OPINION OF ADVOCATE GENERAL GULMANN

delivered on 16 February 1993 *

Mr President,
Members of the Court,

1. Under the Belgian legislation on retirement pensions, the amount of the pension depends on the length of the period during which the person concerned was employed in Belgium. 45 years' employment in Belgium confers a right to a retirement pension at the full rate. For the purposes of calculating the length of the period of employment, the Belgian legislation permits periods during which an employed person was unfit for work on the ground of invalidity to be treated as periods of employment. This is conditional, however, upon the person concerned having been employed in Belgium at the time when he stopped working.

In the cases now before the Court the Tribunal du Travail (Labour Court) Brussels, has asked the Court to interpret the provisions of the Council regulations concerning the coordination of the social security schemes [1] of the Member States so as to enable it in particular to give a ruling on the question of the extent to which the abovementioned condition is compatible with Community law.

Summary of facts of main actions

2. The plaintiffs in the main proceedings, Mr Lepore and Mr Scamuffa, are Italian nationals who worked for a time in Belgium, namely from 1951 to 1954 and from 1951 to 1959 respectively. Mr Lepore also worked in Italy, Luxembourg and Germany, whilst Mr Scamuffa worked only in Italy in addition to Belgium.

Mr Lepore became unfit for work on the ground of invalidity in 1986, when he was employed in Luxembourg. Since then he has been in receipt of invalidity benefits from Luxembourg and Germany which have been paid, without being recalculated, in the form of old-age pensions since he reached the age of 65. He has also received an Italian old-age pension since reaching the age of 60. Since June 1987 he has been paid a pro-rata Belgian invalidity benefit, which was converted into an old-age pension in 1990.

Mr Scamuffa became unfit for work on the ground of invalidity in 1978, when he was employed in Italy. Since then he has received an Italian invalidity pension, which, under Italian law, continues to be paid as such even though he has reached the statutory retirement age. Since December 1980 he has been

* Original language: Danish.

1 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).
A number of the provisions applicable here have been amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), which came into force on 1 June 1992; see the transitional provisions set out in Article 2(6) of the regulation. As the Commission has pointed out, the amendments have no bearing on the replies to the questions in the present case.

paid a pro-rata Belgian invalidity benefit, which was converted into an old-age pension in 1990.

Under Belgian law, entitlement to invalidity benefits ceases at the age of 65 and a claim for an old-age pension must be submitted. That pension is calculated according to different criteria from those applying to the calculation of invalidity benefit.

When calculating the old-age pensions of Mr Lepore and Mr Scamuffa, the Office National des Pensions ('ONP') refused to recognize the periods when they were in receipt of Belgian invalidity benefits, on the ground that the conditions for treating those periods as periods of employment were not fulfilled. The main actions relate to the relevant decisions.

The Belgian legislation and the ONP's interpretation of it

3. Under Belgian law, the conditions required for periods of incapacity for work to be treated as periods of active employment are, *first*, that the person concerned must have received benefits laid down by the Belgian legislation on sickness and invalidity insurance and, *secondly*, that one of the two following alternative conditions must be fulfilled, namely *either* that the person concerned is covered by the Belgian social security scheme for employed persons *or* that he had the status of an employed person at the time when he stopped working, in addition to which the degree of incapacity for work must in this case not be less than 66%. [2]

The ONP interprets the requirement that the person concerned should have had the *status of an employed person* at the time when he stopped working as meaning that the person concerned must have been employed *in Belgium* at that date. [3] If this condition is fulfilled, the period of invalidity is treated fully as a period of active employment, irrespective of its duration and however short the period of actual work in Belgium.

In this context, the ONP refused to treat the periods of invalidity in question as periods of employment, on the ground that Mr Lepore and Mr Scamuffa were not employed in Belgium at the date when they stopped working by reason of invalidity, but were working in Luxembourg and Italy respectively.

First question

4. The main question here is whether it is permissible under Community law to require the person concerned to have been employed in Belgium at the time when invalidity supervened, as a condition for treating periods of invalidity as periods of employment for the purposes of calculating retirement pension. [4]

2 — See Article 34 of the Belgian Royal Decree of 21 December 1967 on general regulations for the retirement pension and survivors' pension scheme for employed persons.

3 — The ONP bases this interpretation on Article 1 of Royal Decree No 50 of 24 October 1967, which provides that the retirement pension scheme is established for 'employed persons who have been employed in Belgium under a contract of any kind for the hire of labour'.

4 — It is clear from the wording of the national court's question that it is concerned with whether this condition is compatible with Community law. It is therefore unnecessary to decide whether the ONP's first ground for refusing to take account of the periods of invalidity is permissible under Community law. This ground was that, by virtue of an administrative practice in Belgium, there is no right for a period of invalidity to be treated as a period of active employment if the person concerned received benefits under the Belgian legislation on sickness and invalidity insurance only because of the application of the Community rules, and was simultaneously in receipt of foreign invalidity benefits.

