In Case 176/78

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

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 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) and of Article 46 of 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. 159),

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, acting as President, Lord Mackenzie Stuart (President of the Second Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and Issues

The order for reference 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

The Centrale Raad van Beroep [Court of last instance in social security matters] has referred a question to the Court of Justice for the second time within the context of the same proceedings. In fact, that court submitted to the Court by order of 12 July 1977 a question on the interpretation of Articles 12 (2) and 46 of Regulation (EEC) No 1408/71. That question was answered by judgment of 14 March 1978 (Case 98/77, *Max Schaap v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen Groothandel en Vrije Beroepen*, [1978] ECR 707).

The facts of the main action may be recalled as follows:

Mr Schaap, a Netherlands national, worked as an employed person in Germany from 1929 to 1933. In 1934 he took up residence in the Netherlands where, except for the period from 1940 to 1945, he worked as an employed person and as a self-employed person until 1972 when he became disabled. The competent institution (the 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"). At the same time Mr Schaap was awarded a pension under the German legislation which was higher than that 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 voluntarily paid contributions for the back period from 1934 to 1945 in respect of pension insurance in accordance with the opportunity afforded by the legislation on the payment of damages to the victims of Nazi persecution.

In pursuance of Article 46 (3) of Regulation (EEC) No 1408/71, the Fund deducted the amount of the German pension from that of the Netherlands pension. Mr Schaap contested this decision before the Raad van Beroep [Court of Appeal in social security matters], Amsterdam, then lodged an appeal before the Centrale Raad van Beroep, Utrecht, complaining that the Fund had taken into account the whole of his German pension whereas by virtue of Article 46 (2) of the above-mentioned Regulation No 574/72, it should only have deducted from the Netherlands pension the proportion of the German pension acquired on the basis of his voluntary insurance. The Fund considered that it could in any case reduce the pension pursuant to the national rule against the overlapping of benefits laid down in a decree issued in implementation of the WAO.

The Centrale Raad van Beroep referred to the Court of Justice 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 Court held:

"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".

When the proceedings in this case were resumed before the national court and it had been decided to re-open the oral proceedings the Fund raised the question of the interpretation of paragraphs 8 and 9 of the Decision of the Court.

"Article 46 (2) of Regulation No 574/72 of the Council of 21 March 1972 (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 be taken into account.

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 Fund considers in fact that in the present case there is no overlapping of periods since Mr Schaap's German and Netherlands pensions were acquired without the need to have recourse to the aggregation procedure. It therefore deduces from this that the above-mentioned Article 46 (2) which must be interpreted in conjunction with the preceding paragraph and the heading of the article itself does not apply to Mr Schaap and that this provision refers only to cases in which aggregation of the periods completed and apportionment of the benefit have occurred.

In the light of these considerations, the Centrale Raad van Beroep found that it was necessary to refer to the Court of Justice under Article 177 of the EEC Treaty a further question for a preliminary ruling. By order of 11 July 1978, transmitted to the Court by letter of 15 August 1978, the Centrale Raad van Beroep referred to the Court the following questions for a preliminary ruling:

"1. Is the heading of Article 46 of Regulation No 574/72 an integral part of that article in the sense that the content of the article is also determined by that heading?

2. Having regard to Article 46 (2) (d) of Regulation No 1408/71 are the second subparagraph of paragraph (1) and paragraph (2) of Article 46 of Regulation No 574/72 read together with the first subparagraph of paragraph (1) and the heading above the article relates only to benefits calculated in accordance with Article 46 (2) (a) and (b) of Regulation No 1408/71 in cases where aggregation of periods has occurred and in connexion with

which periods of voluntary or optional continued insurance were not taken into account, or do those provisions, or does one of them, also apply to cases in which the benefits were not calculated in accordance with Article 46 (2) (a) and (b) of Regulation No 1408/71 and there has been no question of leaving out of account periods of voluntary or optional continued insurance in calculating the benefits?"

The order for reference was received at the Court on 17 August 1978.

After 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 *Fund*, the *defendant in the main action*, refers to the viewpoint which it maintained before the Centrale Raad van Beroep and which is reflected by the questions which that court has referred to the Court of Justice.

The *Belgian Government*, which had already submitted observations in Case 98/77, considers that Article 46 of Regulation No 574/72 refers to all cases in which overlapping of pensions occurs and that its scope is not limited to those cases arising from the duplication of benefits calculated on a *pro rata* basis. In fact overlapping can arise within the context of the award of benefits under national law. It also follows from the provisions of the second subparagraph of Article 46 (1) that the argument that the overlapping of benefits resulting from the overlapping of voluntary and compulsory insurance periods should be permitted is correct.

