In Case 111/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail [Labour Tribunal], Mons, for a preliminary ruling in the proceedings pending before that court between

PIETRO FANARA

and

INSTITUT NATIONAL D'ASSURANCE MALADIE-INVALIDITÉ [National Sickness and Invalidity Insurance Institution]

on the interpretation of the Community rules applicable in social security matters,

THE COURT (First Chamber)

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

Advocate General: J.-P. Warner
Registrar: H. Gentin, Legal Secretary

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The facts of the case and the question put to the Court

Mr Fanara, the plaintiff in the main action, who is an Italian national residing in Belgium, completed 12 years of insurance in Belgium, three years in Italy and six months in Germany. He became incapacitated from work from 7 October 1975 and his invalidity was recognized from 7 October 1976.

Mr Fanara fulfilled the conditions required to enable him to claim the award of invalidity benefits. From 1 November 1976 to 28 February 1979 he received full Belgian invalidity allowances which were awarded to him on a provisional basis pending a co-ordinated award of the benefits payable under the scheme of Regulations (EEC)

Nos 1408/71 and 574/72. Germany decided to refuse any payment on the ground that Mr Fanara had completed less than one year of insurance on its territory (Article 48 of Regulation No 1408/71). Italy awarded Mr Fanara an apportioned invalidity pension from 1 November 1976. The decision was notified to him on 16 March 1979.

As regards the amount of the Belgian benefits, Mr Fanara satisfied the conditions laid down by the Belgian legislation for the award of a full pension under national law alone without aggregation. That pension was reduced by the amount of the Italian benefit following the combined application of the national rules against overlapping benefits (Article 70 (2) of the Law of 9 August 1963) and the rules against overlapping referred to by Article 12 of Regulation No 1408/71.

As regards the allowances paid on a provisional basis to Mr Fanara, the Institut National d'Assurance Maladie-Invalidité (hereinafter referred to as "the Belgian Institution") calculated that an undue payment of BFR 19 627 had been made. That amount had to be recovered from the arrears of the Italian pension pursuant to the provisions of Article 111 of Regulation No 574/72. In December 1978 the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institution] (hereinafter referred to as "the Italian Institution") remitted to the Belgian Institution the sum of LIT 846 865 representing the invalidity pension payable to Mr Fanara for the period from 1 November 1976 to 31 December 1978. On conversion into Belgian francs the sum yielded BFR 29 538. There remained therefore a balance of BFR 9 911 over and above the sum to be recovered.

The Belgian Institution refused to pay over the difference to the plaintiff, first on the ground that Italy had not remitted to Belgium the whole of the arrears for the period during which Belgium had made payments on a provisional basis and, secondly, in reliance upon Article 241 (2) of the Royal Decree of 4 November 1963 (as supplemented by Article 2 of Royal Decree No 19 of 14 December 1978) which provides:

"Where the arrears received from a foreign institution, when converted into Belgian currency, exceed the amount of the advance payments or allowances paid on a provisional basis, the balance shall not be paid over if the difference is due either to the difference in the respective exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living".

Mr Fanara contested the Belgian Institution's refusal before the Tribunal du Travail, Mons, which decided to refer the following question to the Court for a preliminary ruling:

"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 allow Member States to retain the power, and if so to what extent, to decide by means of domestic rules not to pay over in matters of this 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 respective exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living?"

The judgment making the reference was lodged at the Court Registry on 14 April 1980. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were submitted on behalf of Pietro Fanara by Daniele Rossini, Director of the Welfare Organization "Patronato ACLI", on behalf of the Belgian Institution by Mr Wattier of the Mons Bar, and by the Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, acting as Agent.

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 and to assign the case to the First Chamber.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

Mr *Fanara* sets out his disagreement with the Belgian Institution, which raises a problem comprising three parts:

— The application of Article 51 (1) of Regulation No 1408/71;

— The rates of currency conversion under Article 107 of Regulation No 574/72;

— The compatibility of Article 241 of the Royal Decree of 4 November 1963 with the Community rules for the calculation and award of pensions.

Article 51 of Regulation No 1408/71 provides as follows:

"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 Article 46, without the need for a recalculation in accordance with the provisions of that article."

Article 51 governs the stabilization of benefits awarded pursuant to Article 46. Article 46 covers benefits awarded under independent rules without the intervention of Community law and benefits to which entitlement is acquired by Community law. Mr Fanara satisfies the conditions laid down by the Belgian legislation for the award of a full pension under national law alone without aggregation. That pension was reduced by the amount of the Italian pension following the application of the national rules against overlapping benefits.

