20 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 Tribunal du Travail, Charleroi, by judgment of 18 November 1976, hereby rules:

Article 46 (3) of Regulation No 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of a Member State alone.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 13 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 20 SEPTEMBER 1977

My Lords,

Introductory

The feature that these four cases (Case 112/76, Case 22/77, Case 32/77 and Case 37/77) have in common is that they all raise questions as to the consequences and scope of the principle established by the decisions of the Court in the long line of cases of which the three most recent are Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, Case 50/75 *CPEP* v *Massonet*, ibid. p. 1473, and Case 62/76

Strehl v *NPVM* [1977] ECR 211. More particularly, they are about the consequences of the rulings of the Court in the *Petroni* and *Strehl* cases to the effect that Article 46 (3) of Regulation No 1408/71 of the Council is incompatible with Article 51 of the EEC Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of either of those States alone. I apprehend that Your Lordships are so familiar both with those decisions and with Article 46 that I need not rehearse them.

Of the present four cases, three come before the Court by way of references for preliminary rulings by Belgian Courts. In each of them the Belgian social security institution concerned is the 'Fonds National de Retraite des Ouvriers Mineurs' (or 'FNROM'), which, under its Dutch name ('Nationaal Pensioenfonds voor Mijnwerkers'), was the Defendant in the *Strehl* case. In each of them the question at issue is as to the amount of the invalidity pension payable by the FNROM to an Italian worker who was at one time employed as a miner in Belgium. The three cases are Case 112/76 *Manzoni* v *FNROM,* referred by the Tribunal du Travail of Charleroi, Case 22/77 *FNROM* v *Mura,* referred by the Cour du Travail of Mons, and Case 37/77 *Greco* v *FNROM,* also referred by the Tribunal du Travail of Charleroi. I propose in what follows to refer, where appropriate to Signor Manzoni, Signor Mura and Signor Greco collectively as 'the Claimants in the Belgian cases' or simply as 'the Claimants'.

The fourth case is Case 32/77 *Giuliani* v *Landesversicherungsanstalt Schwaben,* which comes to the Court by way of a reference for a preliminary ruling by the Sozialgericht of Augsburg. There again the worker concerned is an Italian. This case differs from the other three, not only in that it comes from the Federal Republic of Germany instead of from Belgium, but also in two other respects. First, the Sozialgericht of Augsburg is not content to ask the Court to work out the consequences of its rulings in the *Petroni* and *Strehl* cases. It invites the Court to reconsider those rulings. Secondly, the provision of Regulation No 1408/71 in relation to which the Court is, on the footing that it adheres to its rulings in those cases, invited by the Sozialgericht to work out their consequences is different: that provision is Article 10, whereas in the Belgian cases it is Article 12.

If one is to judge by the number of interventions by Member States, the Belgian cases arouse more interest than does the *Giuliani* case. We have had the benefit of Observations put in, in one or more of the Belgian cases, by the Belgian, Dutch, Italian and United Kingdom Governments. In the *Giuliani* case, on the other hand, we have had Observations only from the Commission and from the Landesversicherungsanstalt Schwaben (which I shall henceforth call, for the sake of brevity, 'the LVA').

Nonetheless, I think it convenient to deal with the *Giuliani* case first.

The Giuliani case

The facts and the questions raised

In order to understand that case it is necessary to have in mind paragraphs 1315 to 1319 of the Reichsversicherungsordnung (the 'RVO'). Those paragraphs were, so I understand, inserted by paragraph 2 of the Fremdrenten- und Auslandsrenten-Neuregelungsgesetz, a statute with which Your Lordships are familiar from having had to consider it recently in Case 79/76 *Fossi* v *Bundesknappschaft* [1977] ECR 667.

Paragraph 1315 provides, briefly and so far as material, that, where a person who is not a German national is entitled to a German pension, payment of that

pension shall be suspended so long as he is habitually and voluntarily resident abroad. Paragraph 1316 empowers the Federal Government to make, by statutory instrument, exceptions to the application of paragraph 1315 in the case of foreign territories lying at the frontiers of Germany ('ausländische Grenzgebiete') and in the case of foreign States having reciprocal arrangements in favour of German nationals. Paragraph 1317 provides in effect, if I have understood it correctly, that, subject to the exceptions in paragraphs 1318 and 1319, payment of a pension due to a German national shall also be suspended so long as he is resident abroad.

The exception in paragraph 1318 is for pensions earned by the completion of insurance periods (or of certain deemed insurance periods) under the RVO itself, whilst that in paragraph 1319 is in respect of temporary residence abroad.

Your Lordships see that there may thus be, in terms of Community law, two kinds of discrimination inherent in those paragraphs of the RVO: discrimination on grounds of residence and discrimination on grounds of nationality.

Those two kinds of discrimination are dealt with by different provisions of Regulation No 1408/71 (OJ L 149 of 5. 7. 1971).

Discrimination on grounds of nationality is dealt with by Article 3, paragraph 1 of which provides:

'Subject to the special provisions of this Regulation persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State'.

In considering the effect of that provision, it is I think necessary to remember that Regulation No. 1408/71 is, as its preamble records, founded as much on Article 7 of the Treaty as on Article 51.

Discrimination on grounds of residence is dealt with by Article 10 of the Regulation. This, so far as here material, provides:

'Save as otherwise provided in this Regulation, invalidity ... cash benefits ... acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

A puzzling feature of the *Giuliani* case is that, apart from a short and rather tardy reference to Article 7 of the Treaty made by Counsel for the Commission at the hearing, the whole case was argued as if only Article 10 of Regulation No 1408/71 were in point. The Sozialgericht's Order for Reference contains, so far as I can discern, no reference to Article 7 of the Treaty and only a passing reference to Article 3 of the Regulation.

Of course, the jurisdiction of this Court under Article 177 of the Treaty is confined to ruling on the questions referred to it by the national Court or Tribunal concerned, and I must deal with this case on that footing. But I think it right to express *in limine* the reservation that, perforce, in what I shall say I must leave aside the possible relevance to the case of Article 7 of the Treaty and of Article 3 of the Regulation, even though they might conceivably make a material difference to its outcome. On the other hand it may be that that reservation is unnecessary and that Signor Giuliani's position under German law would in fact be precisely the same if he were a German national, instead of being an Italian national.

The facts of the case are briefly these. Signor Giuliani, who was born on 26

March 1921, worked at different times in Italy and in Germany. He now resides in Italy. He is entitled to invalidity pensions in both Italy and Germany. His Italian pension amounts to Lit 507 030 a year. In Germany, leaving aside paragraph 1315 of the RVO, he is entitled, under German law alone, i.e. without aggregation and apportionment, to a pension of DM 102·60 a month. The application to his case of the processes of aggregation and apportionment in Germany would not entitle him to a greter pension there. On the contrary, it would produce a figure of only DM 81·30 a month. The total of his Italian pension and of the pension of DM 102·60 a month to which he is *prima facie* entitled in Germany comes to DM 3 117·69 a year. His 'highest theoretical amount of benefit' for the purposes of Article 46 (3) (which is in fact the German 'theoretical amount') is DM 2 747·38 a year. So, in pursuance or purported pursuance of Article 46 (3), the LVA reduced his German pension by the difference between DM 3 117·69 and DM 2 747·38 and, in the result, granted him a pension of DM 64·80 a month. Against that decision Signor Giuliani appeals to the Sozialgericht of Augsburg. He contends, in reliance on the rulings of the Court in the *Petroni* and *Strehl* cases, that there should have been no such reduction of his pension.

