked as a miner underground may be paid by Belgium, with the proviso that the sum of the Italian or German and Belgian retirement pensions must be at least equal to the full retirement pension guaranteed by virtue of employment as a miner underground.

Mr Strehl, a German national, is entitled to an invalidity pension in both Germany and Belgium by virtue of his work as a miner. A reference has already been made to the Court of Justice by the

Arbeidsrechtbank Hasselt, for a preliminary ruling in the action which was pending before that Court between Mr Strehl and the Nationaal Pensioenfonds voor Mijnwerkers (hereinafter referred to as "the Miners' Fund") in Case 62/76 ([1977] ECR 211). The Miners' Fund appealed against the judgment of the Arbeidsrechtbank Hasselt, which took into consideration the preliminary ruling of the Court of Justice in the case cited above and held that Mr Strehl was entitled to an invalidity pension calculated on the basis of a full insurance record in Belgium as a miner underground.

2. The national law applicable is as follows.

The retirement pension scheme for miners is laid down by Royal Decree No 50 of 24 October 1967, which provides:

"Article 4

The retirement pension shall take effect from the first day of the month which follows that during which the claimant applies for the pension and not before:

1. ...

2. ...

3. The first day of the month which follows that in which the claimant:

   (a) reaches the normal retirement age, which is 55 or 60 years of age depending on whether a retirement pension is paid in respect of employment either as a mineworker underground or as a mineworker on the surface, or

   (b) proves that he has been habitually and mainly employed as a mineworker for 25 years in mines or quarries worked underground ...;"

Under paragraph (2) of Article 10, by way of derogation from subparagraph (2) of paragraph (1), a worker:

"1. who has been habitually and mainly employed as a mineworker for at least 20 years may receive a retirement pension calculated at $^1/_{30}$ for each calendar year of employment as a mineworker. If in aggregate he has not been habitually and mainly employed for 30 calendar years as a mineworker underground in mines or quarries worked underground but can show such employment for at least 25 such years he shall be deemed to have been so habitually and mainly employed for a number of additional calendar years equal to the difference between 30 and the number of calendar years in which he proves that he was so habitually and mainly employed. Each of those additional years shall be considered as years of employment underground in coal-mines before 1955;"

The invalidity pension scheme for miners is laid down by Royal Decree of 19 November 1970, which provides:

"Article 1 (1). The following persons shall be entitled to an invalidity pension on the conditions hereinafter provided:

(a) a worker subject to the social security scheme for miners who has actually ceased work in mining undertakings on account of ill-health causing unfitness for normal underground and surface work in those undertakings;

(b) a worker subject to the social security scheme for miners who, having been employed underground, has actually ceased work in the said

undertakings on account of ill-health causing unfitness for normal underground work in those undertakings.

(2). The invalidity pension shall be granted:

1. to a worker referred to in paragraph (1) (a), if he can show a minimum of ten years' service in mining undertakings;

2. to a worker referred to in paragraph (1) (b), if he can show the minimum number of years' service laid down by subparagraph 1. and if that minimum period includes at least five years' actual service underground in mining undertakings.

Article 23 (1). An invalidity pension granted under this decree may overlap with one or more retirement or invalidity pensions only to the extent of the annual amount of the pension laid down by Article 4 (1) (2.) or (4.), according to whether the worker concerned is married, widowed, divorced or separated."

3. The Arbeidshof Antwerpen, Hasselt Division, by interlocutory judgments of 22 April 1980, decided, in pursuance of Article 177 of the Treaty, to stay proceedings until the Court of Justice had given a preliminary ruling on

"the interpretation of Article 51 of the EEC Treaty and, in so far as necessary, of other articles of the Treaty and provisions of secondary legislation in connexion with the question set out in the grounds",

a question which amounts to inquiring whether those provisions must be interpreted as meaning that in determining the benefits to be paid to the persons concerned pursuant to the legislation of a Member State, periods of insurance may not be taken into account twice, in particular where actual periods of insurance in that State overlap with notional periods in another State. It should be observed that the Arbeidshof Antwerpen referred no specific question to the Court of Justice.

