Costs

19 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable and 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 questions referred to it by the Arbeidsrechtbank of the judicial district of Hasselt by judgment of 25 June 1976 hereby rules:

'Article 46 (3) of Regulation No 1408/71 and Decision No 91 of the Administrative Commission are incompatible with Article 51 of the Treaty to the extent to which they impose a limitation on the overlapping of two benefits acquired in different Member States by a reduction of the amount of the benefit acquired under national legislation alone.'

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 3 February 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 DECEMBER 1976

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Arbeidsrechtbank of Hasselt, in Belgium. To my mind it presents no difficulty because, as the Commission has pointed out, a complete answer to the questions

asked in the order for reference is given by the Judgment of the Court in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149. I realize of course that the Court is not strictly bound by its own decisions. But it seldom departs from them, and in this, in my opinion, it is wise, because certainty in the law is of great importance. It is particularly important in a field such as that of social security, with which we are here concerned, where the law is highly complex and affects the rights of numerous people of modest means. One's imagination boggles at the confusion, and the injustices, that could be caused if, in such a field, the Court were to produce conflicting decisions. Moreover the judgment in the *Petroni* case was in my opinion right. It forms part of a long line of consistent decisions of the Court all of which rest on the view that Article 51 of the EEC Treaty does not empower the Council to deprive migrant workers of rights conferred on them by the laws of Member States. In Case 191/73 *Niemann* v *Bundesversicherungsanstalt* [1974] ECR 571, at p. 584, I collected the decisions of the Court to that effect as they then stood. Since then there have been the decisions in the *Niemann* case itself, in the *Petroni* case and in Case 50/75 *CPEP* v *Massonet* [1975] ECR 1473. To depart from that view would be to hold that the authors of the Treaty envisaged that workers moving within the Community could be made worse off as a result of the Treaty than they would have been without it. This would seem to me contrary both to the spirit of the Treaty and to the letter of its relevant provisions.

I must refrain of course from repeating everything that I said in the *Petroni* case. Your Lordships will remember that it concerned the compatibility of a particular provision of Council Regulation (EEC) No 1408/71, namely Article 46 (3), with Article 51 of the Treaty. The purpose of Article 46 (3) or, at all events, one of its purposes was to limit the total amount of pension receivable by a person who had been subject to the social security legislation of two or more Member States, to the amount he could have claimed if all the insurance periods completed by him under the legislations of those Member States had been completed in the the Member State whose legislation would have afforded him the highest pension. As the preamble to Regulation No 1408/71 makes clear, its authors conceived that for a pensioner to receive more than that would constitute 'unjustified overlapping of benefits'.

Article 46 is concerned with the computation of old age pensions and death benefits, and also, by virtue of Article 40 (1), with the computation of invalidity pensions in cases other than those of workers who have been subject only to legislations of Type A, that is to say legislations according to which the amount of invalidity benefits is independent of the duration of insurance periods.

Article 46 envisages that a worker who has been subject to the social security legislation of two or more Member States may, as regards his rights to pension, be, in each of those States, in any one of four possible situations:

(1) He may be entitled to a pension in that State without recourse to aggregation under Community law and find that he can get no greater benefit by the application to his case of the processes of aggregation and apportionment prescribed by that law; or

(2) He may be entitled to a pension in that State without recourse to such aggregation, but be entitled to a greater pension there through the processes of aggregation and apportionment; or

(3) He may be entitled to a pension in that State only through the processes of aggregation and apportionment; or

(4) He may be entitled to no pension in that State even if the processes of aggregation and apportionment are applied to his case.

Paragraph 1 of Article 46 relates to a case where a person is entitled to a pension in the Member State concerned without recourse to aggregation, i.e. to a person who finds himself either in the first or in the second of the situations I have described. It provides in effect that such a person is prima facie entitled to whichever is the higher of the pension ascertained by reference to the legislation of that Member State alone (conveniently referred to by the Arbeidsrechtbank in its order for reference as 'the national amount' of benefit) or the pension ascertained by applying the processes of aggregation and apportionment (referrred to by the Arbeidsrechtbank as 'the apportioned amount' of benefit). I say 'prima facie', because of the existence of Article 46 (3).