The argument of the LVA is simple and readily intelligible. The LVA submits that this Court's rulings in the *Petroni* and *Strehl* cases are founded on the view, established by the Court's earlier decisions, that Article 51 of the Treaty does not empower the Council to legislate for any reduction in a benefit to which a person is entitled under the law of a Member State independently of Community law. But, the LVA submits, there is nothing to preclude the Council from imposing limits on benefits that a person is able to claim only by invoking Community law. Indeed, the LVA points out, the Court expressly held that to be so in Case 34/69 the *Duffy* case [1969] ECR 597 (see in particular paragraph 8 of the Judgment) and in the *Massonet* case (already cited — see in particular paragraph 11 of the Judgment). The proposition is moreover implicit in a number of other Judgments of the Court. I myself asserted it in my Opinions in the *Petroni* and *Strehl* cases. Here, says the LVA, Signor Giuliani is, under German law alone, entitled to receive no pension, because paragraph 1315 of the RVO applies. Being therefore driven to invoke Community law, in the shape of Article 10 of Regulation No 1408/71, in order to assert a right to payment of his pension, Signor Giuliani must take it subject to the limitations imposed by Article 46 (3) of the same Regulation.

The Sozialgericht, as I have indicated, does not confine itself to asking the Court whether that argument is correct. It asks four questions, as follows:

'1. Does the Court, having regard to the principle of equality ("Gleichheitsgrundsatz"), adhere to its ruling (Judgment of 21. 10. 1975 — *Petroni*, Case 24/75) to the effect that Article 46 (3) of Regulation No 1408/71 of the Council is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of a Member State alone?
2. Is Article 46 (3) of Regulation No 1408/71 of the Council, where appropriate, valid in so far as rights to payment are thereby limited which would not exist in the absence of Community law?
3. Do rights to payment exist in the absence of Community law or are such rights acquired under the legislation of a Member State alone if, in the case of a migrant worker resident in another Member State, they can be realized, by reason of national suspensory provisions, only through the lifting of residence

clauses under Article 10 of Regulation No 1408/71?

4. How is the last question to be answered if bilateral or multilateral Conventions between the Member States concerned have already provided rules corresponding to those in Article 10 of Regulation No 1408/71?'

In relation to the first of those questions, the Sozialgericht, in the part of its Order for Reference in which it states its reasons for making the Order, refers not only to the 'principle of equality', but also, incidentally, to that of the separation of powers. In relation to the second question it raises a point that has been much discussed by learned writers, viz. what is the extent of the binding effect of a ruling of this Court under Article 177 of the Treaty? Specifically, the Sozialgericht asks whether such a ruling has statutory force in the same way as have certain rulings of the Bundesverfassungsgericht by virtue of paragraph 31 (2), of the Bundesverfassungsgerichtsgesetz. The effect of paragraph 31 (2), according to my understanding, is that, where it applies, e.g. where the Bundesverfassungsgericht rules that a statute is incompatible with the Constitution of the Federal Republic (the "Grundgesetz"), that ruling operates *in rem*, so that, *erga omnes*, the statute is deemed never to have existed. The Sozialgericht's idea seems to be that, if the ruling of this Court in the *Petroni* case had the same effect in relation to Article 46 (3), it is too late for the LVA to rely on that provision in the present case. For my part I doubt whether, even given the premise, that consequence would necessarily follow. But I agree with the Commission that, logically, the point, if it arises at all, arises in relation to question 1, because, if the ruling of the Court in the *Petroni* case had the effect suggested by the Sozialgericht, it cannot be open, even to the Court itself, to reconsider that ruling now. That indeed was a submission put forward on behalf of the Italian Government at the hearing in the *Mura* case, in the course of which reference was made to the analogy of decisions of the Constitutional Court of Italy concerning the compatibility of Italian statutes with the Italian Constitution.

Not only the Sozialgericht but also the Commission and the Italian Government have indicated that, in their view, it would be valuable if this Court were now to clarify the law as to the binding effect of its rulings under Article 177.

The binding effect of rulings under Article 177

That subject is, as I have mentioned, one of which there has been much learned discussion. The Sozialgericht refers in particular to Bleckmann, "Europarecht" (Carl Heymanns Verlag KG) 1976, p. 154. The Commission adds references to other authors and especially to articles written by two former Advocates General of this Court in the Revue Trimestrielle de Droit Européen for 1974: 'L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes' by Alberto Trabucchi, at p. 56, and L'action préjudicielle dans le droit interne des États membres et en droit communautaire' by Maurice Lagrange, at p. 268 — see particularly pp. 294-296. The Commission also refers to the Opinion of Mr Advocate General Gand in Case 16/65 *Schwarze* v *EVSt für Getreide und Futtermittel* [1965] 2 ECR. 877 at p. 899 (Rec. 1965 II, pp. 1109-1110). I respectfully agree with M. Lagrange, with Professor Trabucchi and with Mr Advocate General Gand that a ruling of the Court declaring, under Article 177, that an act of a Community institution is incompatible with the Treaty cannot be held to have the same effect as a decision of the Court declaring such an act void under Articles 173 and 174. So to hold would be to render almost nugatory the limitations in Article 173 as to the period within which, and persons by which, actions under that Article may be

brought. Indeed it seems to me that, as is submitted by the Commission, the Judgment of the Court in the *Schwarze* case, which follows the Opinion of Mr Advocate General Gand, recognizes that there is a distinction between the effect of a declaration under Articles 173 and 174 and that of a ruling under Article 177: see [1965] 2 ECR at p. 886 (Rec. 1965 II, p. 1094).

That is not to say that in my opinion a ruling of the Court under Article 177 has no binding effect at all except in the case in which it is given. To my mind it is crucial in this context to distinguish between the scope of *res judicata* and that of *stare decisis*. (I fear that this is a context in which the use of Latin phrases is inescapable). With the exception of Professor Trabucchi, most of those who have written on the subject appear to me to have focused their attention exclusively on the effect that the ruling has as constituting *res judicata*. As to that, I share the view that its effect is confined to the particular case in which it is given. I would observe only that, since proceedings under Article 177 are in the nature of, as it has been expressed, 'a dialogue between Courts', and are not strictly speaking *inter partes*, it is more accurate to say that the ruling binds the Court or Tribunal making the reference than to say that it constitutes *res judicata* only *inter partes*. That indeed is how this Court expressed the proposition in Case 29/68 *Milch-, Fett- und Eier-Kontor GmbH* v *Hauptzollamt Saarbrücken* [1969] ECR 165 (see paragraph 3 of the Judgment) and again more recently in Case 52/76 *Benedetti* v *Munari Fratelli s.a.s.* [1977] ECR 163. As has been pointed out, however, by a number of writers, and not least by Professor Trabucchi, to hold that a ruling of the Court under Article 177 had no binding effect at all except in the case in which it was given would be to defeat the very purpose for which Article 177 exists, which is to secure uniformity in the interpretation and application of Community law throughout the Member States. It would also render absurd the provisions of the Statute of the Court under which the Community Institutions and all the Member States may submit observations in an Article 177 case. It would make those provisions correspond to the use of a sledgehammer to crack a nut. This, it seems to me, is where the doctrine of *stare decisis* must come into play. That doctrine is of course a flexible one. The mode of its application varies widely according to the particular relationships between particular Courts. But I do not think that there can be much doubt about the mode of its application in the present instance. It means that all Courts throughout the Community, with the exception of this Court itself, are bound by the *ratio decidendi* of a Judgment of this Court. (I refer to the *ratio decidendi* of such a Judgment rather than to its operative part, because one must allow for cases to which the ruling in the operative part at first sight applies, but which are in reality distinguishable from the case in which that ruling was given). I thus reach, albeit by a slightly different route, the same conclusion as Professor Trabucchi. Like him I am impressed by the thought that, if one were to reject that conclusion, one would be driven to accept that inferior Courts and Tribunals in the Member States might treat the Court's Judgments as of persuasive authority only, and so ignore them if they thought fit, whereas the superior Courts (Courts 'against whose decisions there is no judicial remedy under national law') may not. Acceptance of that conclusion, on the other hand, means that all Courts in the Member States are, in this respect, in the same position. If they have any doubt about the correctness of a decision of this Court, they have a discretion either to apply it nonetheless to the case before them or to refer that case to this Court, inviting it to reconsider its decision — as indeed the Sozialgericht has very properly done in the present case.