The view emerges from the judgments of the Arbeidshof that, under Article 51 of the Treaty in conjunction with Article 46 of Regulation (EEC) No 1408/71, all the periods of insurance completed in the various Member States should be taken into account, so long as that does not result in taking periods of insurance into account twice, so that there is no discrimination against a worker who has remained in his own country.

The Arbeidshof clarifies its opinion by means of the following examples:

(1) Retirement pension:

A miner has worked 27 years in Belgium, for which he receives a full retirement pension of BFR 150 000, and 5 years abroad, for which he receives a partial retirement pension of BFR 50 000;

Years actually completed abroad are to be substituted for notional years in Belgium.

The Belgian pension is reduced by $^{27}/_{30}$ of BFR 150 000 but is aggregated with the foreign benefit;

Since the total amount, namely BFR 135 000 + BFR 50 000 = BFR 185 000, is higher than the full Belgian amount, this solution may be adopted;

(2) Invalidity pension:

A miner is entitled to the (full) Belgian invalidity pension of BFR 150 000 and to partial invalidity benefits abroad of BFR 50 000 for 5 working years;

The years actually worked abroad are substituted for the notional years in Belgium;

The Belgian pension must be reduced to $^{25}/_{30}$ of BFR 150 000 but is aggregated with the foreign benefit;

The sum of both benefits, that is BFR 125 000 + 50 000 = BFR 175 000, exceeds the full Belgian pension and must therefore be upheld.

Written observations were submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community by the National Office, represented by J. Janssens, Director of Administration, by the Miners' Fund, represented by J. Kranzen of the Hasselt Bar, by Mr Celestre and Mr Bohnefeld and Mrs Rydlakowski, represented by D. Rossini, Union Representative, Patronato ACLI, by the Kingdom of Belgium, represented by A. Nokerman, Secretary General of the Ministry of Social Security, acting as Agent, by the Italian Republic, represented by A. Squillante, Head of the Department for Diplomatic Litigation, Treaties and Legislative Matters, of the Ministry of Foreign Affairs, acting as Agent, assisted by F. Favara, Avvocato dello Stato, by the Kingdom of the Netherlands, represented by I. Verkade, acting Secretary General of the Ministry of Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by J. Amphoux, Legal Adviser, acting as Agent, assisted by A. Haagsma, a member of the Commission's Legal Department.

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 inquiry.

By order of 18 June 1980 the Court decided to join the cases for the purposes of procedure and judgment.

By order of 15 October 1980 the Court, in pursuance of Article 95 (1) and (2) of its Rules of Procedure, decided to assign the joined cases to the First Chamber.

II — Written observations submitted to the Court

1. *Mr Celestre, Mr Bohnefeld and Mrs Rydlakowski* point out that pursuant to the case-law expressed in the *Petroni, Manzoni, Massonet* and *Mura* judgments, the full retirement pension acquired on the basis of Belgian law alone may be the subject of a reduction when it overlaps with the pension granted under the legislation of another State in two circumstances only: where the national legislation under which the pension was granted contains a provision against overlapping benefits which expressly provides for the reduction of the benefit in cases where there is another pension, and where the periods of insurance credited by the Belgian institution represent periods of notional insurance which overlap with periods of compul-

sory insurance completed on the territory of another State. In the second case, the provisions of Article 12 (1) of Regulation (EEC) No 1408/71 and of Article 15 of Regulation (EEC) No 574/72 must be applied.

A mere comparison of the texts clearly shows that the provision in Article 10 (2) (1.) of Royal Decree No 50 is not, unlike other provisions of Belgian legislation on retirement and survivor's pensions, a rule against or a restriction of overlapping benefits. On the other hand, in contrast to those provisions, Article 10 (2) of Royal Decree No 50 makes no reference to a foreign pension scheme. The conclusion may therefore be drawn that the legislature intended to assure the miner that, owing to the risks to which he has been exposed during his working life and the premature deterioration of his physical condition, the pension acquired by virtue of his periods of work in the mines will be a full one. Conversely, there is a clear and unambiguous rule against overlapping in the legislation on miners' invalidity pensions, a fact which distinguishes the case of Mr Strehl from the four other cases.