In the opinion of the *Commission*, the Fund seems to confuse the concept of overlapping of periods and that of aggregation of periods and apportionment of benefits. However, the facts might show that from 1934 to 1940 Mr Schaap was not compulsorily insured in the Netherlands because for example he worked there as a self-employed person and that no overlapping of periods has therefore occurred but that it was necessary in one of the two Member States in question, or even in both, to have recourse to the aggregation procedure for the purpose of the acquisition of the right to benefits. Conversely, it might occur that from 1934 to 1940 Mr Schaap was insured compulsorily in the Netherlands and that overlapping of periods therefore occurs without its however being necessary to have recourse to the aggregation procedure in one or other or even both Member States.

Thus the Commission considers that the question should be reworded as follows:

1. Are the second subparagraphs of Article 46 (1) and Article 46 (2) of Regulation No 574/72 of the Council read together with the provisions of the first subparagraph of Article 46 (1) and with the heading above the article to be understood as meaning that the whole article relates only to cases where overlapping of periods occurs, in other words where a period of voluntary insurance coincides with a period of compulsory insurance, or

do those provisions relate to cases not covered by the first subparagraph of Article 46 (1), in other words cases where no overlapping of periods occurs?

2. Is Article 46 of Regulation No 574/72 of the Council to be understood as meaning that it relates solely to benefits calculated in accordance with Article 46 (2) (a) and (b) of Regulation No 1408/71 or as meaning that it also relates to benefits calculated on the basis of national legislation alone pusuant to Article 46 (1) of Regulation No 1408/71?

The first question

The problem whether the two overlapping periods (compulsory insurance period and voluntary or optional continued insurance period) should be taken into account for the purpose of the calculation of the theoretical amounts and for the purpose of the calculation of the amount of the benefits and the amount of the reduction, which was not resolved by Article 15 of Regulation No 574/72 (headed "General rules for the aggregation of insurance periods"), is resolved by Article 46 of the same regulation. According to the Commission, the latter provision does not relate to all cases where there is a period of compulsory or optional continued insurance in a Member State but only those where that period coincides with a period of compulsory insurance in another Member State. It is for the national court to decide as a matter of fact whether overlapping of periods has occurred, in other words whether a period of voluntary insurance coincides with a period of compulsory insurance.

The second question

By taking out voluntary insurance the person concerned may have two different objectives:

— either to fill a gap in his insurance record;

— or to improve the protection given him under compulsory insurance.

In the first case, the voluntary insurance appears to be a substitute for compulsory insurance. In the second case overlapping of periods occurs and the voluntary insurance may be considered as complementary insurance and the advantages of that insurance expected by the person concerned should not be affected by the methods of calculation of benefits laid down by the regulation.

According to the Commission, it is impossible to interpret Article 46 (2) of Regulation No 574/72 as relating solely to pensions acquired after aggregation of the periods and apportionment of the benefits. This follows from:

— The very wording of that provision which refers generally to "the purposes of Article 46 (3) of the regulation", that is Regulation No 1408/71, for which the amounts of benefit corresponding to periods of voluntary or optional continued insurance are not be taken into account;

— The logic of the system introduced by Article 46 (3). Where voluntary insurance overlaps with compulsory insurance it is necessary, even in the case of pensions acquired under national legislation alone, to take

into account Article 46 (1) of Regulation No 574/72 which provided by reference to Article 15 of the same regulation that for the calculation of the theoretical amount in accordance with Article 46 (2) (a) of Regulation No 1408/71 only the period of compulsory insurance is taken into account;

— The intention of the Community legislature in adopting Article 46 of Regulation No 574/72 which was to safeguard the advantages expected by the worker from his taking out voluntary insurance.

To limit the application of Article 46 of Regulation No 574/72 solely to pensions calculated on a *pro rata* basis would amount to stating that where a pension has been acquired under the national legislation alone the fact that the amounts of benefit corresponding to periods of voluntary insurance are taken into account does not adversely affect the worker. The Commission shows on the contrary by a specimen calculation the loss which would be suffered if that provision did not limit the effect of the reduction provided for in Article 46 (3) of Regulation No 1408/71 and that there would also be a loss where two benefits overlapped when calculated in accordance with Article 46 (1) of Regulation No 1408/71, in other words by virtue of national legislation alone.

The system introduced by Regulations Nos 1408/71 and 574/72 is therefore absolutely consistent. In fact:

1. In so far as voluntary insurance replaces compulsory insurance and does not therefore lead to overlapping of insurance periods of voluntary insurance must be treated as periods of compulsory insurance.

2. The overlapping of voluntary insurance and compulsory insurance is expressly authorized by Article 15 (3) of Regulation No 1408/71; Article 46 of Regulation No 574/72 draws the inferences from that possibility of overlapping by preventing the methods of calculation laid down in Article 46 (2) or Article 46 (3) of Regulation No 1408/71 from affecting adversely the advantages which those concerned may expect from this overlapping of insurance periods (and of contributions).