The Belgian benefit, which was calculated on the above basis as at 1 November 1976, must be determined independently of the Italian pension. Consequently, out of the arrears of the Italian pension the Belgian Institution was entitled to retain only the sum which corresponded to the days included in the period for which it made advance

payments on a provisional basis. The difference between that amount and the amount remitted by the Italian Institution must be paid over to Mr Fanara.

Mr Fanara claims that the figure which the defendant in the main action calculates as being the amount of the advance payments recoverable, namely BFR 19 627, is not entirely correct because it represents a deduction of BFR 29.92 from the Belgian benefit instead of BFR 25.27.

Under the terms of Decision No 101 of 29 May 1975 adopted by the Administrative Commission on Secial Security for Migrant Workers, the date to be taken into consideration for the purpose of determining the rate of conversion is to be that from which the provisions must be applied in respect of the person concerned.

Mr Fanara submits however that in view of the long period which elapses between the date on which pensions begin to run and the date on which the final processes of calculation and award are performed, it would be more logical to take into consideration the rates of currency conversion prevailing on the occasion of the final processes of making the award.

Consequently, the financial settlement of cases should be made, at least for the period in respect of which the pension arrears are remitted by one institution to another, on the basis of the exchange rate used for the conversion of those arrears. Such a system would allow a correct application of the rules against overlapping benefits and the deduction from the pension subject to reduction of the amount of the benefit actually paid by another institution. That solution would also avoid an undue payment at the expense of the person concerned where, owing to the fall in value of certain currencies, the exchange rate proves unfavourable.

Mr Fanara takes the view that Article 241 of the Royal Decree of 4 November 1963 is incompatible with Regulations Nos 1408/71 and 574/72 on the question of the calculation and award of pensions because it has the effect of depriving him of the benefit resulting from the increases in the Italian pension which have occurred since 1 November 1976. The Community regulations were adopted in order to confer certain benefits on migrant workers and not to permit the competent institutions to appropriate sums which do not belong to them.

Mr Fanara submits that since entitlement to a benefit is acquired by virtue of national legislation alone, there can be no question of allowing persons who are socially insured to suffer the adverse consequences of the fall in value of currencies. If the amount of the arrears paid by the institution of another State is less than the sums which were paid on a provisional basis but were payable by virtue of national legislation alone, no part of the difference should be reclaimed from the person concerned; the application of national rules against overlapping benefits can under no circumstances result in the deduction from a pension due under independent rules of sums in excess of those which the person concerned has actually received from another institution.

The *defendant in the main action* observes that in the application of Article 111 of Regulation No 574/72 and Annex 6 thereto, particularly in Belgo-Italian relations, the exchange value in Belgian francs of the Italian arrears paid to the Belgian Institution is very frequently less than the amount of the "recoverable advances" granted, with the result that the procedure for reimbursement laid

down by the Community regulations allows an undue payment to subsist. The causes of these differences are twofold and may act jointly or severally: The progressive fall in value of the Italian lira in relation to the Belgian franc and the effect of Article 51 (1) of Regulation No 1408/71.

In the calculation of the benefit actually payable by Belgium under Article 46 of Regulation No 1408/71, the amount of the Italian benefit which affects the amount payable by Belgium is converted into Belgian francs in accordance with Article 107 (1) and (5) of Regulation No 574/72 and with Decision No 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, that is to say at the rates of exchange prevailing for the quarter during which the award becomes effective for the worker, which corresponds to the date on which he becomes entitled to the invalidity benefit.

On the other hand, when the Italian Institution pays its arrears to the Belgian Institution, the provisions of the various regulations which prevail in the matter of currency conversion are those of Article 107 (6) of Regulation No 574/72, so that the Belgian Institution therefore receives exchange value in Belgian francs of the Italian arrears converted at the rates of exchange applicable on the date of payment.

In so far as the Italian lira has for a long time tended to fall in value in relation to the Belgian franc and in view of the period elapsing between the date on which the right to the benefits is acquired and the date on which the arrears are paid, it is obvious that payment is made at a lower exchange rate than that of the decision.

Article 51 implies that the benefits determined by the competent institutions at the date on which the right is acquired are subsequently separately adjusted to the economic situation in the country responsible for payment, whilst an alteration in one of the benefits is to have no effect on the other.

The effect therefore of Article 51 of Regulation No 1408/71 is that there is great diversity in the development of the benefits paid by each of the Member States since changes in the economic situation occur at different times, by different rhythms and according to dissimilar economic trends.

The consequences of Article 51 find expression in various ways:

— If the foreign benefit increases less rapidly than the Belgian benefit, the arrears are less than the advances;

— In the converse case, the arrears are greater than the advances.