The alleged overlapping of the Belgian periods of insurance with the periods of insurance completed in Germany or in Italy is by no means established in the cases in question. Since the Belgian legislature has laid down that each of the additional years added to the working life of the person concerned shall be taken into account as a year of employment underground in the mines before 1955, the years credited may fall at any time from the point at which the miner attains the age of 14 until 1954 and cover the years of his working life which are not taken into account in another State. It must on the other hand be emphasized that the principle that the full Belgian pension acquired after the completion of 25 years' service as a miner should not be reduced is now acknowledged by most of the Belgian national courts, both of first instance and of appeal, a claim substantiated by the persons concerned by the submission by way of examples of the statements of grounds relating to a number of judgments which establish the lawfulness of overlapping benefits.

There can in any event only be a question of the overlapping of periods of insurance in the case of aggregation. The right to the Belgian pension was acquired solely by virtue of the periods of work performed in Belgium in the mining industry; on the other hand, the periods of work completed outside the mines in the other State could not in any case be aggregated with the Belgian periods in order to determine the right to the Belgian pension, if such aggregation were necessary, because the periods were covered by different schemes.

The persons concerned propose therefore that the Court of Justice should confirm the decisions in the judgments in the *Massonet* and *Mura* cases and give the following answer to the Belgian court:

"The provisions implementing Article 51 of the EEC Treaty, in particular Article 46 of Regulation (EEC) No 1408/71 of the Council, must be interpreted as meaning that they do not authorize a national insurance body to reduce the benefits which are due to a worker or to those entitled under him by virtue of

national legislation alone, because it was not necessary to have recourse to the process of aggregation and the applicable national legislation contains no rules against overlapping benefits.

For the purpose of determining whether Article 12 (1) of Regulation (EEC) No 1408/71, which prohibits the overlapping of benefits for one and the same period of insurance, applies, it is a matter for the national court to determine whether periods of insurance completed in the various Member States do in fact overlap."

2. The *National Office* maintains that if it were to agree in cases such as those in question to the grant of a full retirement pension as a miner underground to be paid by Belgium ($^{30}/_{30}$), the consequence of the application of the Community provisions would be to create discrimination incompatible with the aim of the Treaty.

The National Office proceeds as follows for the purpose of applying those provisions to a migrant worker: where a miner proves that his customary and principal employment for at least 25 years has been in the Belgian mines and where he claims to have also been employed in another Member State, the Office first calculates the provisional advance payment on the basis of the services performed exclusively in Belgium, applying the rules concerning the presumption; that advance payment is therefore calculated on the basis of 30 years, for example 28 proven years and 2 additional years which are presumed. When the other Member State in which the worker was also employed informs the Office of the periods valid under its legislation, the Office calculates the national pension limiting the number of additional years to the difference between 30 and the number of valid years of employment as a miner underground under the legislation of both countries, which leads to the loss of the additional years which coincide with the years of actual employment abroad. That does not give rise to any great difficulties where the worker in question was employed as a miner underground or on the surface for a number of years abroad. Conversely, where the worker was employed abroad in a sector other than mining and was therefore subject to the general scheme for workers, the Office takes account of the fact that under Belgian law the right to the pension is acquired not at the rate of $^{1}/_{30}$, but only at the rate of $^{1}/_{45}$ per annum, and it takes only $^{2}/_{3}$ of that period of employment into account in order to determine the number of additional presumed years which must be eliminated in order to comply with the rule concerning the restriction to unity ($^{30}/_{30}$).

The National Office maintains therefore that Article 10 (2) of Royal Decree No 50 lays down a *sui generis* rule against overlapping whereby workers who can show an insurance record partly as a miner and partly as an ordinary worker may obtain a retirement pension equal to the result obtained by multiplying the number of years of employment as a miner by 1.5, with a maximum of $^{45}/_{45}$. A full insurance record of $^{30}/_{30}$ consequently corresponds to a full insurance record of $^{45}/_{45}$, the full record being restricted to unity (in the cases in question to $^{30}/_{30}$).

