OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 2 February 1989 *

My Lords,

1. In this case I can give my view quite shortly, since despite certain difficulties which have led the national court to make this reference for a preliminary ruling, it seems to me that the questions referred can be answered on the basis of the previous case-law of the Court and that there is no reason in this case to suggest any departure from the principles established by that case-law.

2. The facts are set out only summarily in the order for reference but it emerges that Mr Olandino Di Felice was born on 28 April 1924, and was occupied as a self-employed worker in Belgium from 18 November 1950 until the middle of 1964. He now resides in Pescara, Italy, and has received an invalidity pension from the Italian authorities since April 1969. On 24 November 1983 he applied for a Belgian early retirement pension from the age of 60, which he reached on 28 April 1984. The Belgian Institut national d'assurances sociales pour travailleurs indépendants ('the Institute') refused his application on 24 September 1986. Mr Di Felice contested the decision by an action brought before the tribunal du travail, Brussels, on 23 October 1986. That court delivered a judgment on 3 September 1987 ordering a further hearing on the question whether the person purportedly appointed by Mr Di Felice to represent him was competent to do so and on the question of the exact nature of the Italian invalidity benefit which he was receiving. After the further hearing, that court by a judgment of 21 April 1988 fixed the amount of the Belgian retirement pension payable to Mr Di Felice at BFR 39 007 per year from 1 May 1984. That amount was calculated on the basis of a period of 16 years of a potential total of 45 years and taking account of a reduction of 5% for each year before his 65th birthday. However the court suspended judgment on the question whether that pension should actually be paid until it had resolved its doubt over the effect of the Belgian legislation against overlapping of benefits considered in the light of Community law on social security.

3. Article 30 bis of the Belgian Royal Decree No 72 of 10 November 1967 on old-age and survivors' pensions for self-employed persons, as amended by Article 9 of Royal Decree No 1 of 26 March 1981 and Article 10 of Royal Decree No 34 of 30 March 1982, provides that:

'The benefits referred to in this chapter . . . are payable only if the recipient does not exercise an occupational activity and is not in receipt of an allowance for illness, invalidity or involuntary unemployment under Belgian or foreign social

* Original language English.

security legislation or under the rules applicable to the staff of an institution subject to public international law.'

Article 31 of the decree, as amended by Article 147(2) of the Law of 15 May 1984, empowers the Belgian executive authorities to determine, by way of derogation from that provision, the extent to which benefits may overlap; but at the date of the order for reference in this case no such determination had been made. The Institute refuses payment of the Belgian retirement pension claimed on the grounds that Article 30 bis clearly excludes simultaneous entitlement to Belgian retirement pension and Italian invalidity benefits.

4. The tribunal du travail, however, is uncertain whether such legislation and the refusal based on it comply with the Community rules on social security. To resolve the uncertainty, the tribunal has asked the Court of Justice for a preliminary ruling on the following questions, which in the original are put as one question in three parts but which for convenience I will set out as three questions:

'(1) Whether the continuing lack of provision in Belgian national legislation with regard to overlapping pensions (in this case, individual old-age pensions) for self-employed persons with other retirement benefits or an advantage taking the place thereof (in this case, an invalidity allowance) granted under a foreign old-age pension scheme, and the practice consequently adopted by the competent national paying body, constitute, or could constitute, discrimination on grounds of nationality as referred to in the first paragraph of Article 7 of the Treaty, whether direct or indirect or based on nationality, through the application of criteria neutral in form but leading in practice to the same result, which is that non-nationals are placed at a disadvantage owing to a disproportionate obstacle;

(2) Whether they fall, or could fall, under the second paragraph of Article 52 and Article 53 of the Treaty and Articles 12(1) and (2) and 43 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community as well as Chapter III of that regulation, in particular Articles 44(1) and (2) and 46 thereof;

(3) Whether the Italian invalidity pension (in this case *"ab initio"* not yet converted into an old-age pension) and the Belgian early retirement pension for a self-employed person are to be regarded as "benefits of the same kind".'

5. Observations have been submitted to this Court only by the defendant Institute and by the Commission. Observations have not been submitted by the claimant, who also failed to appear before the Belgian court.

6. The Institute addresses only the third of the questions referred. It asserts that the Belgian early retirement pension and the Italian invalidity pension which has not yet been converted into an old-age pension, cannot be considered as benefits of the same kind for the purposes of Article 12(2) of Regulation No 1408/71 (Official Journal English Special Edition 1971 (II), p. 416; updated version, Official Journal 1983, L 230, p. 8). Consequently the Belgian provisions for reduction, suspension or withdrawal of benefit in the case of overlapping between a Belgian retirement pension and other benefits apply even if the other benefits were acquired under the legislation of another Member State. Moreover, it has not been established with certainty that the Italian invalidity pension will be converted into a retirement pension when Mr Di Felice reaches the age of 65, so that even then the Institute would not deem the invalidity pension to be of the same kind as a retirement pension. The Institute considers that Regulation No 1408/71 does not prohibit the application of Article 30 bis of the Belgian Royal Decree, the effect of which is to prevent payment of Belgian early retirement pension to Mr Di Felice.