I find it of some comfort that the view that Professor Trabucchi and I hold is

shared by the Bundesverwaltungsgericht (see its Judgment of 2 July 1975 in Case I C 20.73, 49 BVerwGE, [1977] 2 CMLR 255). It is perhaps also of interest that in one Member State, the United Kingdom, the national Courts are required by statute to act in accordance with that view: section 3 (1) of the European Communities Act 1972 provides among other things that 'For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity meaning or effect of any Community instrument, shall ... if not referred to the European Court, be for determination ... in accordance with the principles laid down by and any relevant decision of the European Court ...'.

I am not convinced that, in this matter, it is helpful to draw analogies between the position of this Court and that of particular Courts in particular Member States. Indeed in the *Benedetti* case this Court declined to make any comparison between its own role and that of the Corte di Cassazione. The role of this Court is in many ways *sui generis*. But I think that, in so far as any analogy is here relevant, that of the House of Lords is closer than that of the Bundesverfassungsgericht or of the Italian Constitutional Court. A decision of the House of Lords is, under the doctrine of *stare decisis*, binding upon, and must be followed by, all other Courts throughout the United Kingdom (in so far of course as the law it declares is applicable throughout the United Kingdom), but the House of Lords itself — and it alone — may reconsider and depart from the decision in a subsequent case. If it does so, it is the new decision of the House that becomes binding on other Courts.

So I turn to the points raised by the Sozialgericht relating to the 'princible of equality' and (incidentally) to the doctrine of the separation of powers.

The 'princible of equality' and the doctrine of the separation of powers

Here I should, I think, at once record that the LVA, both in its written observations and at the hearing, emphasized that it did not support the Sozialgericht's suggestion that the ruling of this Court in the *Petroni* case might be erroneous. The LVA submitted that the Court should adhere to that ruling but should hold it to be inapplicable in the present case on the grounds I have mentioned.

The same is not true of the Belgian and United Kingdom Governments, who, in their observations in the Belgian cases, submitted that the *Petroni* case was wrongly decided.

Much of the reasoning of the Sozialgericht, as expressed in its Order for Reference, is avowedly based on German constitutional law. This has incited the Commission to submit that the Court should reiterate what it said in Case 11/70 *Internationale Handelsgesellschaft* v *EVSt für Getreide und Futtermittel* [1970] 2 ECR 1125 to the effect that the validity of particular rules of Community law cannot be tested by reference to concepts of national law, even constitutional law.

I think for my part that, in that regard, somewhat different considerations are relevant in relation to the principle of equality on the one hand and to the doctrine of the separation of powers on the other.

In the *Internationale Handelsgesellschaft* case the Court was confronted with a situation in which it was suggested that a particular provision of Community law might be held inapplicable in Germany on the ground that it infringed fundamental rights secured by the German Constitution. The Court naturally said that Community law could not be overriden by national law. But, both in that case and, subsequently, in Case 4/73 *Nold* v *Commission* [1974] ECR 491, the Court emphasized that fundamental human rights form part of

the general principles of law the observance of which it is its duty to ensure and that that is so in particular in the case of fundamental rights recognized and protected by the Constitutions of Member States. Such rights, in other words, are protected by Community law itself. In Case 7/76 *IRCA* v *Amministrazione delle Finanze dello Stato* [1976] ECR at p. 1237, I ventured the opinion that a fundamental right recognized and protected by the Constitution of any Member State must be recognized and protected also in Community law, because no Member State can be taken to have transferred to the Community power to legislate in infringement of rights protected by its own Constitution – and Community law must, by its nature, be the same in all Member States. It is not, however, I think, necessary to pursue that topic further here because, as I pointed out in Case 28/76 *Milac* v *Hauptzollamt Freiburg* [1976] ECR at p. 1664, there is no doubt that the principle of equality is recognized in Community law. In the context of Community law it manifests itself more often than not in the form of express provisions forbidding discrimination, but, even where no such express provision applies, Community law unquestionably excludes arbitrary discrimination or unfairness between man and man. The question raised by the Sozialgericht therefore relates more to the application of the principle than to its existence.

The Sozialgericht, as I understand its reasoning, suggests that the rulings of the Court in the *Petroni* and *Strehl* cases may lead to two kinds of discrimination.

The first is discrimination as between migrant workers and non-migrant workers, inasmuch as a migrant worker may, by virtue of his having worked successively in different Member States, secure greater social security benefits in the aggregate than a worker who has spent all his working life in either of those States. Undoubtedly that may be so. The examples given in the Annex to the Commission's written Observations in the *Mura* case illustrate it in a most forceful manner. It is a point which, manifestly, deeply troubles the FNROM and the Belgian Government. On the other hand it must be borne in mind that, as the Commission pointed out, the converse situation can obtain: a migrant worker may, despite the rulings in the *Petroni* and *Strehl* cases, be entitled to less in the aggregate than if he had stayed at home all his life. Moreover, the LVA reminded us, a migrant worker may obtain a greater benefit in a Member State through the application of the processes of aggregation and apportionment than he would through the application of the legislation of that State alone.

The second kind of discrimination discerned by the Sozialgericht is discrimination as between migrant workers, inasmuch as a migrant worker who has stayed long enough in a particular Member State to qualify for a benefit under the law of that State alone may thereby secure greater benefits in the aggregate than one who has not. (Here again, of course, the converse is also potentially true).

Underlying those criticisms formulated by the Sozialgericht (and echoed by others) there appear to me to be, with all respect, two misconceptions.

The first is as to what constitutes discrimination. As has been pointed out over and over again by this Court, discrimination consists in either treating identical situations differently or treating differing situations identically. Whatever else may be true of migrant workers and of non-migrant workers, it cannot be said that their situations are identical. As the Commission pointed out, a migrant worker faces all manner of difficulties, social, linguistic and financial that a worker who stays at home does not. On behalf of the Claimants in the Belgian cases, reference was made to specific

difficulties confronting migrant workers as regards the receipt by them of social security benefits. Of these not the least is the incidence of fluctuations in exchange rates, a matter to which I drew attention in the *Petroni* case ([1975] ECR at p. 1167). This was illustrated by reference to the facts of the *Greco* case: as the result in part of the different provisions as to indexation applicable in Belgium and in Italy, and in part of the fall in the value of the lira in relation to the Belgian franc, Signor Greco, who lives in Belgium and is entitled to a full Belgian pension under Belgian law alone, but whose Belgian pension has been reduced by the FNROM by reference to his Italian pension in the manner I shall describe when I come to his case, currently receives less in respect of his Belgian and Italian pensions combined than be would by way of full Belgian pension alone. Although we were not told so expressly, I imagine that the same situation may obtain in the *Manzoni* and *Mura* cases. On the other hand, probably, Signor Giuliani benefits from the rise in the DM vis-à-vis the lira.

It being thus impossible to regard the situations of migrant workers and of non-migrant workers as identical, the extent to which it is justifiable to treat such workers differently can only be a matter of opinion. There is no objective standard by which it can be judged, capable of forming the basis of a legal decision, unless indeed it were shown that the treatment of one or the other category was in some respect arbitrary.

As to the supposed discrimination between migrant workers according to the length of their stay in a particular Member State, there again the answer must be, in my opinion, that their situations are not identical. After all, the same difference of treatment, inherent in the legislation of the Member State concerned, exists as between workers who never leave its territory according to whether they do or do not complete the qualifying period.

The second misconception, in my opinion, is to suppose that it is possible, notwithstanding the widely divergent social security systems of the Member States, to provide for a state of affairs in which all anomalies as between workers, migrant and non-migrant, are ironed out. Case after case in this Court has shown that that is not possible, and indeed the arguments in the present four cases have vividly demonstrated it again.