If the Office took account neither of Article 10 cited above nor of Article 12 of Regulation (EEC) No 1408/71, the result in the cases in question would be the strange one that the persons concerned would obtain at retirement age a full retirement pension, calculated on the basis of 30 years' employment in Belgium as a miner underground and, in addition, a partial foreign pension. In that case, an insurance record exceeding unity would be recognized at retirement age. The Office takes the contrary view that the persons concerned should obtain a retirement pension amounting to $^{30}/_{30}$, the years of employment as an ordinary worker not giving rise to the grant of a retirement pension (or a survivor's pension).

3. The Miners' Fund claims that in the case of Mr Strehl the consequence of the application of the case-law arising from the *Mura* case is that a choice must be made between the apportionment rule and the national provision against overlapping. The application of the apportionment rule would be more advantageous in this case. On the other hand, the person concerned cannot at 1 July 1974 claim the supplement provided for by Article 50 of Regulation (EEC) No 1408/71, as the total of his benefits in the two countries is greater than the amount of the Belgian minimum benefit.

4. The *Belgian Government* points out that Article 51 of the Treaty provides that all the periods of insurance completed in the Member States must be taken into account so that there is no discrimination against the migrant worker. However, the consequence of taking such periods into account must not be that the same period is taken into consideration twice. Indeed, the periods of actual insurance should take precedence over the presumed periods. Furthermore, since the Belgian benefit is a retirement benefit calculated on the basis of an insurance record including a period of "notional" insurance, if it were aggregated in full with the foreign benefits, periods of insurance would be taken into account twice. Consequently, it is clear that the foreign benefit should be substituted for the Belgian benefit for the "notional" years so that a value is set on the periods of insurance completed in the various countries, but substituting the actual scheme for the notional scheme where periods overlap. Consequently, the solution applied by the National Office is fair if the scheme itself is regarded as a minimum and given that the foreign benefit is substituted for the Belgian benefit for the presumed years.

With regard to Case 121/80, the institution of each Member State, whose conditions for entitlement to a benefit laid down by the legislation which it applies are fulfilled, should compare the benefit calculated according to the provisions of that legislation with the benefit calculated according to Community law and grant the higher amount. In the latter case, the provisions of Article 46 of Regulation (EEC) No 1408/71 must be applied using the rules of aggregation and apportionment. However it is important not to lose sight of the fact that the calculation of the actual Belgian benefit to be paid must take account of the fact that the person concerned worked solely in the mines in Belgium, and both in and outside the mines in Germany and moreover that it seems that in Germany he benefited from

periods treated as completed and, furthermore, that the invalidity benefits granted are of a different type.

5. The *Italian Government* takes the view that the national provision which provides, without any *quid pro quo* and independently of the Community provisions, for a reduction of the social benefit acquired by a migrant worker by virtue of the national law alone by reason of the conferment on that worker of the right to another social benefit following his pursuit of an occupation in another Member State, is compatible neither with the Treaty nor with Regulation (EEC) No 1408/71.

The "notional" months of service (or those covered by conventions) do not correspond to a real period, but merely establish a special procedure for the calculation of the retirement pension; for that reason, it is not possible to speak of the "overlapping" of a period of actual work with a "notional" period of service. Having regard to the terms used in bringing the actions, it seems that the possibility that the benefits are "anticipatory old-age benefits" must be ruled out (Article 12 (3) of Regulation (EEC) No 1408/71). On the other hand, Articles 12 and 46 of that regulation concern benefits "for one and the same period of compulsory insurance", whereas, in the cases of the persons concerned, there is no doubt that the work of the former miner was performed at a different point in time, that is to say during a different "period". The provision in Royal Decree No 50 of 24 October 1967 cannot be regarded as "a provision for reduction, suspension or withdrawal" within the meaning of Article 12; it is in reality not a provision "against overlapping benefits" but a provision in favour of the former miner. Article 12 (2) does permit national provisions against overlapping, but only in the case of true "overlapping" (with the advantages which derive therefrom for the migrant worker), and does not apply "when the person concerned receives benefits of the same kind in respect of ... old age ... which are awarded ... in accordance with the provisions of Articles 46, 50, 51 ...".