Article 51 (1) of Regulation No 1408/71 is not necessarily sufficient to offset entirely the fall in value of currencies; on the contrary, owing to the lack of harmony of the national laws relating to changes in the economic situation, it may have the opposite effect to that desired.

Monetary depreciation therefore continues to represent for the migrant worker a risk of reduction in his income and for the institutions a source of difficulty in connexion with the financial regulations at issue here.

It appears that no solution to those risks and problems has been found or sought

at Community level. Consequently, Belgium sought to achieve a solution at national level by inserting Article 241 in the Royal Decree of 4 November 1963. Mr Fanara's case is covered by paragraph (2) of that provision.

The Belgian Institution claims that no solution is to be found to the problems at issue in this case, arising from the disparities in monetary and economic trends in Member States, in the co-ordinating rules laid down by the regulations, and that no action has been taken at Community level in order to resolve them. Consequently, measures adopted by a national legislature to govern the recovery of provisional payments infringe neither the regulations nor the Treaty of Rome.

The *Commission*, in its observations, submits that the Community rules leave to the national legislation of the Member States the matter of determining the conditions and detailed rules for the recovery by social security institutions of undue payments. The only Community provisions which exist on this matter are those of Article 111 of Regulation No 574/72 concerning the assistance which the social security institutions of the various Member States may expect for the purpose of such recovery.

Clearly there is a limit to this power of the Member States to enact rules on the recovery of overpayments. A social security institution may not, on the pretext of recovering payments not due, deprive the person concerned of his enjoyment of rights to benefits which he has acquired under the legislation of another Member State or which must be granted him under the Community rules. To paraphrase the terms used in Article 111 (1) or (2) of Regulation No 574/72, the permissibility of recovering payments not due presupposes that the institution concerned has paid the recipient a sum in excess of that to which he is entitled.

The limits resulting from Community provisions concern the determination of the undue payment which may be recovered. Article 45 (1) of Regulation No 574/72 provides as follows:

"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 a case such as the present where the person concerned was entitled to the grant of invalidity pensions under the legislation of two Member States, namely Belgium and Italy, the undue payment is made up of the difference between the full Belgian invalidity allowances which the Belgian Institution paid to him from the time of the acquisition of his right to a pension pending the definitive award of his rights and the benefits determined to be payable by the Belgian Institution on the co-ordinated award of his rights in accordance with Articles 45 and 46 of Regulation No 1408/71.

As regards the rate of exchange applied to the benefits, the Commission submits that it is clear from Decision No 101 of the Administrative Commission of the

European Communities on Social Security for Migrant Workers and from Article 51 of Regulation No 1408/71 that, except in cases where the method of determining or the rules for calculating benefits are altered, the benefits due to a person concerned by the institutions of various Member States in accordance with the rules of Article 46 are to be determined once and for all. Once awarded in pursuance of that article, each of the national benefits is governed by its own scheme as far as concerns the adjustments to the economic situation provided for by the legislation under which it is paid. Cost of living increases in benefits payable under the legislation of one Member State cannot therefore affect the amount of the benefits due from the institutions of other Member States.

The Commission observes that in so far as the person concerned in this case benefited, when the full Belgian invalidity allowances were paid on a provisional basis, from the cost of living adjustments applicable to those allowances under the Belgian rules from the date on which the right to benefits was acquired, the Belgian Institution may, for the purpose of determining the amount overpaid to the recipient, take account of those adjustments, and also of those which must be applied to that part of the benefit which is determined as remaining chargeable to the institution under Article 46 of Regulation No 1408/71. On the other hand, any cost of living increases which may have been applied to the apportioned Italian pension from the decisive date for calculation purposes can have no bearing on the determination of the undue payment. They may not be deducted from the amount of the Belgian allowances.

The amount overpaid by an institution, determined in accordance with the rules set out above, is the full extent of the sums which may be recovered.

Where it is established that the institution of a Member State has paid to a recipient of benefits a sum in excess of that to which he is entitled and where the amount overpaid has been calculated, there are several conceivable ways in which recovery may be effected.

First of all, the institution may claim repayment of the overpayment directly from the person concerned where he receives directly from the institution responsible for payment in another Member State payment of the benefits due from that institution.

The institution may also have recourse to the machinery for assistance set up by Article 111 of Regulation No 574/72. When that provision is applied, the recipient is not directly involved in the arrangements for the recovery of the undue payment. The arrangements are made exclusively between the creditor institution and the institution responsible for payment.