In the alternative, the Commission takes the view that it is necessary to consider that the rule laid down in Article 46 (2) of Regulation No 574/72 remains applicable *mutatis mutandis* where pensions acquired under national legislation alone are reduced on the basis of the domestic rule against the overlapping of benefits. Such a solution would enable the intention of the Community legislature to be complied with; in any case the legislature did not intend to affect adversely rights arising under voluntary insurance.

The Commission considers that the following replies might be given to the questions referred to the Court:

1. Article 46 of Regulation No 574/72 of the Council does not refer to all cases in which a worker has taken out voluntary insurance during his career in a Member State but only to those in which overlapping of periods of insurance occurs, in other words where a period of voluntary insurance in a Member State coincides with a period of compulsory insurance in another Member State.

2. Where a pension payable under national legislation alone is reduced pursuant to the provisions of that legislation because that pension overlaps with a pension payable under the legislation of another Member State, the competent institution of the first Member State does not take into account for the purposes of the reduction the amount of the benefit from the second Member State which corresponds to the periods of voluntary or optional continued insurance which coincide with the periods completed under compulsory insurance under the legislation which it administers.

The Commission of the European Communities, represented by A. Haagsma, acting as Agent, presented oral argument at the hearing on 22 February 1979.

The Advocate General delivered his opinion at the hearing on 14 March 1979.

Decision

1 By order of 11 July 1978, which was received at the Court on 17 August 1978, the Centrale Raad van Beroep referred to the Court of Justice under Article 177 of the EEC Treaty two questions for a preliminary ruling on the interpretation of 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) and of Article 46 of 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. 159). These questions have arisen within the context of proceedings relating to the calculation by the competent Netherlands institution of the invalidity pension of a Netherlands national, the plaintiff in the main action, who worked in the Federal Republic of Germany from 1929 to 1933 and afterwards in the Netherlands.

2 The plaintiff in the main action availed himself of the opportunity afforded by German legislation relating to the victims of Nazi persecution and, with reference to his pension insurance, bought in voluntarily the back period from 1934 to 1945 so as to be able to claim a higher German pension. The Netherlands Fund, taking into account the German pension, reduced the amount of the benefit payable to the plaintiff in the main action 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.

3 The plaintiff in the main action 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. 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 Nationale 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.

4 Within the context of the same main action the Centrale Raad van Beroep referred to the Court of Justice under Article 177 of the EEC Treaty by a first order of 12 July 1977 a question for a preliminary ruling on the interpretation of Articles 12 (2) and 46 of Regulation No 1408/71 (Case 98/77, *Max Schaap* v *Bestuur van de Bedrijfsvereniging voor Bank- en Vezekeringswezen, Groothandel en Vrije Beroepen)* worded as follows:

"Where a worker has been subject to the legislation of two or more Member States, to what extent do Article 12 (2) and Article 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?"

For the reasons set out in its judgment of 14 March 1978 (Case 78/77 [1978] ECR 707), the Court gave the following reply:

"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."

5 The Centrale Raad van Beroep, sharing the doubts expressed by the Netherlands Fund, the defendant in the main action, on the interpretation of Article 46 (2) of Regulation No 574/72, referred to the Court once more the following questions:

"1. Is the heading of Article 46 of Regulation No 574/72 an integral part of that article in the sense that the content of the article is also determined by that heading?

2. Having regard to Article 46 (2) (d) of Regulation No 1408/71 are the second subparagraph of paragraph (1) and paragraph (2) of Article 46 of Regulation No 574/72 read together with the first subparagraph of paragraph (1) and the heading above the article to be understood as meaning that the whole article relates only to benefits calculated in accordance with Article 46 (2) (a) and (b) of Regulation No 1408/71 in cases where aggregation of periods has occurred and in connexion with which periods of voluntary or optional continued insurance were not taken into account, or do those provisions, or does one of them, also apply to cases in which the benefits were not calculated in accordance with Article 46 (2) (a) and (b) of Regulation No 1408/71 and there has been no question of leaving out of account periods of voluntary or optional continued insurance in calculating the benefits?"

6 It is necessary to deal with the two questions jointly. The Court bases the reply to be given to the questions referred to it on the fact that the benefits in question come within social security within the meaning of Regulation No 1408/71.

7 A worker who had been successively or alternatively subject to the legislations of two or more Member States, of which at least one is not of the type referred to in Article 37 (1) of Regulation No 1408/71 (that is, legislations according to which the amount of invalidity benefits is independant of the duration of insurance periods or periods of residence — type A), receives benefits, according to Article 40 (1) of the same regulation, under the provisions of Chapter 3 (Old age and death (pensions)), which apply by analogy. The German legislation is of type B, according to which the amount of benefits depends upon the duration of insurance periods. It follows that the plaintiff in the main action must receive benefits calculated according to the provisions of Chapter 3 — Article 44 *et seq.* of Regulation (EEC) No 1408/71.