Paragraph 2 of Article 46 deals with the case of a person who can only obtain a pension in the Member State concerned through the processes of aggregation and apportionment, i.e. a person in the third situation I have described. It provides in effect that, in such a case, those processes shall be applied. In so doing, it provides, by paragraph 2 (a), for the calculation of the 'amount of benefit that the person concerned could claim if all the insurance periods completed under the legislation of the Member States to which he has been subject had been completed in the State in question' and it refers to that amount as 'the theoretical amount' of benefit.

Article 46 (3) is in these terms:

'The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefit calculated according to paragraph 2 (a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with paragraph 1.' (OJ L 149/2 of 5. 7. 1971)

What the Court decided in the *Petroni* case was that Article 46 (3) was incompatible with Article 51 of the Treaty to the extent to which it provided for a reduction in the amount of a benefit the right to which had been acquired under national law alone.

As I interpret the Judgment, the Court would, had the question been material, have held Article 46 (3) to be valid in so far as, in a case where the 'apportioned amount' exceeds 'the national amount', it provides for the reduction of the benefit quoad the excess; for the right to such excess is acquired, not under national law, but under Community law. I certainly expressed the opinion that Article 46 (3) was valid to that extent (see [1975] ECR at p. 1167). That question was not however material on the facts of the *Petroni* case.

For that reason, no doubt, the Court did not have before it in that case the instrument which has given rise to the reference in the present case, namely Decision No 91, dated 12 July 1973, of the Administrative Commission of the European Communities on Social Security for Migrant Workers. This is of course the body set up under Article 80 of Regulation No 1408/71, one of whose duties is by virtue of Article 81 (a):

'to deal with all administrative questions and questions of interpretation arising from this Regulation ... without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by this Regulation or by the Treaty.' (OJ L 149 of 5. 7. 1971)

Decision No 91 is expressed to have been made in performance of that duty. The wording of it is not, as the

Arbeidsrechtbank points out, entirely clear, but it appears to me to mean that Article 46 (3) is to be interpreted as not requiring a benefit to be reduced below the 'apportioned amount' or, in other words, that Article 46 (3) is to be applied only in a case where the 'national amount' exceeds the 'apportioned amount' and then only quoad that excess. The reason given for this interpretation in the preamble to the Decision is that, otherwise, workers would be worse off under Regulation No 1408/71 than they were under Regulation No 3, whereas the intention had been that they should be better off.

The facts of this case are briefly these. The plaintiff before the Arbeidsrechtbank, Mr Jozef Strehl, was born in 1915. He spent his working life partly as a miner in Belgium, partly in other employment (we are not told its nature) in Germany. Since 1969 or thereabouts, Mr Strehl, who lives in Belgium, has been in receipt of both Belgian and German invalidity pensions. In 1975, owing to changes in his medical condition, his German pension was recomputed, and the recomputed pension was awarded to him retroactively with effect from 1 July 1974. As a result of this, or so it seems, the competent Belgian institution, which is the defendant before the Arbeidsrechtbank, recomputed his Belgian pension. It is this recomputation, by the defendant, that Mr Strehl challenges before the Arbeidsrechtbank.

The Commission raised, in its Observations, the question whether, having regard to Articles 94 (5) of Regulation No 1408/71 and 118 (2) of Regulation No 574/72, it was permissible for the defendant to recompute Mr Strehl's Belgian pension. The Arbeidsrechtbank has not however asked this Court any question as to that and there is in fact no ground for thinking that those provisions were not correctly applied. So I leave that matter aside.

The Belgian legislation relating to invalidity benefits is of Type A: it makes the amount of invalidity benefits independent of insurance periods. The 'national amount' of Mr Strehl's Belgian invalidity pension as at 1 July 1974 was FB 137 352. That was also its 'theoretical' amount. Its 'apportioned amount' was FB 129 272.

The relevant German legislation is of Type B: it makes the amount of invalidity benefits depend on the length of insurance periods. The 'national' amount of Mr Strehl's German pension as at 1 July 1974 was equivalent to FB 86 383. Its 'apportioned amount' was equivalent to FB 90 048. Its 'theoretical amount' was equivalent to FB 172 061. The actual pension awarded to Mr Strehl in Germany was, in accordance with Article 46 (1) of Regulation No 1408/71, the 'apportioned amount', equivalent to FB 90 048. If the view that I have expressed as to the scope of the validity of Article 46 (3) is correct, this could have been reduced to the 'national amount', equivalent to FB 86 383. But, presumably because of Decision No 91, it was not so reduced.

