JUDGMENT OF THE COURT OF 14 MARCH 1978 [1]

Max Schaap v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen (preliminary ruling requested by the Centrale Raad van Beroep, Utrecht)

'Social Security'

Case 98/77

1. *Social security for migrant workers — Benefits — Overlapping — Benefits corresponding to an insurance period bought in voluntarily by the person concerned — Application of Article 46 (2) of Regulation No 574/72 of the Council*

2. *Social security for migrant workers — Benefits — Overlapping — Entitlement under national legislation alone — Provisions for reduction or suspension of benefit — Applicability — Position under Community rules more favourable — Preference*
(Regulation No 1408/71 of the Council, Arts. 12 (2) and 46)

1. The benefits corresponding to an insurance period which has been bought in pursuant to the provisions of national legislation which grants a worker this right are to be regarded as falling within Article 46 (2) of Regulation No 574/72 of the Council.
2. So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation 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 than the application of the rules laid down by Article 46 of Regulation No 1408/71 the provisions of that article must be applied.

In Case 98/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep (Court of last instance in social security matters), Utrecht, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: Dutch.

MAX SCHAAP, Amsterdam,

and

BESTUUR VAN DE BEDRIJFSVERENIGING VOOR BANK- EN VERZEKERINGSWEZEN GROOTHANDEL EN VRIJE BEROEPEN (Board of the Trade Association for Banking, Insurance, the Wholesale Trade and the Professions), Amsterdam,

on the interpretation of Articles 12 (2) and 46 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),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the procedure and the written observations submitted under 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

Mr Schaap, a Netherlands national and the appellant in the main action, completed an insurance period from 1929 to 1933 in Germany. He then took up residence in the Netherlands where from 1934, except for the period from 1940 to 1945, he worked as an employed person and as a self-employed person until 1 June 1972 when he became disabled. The respondent in the main action, the competent Netherlands institution, Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen Groothandel en Vrije Beroepen (hereinafter referred to as 'the

Fund'), awarded him an invalidity pension under Netherlands legislation on insurance against incapacity for work (Wet op de arbeidsongeschiktheidsverzekering, hereinafter referred to as 'the WAO').

Mr Schaap was at the same time permitted by the competent German institution to establish a right to an invalidity pension substantially higher than the one to which he would have been entitled on the basis only of the compulsory periods of insurance which he had completed in Germany. He had in fact availed himself of the opportunity afforded by German legislation relating to the victims of Nazi persecution and voluntarily paid contributions for the back period from 1934 to 1945 in respect of pension insurance (including invalidity insurance) in order to be able to claim a higher German pension.

The Netherlands Fund, taking into account this German invalidity pension, reduced the amount of the benefit due to Mr Schaap pursuant to the WAO in application of Netherlands Royal Decree of 22 December 1972 enacted in implementation of Article 52 of the WAO and with reference to Article 46 (3) of Regulation No 1408/71. Mr Schaap then brought the matter before the Raad van Beroep (Court of Appeal in social security matters), Amsterdam, and contended that the whole of his German pension had wrongly been taken into account even though the larger proportion thereof was attributable to his voluntary insurance.

Since the Raad van Beroep decided against Mr Schaap he appealed to the Centrale Raad van Beroep, Utrecht, which, by an order of 12 July 1977 sent to the Court by a letter of 28 July 1977 from its President, decided to stay proceedings and refer to the Court of Justice of the European Communities pursuant to Article 177 of the EEC Treaty the following question for a preliminary ruling:

'Where a worker has been subject to the legislation of two or more Member States, to what extent do Articles 12 (2) and 46 of Regulation (EEC) No 1408/71 prevent the application of national rules against the overlapping of benefits such as those in force pursuant to the WAO, where entitlement to benefit has been obtained pursuant to national legislation alone without its being necessary to apply the regulation for that purpose?'

The order of the Centrale Raad van Beroep was received at the Court on 1 August 1977.