It is, as I understand it, in connexion with the Court's frequently expressed recognition of that last fact that the Sozialgericht refers to the doctrine of the separation of powers. The suggestion of the Sozialgericht seems to be that the Court, in emphasizing that fact in many of its Judgments, has shown itself to be guided by the idea of inducing the legislative organs of the Community and of the Member States to create a uniform system of social security. In so doing, says the Sozialgericht, the Court has encroached upon the discretion that properly belongs to those legislative organs. I am sure that the Sozialgericht has not realized the full implications of that suggestion. In dealing with it, the Commission has preferred to assume that the Sozialgericht has overlooked the provisions of the Treaty that require the Court to decide whether particular acts of other Community Institutions are lawful (Articles 164, 173, 174, 177 and 184). But perhaps the Sozialgericht has overlooked only that it is no part of the function of a Court to shut its eyes to realities, including the imperfections of legislation.

At all events, it does not appear to me that any argument has been put forward in any of these cases that should persuade Your Lordships to depart from the Court's previous decisions.

So I turn to the problem put in the Sozialgericht's questions 2 and 3.

Article 10 of Regulation No 1408/71

I have already summarized — and I need not do so again — the LVA's argument

for saying that the rulings in the *Petroni* and *Strehl* cases do not apply here. I described that argument as simple and readily intelligible. It is also at first sight incontrovertible (leaving aside of course Article 7 of the Treaty and what may flow from that).

The Commission, however, submits that that argument is wrong. It draws attention to the fact that Article 51 of the Treaty has two subparagraphs, (a) and (b). That Article provides, Your Lordships remember:

'The Council shall ... adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

The decisions of the Court culminating in the rulings in the *Petroni* and *Strehl* cases all turned, says the Commission, on the interpretation of subparagraph (a). Indeed many of them were concerned with the circumstances in which it is appropriate to apply the process of aggregation envisaged by that subparagraph, and with the proposition that, where there is no call for such aggregation, there is no call for apportionment either. It is in that context, says the Commission, i.e. in the context of the acquisition of a right to benefit, that it is true to say that, if a worker needs to resort to Community law, he must take that law as he finds it: he cannot claim more than the measures adopted by the Council under Article 51 entitle him to.

Here, in contrast, says the Commission, the relevant subparagraph of Article 51 is subparagraph (b). This requires the Council to provide for the payment of benefits, the right to which has *ex hypothesi* been acquired *aliunde*, to those entitled to them wherever they may be resident in the Community. That provision cannot be interpreted as empowering the Council to provide for a reduction in the amount of a benefit because the person concerned is resident in one Member State rather than in another.

That is a powerful and attractive argument, and I confess to Your Lordships that, during the consideration of this case, my mind has fluctuated on the question whether or not it should be accepted. I have, however, finally come to the conclusion that it should be rejected.

Your Lordships will remember that, in Case 19/76 *Triches* v *Caisse de Compensation pour Allocations Familiales de la Région Liégeoise* [1976] ECR 1243 a question arose as to the validity of Article 42 of Council Regulation No 3 as substituted by Regulation No 1/64/EEC. This laid down a code for determining what family allowances a pensioner should be entitled to. It represented the Council's second attempt at solving a problem of which the root lay in the divergences between the family allowance schemes of the different Member States. The solution lay in selecting the legislation of a particular Member State as being applicable in the case of any particular pensioner, in certain circumstances on the basis of his residence. (A similar but more sophisticated system is now in force under Article 77 of Regulation No 1408/71). The effect of the application of the system in the case of Signor Triches, an Italian who had worked in Belgium and retired to Italy, was, essentially, that, from the time of his return to Italy, he became no longer entitled to Belgian family allowances but entitled instead to (lesser) Italian family pension supplements. It was submitted on his

behalf, among other things, that Regulation No 1/64 was incompatible with Article 51 (b) of the Treaty in so far as it deprived him, by reason of his residence in Italy, of his right to Belgian family allowances. It was common ground that, not being resident in Belgium, he was not entitled to such allowances under Belgian law alone. His nationality was in no way relevant. The Court rejected his submission. It held (see paragraph 18 of the Judgment) that —

'Although the measures taken by the Council pursuant to Article 51 must not have the effect of depriving a migrant worker of a right acquired by virtue only of the legislation of the Member State in which he has worked, none of the aforementioned provisions of the Treaty restricts the freedom conferred on the Council by Article 51 to choose any means which, viewed objectively, are justified, even if the provisions adopted do not result in the elimination of all possibility of inequality between workers arising by reason of disparities between the national schemes in question.'

To accept the submission of the Commission in the present case would, I think, involve departing from the decision in the *Triches* case, for I do not think that that decision can sensibly be distinguished. Either Article 51 (b) does, or it does not, empower the Council to legislate as to what benefit is to be received by a person who, by reason of his residence in one Member State, is not entitled to benefit in another Member State under the law of the latter State alone.

That, in my opinion, constitutes in itself a strong ground for rejecting the Commission's submission: I gave in the *Strehl* case my reasons for thinking that it is in general undesirable, particularly in the field of social security, for this Court to produce conflicting decisions. But that is not, I think, the only consideration. It seems to me that for the Court to accept the Commission's submission here would create confusion, not to say chaos, not only in the field of family allowances for pensioners (with which the *Triches* case was concerned) but in all those fields where, under Regulation No 1408/71, entitlement to benefits, or the measure of them, is determined by reference to residence.

At the end of the day I think that the premise of the Commission's argument is erroneous. Article 51 does not have two limbs. It confers on the Council a single power (coupled with a duty), which is 'to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers'. Subparagraphs (a) and (b) prescribe that, in the exercise of that power ('to this end'), the Council is to make 'arrangements' for two purposes. But they are not exhaustive or descriptive of the power. The power does not extend to enabling the Council to deprive a person of a right he has under national law alone: so the Court has held. But in my opinion (always leaving aside any question as to discrimination on grounds of nationality) the qualification goes no further and is no more complex than that.

Nor do I overlook that, in the *Triches* case, the Court held that the discretion of the Council under Article 51 was restricted to the adoption of measures 'which, viewed objectively, are justified'. In my opinion, however, there is no warrant for saying that, in circumstances such as those of this case, Article 46 (3) of Regulation No 1408/71 fails to pass that test.

In the result I would uphold the argument of the LVA.

I turn to the Sozialgericht's question 4.

The relevance of bilateral and multilateral Conventions

The Sozialgericht does not specify in its Order for Reference which bilateral or

multilateral Conventions it has in mind as being possibly relevant in the present case. It appears however from the observations, both written and oral, of the LVA, and from the oral observations of the Commission, that there are two, namely a Convention of 5 May 1953 between the Federal Republic of Germany and the Italian Republic, and the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe. There is some disagreement between the LVA and the Commission as to the interpretation of the provisions of those Conventions in so far as they may be relevant. As to that I propose to express no opinion, for it is not within the jurisdiction of this Court under Article 177 to interpret such conventions – see Case 75/63 *Hoekstra* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177 at p. 186 (Rec. 1964, p. 353 at p. 365) and Case 28/68 *Caisse Régionale de Sécurité Sociale du Nord de la France* v *Torrekens* [1969] ECR 125 (paragraphs 6 and 22 of the Judgment). Suffice it to say that both of those Conventions have been incorporated into German law by Federal statutes and that either of them, as so incorporated, might confer on Signor Giuliani, independently of Community law, rights as regards the payment to him of his German pension despite the fact that he is an Italian national residing in Italy. It appears that Article 59 (2) of the German Constitution requires international agreements to be so incorporated in order to render them effective in the Federal Republic.

Articles 3 (3), 6, 7 and 46 (4) of Regulation No 1408/71 contain provisions as to the relationship between such conventions and the Regulation.