7. The Commission submits in essence that the matter is covered by Articles 12(2) and 46 of Regulation No 1408/71. The two benefits in question are 'benefits of the same kind' for the purposes of Article 12(2) which therefore excludes the operation of Article 30 bis of the Belgian Royal Decree. The claimant is entitled to the amount of the Belgian early retirement pension either calculated under Belgian law excluding Article 30 bis of the Royal Decree or calculated according to Article 46(2) of the regulation, whichever is the higher.

8. I think it is clear that by the first two questions the national court is asking in substance whether the Belgian provisions are contrary to any provisions of Community law. The answer cannot be couched in those terms, since that would involve the Court in ruling directly on national law. The answer must be limited to interpretation of the relevant provisions of Community law. As the Court put it in paragraph 8 of the judgment of 24 September 1987 in Case 37/86 *Van Gastel, née Coenen* [1987] ECR 3589, 'in proceedings brought under Article 177 of the EEC Treaty the Court has no jurisdiction to apply the rules of Community law to a specific case nor, consequently, to classify provisions of national law with respect to such a rule. It may, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful in assessing the effects of such provisions of national law'.

9. As to the first question, Article 30 bis of Royal Decree No 72, as amended, contains a particularly extensive provision not merely reducing but — in the absence of derogations — completely excluding payment of benefits under Belgian law when benefits are paid under the law of another Member State. Such a provision would seriously restrict the social security rights of workers who moved between one Member State and another, were its operation not circumscribed by Community provisions, in particular Articles 12 and 46 of Regulation No 1408/71. That regulation is based *inter alia* on Article 7 of the EEC Treaty, and in my view any discriminatory effects of a national rule against overlapping are apprehended by the regulation and not directly by Article 7 of the Treaty. It is sufficient to refer to the Court's case-law to

the effect that if a person is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent national rules against overlapping from being applied, provided that if the application of such legislation proves to be less favourable to the worker than the provisions of Article 46 of the regulation, the provisions of Article 46 apply instead: see for example Joined Cases 116, 117, 119, 120 and 121/80 *RWP* v *Celestre* [1981] ECR 1737, at p. 1756, point (a) of the ruling. That ruling, suitably adapted, can be adopted in answer to the first question referred.

10. As regards the second question, in my opinion Articles 52 and 53 of the Treaty are not relevant as they concern the right of establishment rather than free movement of workers and do not form part of the legal basis of Regulation No 1408/71. The extension of the provisions of that regulation to self-employed persons and their families was effected not pursuant to the chapter of the Treaty on the right of establishment but by Regulation No 1390/81 (Official Journal 1981, L 143, p. 1), which was based on Articles 2, 7, 51 and 235 of the Treaty. That regulation entered into force on 2 July 1982 with the effect that all the provisions of Regulation No 1408/71 here in issue have applied to self-employed persons since that date and were thus applicable at the material time in the present case.

11. Having regard to those provisions, the first step is to establish the amount of the pension due under Belgian legislation (including its rules against overlapping) and then to determine the amount of the pension under Community law (i.e. Article 46 of Regulation No 1408/71). The provision in Article 12(2) excluding the application of national anti-overlapping rules where the person concerned receives 'benefits of the same kind' in accordance with the provisions of Article 46, intervenes at the stage of the application of Article 46(1), and at that stage it must be decided whether the early retirement pension and the invalidity benefit are benefits of the same kind. That is the purport of the third question, which asks whether the Italian invalidity pension and the Belgian early retirement pension are 'benefits of the same kind', impliedly within the meaning of Article 12(2) of Regulation No 1408/71 which reads as follows:

'The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with the provisions of Articles 46, 50 and 51 or Article 60(1)(b).'

12. The criteria for deciding whether benefits are of the same kind can be found

in the past case-law of the Court. In paragraph 13 of the judgment in Case 171/82 *Valentini* [1983] ECR 2157, at p. 2170, confirmed in paragraph 10 of the judgment in *Van Gastel, née Coenen*, already cited, the Court held that benefits were of the same kind when their purpose and object together with the basis on which they were calculated and the conditions for granting them were identical and that characteristics which were purely formal were not to be considered relevant. The real difficulty which the national court appears to have had in this case was to establish the exact nature of the Italian benefit in question. The national court was unable to obtain further information about the nature of the Italian pension from the claimant, who did not appear and was not represented before it. But it should not be forgotten that the national social security institution is always in a position to obtain relevant information by using the machinery for cooperation between social security institutions in different Member States: see Article 84 of Regulation No 1408/71 and Article 7(2) of Regulation No 574/72 as amended (Official Journal 1983, L 230, p. 86).