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.

II — Summary of the written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *respondent* in the main action points out that, as far as concerns the Netherlands, benefits are acquired under national law and not under Regulation No 1408/71. The second sentence of Article 12 (2) does not contain any prohibition on the adoption of national regulations to prevent the overlapping of benefits. The reduction provisions laid down by the Royal Decree of 22 December 1972 relate to the overlapping of national and foreign benefits and are not within the field of application of Article 12 (2). The latter provides an exception to the general rule set out in the first sentence of the said paragraph (2) (according to which the national legislative provisions of Member States for reduction of benefit in cases of overlapping with other social security benefits may be invoked even when these other benefits are paid by

another Member State). However, this exception to the general rule does not apply to provisions such as those in the Royal Decree.

Even if the exception set out in the second sentence of Article 12 (2) does apply, it only refers to the case where benefits of the same kind in respect of invalidity are awarded by the institutions of two or more Member States in accordance with Article 46.

The Netherlands benefits are not 'awarded in accordance with Article 46', because, since the amount thereof certainly does not vary according to the period of insurance, it cannot correspond to the total periods of insurance completed in the Netherlands. If the calculation carried out under the terms of Article 46 (2) does not produce a greater amount, which in practice hardly ever happens in the Netherlands, only the national method of computing the amount of the benefits remains.

There is no substantial difference between Article 12 (2) of Regulation No 1408/71 and Article 11 (2) of Regulation No 3. Therefore the Court's decided cases on the latter regulation apply to the main action; they clearly suggest the adoption of provisions for the reduction of benefit to deal with the kind of overlapping of benefits found in this case.

Furthermore, if the second sentence of Article 12 (2) were to apply and if consequently the effect of the Netherlands provisions for reduction of benefit were nullified, the result would be that one part of the national benefit, namely the part which is not normally paid pursuant to the national provisions for reduction of benefit, would nevertheless be paid under Regulation No 1408/71. It could be said that this portion of the benefits thus assumes the nature of a benefit acquired under Community regulations, and, on the strength of the principles developed in Case 24/75 *(Teresa and Silvana Petroni* v *Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149), this means in turn that there would be no reason why Article 46 (3) should not be applied to it.

Finally it is inconsistent with the objectives sought to be attained by Articles 48 to 51 of the Treaty that these articles, or regulations adopted pursuant to them, prevent any obstacle being placed in the way of unfair overlapping of benefits at national level. This should certainly be the position in circumstances such as those found in the main action, where a benefit acquired under the legislation of one Member State is added to the benefit acquired under the Netherlands Law on invalidity insurance amounting to as much as 80% of final wage or salary. This situation is all the more unacceptable because the party concerned thus gets benefits greater than the wage or salary which he received before.

The *Belgian Government* repeats its argumentation in Case 22/77 *(Fonds National de Retraite des Ouvriers Mineurs* v *Giovanni Mura* [1977] ECR 1699) and Case 37/11 *(Fernando Greco* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711).

The *Italian Government* points out that Article 12 (2) of Regulation No 1408/71 must be interpreted as meaning that it precludes the application of national rules against the overlapping of benefits where there are two overlapping benefits of the same kind awarded by two Member States in accordance with Article 46 of the said regulation, even if one of the benefits is payable under national legislation alone, because even in such a case the benefit is awarded *in accordance with* Article 46 (1). Since Article 46 provides that the higher of the two amounts resulting from the application of national legislation alone and the application of the rules for aggregation is to be taken, the 'benefit payable in pursuance of

national legislation alone' is payable 'in accordance with' Article 46 (1). Article 12 (2) is not therefore incompatible with the Treaty, even if in certain cases the migrant worker is favoured compared with the non-migrant worker.