In relation to the Germano-Italian Convention of 5 May 1953 the relevant provisions are those of Articles 3 (3), 6 (a) and 7 (2) (c). According to those provisions, the Convention is replaced by the Regulation except in so far as is specified in Annex II to the Regulation. That Annex in fact specifies only a few of the provisions of the Convention and, so I understand, does not include those that could be most important in Signor Giuliani's case. It was held by this Court in Case 82/72 *Walder* v *Bestuur der Sociale Verzekeringsbank* [1973] 1 ECR 599 that, where such a situation obtained, the provisions of the convention were replaced by those of the Regulation even where the former were more advantageous to the person concerned. In that case, however, the Court was concerned only with the interpretation of the Regulation. No question as to its validity, or as to the possible effect of the incorporation of the convention into national law by a national statute, was raised or considered.

In relation to the European Interim Agreements of 11 December 1953 the relevant provision of the Regulation is Article 7 (1) (b). This provides that the Regulation 'shall not affect obligations arising from' those Agreements. So, as to those Agreements, there is no problem. If Signor Giuliani is entitled to more under them than under the Regulation, he is entitled to claim it. The Commission drew our attention to Case 187/73 *Callemeyn* v *Belgium* [1974] 1 ECR 553, where the Court held that, where the converse situation applied, i.e. where a person was entitled to more under the Regulation than under the European Interim Agreements, the Regulation prevailed. The Commission suggested, as I understood it, that the inference was that, where the person concerned was entitled to more under the Agreements than under the Regulation, the Agreements prevailed. I do not however think that it is necessary to resort to that authority to reach that conclusion. It follows from the wording of Article 7 (1) (b) itself. It is perhaps noteworthy that Article 46 (4), which provides that where a person is entitled in the aggregate to lower invalidity benefits under a multilateral convention than under Articles 46 (1) and (3), he

shall enjoy the latter does not apply in relation to benefits under the European Interim Agreements.

Reverting to the Germano-Italian Convention, the question raised by the Sozialgericht can be expressed as follows. Assuming that, under German law incorporating the Convention, Signor Giuliani was entitled to more than under the Regulation having regard to Article 46 (3), was it open to the Council to legislate so as to deprive him of it?

The Sozialgericht refers in that connexion to Article 234 of the Treaty. But that Article is not in my opinion in point, because, in terms, it applies only to 'agreements concluded ... between one or more Member States on the one hand, and one or more third countries on the other'. The Sozialgericht also refers to a Judgment of the Bundessozialgericht of 29 March 1973 (Az. 4 RJ 351/71). That, however, although no doubt correct, is not, in my opinion, in point either. It was concerned with a bilateral Convention between Germany and France, but the person whose rights were in question, although he had worked in both Germany and France, was a United States citizen, so that he was outside the field of application of Regulation No 1408/71 by reason of Article 2 of that Regulation, which confines its application to nationals of Member States.

The point underlying the Sozialgericht's question seems to me nonetheless sound. The rationale of the rulings of this Court in the *Petroni* and *Strehl* cases is that Article 51 of the Treaty empowers (and requires) the Council to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers' but does not empower the Council to legislate to the detriment of workers who exercise their right to freedom of movement. That rationale must be equally applicable whether the advantage of which the legislation of the Council purports to deprive a worker is derived from national law alone or from national law incorporating an international convention, and, I would add, whether such incorporation is effected by a national statute or simply because the constitution of the Member State concerned is 'monist' I realize that that conclusion conflicts in its result with the decision of the Court in the *Walder* case, but I think it inescapable, and I have already indicated why that decision is not, in this respect, authoritative. Of more pertinence it seems to me, is the Judgment in the *Duffy* case (already cited), in paragraph 9 of which the Court expressly assimilated 'special conventions between Member States' to national law in stating the rule that Community regulations may not restrict rights that workers have under such law.

Conclusions as to the Giuliani case

In my opinion, therefore, Your Lordships should, in answer to the questions referred to the Court by the Sozialgericht, rule that:

(1) Article 46 (3) of Regulation No 1408/71 of the Council is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of a Member State alone.

(2) For that purpose —

(a) A benefit is not to be considered as acquired under the national legislation of a Member State alone if the beneficiary may claim payment of it only by invoking Article 10 of the Regulation;

(b) A benefit is to be considered as acquired under the legislation of a Member State alone if the beneficiary may claim payment of it under that legislation as incorporating a bilateral convention to which Article 6 (a) of the Regulation is expressed to apply.

(3) The Regulation does not affect obligations of Member States arising from the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe where the provisions of those Agreements are more favourable to the worker concerned than those of the Regulation.

I turn to the Belgian cases.

The Belgian cases

The question raised by them

Your Lordships will remember that, in the *Strehl* case, 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 social security institutions of Regulation No 1408/71. The Council did not respond to that invitation, but the Commission did. From its reply it appeared that, leaving aside problems concerning past cases:

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

(2) From discussion in the Administrative Commission on Social Security for Migrant Workers (established by Article 80 of Regulation No 1408/71) it had emerged that the Judgment in the Petroni case was not considered to give rise to any difficulty where the legislations involved in a particular case were all of Type B (i.e. made the amount of benefits depend on the length of insurance periods) except where any of them took account of notional insurance periods.

(3) In a case where the legislations involved were a mixture of Type B and of Type A (the latter making the amount of benefit independent of the length of insurance periods), the representatives of Member States having legislation of Type A had put forward the view that the invalidity of Article 46 (3) gave rise to unjustified duplication of benefits, which it would be legitimate for them to counter by appropriate provisions in their legislation. The Commission objected to that suggestion on the ground that it would infringe Article 12 (2) of Regulation No 1408/71.

Among the papers in the *Mura* case is a Note dated 5 May 1976 prepared by the Secretariat of the Advisory Committee on Social Security for Migrant Workers (established by Article 82 of the Regulation) which confirms the information thus given to the Court by the Commission. The Note mentions in particular that the Member States who wish to resort to anti-duplication provisions in national legislation rely upon the dicta of the Court in Case 12/67 *Guissart* v *Belgium* [1967] ECR 425 at p. 434 (Rec. 1967, p. 552 at p. 563), in Case 140/73 the *Mancuso* case [1973] 2 ECR 1449, at p. 1456 (paragraph 18 of the Judgment) and in the *Massonet* case (already cited, paragraphs 26 and 28 of the Judgment). In the *Strehl* case I expressed the view that, on those authorities, it would clearly be open to a Member State with legislation of Type B enabling a worker to be credited with notional insurance periods to provide by the same legislation against overlap of such periods with actual insurance periods completed by the same worker in another Member State. I did not express any view as to whether those authorities would extend to the case of a Member State with legislation of Type A. That is in a sense the question that Your Lordships have to decide in the present cases. I say 'in a sense' because those authorities were on the interpretation of Article 11 of Regulation No 3, whereas the provision here in point is its successor, Article 12 of Regulation No 1408/71. It does not appear to me, however, that the material provisions of Article 12, i.e. those of paragraph 2, differ in any significant way from those of the corresponding paragraph (paragraph 2) of Article 11.

Article 12 (2) reads:

'The legislative provisions 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 Articles 46, 50, 51 or Article 60 (1) (b).'

One need not for present purposes trouble with the references to Articles 50, 51 and 60 (1) (b).

The national legislation here in point is the Belgian legislation about invalidity benefits for mineworkers, which is, administered by the FNROM. That legislation, so far as relevant to these cases, is mainly embodied in an Arrêté Royal of 19 November 1970 (Moniteur Belge 26. 11. 1970). It is complex and its effect in certain respects has been the subject of some argument. This much, however, seems to be common ground: By virtue of Article 1 of the Arrêté Royal a mineworker is entitled to an invalidity pension if, having been employed for at least ten years as such, he becomes incapacitated from normal work. The ten year qualifying period is reduced to five years in the case of a faceworker in certain circumstances. By Article 4 the amount of the pension is fixed at an annual sum expressed in BF which varies only according to whether the worker concerned is a faceworker or a surface worker and according to whether he is married or not. It does not vary according to the length of his service or according to the length of insurance periods. Article 23 contains a number of provisions about the overlapping of benefits. In particular paragraph 1 of that Article provides that an invalidity pension granted under the Arrêté Royal may be cumulated with one or more other retirement or invalidity pensions only up to the annual amount fixed by Article 4 for faceworkers, married or unmarried as the case may be. It appears that, as a matter of Belgian law, that provision is to be interpreted as applying in relation to all other retirement or invalidity pensions, whether payable under Belgian legislation or under any foreign legislation. Article 23 (4) contains provisions limiting the extent to which invalidity pensions payable under the Arrêté Royal may be cumulated with benefits in respect of occupational accidents or diseases.