In Mr Fanara's case, the Italian Institution paid to the Belgian Institution the whole of the invalidity pension arrears due to Mr Fanara for the period from 1 November 1976 to 31 December 1978. The Belgian Institution is not entitled to retain that sum even though it came to a higher amount than had been calculated. The balance cannot be explained solely by fluctuations in the exchange rates but is also composed of cost of living increases in the Italian

benefit. Article 241 (2) of the Royal Decree of 4 November 1963, under which the Belgian Institution acted, also results in that institution's retaining for itself the cost of living increases in the Italian benefit, which would be directly contrary to Article 51 (1) of Regulation No 1408/71, which provides that the benefit of such increases must accrue to the person concerned and may not affect the amount of the benefits due from the institutions of other Member States. A Member State may certainly assume the risks where economic developments lead to an unfavourable result for the persons concerned. However, it is not permissible that it should wish to offset the advantage thus conferred upon certain workers by imposing a disadvantage on others.

In the present case the consequence of the Belgian position is that the person concerned suffers a twofold loss:

— First, as far as the conversion of his Italian pension into Belgian francs is concerned, he bears the unfavourable conseuqences of the change in value of Italian currency from the date on which his entitlement to the pension was recognized;

— secondly, he is deprived of the cost of living increases in the Italian pension.

Such provisions are clearly in conflict with the provisions of the Community rules on the award of invalidity pensions.

For the above reasons the Commission takes the view that the questions put by the Tribunal du Travail, Mons, might receive the following reply:

"Where an institution of a Member State, acting as a liaison body, is in possession of arrears representing benefits due from the institution of a Member State in respect of a given period, that institution is bound to transfer to the recipient the exchange value of that amount, subject to a deduction, if necessary, of an amount equal to that part of the benefit paid to him on a provisional basis which exceeds the definitive amount due to him under Article 46 of Regulation No 1408/71. Whilst the Community rules do not preclude the application of a national provision permitting the institution, of its own motion, to waive recovery from the recipient of any overpayment, it cannot, however, have the effect of allowing the institution to retain a specific amount representing a positive balance, which must accrue to the recipient pursuant to Article 51 (1) of Regulation No 1408/71 and which, in any event, he would retain if the benefit had been paid to him directly, instead of having been paid to the liaison body as arrears by the institution responsible for payment".

III — Oral procedure

The Belgian Institution, represented by A. Wattier of the Mons Bar, accompanied by Mr De Craene, an official of the said institution, and the Commission of the European Communities, represented by its Legal Adviser, J. Amphoux, acting as Agent, presented oral argument at the sitting on 20 November 1980.

The Advocate General delivered his opinion at the sitting on 15 January 1981.

Decision

1 By a judgment of 3 April 1980, which reached the Court on 18 April 1980, The Tribunal du Travail, Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 51 of the Treaty, of Articles 46 and 51 of Regulation 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) and of Articles 107 and 111 of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 cited above (Official Journal, English Special Edition 1972 (I), p. 159).

2 The question was raised in the course of proceedings between Pietro Fanara, the plaintiff in the main action, and the Institut National d'Assurance Maladie-Invalidité, a Belgian social security institution and the defendant in the main action (hereinafter referred to as "the Belgian Institution"), and concerned the compatibility with Community law of Article 241 ter of the Royal Decree of 4 November 1963 implementing the Belgian Law of 9 August 1963 instituting and organizing a compulsory sickness insurance scheme.

3 The plaintiff in the main proceedings, an Italian national residing in Belgium, pursued employment successively in Italy and Belgium. He was incapacitated for work from 7 October 1975 and his invalidity was recognized from 7 October 1976. He fulfilled the conditions required to enable him to claim the award of invalidity benefits. The Belgian and Italian institutions proceeded to award those benefits pursuant to Article 40 (1) and to the provisions of Chapter 3 of Title III of Regulation No 1408/71, and in particular Article 46 thereof.

4 From 1 November 1976 to 28 February 1979 the plaintiff in the main proceedings received full Belgian invalidity allowances, which were awarded to him on a provisional basis under Article 45 (1) of Regulation No 574/72. By a decision notified to him on 16 March 1979, the Belgian Institution made a definitive calculation of the amount of the Belgian benefit, deducting from the full Belgian allowance due on 1 November 1976 the daily amount of the Italian pension corresponding to the same date. For the purposes of

that calculation, the amount of the Italian pension was converted into Belgian francs by application of the rate of exchange prevailing in the fourth quarter of 1976, that decision and on the basis of that calculation, the plaintiff in the main action was said to have received on a provisional basis for the above-mentioned period the sum of 19 627 Belgian francs, which had to be recovered by the Belgian Institution.