Nor is it certain that Article 46 (2) of Regulation (EEC) No 1408/71 applies in the cases in question: it seems, on the contrary, that "the conditions for entitlement to benefit" were fully satisfied, at least as far as the period of work in the mine is concerned. Cases where it is neither possible nor necessary to aggregate several periods of insurance, because the two periods in question "do not overlap", fall outside the scheme of Community "aggregation"; in that case, both pensions are cumulative (in fact) and are not aggregated, and it is not possible to determine the limit of what is referred to by common agreement as the "theoretical amount". Even under the present system of imperfect harmonization of the laws on social security, the national legislatures cannot be authorized to adopt measures which impose on migrant workers restrictions which in any event contain no *quid pro quo*. The Court made an express ruling to that effect in the *Mura* and *Schaap* cases.

6. The *Netherlands Government* takes the view that the "notional" periods play no part in the determination of the amount of the invalidity pensions. Where

a miner becomes disabled after at least 10 years' work in the mines, he receives an invalidity pension which is independent of the length of the period for which he was insured. If he was not insured for that minimum period as a miner, but was insured for the minimum period of insurance of 6 months required by the general scheme, he is then entitled on the basis of the general scheme to an invalidity pension which is also independent of the length of the period for which he was insured. The Belgian scheme contains no provisions providing that the "notional" periods are not to be taken into account when they coincide with periods completed in another Member State.

The Netherlands Government considers that the solution may be found in the present cases in Article 46 (3) having regard to the findings of the Court, in particular in Cases 105/77, 98/77 and 236/78. The application of the Belgian national rules against overlapping is in these cases less favourable than that of the scheme contained in Article 46. In the Strehl case, the German institution does not apply Article 46 (1) in the sense referred to in the second subparagraph of paragraph (3). That means that the Belgian institution alone applies paragraph (1) and may therefore deduct the amount by which the sum of the Belgian pension and the German pension exceeds the highest theoretical amount from the benefit for which it is accountable independently of the provisions regarding reduction. This solution would be in accordance with the *Petroni* case and it follows from that that an apportionment of the amount deducted may only be made between institutions which apply a legal scheme containing provisions against overlapping.

7. The *Commission* observes that neither Article 51 nor any other provision of secondary Community law can have the effect of not taking into consideration certain periods of insurance taken into account pursuant to the legislation of a Member State, even if, in addition to the benefit which he receives under that legislation, the insured person also receives a benefit in another Member State and if "notional" periods of insurance completed by him in the first Member State coincide with actual periods completed in the other State.

The Arbeidshof accepts the argument that Article 51 of the Treaty in conjunction with Article 46 of Regulation (EEC) No 1408/71 must be interpreted as meaning that not only "all the periods of insurance completed in the various countries" must be taken into account, but that in addition periods of insurance must not as a result be taken into account twice so that there is no discrimination against a worker who has remained in his own country. That view cannot fail to arouse justifiable astonishment. Indeed, the cases in question are concerned with payments made exclusively pursuant to the legislation of a single Member State. Furthermore, in one of the five cases (the Strehl case), a reference was made at an earlier stage to the Court of Justice for a preliminary ruling, which was obtained.

The case-law of the Court of Justice does not of itself preclude the national legislation from applying in its entirety, that is to say including the national provisions, if any, against overlapping. The Belgian rules relating to retirement and survivor's pensions contain a single provision laying down a true rule against overlapping, namely Article 25 Royal

Decree No 50 of 24 October 1967, whereby the retirement or survivor's pension may not overlap with a benefit granted under foreign legislation on account of sickness, invalidity or involuntary unemployment. But the royal decree contains no express provision against overlapping concerning benefits of the same nature. Nevertheless, that meaning is adopted in the actual application of that provision in Belgian administrative practice. With regard to the nature of the "presumption" of 30 years, a judgment of the Cour du Travail [Labour Court], Liège, of 29 June 1979 *(ONPTS v Schiabello)* held that that presumption must be regarded as "irrebuttable" and that it is not possible to restrict or annul it by giving proof to the contrary, in particular by showing that the miner was employed elsewhere during those years. It seems that it is not altogether impossible to assert that proof to the contrary may and must be produced, and consequently that the years "worked" elsewhere should, if necessary, be deducted from the "notional" years taken into account in Belgium. This amounts therefore to the application of a rule against overlapping.