8 Article 46 of that regulation is devoted to the award of benefits to a worker who has been subject to the legislation of two or more Member States. That article, which may be applicable to the case of the plaintiff in the main action, provides as follows:

"1. Where a worker has been subject to the legislation of a Member State and where he satisfies its conditions for entitlement to benefits, without application of the provisions of Article 45 being necessary, the competent institution of that Member State shall, in accordance with the legislation which it administers, determine the amount of benefit corresponding to the total length of the insurance periods to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph (2) (a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where a worker has been subject to the legislation of a Member State and does not satisfy the conditions for entitlement to benefits unless account is taken of the provisions of Article 45, the competent institution of that Member State shall apply the following rules:

(a) The institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the insurance periods completed under the legislations of the Member States to which he has been subject had been completed in the State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the insurance periods, then that amount shall be taken as the theoretical amount referred to in this subparagraph;

(b) The institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph and in the ratio which the length of the insurance periods completed before the materialization of the risk under the legislation administered by that institution bears to the total length of the insurance periods completed before materialization of the risk under the legislations of all the Member States concerned;

(c) ...

(d) The procedure for taking into account duplicate periods when applying the rules of calculation laid down in this paragraph shall be laid down in the implementing regulation referred to in Article 97.

3. The persons 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 benefits 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."

9 The implementing regulation referred to in Article 46 (2) (d) of Regulation (EEC) No 1408/71 is Regulation (EEC) No 574/72 of the Council, the interpretation of which is requested in the questions referred to the Court. Article 15 (1) (b) of that regulation, as amended by Regulation (EEC) No 878/73 of the Council of 26 March 1973 (Official Journal L 86, p. 1), provides as follows:

"When a compulsory insurance period or period of residence completed under the legislation of one Member State coincides with a voluntary or optional continued insurance period under the legislation of another Member State, only the period completed under compulsory insurance shall be taken into account."

For the purpose of aggregation of the periods, Article 46 of the same regulation, as amended by Regulation (EEC) No 878/73 and by Regulation (EEC) No 1392/74 of the Council of 4 June 1974 (Official Journal L 152, p. 1) is entitled "Calculation of benefits in the event of overlapping of periods" and provides as follows:

"1. For the calculation of the theoretical and actual amount of benefit in accordance with Article 46 (2) (a) and (b) of the Regulation, the rules provided for in Article 15 (1) (b), (c) and (d) of the implementing Regulation shall apply.

   The actual amount thus established shall be increased by the amount corresponding to the periods of voluntary or optional continued insurance and shall be determined in accordance with the legislation under which these insurance periods were completed.

2. 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."

10 It is clear from the provisions quoted above that for the purpose of the calculation of the actual amount of benefit in accordance with Article 46 (2) of Regulation (EEC) No 1408/71, the regulation aims to ensure that a period of insurance completed under voluntary or optional continued insurance under the legislation of one Member State which coincides with a period of insurance or residence completed under compulsory insurance under the legislation of another Member State is not taken into account for the purpose of the aggregation of periods without this however depriving the worker of the benefit of that period. It follows from all the foregoing that where there can be no question of periods coinciding because one body of legislation in question is of type A the regulation also allows the worker the benefits corresponding to any period of voluntary or optional insurance.

11 Therefore although Article 46 (2) of Regulation No 574/72 appears under the heading "Calculation of benefits in the event of overlapping of periods", it must be applied to all cases coming under Article 46 (3) of Regulation No 1408/71 so that, for the purpose of the application of that paragraph, the competent institution cannot take account of benefits corresponding to periods completed under voluntary or optional insurance.

Costs

12 The costs incurred by the Belgian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since the proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Centrale Raad van Beroep, 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 Centrale Raad van Beroep by order of 11 July 1978 hereby rules:

Although Article 46 (2) of Regulation No 574/72 appears under the heading "Calculation of benefits in the event of overlapping of periods", it must be applied to all cases coming under Article 46 (3) of Regulation No 1408/71 so that, for the purpose of the application of that paragraph, the competent institution cannot take account of benefits corresponding to periods completed under voluntary or optional insurance.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 April 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber
acting as President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 14 MARCH 1979

My Lords,

This case comes to the Court, for the second time, by way of a reference for a preliminary ruling by the Centrale Raad van Beroep. On the first occasion it bore number 98/77. The Judgment delivered by the Court on that occasion is reported at [1978] ECR 707.