5 In respect of the period from 1 November 1976 to 31 December 1978 the competent Italian institution paid to the defendant in the main action the sum of LIT 846 865, which represented the Italian invalidity pension and took account of the cost of living increases in that pension. On conversion into Belgian francs at the rate of the date of payment, that sum yielded BFR 29 538. Consequently, there was a difference of BFR 9 911 as compared with the sum to be recovered.

6 The action before the national court is concerned with the plaintiff's right to the payment of that sum by the Belgian Institution. Relying upon Article 241 ter of the above-mentioned Royal Decree of 4 November 1963 implementing the Belgian Law of 9 August 1963, as inserted in that Royal Decree by Article 2 of Royal Decree No 19 of 14 December 1978, the Belgian Institution refused to pay over the balance to the plaintiff in the main action.

7 The provisions of that article are as follows:

"(1) Where the arrears received from a foreign institution, when converted into Belgian currency, do not cover the amount of the advance payments or allowances paid on a provisional basis, the balance shall not be recovered if the difference is due either to the difference in the respective exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living.

(2) Where the arrears received from a foreign institution, when converted into Belgian currency, exceed the amount of the advance payments or allowances paid on a provisional basis, the balance shall not be paid over if the difference is due either to the difference in the respective exchange rates used to calculate the amount of the sums due from the

foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living.

(3) Where the arrears received from a foreign institution, when converted into Belgian currency, exceed the amount of the advance payments or allowances paid on a provisional basis and the excess received originates from arrears in respect of a period in which the allowances were not awarded as advances or on a provisional basis, the balance shall be paid to the worker or his successors or to the institution entitled to claim it".

8 In view of those facts, the court requested a preliminary ruling on 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 allow Member States to retain the power, and if so to what extent, to decide by means of domestic rules not to pay over in matters of this 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 respective exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign currency, or to the adjustment of the allowances to the cost of living?"

9 In the present case, the Belgian Institution, in conformity with the case-law of the Court, and in particular the judgments of 14 March 1978 (Case 98/77 *Schaap* [1978] ECR 707) and 16 May 1979 (Case 236/78 *Mura* [1979] ECR 1819), took the view that the application of the provisions of Article 46 of Regulation No 1408/71 would be less favourable for the worker than the award of the full Belgian invalidity pension with the application of the national legislation against overlapping. Consequently, by a decision notified on 16 March 1979 it awarded Mr Fanara the full Belgian pension whilst deducting the amount of the Italian pension.

10 The Belgian Institution takes the view that it is in accordance with Community law to apply the above-mentioned provisions of national legislation relating to the recovery of undue payments where it has paid on a provisional basis a sum in excess of the definitive amount due.

11 The payment of benefits on a provisional basis is provided for by Article 45 of Regulation No 574/72. Article 111 of the same regulation lays down the rules to be applied for the recovery of payments not due if, when awarding benefits in respect of invalidity pursuant to Chapter 3 of Title III of Regulation No 1408/71, the institution of a Member State has paid to a recipient of benefits a sum in excess of that to which he is entitled.

12 The case-law of the Court cited above is not concerned with settlement of the payment of benefits on a provisional basis and the recovery of sums in excess of those to which the persons concerned are entitled. In a case such as the present it is therefore the provisions of Regulations Nos 1408/71 and 574/72 which apply.

13 Article 111 of Regulation No 574/72 allows an institution which has paid benefits on a provisional basis to request the institution of any other Member State responsible for the payment of corresponding benefits to the recipient to deduct the amount overpaid out of any arrears payable by the latter institution to the recipient. The amount thus deducted is to be transferred to the creditor institution.

14 That provision deals exhaustively with the question of the recovery of the amount overpaid as regards social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45 (1) of Regulation No 574/72. It leaves the Member States no freedom to legislate on the matter, or in particular to provide that where the arrears received from a foreign 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 dfference in the exchange rates used to calculate the amount of the sums due from the foreign institution and to arrive at the figure expressed in foreign

currency, or to the adjustment of the allowances to the cost of living. Such a provision would therefore be incompatible with Regulation No 574/72.

15 The reply which must be given to the question put by the Tribunal du Travail, Mons, is therefore that a provision of national law which, in the case of social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45 (1) of Regulation No 574/72, provides that where the arrears received from a foreign institution, when converted into Belgian 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 currency, or to the adjustment of the allowances to the cost of living, is incompatible with Regulation No 574/72.

Costs

16 The costs incurred by the Commission of the European Communities, which has 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 Tribunal du Travail, Mons, by a judgment of 3 April 1980, hereby rules:

A provision of national law which, in the case of social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45 (1) of Regulation No 574/72 of the Council of 21 March 1972, provides that where the arrears received from a foreign

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