The position regarding invalidity pensions is clearer as Article 23 (1), cited above, of Royal Decree of 19 November 1970 contains a rule against overlapping which has already been applied in several cases (cf. for example, *Mura).* In any event, in certain circumstances the application of national provisions regarding overlapping is therefore possible in principle. As regards the limits within which those provisions must apply, the Commission refers to the case-law of the Court (Cases 98/77, *Schaap,* and 105/77, *Boerboom-Kersjes).* Hence, the national provisions regarding overlapping may in principle be applied, except where such application proves less favourable than that of the system established by Article 46 of Regulation (EEC) No 1408/71.

The Commission proposes therefore to the Court of Justice that the following answer should be given to the Belgian court:

"Neither Article 51 of the EEC Treaty nor any other secondary provision implies that benefits based on the legislation of one Member State alone must be reduced on the ground that the recipient is also entitled to another benefit, whether or not of the same nature, in another State, and that periods of insurance completed by that recipient under the legislation of the second State coincide with notional periods completed under the legislation of the first State."

III — Oral procedure

The National Office, represented by Guy Auwerx and Jan Declerck, acting as Agents, and the Commission of the European Communities, represented by Jean Amphoux, one of its Legal Advisers, acting as Agent, assisted by T. Van Rijn, presented oral argument at the sitting on 12 March 1981.

The Advocate General delivered his opinion at the sitting on 7 May 1981.

Decision

1 By judgments of 22 April 1980, which were received at the Court on the following 5 and 7 May, the Arbeidshof Antwerpen [Labour Court, Antwerp], Hasselt Division, asked the Court to give a ruling under Article 177 of the EEC Treaty on the interpretation of Article 51 of the Treaty and Article 46 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) in connexion with the problem set out in the grounds of the judgments.

2 Those grounds may be summarized as follows: Mr Celestre, an Italian national, Mr Dreilich and Mr Bohnefeld, both German nationals, were occupied as miners underground in Belgium for 27, 28 and 27 years respectively. Previously, they had been employed in their countries of origin. The Rijksdienst voor Werknemerspensioenen (hereinafter referred to as "the National Office"), the competent Belgian institution, awarded them retirement pensions on the basis of the periods of insurance completed in Belgium. They also receive a retirement pension in their countries of origin. Mrs Rydlakowski, a widow, for her part receives a survivor's pension under German and Belgian law, because her husband was employed in Germany and then worked as a miner underground in Belgium for 25 years.

3 The persons concerned brought proceedings before the Arbeidsrechtbanken [Labour Tribunals] Hasselt and Tongeren, which held that Mr Celestre, Mr Dreilich, Mr Bohnefeld and Mrs Rydlakowski could claim retirement and survivor's pensions calculated on the basis of the full insurance record of a miner underground in Belgium, corresponding to 30 years' service.

4 The National Office appealed to the Arbeidshof Antwerpen, Hasselt Division, against the judgments at first instance claiming that Article 10 (2) of Belgian Royal Decree No 50 lays down a rule against overlapping benefits under which workers who can establish an insurance record partly as a miner and partly as an ordinary worker may obtain a retirement pension equal to the result obtained by multiplying the number of years worked as a miner by

1.5 with a maximum of $^{45}/_{45}$, and that only a retirement pension (or survivor's pension) corresponding to the years worked as a miner underground may be paid by Belgium, with the proviso that the sum of the Italian or German and Belgian retirement pensions must be at least equal to the full retirement pension guaranteed by virtue of employment as a miner underground.

5 Mr Strehl, a German national and the plaintiff in the main action in Case 121/80, is entitled to an invalidity pension in both Germany and Belgium by virtue of his work as a miner, The Nationaal Pensioenfonds voor Mijnwerkers (hereinafter referred to as "The Miners' Fund") appealed against the judgment of the Arbeidsrechtbank Hasselt, which took into consideration the preliminary ruling of the Court of Justice in Case 62/76 *(Strehl* [1977] ECR 211) and held that Mr Strehl was entitled to an invalidity pension calculated on the basis of a full insurance record in Belgium as a miner underground.