Entitlement to a pension under the Arrêté Royal does not depend in any way upon the nationality or upon the residence of the worker concerned, so that no problems arise in these cases of the kind that arise in the *Giuliani* case. In fact, all three of the Claimants reside in Belgium.

Thus, essentially, the question raised by these cases is whether Article 12 (2) of Regulation No 1408/71 does or does not preclude the application by the FNROM of Article 23 (1) of the Arrêté Royal in relation to pensions payable under the legislation of other Member States.

The Manzoni case

The facts of the *Manzoni* case are briefly these.

Signor Manzoni was born on 5 October 1930. He worked in Italy from September 1944 to July 1950 (i.e. while he was under 20) and in Belgium as a miner, at the face, from 1952 to 1972, when he became incapacitated. The FNROM awarded him as from 1 December 1972 a full pension under the Arrêté Royal, on the strength of Belgian law alone. In November 1974 the competent Italian institution completed

the consideration of his case and awarded him an Italian invalidity pension backdated to 1 December 1972. It appears that the relevant Italian legislation is of Type B and that Signor Manzoni became entitled to this pension as the result of aggregation and apportionment under Articles 45 and 46 (2) of Regulation No 1408/71. Upon hearing of the award to Signor Manzoni of his Italian pension, the FNROM reopened his case and, in purported pursuance of Article 46 (3), to all intents and purposes reduced his Belgian pension by the amount of his Italian pension. I say 'to all intents and purposes' because the calculations were complicated by the need to take into account, under Article 23 (4) of the Arrêté Royal, benefits also awarded to Signor Manzoni in Belgium in respect of his occupational disease (silicosis). For that reason I refrain from setting out all the relevant figures. They are explained in a 'Complementary Note' prepared on behalf of Signor Manzoni and lodged at the Registry on 29 March 1977. As appears from that Note the net effect was to reduce Signor Manzoni's pension by BF 3 562 a year, subject to indexation. The formal Decision of the FNROM effecting the reduction was dated 9 December 1975 and it stated that Signor Manzoni was liable to refund BF 12 523 in respect of past overpayments of pension. Against that Decision Signor Manzoni appealed to the Tribunal du Travail of Charleroi, relying on the decision of this Court in the *Petroni* case.

The Tribunal's Order for Reference does not raise any question about Article 12 (2) of Regulation No 1408/71. We were told by Counsel for Signor Manzoni that he suggested such a question to the Tribunal, but that his suggestion was not adopted. The reason, I apprehend, lies in the nature of the arguments that were put forward before the Tribunal by the FNROM. In order to understand them, one must bear in mind that the Tribunal heard the *Manzoni* case before this Court delivered Judgment in the *Strehl* case. Indeed most of the written procedure before this Court had also taken place before then. At the end of the hearing before this Court, however, it became common ground, or at all events became evident, as the result of questions put to Counsel by two of Your Lordships and by me, that the real question in the case is as to the effect of Article 12 (2). I must however of course deal, albeit as briefly as possible, with the actual questions referred to the Court by the Tribunal and with the arguments of the FNROM (supported by the Belgian Government) which they reflect.

The FNROM put forward two arguments, which, whilst they dovetailed into each other, were distinct. The first was that the *Petroni* case was distinguishable because it was concerned with an old age pension whereas the present case was concerned with an invalidity pension. The second was based on an assertion (which the Tribunal seems to endorse) that an invalidity pension payable under the Arrêté Royal corresponds to the retirement pension payable to a mineworker, under the relevant Belgian legislation, after a full working life of 30 years. On that footing the FNROM argued that where, as here, the beneficiary had been employed in Belgian mines for less than 30 years and had, during part of the 30-year period preceding his incapacity, been employed and insured elsewhere, the period when he had been employed and insured elsewhere should be regarded as one of actual insurance overlapping a period of notional insurance credited to him under Belgian law. In such circumstances, said the FNROM, dicta of the Court in a number of cases showed that the principle on which the decision in the *Petroni* case rested did not apply. Those cases, it appears from the Order for Reference, were Case 1/67 *Ciechelski*'s case [1967] ECR 181 (Rec. 1967, p. 235), *Guissart*'s case (already cited), *Duffy*'s case (already cited), Case 27/71 *Keller*'s case [1971] 2 ECR 885 and Case 191/73

Niemann's case [1974] 1 ECR 571 (paragraph 6 of the Judgment).

The questions referred to the Court by the Tribunal, reflecting as I have said those arguments, are these:

'(1) If a pension payable by Belgium under the *invalidity* pension scheme for mineworkers as it at present results from the Arrêté Royal of 19 November 1970 and subsequent amending arrêtés is reduced pursuant to Article 46 (3) of Regulation (EEC) No 1408/71 by reason of benefits paid by other Member States, is such reduction in accordance with Article 51 of the Treaty of Rome?

(2) Are the competent institutions entitled to reduce benefits payable by them in applying Article 46 (3), where duplication of benefits awarded by different Member States results in the grant of benefits on the basis of *overlapping* insurance periods.'

As to the first question, the Commission was not slow of course to point out that the *Strehl* case was about an invalidity pension and indeed one payable under the very scheme that is here in issue. It must however in fairness be said that in the *Strehl* case the question was never raised or considered whether that case might be distinguishable from the *Petroni* case on that ground. However, the Commission and Counsel for Signor Manzoni referred also to the *Mancuso* case (already cited). The argument put forward by the FNROM, at all events as it was developed in this Court, was precisely the argument, based on the different characteristics of old age pensions on the one hand and of invalidity pensions on the other, that was so forcefully put by Professor Trabucchi as Advocate General in the *Mancuso* case, but which the Court nonetheless there rejected. The FNROM (and the Belgian Government) submitted that the *Mancuso* case was distinguishable because it was decided under Regulation No 3 which contained no provision quite like Article 46 (3), and because it was concerned with the applicability of the processes of aggregation and apportionment, which is not in issue here. However, the reasoning of the Court, in so far as it declined to draw a distinction between old age pensions and invalidity pensions, did not turn on those considerations. Nor, if the rationale of the decisions in the *Petroni* and *Strehl* cases is, as I have suggested, that the Council is not empowered by Article 51 of the Treaty to legislate for the reduction of a benefit conferred by national law alone, can it make any difference what kind of benefit is involved.

As regards the second question, there was considerable argument before us as to whether there was, under the present Belgian legislation, any correlation between the amount of a mineworker's invalidity pension and the amount of retirement pension that he would receive after being employed for 30 years or any other period. It was, I understood, conceded on behalf of Signor Manzoni and of the Commission that there had been such a correlation under earlier legislation. So much indeed appears from the Judgment of the Belgian Cour de Cassation in *Vittorino* v *FNROM* (2 October 1974, No R.G. 5059) to which we were referred. It was submitted however that the legislation on which that Judgment rested had been superseded and that the position was different in the case of pensions payable under the Arrêté Royal of 19 November 1970. I do not propose, my Lords, to examine the rather complex Belgian legislation on which the argument turned, grateful though I am to Counsel for the Commission and to Counsel for Signor Manzoni for their expositions of it. The matter being one of Belgian law, it would not be right for me to express any opinion on it. I will assume, in favour of the FNROM, that the effect of that law is as it stated it to be. Nonetheless it seems to me that the FNROM's argument is ill-founded. Certainly the dicta of the

Court in the cases cited in the Order for Reference afford no warrant for it. They were all concerned in so far as they are relevant at all to the present point, with the possible overlapping of insurance periods in a situation where the length of insurance periods is relevant to the computation of a benefit. Here, as I have pointed out, the right to benefit is dependent only on the completion of the qualifying period of ten years and, that right having been acquired by the completion of that period, the amount of benefit is not dependent in any way on the length of insurance periods. Signor Manzoni in fact worked in Belgian mines for 20 years and the period for which he worked in Italy when he was in his teens does not overlap those years. The irrelevance of that period was vividly brought out by Counsel for Signor Manzoni at the hearing when he told us (without being contradicted by Counsel for the FNROM or by Counsel for the Belgian Government) that, under the relevant Belgian legislation, periods of employment completed before the age of 20 are left out of account.

