OPINION OF MR ADVOCATE GENERAL DA CRUZ VILACA
delivered on 19 November 1987 *

Mr President,
Members of the Court,

1. The tribunal du travail, Nivelles, has referred to the Court for a preliminary ruling two questions on the interpretation of Article 46 of Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. [1]

2. The plaintiff in the main proceedings, Giuseppe Collini, an Italian national, worked for seven years in Italy and then emigrated to Belgium, where he was employed for 35 years.

3. Under the Belgian legislation, if Mr Collini's working life had been limited merely to those 35 years' employment in Belgium, he would have been entitled to an old-age pension of BFR 326 390, as a result of the addition to the 35 years actual employment of eight additional years of 'notional employment' (Article 11 bis of Royal Decree No 50).

4. However, the Belgian Social Security Institution — the Office national des pensions pour travailleurs salariés (ONPTS) — in calculating the pension due to Mr Collini took into account the seven years of employment in Italy.

5. Since in Belgium a complete working life cannot exceed 45 years, the ONPTS applied the Belgian rule against overlapping benefits, known as the 'external' rule, contained in Article 11 ter of Royal Decree No 50, and reduced the period of notional work to which Mr Collini was entitled from eight years to three years, so as to bring the total to the maximum possible of 45 years (35 + 7 + 3).

6. Thus, the ONPTS awarded Mr Collini a pension of BFR 300 490, to which was added an Italian pension of BFR 23 829 payable by Italy in respect of the Italian portion of his total working life.

7. Consequently, and as a result of his having previously worked in Italy, Mr Collini received a pension of BFR 324 319, which was less than he would have been entitled to if he had only worked for 35 years in Belgium (BFR 326 390).

8. He therefore considers that he has been penalized for being a migrant worker and therefore, in the main proceedings, he has challenged the ONPTS's calculation of his old-age pension.

9. Before the Belgian Tribunal, Mr. Collini maintained that he had become entitled at least to the amount which would be payable to him under Belgian Legislation if his

* Translated from the Portuguese.

1 — Official Journal, English Special Edition 1971 (II), p. 416.

working life had been limited to the 35 years which he spent in employment in Belgium (BFR 326 390).

10. He also considered that the rule against overlapping benefits to be applied was the Community rule contained in Article 46 (3) of Regulation No 1048/71, and that his pension should therefore be calculated according to a formula different from that used by the Belgian institution.

11. In his view, the rule contained in Article 46 (3) applies only in the case of duplication of insurance periods in more than one Member State; Mr Collini claims that that is the position in his case.

12. In those circumstances, the tribunal du travail, Nivelles, referred two questions to the Court of Justice for a preliminary ruling on the interpretation of Article 46 (3) of Regulation No 1408/71.

13. Those questions are reproduced in the Report for the Hearing.

14. Before I analyse them, it is appropriate to clarify a preliminary point.

15. Both parties to the proceedings before the national court ultimately accepted that Community legislation was applicable, since it was more favourable than the Belgian legislation.

16. That applicability derives from the principle laid down by the Court [2] according to which a limitation on the overlapping of benefits 'which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone' is incompatible with Article 51.

17. That principle, which was laid down by the Court in relation to the Community anti-overlapping rule in Article 46 (3), must also be observed with respect to a national rule against overlapping benefits.

18. As the Court held, 'the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State' (*Petroni* [1975] ECR 1149, paragraph 13).

19. Furthermore, it is also apparent from the case-law of the Court that the conditions laid down in Article 46 of Regulation No 1408/71 must be applied whenever to do so is of greater benefit to the worker than the application of national legislation alone, including, where appropriate, an external rule against overlapping benefits. [3]

20. It is appropriate briefly to describe the provisions of Article 46 and to apply it to the case under review.

21. By virtue of Article 46 (1), as made clear by the Court, [4] the Belgian social security authority calculates the amount to which the worker would have been entitled under the domestic legislation if he had not received a pension under the legislation of another Member State. For that purpose, the application of a rule to prevent the overlapping of domestic and foreign benefits is

2 — Judgment of 21 October 1975 in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, at pp. 1160 and 1161, paragraph 21.