The *Commission* calls attention to the fact that the problem posed by the question referred is not of the same kind as the one raised by Mr Schaap both in the original action and on appeal. Mr Schaap takes the view that the Fund ought not to have taken into account that part of his German pension which was acquired as a result of voluntary insurance and refers to Article 4 (4) of Regulation No 1408/71. Since it may be inferred from the Court's judgment in Case 93/76 *(Fernand Liégeois* v *Office National des Pensions pour Travailleurs Salariés* [1977] ECR 543) that, provided that the contributions fixed by national legislation have been paid, the buying in of back insurance periods must be regarded as a form of voluntary insurance, it appears therefore that the period from 1934 to 1945, in respect of which Mr Schaap has paid his back contributions, must be regarded as a period of voluntary insurance within the meaning of Regulation No 1408/71.

The Netherlands Fund should therefore have applied these specific provisions designed for periods of voluntary insurance and in particular Article 46 (2) of Regulation (EEC) No 574/72 of the Council fixing the procedure for implementing Regulation (EEC) No 1408/71 which provides that 'For the purposes of Article 46 (3) of the regulation, the amounts of benefit corresponding to periods of voluntary or optional continued insurance shall not be taken into account'.

The question referred to the Court for a preliminary ruling raises in similar wording the question of interpretation referred to the Court in Cases 22/77 *(Mura* [1977] ECR 1699) and 37/77 *(Greco* [1977] ECR 1711). Article 12 (2) of Regulation No 1408/71 lays down the principle that national legislative provisions against overlapping may be applied to workers covered by the said regulation except in the case of certain benefits of the same kind and in particular of benefits in respect of invalidity awarded in accordance with Article 46.

The reason why Article 12 (2), which as such favours the migrant worker, appears in Regulation No 1408/71 is that Article 46 (3) thereof places limits on the overlapping of pensions. Indeed the Court held in its judgment in Case 24/75 *(Teresa and Silvana Petroni* v *Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149) that the latter provision is incompatible with Article 51 of the Treaty. Can it therefore be accepted that it is lawful to reintroduce national rules against overlapping? The Court in the *Petroni* judgment did not disavow the principle of reduction of pensions. The Council, in the exercise of its powers under Article 51, in so far as it adopts rules conferring upon migrant workers rights which they would not otherwise enjoy, is entitled to make certain that they do not result in unjustified overlapping of benefits. However Article 12 (2) does not allow national provisions against overlapping to be applied whether the benefits are awarded pursuant to Article 46 (1) or to Article 46 (2). Moreover, in the absence of a common system of social security, a Community rule enabling unjustified overlapping to be avoided is better than a reduction of benefits based on national provisions against overlapping.

According to the opinion of Mr Advocate General Warner in Cases 22/77 *(Mura)* and 37/77 *(Greco)* where a benefit is acquired under the national legislation of a Member State alone, Article 12 does not preclude the operation of a national provision against overlapping, provided that the benefit

giving rise to the reduction overlaps with a benefit acquired under the legislation of another Member State. The Court has acknowledged that in certain circumstances other than those where periods of insurance overlap, an accumulation of pensions might result from its interpretation of Article 51, but that "this consequence follows not from the interpretation of Community law but from the system at present in force, which, in the absence of a common social security scheme, rests on a simple co-ordination of national legislations which have not yet been harmonized" (judgment in Case 50/75, *Caisse de Pension des Employés Privés* v *Helga Massonet* [1975] ECR 1473 at p. 1484).

In the case with which the main action is concerned there can be no overlapping of periods, since, on the one hand, the Netherlands legislation is not based on insurance periods and, on the other hand, the German pension was acquired in part on the basis of voluntary insurance. If it were to be admitted that the national rule against overlapping might replace Article 46 (3) for the purpose of reducing the benefit acquired under national legislation alone, would it not be necessary to comply with the intention of the Community legislature which in Article 46 of Regulation No 574/72 clearly intended not to affect adversely the rights derived from voluntary insurance? It seems to be unthinkable that, simply because the Court considered that Article 46 (3) of Regulation No 1408/71 is incompatible with Article 51 of the Treaty, this latter provision may no longer apply, since if that were the case, the parties concerned would be in a less favourable position than they would be if Article 46 (3) of Regulation No 1408/71 were applied.