Thus it is that in my opinion the real problem in this case is whether Article 12 (2) of Regulation No 1408/71 prevents the FNROM from invoking Article 23 (1) of the Arrêté Royal. But that question is not raised by the Order for Reference, though it is raised by the Order for Reference in the *Greco* case, which, as I have said, was also made by the Tribunal du Travail of Charleroi.

I would accordingly answer the questions referred to the Court by the Tribunal in the *Manzoni* case as follows:

(1) Article 46 (3) of Regulation No 1408/71 of the Council is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two invalidity benefits acquired in different Member States by a reduction in the amount of such a benefit acquired under the national legislation of a Member State alone.

(2) The circumstance that the last-mentioned benefit may be acquired under the national legislation of the Member State concerned by the completion of a shorter qualifying period of insurance than would be required under the legislation of the same Member State for the acquisition of retirement benefit of corresponding amount is immaterial.

So I come, lastly, to the *Mura* and *Creco* cases.

The Mura and Greco cases

In the *Mura* case the facts are these.

Signor Mura was born on 28 October 1937. He worked as a miner in France from 1957 to 1962 and in Belgium from 1963 to 1973, when he became incapacitated. The FNROM awarded him, as from 1 November 1973, a full invalidity pension under the Arrêté Royal of 19 November 1970, on the strength of Belgian law alone. He was also awarded, as from the same date, a French invalidity pension based on his period of insurance in France. To this he was entitled as the result of aggregation and apportionment under Articles 45 and 46 (2). It seems that the French legislation relating to invalidity pensions for mineworkers is, unlike most French legislation relating to invalidity benefits, of Type B. Upon hearing of the award to Signor Mura of his French pension, the FNROM reduced his Belgian pension in purported pursuance of Article 46 (3). Here again the figures are complicated by the fact that Signor Mura is also entitled to benefit in Belgium in respect of occupational disease, in relation to which Article 23 (4) of the Arrêté Royal applies. The formal Decision of the FNROM was dated 24 March 1975 and it stated that Signor Mura was liable to refund a sum of BF 10 181 representing past overpayments to him of pension. Against that Decision Signor Mura appealed to the Tribunal du Travail of Mons, which, following the decision of

this Court in the *Petroni* case, annulled the Decision and declared that Signor Mura was entitled to his Belgian pension without reduction. The FNROM now appeals to the Cour du Travail of Mons. Before that Court the FNROM put forward its argument based on the suggestion that, under the Belgian legislation, a mineworker's invalidity pension corresponds to a retirement pension for 30 years service. The Cour du Travail seems to have been unimpressed by that argument. On the other hand that Court had before it a copy of the Note to which I have referred prepared by the Secretariat of the Advisory Committee on Social Security for Migrant Workers. It says, in its Order for reference:

'The real question that arises in this case is whether Article 12 of Regulation (EEC) No 1408/71 authorizing the overlapping of benefits prevails over national rules against overlapping in cases where the Community rules result in migrant workers being placed in a more favourable position than non-migrant workers.'

And that is the question on which this Court is invited by that Order to rule.

In the *Greco* case the facts are as follows.

Signor Greco was born on 9 August 1932. He worked in the building trade in Italy from 1949 to 1956 and as a miner in Belgium from 1956 to 1970, when he became incapacitated. The FNROM granted him, as from 1 April 1971, a full invalidity pension under the Arrêté Royal of 19 November 1970. Subsequently he was granted by the competent Italian institution an invalidity pension in respect of his period of employment in Italy. To this he was entitled as the result of aggregation and apportionment. Thereupon the FNROM decided to reduce his Belgian pension, but, in his case, it did so purely and simply in reliance on Article 23 (1) of the Arrêté Royal. The FNROM recognized that it was debarred from relying on Article 46 (3) by the Judgment of this Court in the *Petroni* case. the Decision of the FNROM, which was dated 9 November 1976, like its Decisions in the *Manzoni* and *Mura* cases set out the overpayments of pension, which the FNROM considered Signor Greco should refund, but it quantified them separately in so far as they related to the period before and to the period after 1 October 1972, the date when Regulation No 3 was replaced by Regulation No 1408/71. For the earlier period they were quantified at BF 10 260, for the later period at BF 41 433. Signor Greco now appeals to the Tribunal du Travail of Charleroi against that Decision. The Tribunal, in its Order for Reference, records its opinion that different considerations apply to the two periods. It puzzlingly asserts that no problem arises as to the period before 1 October 1972, the reduction applied to Signor Greco's pension for that period being in accordance with the decisions of this Court and the decision of the Cour de Cassation in the *Vittorino* case. It is not, of course, for me to seek to resolve that puzzle. In relation to the later period, the Tribunal refers to this Court the following question:

'Is Article 12 (2) of Regulation (EEC) No 1408/71 compatible with the reduction of an invalidity pension awarded by a Member State under Article 46 (1) on the ground that similar benefits are paid by the competent institution of another Member State, where such reduction is effected on the basis of provisions of the internal law of the first-mentioned Member State?'

The question put to this Court in the *Greco* case is thus in substance the same as that put to it in the *Mura* case.

To my mind it is a pure question of interpretation of Article 12 (2), and I approach it as such.

We were referred to two authorities which, it was said, had a bearing on the

question, namely the *Duffy* case (already cited) and Case 184/73 *Bestuur van de N.A.B.* v *Kaufmann* [1974] 1 ECR 517. Both of them were concerned with the interpretation of the first sentence of Article 11 (2) of Regulation No 3, corresponding to the first sentence of Article 12 (2) of Regulation No 1408/71. That first sentence, Your Lordships remember, provides that 'legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits ... may be invoked even though the right to such benefits was acquired under the legislation of another Member State'.

In the *Duffy* case what was in issue was the operation of a French legislative provision which admittedly, as a matter of French law, prevented only the duplication of benefits conferred by French legislation. The question was whether Article 11 (2) extended the operation of that provision so as to prevent a benefit conferred by French legislation being duplicated by a benefit conferred by Belgian legislation. The Court held that Article 11 (2) could not be invoked to that effect where the beneficiary was entitled to each benefit under the relevent national legislation alone and so did not need to rely on Community law to claim either of them. That authority can have no direct bearing on the present cases where the FNROM invokes Article 23 (1) of the Arrêté Royal on the footing that, as a matter of Belgian law and without recourse to Article 12 (2), it relates as well to benefits conferred by foreign legislation as to benefits conferred by Belgian legislation. But the *Duffy* case may, I think, have an indirect bearing here, for the reason I will explain in a moment.

The *Kaufmann* case was concerned with a Dutch legislative provision which, by its own force, applied only to prevent the duplication of Dutch social security benefits. But Herr Kaufmann could claim Dutch benefit only by invoking Community law. So the case was argued and decided on the footing that Article 11 (2) extended the operation of that Dutch provision so as to prevent in his case the duplication by the Dutch benefit of a German one. That authority too is not directly in point since, in the present cases, each of the Claimants is entitled to his Belgian pension without recourse to Community law. The only relevance of the *Kaufmann* case is, I think, to provide a contrast with the *Duffy* case.