3 — Judgment of 13 October 1977 in Case 22/77 *FNROM* v *Mura* [1977] ECR 1699, at p. 1708, paragraph 15; judgment of 14 March 1978 in Case 98/77 *Max Schaap* [1978] ECR 707, at p. 714, paragraph 10; judgment of 2 July 1981 in joined Cases 116, 117 and 119 to 121/80 *RWP* v *Celestre* [1981] ECR 1737, at p. 1755, paragraph 15; judgment of 13 March 1986 in Case 296/84 *Sinatra* v *FNROM* [1986] ECR 1047, paragraph 20.

4 — See *Sinatra*, cited above, paragraph 21.

precluded by the second sentence of Article 12 (2) of Regulation No 1408/71.

22. In the present case, the result would be BFR 326 389, corresponding to 35 years of actual employment plus eight years of notional employment.

23. The ONPTS also calculates the amount of the benefit which would be obtained by application of the rules contained in Article 46 (2) (a) and (b), which is then compared with the abovementioned figure so that only the higher one is taken into account.

24. Thus, pursuant to Article 46 (2) (a), the Belgian institution [5] calculates the theoretical amount of the benefit which the person concerned might claim if all the insurance periods completed under the legislation of the Member States to which the worker had been subject had been completed in Belgium.

25. If he had completed in Belgium the insurance periods which he completed in Italy, Mr Collini would have had 42 years of actual work to his credit, to which would be added 10 years of notional employment (Article 11 bis of Royal Decree No 50).

26. Pursuant to Article 46 (2) (c), and because the maximum period laid down by the Belgian legislation for the award of the full benefit is 45 years, the theoretical amount provided for in Article 46 (2) (a) is, in this case, BFR 336 748.

5 — The same procedure was followed by the Italian institution but I assume that in this case the theoretical amount calculated by it was lower than that arrived at under the Belgian legislation.

27. On the basis of that theoretical amount, a calculation is made (Article 46 (2) (b)) of the effective amount of the Belgian benefit, pro rata to the insurance periods completed under Belgian Legislation before the materialization of the risk, having regard to the aggregate duration of the insurance periods completed before the materialization of the risk under the legislation of all the Member States concerned.

28. Whatever the procedure adopted for calculating the insurance periods involved here, the amount calculated by application of Article 46 (2) (a) and (b) is, in the present case, always lower than the amount of the benefit calculated pursuant to Article 46 (1) (BFR 326 390).

29. By virtue of the second sentence of the second subparagraph of Article 46 (1), only that amount is to be taken into consideration.

30. Pursuant to the first subparagraph of Article 46 (3), the person concerned is entitled, within the limit of the highest theoretical amount of benefits calculated according to Article 46 (2) (a) — which is presumed to be the Belgian benefit (BFR 336 748) — to the total sum of the benefits calculated in accordance with Article 46 (1) and (2) (BFR 326 389 + BFR 23 829 = BFR 350 218).

31. Since that sum exceeds the limit mentioned earlier, the institution applying Article 46 (1) (in this case the Belgian institution) will adjust its benefit in accordance with the second subparagraph of Article 46 (3).

32. I shall now analyse the conditions under which this adjustment must be carried out, in response to the questions submitted by the national court.

A — *The first question*

33. The purpose of the first question submitted by the tribunal du travail, Nivelles, is to determine whether the rule against overlapping benefits in Article 46 (3) of Regulation No 1408/71 applies to all cases of unjustified overlapping of pensions — that is to say, to all cases where there is exceeded the limit represented by the amount to which the worker would have been entitled if he had completed all the insurance periods not in different Member States but in that whose legislation would entitle him to the highest pension or whether that rule applies only to cases in which the limit is exceeded because there is a duplication of insurance periods.

34. A reply to that quesion, in the context of the main proceedings, only appears to be strictly necessary if the view is taken that in the present case there is no duplication of insurance periods.

35. If there is duplication, there is no doubt as to the applicablity of Article 46 (3).

36. The national Court does not, however, ask for a ruling on the scope of the term 'duplication of insurance periods'.

37. I may therefore confine myself to suggesting a direct answer to the question submitted — the usefulness of such an answer being obvious, particularly because, if it should be affirmative, it will enable the national court to resolve immediately the question of the applicablity of Article 46 (3) without the need to interpret any other concept before doing so.