The Government of the Italian Republic, represented by O. Fiumara, Deputy State Advocate, acting as Agent, the Commission of the European Communities, represented by A. Haagsma of the Legal Department of the Commission, presented oral argument at the hearing on 17 January 1978.

The Advocate General delivered his opinion at the hearing on 15 February 1978.

Decision

1 By an order of 12 July 1977 which was received at the Court on 1 August 1977 the Centrale Raad van Beroep referred to the Court, pursuant to Article 177 of the EEC Treaty, for a preliminary ruling a question relating to the interpretation of Articles 12 (2) and 46 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).

2 This question has been raised in an action concerning the calculation by the competent Netherlands institution of the invalidity pension of a Netherlands

national Mr Schaap, the appellant in the main action, who had worked in Germany from 1929 to 1933 and then in the Netherlands.

3 Mr Schaap availed himself of the opportunity afforded by German legislation relating to the victims of Nazi persecution and, with reference to his pension insurance (including invalidity), bought in voluntarily the back period from 1934 to 1945 so as to be able to claim a higher German pension.

4 The Netherlands Fund, taking into account this German invalidity pension, reduced the amount of the benefit payable to Mr Schaap under Netherlands legislation on pension insurance, in application of the Netherlands Royal Decree of 22 December 1972, enacted in implementation of Article 52 of the Wet op de arbeidsongeschiktheidsverzekering (Law on insurance against incapacity for work, hereinafter referred to as "the WAO") and with reference to Article 46 (3) of Regulation No 1408/71.

5 Mr Schaap challenged this decision contending that the whole of the German pension had wrongly been taken into account even though the larger part thereof was attributable to his voluntary insurance.

6 The further argument was put forward that the provisions of Regulation No 1408/71 as interpreted by the Court in its judgment of 21 October 1975 in Case 24/75 *(Teresa and Silvana Petroni* v *Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149) preclude any reduction, pursuant to the provisions of the national legislation of a Member State, of benefit acquired solely by virtue of national legislation without having recourse to Community provisions.

7 The question referred to the Court is:

"Where a worker has been subject to the legislation of two or more Member States, to what extent do Articles 12 (2) and 46 of Regulation (EEC) No 1408/71 prevent the application of national rules against the overlapping of benefits such as those in force pursuant to the WAO, where entitlement to benefit has been obtained pursuant to national legislation alone without its being necessary to apply the regulation for that purpose?"

The portion of the German benefit attributable to the period from 1934 to 1945

8 Article 46 (2) of Regulation No 574/72 of the Council of 21 March 1974 (Official Journal, English Special Edition 1972 (I), p. 159) provides that for the purposes of Article 46 (3) of Regulation No 1408/71 the amounts of benefit corresponding to periods of voluntary or optional continued insurance shall not be taken into account.

9 It is obvious that benefits attributable to an insurance period which has been bought in pursuant to the provisions of legislation which grants a worker the right to buy in the insurance for this period are to be regarded as falling within this provision.

The application of national legislation

10 The Court has already held in its judgment of 13 October 1977 (Case 37/77, *Fernando Greco* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711) that so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation 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 than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No 1408/71, be applied.

11 It follows that if the provisions of Regulation No 1408/71 are more favourable to the worker than national legislation they must be applied.

Costs

12 The costs incurred by the Belgian Government, the Italian Government and the Commission of the European Communities which have submitted observations to the Court are not recoverable.

13 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

in answer to the question referred to it by the Centrale Raad van Beroep by order of 12 July 1977 hereby rules:

So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation 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 than the application of the rules laid down by Article 46 of Regulation No 1408/71 the provisions of that article must be applied.

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 14 March 1978.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE GENERAL WARNER
(see Case 83/77, p. 694)