6 The retirement pension scheme for miners is laid down by Belgian Royal Decree No 50 of 24 October 1967, which provides:

"Article 4

The retirement pension shall take effect from the first day of the month which follows that during which the claimant applies for the pension and

1. . . .

2. . . .

3. The first day of the month which follows that in which the claimant:

(a) reaches the normal retirement age, which is 55 or 60 years of age depending on whether a retirement pension is paid in respect of employment either as a mineworker underground or as a mineworker on the surface, or

(b) proves that he has been habitually and mainly employed as a mineworker for 25 years in mines or quarries worked underground . . .;

Under paragraph (2) of Article 10, by way of derogation from subparagraph (2) of paragraph (1), a worker:

"1. who has been habitually and mainly employed as a mineworker for at least 20 years may receive a retirement pension calculated at 1/30 for each calendar year of employment as a mineworker. If in aggregate he has not been habitually and mainly employed for 30 calendar years as a mineworker underground in mines or quarries worked underground but can show such employment for at least 25 such years he shall be deemed to have been so habitually and mainly employed for a number of additional calendar years equal to the difference between 30 and the number of calendar years in which he proves that he was so habitually and mainly employed. Each of those additional years shall be considered as years of employment underground in coalmines before 1955;"

The invalidity pension scheme for miners is laid down by Royal Decree of 19 November 1980, which provides:

"Article 1 (1). The following persons shall be entitled to an invalidity pension on the conditions hereinafter provided:

(a) a worker subject to the social security scheme for miners who has actually ceased work in mining undertakings on account of ill-health causing unfitness for normal underground and surface work in those undertakings;

(b) a worker subject to the social security scheme for miners who, having been employed underground, has actually ceased work in the said undertakings on account of ill-health causing unfitness for normal underground work in those undertakings.

(2). The invalidity pension shall be granted:

1. to a worker referred to in paragraph (1) (a), if he can show a minimum of ten years' service in mining undertakings;

2. to a worker referred to in paragraph (1) (b), if he can show the minimum number of years' service laid down by subparagraph 1. and if that minimum period includes at least five years' actual service underground in mining undertakings.

Article 23 (1). An invalidity pension granted under this decree may overlap with one or more retirement or invalidity pensions only to the extent of the annual amount of the pension laid down by Article 4 (1) (2.) or (4.), according to whether the worker concerned is married, widowed, divorced or separated."

7 The question put by the Arbeidshof amounts to an inquiry whether Article 51 of the Treaty and the legislative provisions adopted in implementation thereof must be interpreted as meaning that in determining the benefits to be paid to the recipients pursuant to the legislation of a Member State, periods of insurance may not be taken into account twice, in particular where actual periods of insurance in one Member State overlap with notional periods in another Member State.

8 The Court has no jurisdiction to interpret national legislation within the procedure laid down by Article 177 of the Treaty. It is possible, however, to emphasize certain rules of Community law which may assist in settling the dispute before the national court.

9 It must be remembered first that, as the Court stated *inter alia* in its judgment of 14 March 1978 in Case 98/77 *Schaap* [1978] ECR 707, so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation (EEC) No 1408/71 do not prevent the national legislation alone, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation (EEC) No 1408/71 the provisions of that article must be applied.

10 It is a matter for the national court to give a ruling on the content and interpretation of the provisions of its national legislation on overlapping benefits and to make the necessary comparison in order to determine in each case whether the application of the national rules is less favourable to the worker than the application of the Community provisions as interpreted by the Court. The worker must indeed receive those benefits which are the most favourable.

11 In its judgment of 15 October 1980 in Case 4/80 *D'Amico* [1980] ECR 2951 the Court ruled that where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the

invalidity benefits are to be regarded as being of the same kind. Consequently, the provisions of Chapter 3 of Regulation (EEC) No 1408/71 are applicable and, by virtue of the last sentence of Article 12 (2) of the regulation, the application of national rules against overlapping is precluded.