The present cases turn on the interpretation not of the first sentence of Article 12 (2) but on that of the second, which excludes the operation of the first when, so far as relevant, 'the person concerned receives benefits of the same kind in respect of invalidity ... which are awarded by the institutions of two or more Member States in accordance with Article 46'.

In my opinion that provision can have no application in the present cases, for two reasons.

First, it operates by way of proviso to the first sentence of Article 12 (2) and so can apply only where that first sentence *prima facie* applies. Here the first sentence does not in my opinion apply, because the Claimants are entitled to their Belgian pensions independently of Community law. The present cases are in that respect analogous to the *Duffy* case. I do not overlook that in the *Duffy* case the person concerned was entitled to her benefits in both France and Belgium independently of Community law, whereas here the Claimants are entitled to their Italian or French pensions only by virtue of Community law, but I do not think, having regard to other authorities in this Court, that that can make any difference to their position in Belgium.

Secondly, and in any case, the Claimants' Belgian pensions were not awarded to them 'in accordance with Article 46'. They were awarded to them on the strength of Belgian law alone. To argue

otherwise, as was done on behalf of the Claimants, of the Commission and of the Italian Government, is to seek to revive the fallacy on which the main argument put forward on behalf of the ONPTS and of the Council in the *Petroni* case rested (as to which see [1975] ECR at p. 1167). True it is that the first paragraph of Article 46 (1) requires the competent institution of a Member State, as the first step in the computation prescribed by that Article, to ascertain, in effect, the amount of benefit, if any, to which the person concerned is entitled under the legislation of that Member State alone. But that does not mean that that person becomes entitled to that benefit by virtue of Article 46. Indeed, if it did, there would be no reason why the benefit should not be subjected to reduction under Article 46 (3). One cannot assert at the same time that the benefit is acquired independently of Article 46, so that Article 46 (3) cannot apply to it, and that it is acquired 'in accordance with' Article 46 for the purposes of Article 12 (2).

I find it of some comfort that my conclusion accords with that of the Dutch Government, and also of course with the dicta of the Court in the *Guissart, Mancuso* and *Massonet* cases, particularly those in the last two.

The Belgian and United Kingdom Governments both approached the matter on the footing that Article 12 (2) did in terms apply here. But the conclusions they drew from that differed.

The Belgian Government drew from it the conclusion that, if Article 46 (3) was incompatible with the Treaty, Article 12 (2) must be so too, for otherwise there would be nothing to prevent what the Belgian Government regards as 'unjustifiable' duplication of benefits in favour of migrant workers. Since in my opinion Article 12 (2) does not have the effect envisaged by the Belgian Government, there is no need for me to pursue that point.

The burden of the United Kingdom Government's observations seems to be that the ruling of the Court in the *Petroni* case must be wrong, or at all events wrong in so far as it applies to a case where the worker concerned is entitled to benefit in one Member State under the legislation of that State alone but entitled to benefit in another Member State only by reason of aggregation and apportionment under Articles 45 and 46 (2) of Regulation No 1408/71. The thought behind that last submission is intelligible enough, but it is far too late to suggest that it leads to the conclusion that the Council may legislate for a reduction, in such a case, in the benefit claimable under national law alone. What it means, as I was at pains to point out both in the *Petroni* case (see [1975] ECR at pp. 1166-1167) and in the *Strehl* case (see [1977] ECR at pp. 221-222), is that the Council may, if it thinks fit, legislate for a reduction in the benefit claimable only by virtue of Community law. Of that power, however, the Council has not availed itself. Perhaps this is because, as the examples contained in the Annex to the Commission's Observations in the *Mura* case evince, the most extreme cases of duplication of benefits in favour of migrant workers occur where such a worker is entitled to benefit in each Member State concerned under the legislation of that State alone. To that situation the suggestion of the United Kingdom Government would not of course be relevant.

The United Kingdom Government does however make one important point, which is closely akin to a point made by the Commission. This is that if, in a situation such as that prevailing in the present cases, the only provisions as to duplication of benefits that may be applied are those contained in national legislation, there is bound to be lack of uniformity in the treatment of migrant workers as between one Member State and another, inasmuch as the legislation of some Member States may contain no

such provisions whilst, in those Member States where such provisions do exist, their effect is likely to vary. The related point made by the Commission is that a problem may arise where, in a particular case, anti-duplication provisions contained in the legislations of several Member States *prima facie* apply. Which then, asks the Commission, is to prevail?

As to those points I would make the following comments, prefacing them with the observation that the function of this Court is to interpret Community instruments, in this instance Article 12 (2) of Regulation No 1408/71, not to reform them. If those instruments, correctly interpreted, lead to what are considered to be untoward results, the remedy lies in the hands of the Council, not in those of the Court. Nonetheless –

(1) There is nothing odd or unusual in migrant workers being treated differently in different Member States. As the Court has so often pointed out, that is, pace the Sozialgericht of Augsburg, the inevitable result of the fact that Community law does not (at all events as yet) attempt to do more than coordinate, without harmonizing them, the different social security systems of the Member States. The very thorough and enlightening observations of the Commission in the *Mura* case demonstrate that, short of such harmonization, there is no possible solution that will get rid of all anomalies.

(2) The net result of the fact that Article 12 (2) does not, if I am right, exclude, in circumstances such as those of these cases, the application of national anti-duplication provisions, is that, as the Dutch Government has pointed out, a migrant worker will, in such circumstances, be entitled, in each Member State, to whichever is the greater of the benefit to which he is entitled under Regulation No 1408/71, due account being taken of Article 46 (3), and the benefit to which he is entitled under the legislation of that Member State alone, due account being taken of any anti-duplication provisions that it may contain.

(3) As the Note, to which I have referred, prepared by the Secretariat of the Advisory Committee on Social Security for Migrant Workers records, the view is tenable that there is at present a lacuna in Article 7 of Regulation No 574/72, in that that Article does not resolve problems arising from the simultaneous incidence of different national anti-duplication provisions except where Article 12 of Regulation No 1408/71 in terms applies.

I must lastly advert to a fundamental point raised by the Commission. This is that, if it be right that, as the Dutch Government submits and as I think, Article 12 (2) does not prevent the application in such cases as these of national anti-duplication provisions, the way is open for Member States to achieve by means of their own legislation precisely the result that the Court has held that it was not open to the Council to achieve by means of Article 46 (3). The question is whether such a result is compatible with the Treaty.

I think it is. The Treaty does not purport to regulate what social security benefits may be conferred on workers by the laws of Member States. All that the Court has held is that the Treaty does not confer on the Council power to take away from a worker rights conferred on him by the law of a Member State. As I pointed out in the *Strehl* case ([1977] ECR at pp. 223-224), the question what constitutes 'unjustifiable' duplication of benefits is a moral or political one, not one that can be judged by objective legal standards. It is not a question that the authors of the Treaty sought to resolve, and I find nothing shocking in the conclusion that it is one over which the legislatures of Member States retain a measure of discretion.

What we were told, however, about the practical effects of the application of Article 23 (1) of the Arrêté Royal in the *Greco* case leads me to voice a reservation. It would clearly be incompatible with the Treaty for a Member State so to operate a provision of its national legislation as to bring about a situation in which one who had worked both in that Member State and in another received less in the aggregate than he would in fact receive if he had never worked elsewhere than in that State. That would indeed be discrimination against a migrant worker. Since the matter has been barely argued, I refrain from saying more about it, but I think that Your Lordships' ruling in the *Mura* and *Greco* cases should allude to it.

In the result I am of the opinion that that ruling should be to the effect that, where a benefit is acquired under the national legislation of a Member State alone, Article 12 of Regulation No 1408/71 does not preclude the operation of a provision of that legislation for reduction of that benefit in so far as it overlaps with a benefit, acquired under the legislation of another Member State, so long as the operation of that provision entails no discrimination against a migrant worker.