13. However, the nature of the Italian benefit in this case does emerge sufficiently from the order for reference for the criteria developed in the Court's case-law to be applied, since the national court does include in the course of its reasoning a statement that the Italian benefit was calculated on the basis of a period of insurance, namely 8.69 years of a potential total of 45 years, which makes it possible to deduce how the provisions of the regulation are to be applied. What does not emerge from the order for reference is whether the Italian benefit was calculated on the basis of a period of insurance completed in Italy alone, or on the basis of aggregation and apportionment. But in either event, it is clear in my view that the provisions of Article 46 must be applied, and that the benefits are benefits of the same kind. In the instant case both benefits are designed to ensure the means of subsistence of a person who is no longer able, or no longer fully able, to work, and the amount of both benefits is established, as I have explained, according to the insurance periods of the same person, as in *Van Gastel, née Coenen*, paragraphs 11 and 12. The position might be different if one of the benefits were based on the contributions of another person, as in the judgment of 6 October 1987 in Case 197/85 *Stefanutti* [1987] ECR 3855. In Case 4/80 *D'Amico* [1980] ECR 2951 the Court held that where a person is in receipt of invalidity benefits converted into an old-age pension under the legislation of one Member State and of invalidity benefits not yet so converted under the legislation of another Member State, those benefits were to be regarded as being of the same kind. At point (b) of the ruling in *Celestre* the Court again held that where a worker is in receipt of invalidity benefits converted into an old-age pension under the legislation of one Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State the old-age pension and the invalidity benefits were to be regarded as being of the same kind for the purposes of Article 12(2) of Regulation No 1408/71.

14. The present case concerns an invalidity pension acquired under the legislation of one Member State and an early retirement pension under the legislation of another Member State. However, it has not been suggested, either in the order for reference or in the observations submitted to the Court, that the fact that the retirement pension is paid early makes any material difference to the law applicable. Nor in my view is there any such difference. The effect of early payment is simply that the amount of the pension is discounted by 5% for each of the years of anticipation on normal pensionable age in Belgium. That it makes no such difference is also indicated indirectly by the approach that the Court took to a German early old-age pension in Case 180/78 *Brouwer-Kaune* [1979] ECR 2111. Again, the position might be different if the scheme were designed to provide a guaranteed income on early retirement, a scheme of the kind in issue in the *Valentini* case already cited. But the benefit in the present case is a normal retirement pension paid at a discount in anticipation of the normal retirement age.

15. On that basis, *D'Amico* and *Celestre* suggest strongly that the two types of benefit at issue in this case are 'of the same kind' for the purposes of Article 12(2); and in the light of the past case-law I take the view that two benefits such as those at issue in the present case are to be considered as 'benefits of the same kind' for the purposes of Article 12(2) of the regulation. Moreover, it seems to me that any other result, allowing the application of the national anti-overlapping provisions in a case such as the present, would be wholly inconsistent with the purposes of the Community legislation and of Article 51 of the Treaty.

16. It may then be necessary to calculate the aggregated and apportioned amount in accordance with Article 46(2) of the regulation, but no question has been referred on the interpretation of those provisions. Whether or not that calculation is necessary, the essential point is that the national provisions excluding the overlapping of benefits cannot be applied in any event.

17. The result therefore is that the national anti-overlapping provisions do not apply and that the amount referred to in Article 46(1) is the amount to which the person would be entitled under national legislation if he did not have a pension under the legislation of another Member State (*Celestre*, at p. 1754, paragraph 12).

18. Accordingly in my opinion the questions referred for a preliminary ruling should be answered as follows:

'(1) Where an employed or self-employed person 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 in its entirety, provided that if the application of such national legislation proves less favourable to the claimant

than the application of the rules laid down by Article 46 of Regulation No 1408/71, the provisions of that article must be applied.

(2) Where an employed or self-employed person receives benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 which are awarded by the institutions of two or more Member States in accordance with the provisions of Article 46 of Regulation No 1408/71, the provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit are inapplicable by virtue of the last sentence of Article 12(2) of the said regulation. The amount mentioned in Article 46(1) of the said regulation is then the amount to which the person would be entitled under national legislation if he did not receive a pension under the legislation of another Member State.

(3) Where an employed or self-employed person receives an old-age pension under the legislation of one Member State and an invalidity pension under the legislation of another Member State, those benefits are to be considered as being of the same kind for the purposes of Article 12(2) of Regulation No 1408/71.'