38. And, in my opinion, the reply can only be affirmative.

39. As is clear from the eighth recital in the preamble to Regulation No 1408/71, the Rule against overlapping benefits in Article 46 (3) reflects the need 'to avoid unjustified overlapping of benefits which could result *in particular* from the duplication of insurance periods and other periods treated as such' (emphasis added). Duplication is, therefore, merely a typical case chosen for the purposes of the regulation to illustrate the situations which might give rise to unjustified overlapping.

40. In its observations, the Commission refers to Articles 76 and 79 (3) of Regulation No 1408/71, and also to Article 46 (2) (c) of the same Regulation and Article 10 of Regulation No 574/72, and gives another specific example of the application of the anti-overlapping rule without duplication of periods: the overlapping of invalidity pensions where one of them is acquired under national legislation which takes no account of the length of the insurance period in determining its amount.

41. Moreover, the question was dealt with in the *Sinatra* judgment of 13 March 1986:

... 'Article 46 of Regulation No 1408/71 is applicable where the amount of the benefits due by virtue of national legislation is unrelated to the periods completed and where the period giving rise to entitlement under that legislation has been completed'.[6]

6 — The same view is eloquently expressed in paragraph 5 of the judgment of 19 June 1979 in Case 180/78 *Brouwer-Kaune* [1979] ECR 2111, at p. 2119; see also the judgments in *FNROM* v *Mura*, *supra*, and *Greco* (judgment of 13 October 1977 in Case 37/77 [1977] ECR 1711). See also the opinion of Mr Advocate General Lenz in Case 197/85 *Stefanutti* [1987] ECR. paragraph 19.

42. In the same way, Article 46 (3) will apply to cases where the limit fixed in that provision is exceeded as a result of the addition to periods of actual work of notional periods, which cannot be related to a specific period and in respect of which, let me say straight away, it is difficult to consider that there is any duplication.

B — *The second question*

43. The purpose of the second question submitted by the tribunal du travail, Nivelles, is to establish exactly how the adjustment factor provided for in Article 46 (3) of Regulation No 1408/71 is to be determined.

44. The doubt raised by the national court derives in particular from the fact that the first subparagraph of Article 46 (3) refers back to Article 46 (1) and (2), whereas Article 46 (2) refers only to Article 46 (1).

45. Accordingly, the court asks how the adjustment factor is to be calculated where only one of the benefits concerned is determined in accordance with Article 46 (1), that is to say where only one of them is a benefit to which, under the applicable national legislation, the worker is entitled without its being necessary to take account, in accordance with Article 45, of the insurance periods completed under the legislation of any other Member State ('independent' benefit).

46. In the main proceedings, the Belgian pension is such a benefit but the Italian pension, which may be classified as a pro rata benefit of the kind referred to in Article 46 (2) (b), is not.

47. As is apparent from the observations of the various parties, there are two questions here which require clarification.

48. The first is whether the pro rata pension (in this case, that awarded by Italy) is also a benefit liable to be reduced; the second is to determine which method of reduction is to be applied.

49. As regards the first question, the ONPTS, although acknowledging that the Administrative Commission on Social Security for Migrant Workers adopted a decision to the contrary (Decision No 91 of 12 July 1973 [7]), contends that the Italian pension should also be subject to the reduction.

50. The principal support for that view is the judgment of this Court in *Sinatra*, in which it is stated that 'the amount found to be higher, on the basis of the comparison prescribed in the second subparagraph of Article 46 (1), is to be reduced where appropriate in accordance with Article 46 (3)'. According to the ONPTS, it follows from the fact that Article 46 (3) refers to both subparagraphs of Article 46 (1) that the amount of the pro rata pension is also subject to the reduction provided for therein.

51. In the view of Mr Collini and the Commission, on the other hand, only the 'independent' benefit (the Belgian pension) must be adjusted, since it is the only one whose amount was determined in accordance with Article 46 (1).

52. It seems to me that the latter view is correct.

53. It should be noted that the reduction referred to in Article 46 (3) is to be carried

7 — Official Journal 1974, C 86, 20.7.1974.

out by the 'institution applying paragraph (1)', which 'shall adjust its benefit'.

54. In this case, the institution responsible for applying Article 46 (1) is the Belgian ONPTS, since it is that institution which has awarded an 'independent' benefit, that is to say a benefit to which the worker is entitled regardless of the conditions laid down in Article 45.