Under Article 46 (1) the pension to which Mr Strehl was entitled in Belgium was of course the 'national amount', FB 137 352. In purported pursuance of Article 46 (3), however, the defendant reduced this to FB 82 013, on the ground that that was the difference between the German pension of FB 90 048 and the higher (German) 'theoretical amount' of FB 172 061.

Before the Arbeidsrechtbank Mr Strehl pleaded, or so I infer, that, in view of Decision No 91, he should be paid in Belgium a pension at least of the 'apportioned amount', i.e. FB 129 272.

Thus has it come about that the Arbeidsrechtbank has referred to this Court a number of questions as to the interpretation of Decision No 91.

I need not trouble Your Lordships with the question whether, in view of the closing words of Article 81 (a) of Regulation No 1408/71, a decision such as Decision No 91 can have any legal effect at all; for, as I indicated at the outset, the whole answer to this case is, in my opinion, that Article 46 (3) cannot validly apply in such a case as this. Mr Strehl was entitled to a pension of FB 137 352 under Belgian law taken alone and he cannot have been deprived of that right by any provision of Community law.

At the close of pleadings the Court invited the Council and the Commission to place before it such information as they had about the effects of the Judgment in the *Petroni* case on the application by national institutions of Regulation No 1408/71. The Council did not respond to that invitation. Perhaps it did not need to, for the Commission put in a most helpful reply.

From this it appears — leaving aside problems concerning past cases — that:

(1) All the Member States have instructed their institutions no longer to apply Article 46 (3).

(2) From discussion in the Administrative Commission on Social Security for Migrant Workers (whose meetings are of course attended by representatives of all the Member States and of the Commission) it has emerged that the Judgment in the *Petroni* case is not considered to give rise to any difficulty where the legislations involved in a particular case are all of Type B, except where any of them take account of notional insurance periods.

(3) In a case where the legislations involved are a mixture of Type A and Type B, the representatives of Member States having legislation of Type A have put forward the view that the invalidity of Article 46 (3) gives rise to unjustified duplication of benefits, which it would be legitimate for them to counter by introducing appropriate provisions into their legislation. The Commission objects to this suggestion on the ground that it would infringe Article 12 (2) of Regulation No 1408/71.

My Lords, as the Court has so often pointed out, those are problems of a kind that must inevitably arise, so long as the diverse social security systems of the Member States are not replaced by a single Community scheme — though of course I realise that Article 51 of the Treaty does not provide for this. Resort would, I think, have to be had to Article 235 or perhaps Article 236 for it.

I will make only two other comments.

First, it is obvious that, where legislation of Type B enables a worker to be credited with notional periods of insurance, that same legislation may define the circumstances in which such credit is permissible, so as to avoid undue overlap. The Court has said so more than once: see Case 12/67 *Guissart* v *Belgium* [1967] ECR 425, at p. 434, the *Massonet* case (already cited — [1975] ECR at p. 1484) and the Judgment in the *Petroni* case itself (paragraph 16).

Secondly, what, in other circumstances, constitutes 'unjustifiable' duplication of benefits is a matter of opinion. There is no objective standard by which it can be judged, and certainly there is no legal standard. One can understand the view that it is unfair that a man who has worked in two Member States should receive more by way of pension than if he had worked all his life in either of them. On the other hand the view is tenable that a man who, finding no work in his own country, has, instead of sitting there and drawing unemployment benefit, the enterprise to seek and find work in another country, ought not, when he becomes old or disabled, to be grudged the extra advantage he has thereby earned. Happily it is no part of the task of this Court to make moral or, if you will, political, judgments on

matters of that kind. This Court's duty is to stick to the law, and that, as I have indicated, presents, to my mind, no difficulty.

So I am of the opinion that Your Lordships should answer the questions referred to the Court by the Arbeidsrechtbank in this case by a declaration in the same terms as that made by the Court in the *Petroni* case.