12 It must be remembered that it is clear from the last sentence of Article 12 (2) of Regulation (EEC) No 1408/71 that where the provisions of Article 46 of the regulation are applied, national legislative provisions for reduction, suspension or withdrawal do not apply. It follows that the amount referred to in Article 46 (1) is the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State. If under the national legislation a worker who is able to establish a certain number of years of insurance is entitled to a full pension, it is the amount of that full pension which must be taken into account.

13 Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 160) contains in Articles 15 and 46 provisions governing the ovelapping of periods of insurance completed under the legislation of two or more Member States. Consequently, it is not permissible for the institution of a Member State to apply national rules for the aggregation and apportionment of periods of insurance which are less favourable to the worker than those contained in the regulation.

14 Attention should be drawn in particular to Article 15 (1) (e) of Regulation (EEC) No 574/72 which provides as follows:

"where it is not possible accurately to determine the period of time in which certain periods of insurance were completed under the legislation of one Member State, such periods shall be presumed not to overlap with periods of insurance completed under the legislation of another Member State and shall, where advantageous, be taken into account."

15 Consequently, the reply which must be given to the question put by the Arbeidshof Antwerpen is as follows:

(a) So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation (EEC) No 1408/71 do not prevent the national legislation alone, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation (EEC) No 1408/71 the provision of that article must be applied.

(b) Where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind. Consequently, the provisions of Chapter 3 of Regulation (EEC) No 1408/71 are applicable and, by virtue of the last sentence of Article 12 (2) of the regulation, the application of national rules against overlapping is precluded.

(c) Where a worker is in receipt of benefits of the same kind in respect of invalidity or old age which are awarded by the institutions of two or more Member States in accordance with the provisions of Article 46 of Regulation (EEC) No 1408/71, the national legislative provisions for reduction, suspension or withdrawal do not apply. It follows that the amount referred to in Article 46 (1) is the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State. If under the national legislation a worker who is able to establish a certain number of years of insurance is entitled to a full pension, it is the amount of that full pension which must be taken into account.

(d) Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 160) contains in Articles 15 and 46 provisions governing the overlapping periods of insurance completed under the legislation of two or more Member States. Consequently, it is not permissible for the institution of a Member State to apply national rules for the aggregation and apportionment of periods of insurance which are less favourable to the worker than those contained in the regulation.

Costs

16 The costs incurred by the Government of the Kingdom of Belgium, by the Government of the Italian Republic, by the Government of the Kingdom of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds

THE COURT (First Chamber)

in answer to the question referred to it by the Arbeidshof Antwerpen by judgments of 22 April 1980, hereby rules:

(a) So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation (EEC) No 1408/71 do not prevent the national legislation alone, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation (EEC) No 1408/71 the provisions of that article must be applied.

(b) Where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind. Consequently, the provisions of Chapter 3 of Regulation (EEC) No 1408/71 are applicable and, by virtue of the last sentence of Article 12 (2) of the regulation, the application of national rules against overlapping is precluded.

(c) Where a worker is in receipt of benefits of the same kind in respect of invalidity or old age which are awarded by the institutions of two or more Member States in accordance with the provisions of Article 46 of Regulation (EEC) No 1408/71, the national legislative provisions for reduction, suspension or withdrawal do not apply. It

follows that the amount referred to in Article 46 (1) is the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State. If under the national legislation a worker who is able to establish a certain number of years of insurance is entitled to a full pension, it is the amount of that full pension which must be taken into account.

(d) Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 160) contains in Articles 15 and 46 provisions governing the overlapping of periods of insurance completed under the legislation of two or more Member States, Consequently, it is not permissible for the institution of a Member State to apply national rules for the aggregation and apportionment of periods of insurance which are less favourable to the worker than those contained in the regulation.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 2 July 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 7 MAY 1981

My Lords,

These cases, which the Court ordered should be joined, were referred on 22 April 1980 by the Arbeidshof of Antwerp (Hasselt Division) for a preliminary ruling in these terms — "for the interpretation of Article 51 of the EEC Treaty and, in so far as necessary, of other articles of the Treaty and provisions of