55. It is true that the second subparagraph of Article 46 (1) refers to Article 46 (2) (a) and (b); but it does so only for the purposes of the comparison provided for therein between the amounts of the same benefit calculated according to the national rules and the Community rules, with a view to determining the higher amount, the only one which will be taken into consideration.

56. The correction required by the second subparagraph of Article 46 (3) does not therefore relate to the pro rata benefit; moreover, it is not readily apparent how the Belgian social security institution (the 'institution applying paragraph (1)') could reduce the amount paid by the Italian social security institution.

57. That is what the legislature intended to say by requiring adjustment of *its* benefit, that is to say the benefit which that institution is required to pay. As the Commission emphasizes, the intention of the legislature was not to reduce pro rata pensions. [8]

58. I shall therefore now consider in detail the second aspect of the problem, namely the applicable method of adjustment.

8 — The same view is expressed in the opinion of Mr Advocate General Warner in the *Petroni* case, [1975] ECR 1165, and in Decision No 91 of the Administrative Commission, cited earlier.

59. The second subparagraph of Article 46 (3) provides that '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)*' (my emphasis).

60. It seems to me that, as far as the interpretation of that subparagraph is concerned, the only correct view is — beyond any doubt — that expressed by the Commission.

61. The subparagraph in question purports to govern the apportionment of the amount by which the higher theoretical amount is exceeded as between the various national institutions applying Article 46 (1), where a worker has been subject to the legislation of two or more Member States which grant independent benefits.

62. Accordingly, the amount of the excess — being the difference between the sum of all the independent and pro rata benefits and the highest theoretical amount — must be multiplied by a factor corresponding to the relationship between the 'amount of the benefit concerned' (that is to say, the highest amount to be taken into account for the purposes of the comparison to be carried out under the second subparagraph of Article 46 (1) — in this case BFR 326 389 — and not the highest theoretical amount, as Mr Collini thinks) and 'the total of the benefits determined in accordance with . . . paragraph (1)' (that is to say, the sum of all the independent benefits, and not the sum of both the independent and the pro rata benefits, as claimed by Mr Collini).

63. This leads to the result, as advocated by the Commission, that each institution granting an independent benefit reduces it by deducting from it a portion of that difference reflecting the proportion which

its benefit bears to the total sum of the independent benefits.

64. It is clear that, if only one of the institutions awards an independent benefit, 'the total of the benefits determined in accordance with . . . paragraph (1)' is equal to that benefit (in this case, BFR 326 389).

65. The factor to be applied to the amount of the difference (in this case BFR 13 470) is equal to 1 (326 389/326 389) and the difference is therefore deducted in its entirety from the independent benefit.

66. No unusual result thus follows from the fact that only one of the institutions applies Article 46 (1), since the method of calculation is precisely the same as if there were two or more institutions.

67. The Commission is therefore right and the calculation formula used in Form E 209 produced by it as an annex to its observations is correct (even though it might perhaps be said that the method of calculation which I have used to reach the same result shows more clearly the nature of the relationship referred to in the second subparagraph of Article 46 (3)).

68. Consequently, Mr Collini will be entitled to BFR 312 919 from Belgium (a larger amount than the benefit calculated under the Belgian legislation, including the external rule against overlapping benefits — BFR 300 490) and BFR 23 829 from Italy, giving a total of BFR 336 748.

69. The result is that the 'limit of the highest theoretical amount' imposed unconditionally by the first subparagraph of Article 46 (3) is scrupulously observed.[9]

70. I therefore propose that the Court should give a ruling in answer to the questions submitted by the tribunal du travail, Nivelles, in the following terms:

(1) The adjustment provided for in the second subparagraph of Article 46 (3) of Regulation No 1408/71 applies whenever the highest theoretical amount of the benefits calculated in accordance with Article 46 (2) (a) is exceeded by the sum of the benefits calculated in accordance with Article 46 (1) and (2), regardless of whether or not there is any duplication insurance periods;

(2) Where the adjustment provided for in the second subparagraph of Article 46 (3) is to be made and only one of the benefits in question is determined in accordance with Article 46 (1), the insitution responsible for paying that benefit will deduct from the amount thereof the full amount corresponding to the difference between the highest theoretical amount and the sum of the benefits calculated in accordance with Article 46 (1) and (2).

9 — The same view is expressed in *Sinatra*, cited above, paragraph 23.