5. The Commission and the plaintiffs in the main proceedings argue that that condition is contrary to Community law. In their opinion, the Belgian authorities must treat employment in other Member States at the time in question as if it had been employment in Belgium.

6. If accepted, this point of view will have important practical consequences. For example, the effect will be that a person who works for one year in Belgium and then 19 years in another Member State where he is found to be disabled and where he remains for the next 29 years, being incapable of working, until he can claim an old-age pension at the age of 65, will be entitled to a Belgian old-age pension on the basis of a period of 30 years. Although Mr Lepore and Mr Scamuffa are not in this extreme situation, it must be observed that their only connection with Belgium is a few years' employment, namely four and nine years respectively, which of course entitles them to a pro-rata Belgian retirement pension, although they were employed and resided outside Belgium at all other material times.

7. By its first question, the Tribunal du Travail, Brussels, seeks to establish to what extent it follows from Article 43(1) or Article 45(1) of Regulation No 1408/71 that the condition in question must be deemed to be fulfilled 'having regard to the fact that the person concerned was still at that time an employed person in a Member State of the European Communities'.

8. Article 43(1) of Regulation No 1408/71 provides that invalidity benefits are to be converted into old-age benefits under the conditions laid down by the legislation under which they were granted and in accordance with Chapter 3 of the regulation, that is to say, the provisions concerning old age and death (pensions).

In the order making the reference, the national court points out that Mr Lepore and Mr Scamuffa were entitled to Belgian invalidity benefits because of the aggregation of insurance periods completed in different Member States and that the benefits were calculated in proportion to the Belgian share of those periods. The court therefore considers it necessary to ascertain whether it follows from Article 43 that the same principles of aggregation as those governing the grant of invalidity benefits must be applied to the grant of a retirement pension.

In my opinion, the wording of Article 43, which expressly states that old-age benefits are to replace invalidity benefits 'under the conditions laid down by the legislation or legislations under which they were granted', is sufficient to reject this interpretation.

Article 45(1), which appears in the chapter concerning old age and death, provides as follows:

'The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence shall take into

account, to the extent necessary, periods of insurance or residence completed under the legislation of any Member State as if they were periods completed under the legislation which it administers.'

The national court expressly points out that Belgian law does not make the acquisition of the right to a pension subject to a minimum period of employment. The court is therefore in no doubt that Article 45 is not directly applicable, but considers nevertheless that it is necessary to ask whether the disputed condition is a prior condition within the meaning of Article 45, so that in the present case the period in question should be treated as equivalent under the Belgian retirement pension scheme by applying the principle of aggregation by analogy.

I would agree with the Commission that Article 45(1) cannot be applied directly or by analogy in the present case. Article 45(1) deals with the aggregation of periods for the purpose of the acquisition of rights and, as I have said, such aggregation is not necessary in order to acquire a right to a retirement pension in Belgium. Furthermore, Article 45(1) deals with the aggregation of periods, whereas the question here is whether employment in another Member State at a particular time must be treated as employment in Belgium at that time.

9. However, as the Commission observes, it may be necessary to inquire whether other Community rules must be taken into consideration in order to reply to the question from the national court.

The extent to which periods of invalidity may be treated as periods of insurance is a question which affects the calculation of the retirement pension in question. Therefore it is necessary to start with Article 46 of Regulation No 1408/71, which deals with the calculation of benefits. The first sentence of Article 46(1) provides that the competent institution

'shall, in accordance with the provisions of the legislation which it administers, determine the amount of benefit corresponding to the total length of the periods of insurance or residence to be taken into account in pursuance of such legislation.'

10. Article 46(1) does not define 'periods of insurance'. However, a definition is given by Article 1(r) of the regulation, which states that for the purpose of the regulation:

'"insurance periods" means periods of contribution or periods of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.'

The Court has held that the question of what periods should be treated as periods of insurance must be determined by reference to the criteria laid down by national law alone, provided that the legislation in question

observes the provisions of Articles 48 to 51 of the Treaty. [5]

11. Before I go on to examine the implications of Articles 48 to 51 of the Treaty, a few remarks may be appropriate on the relationship between a condition such as that which is at issue in the main proceedings and the scheme of the regulation.

Community law does not include an obligation, for the purpose of calculating retirement pensions, to treat periods of employment completed in other Member States as periods of employment in the Member State where the pension is claimed. Therefore the scheme of the regulation clearly provides that, for the purpose of calculating benefits, insurance periods give rise to rights in the Member State under whose legislation the periods were completed. In the *Rönfeldt* judgment the Court held as follows:

'Consequently, Regulation No 1408/71 does not provide that periods of contribution completed in one or more Member States are to be added, for the purpose of increasing the amount of the pension, to the periods of contribution completed in the Member State in which the pension is sought. Thus it is only for the acquisition of the pension entitlement that periods of insurance completed in the various Member States are aggregated.' [6]

As I have already said, it appears from Article 1(r) of the regulation that the definition of periods of insurance covers periods of employment and periods treated as such and, in this context, it must be observed that the place where a person was last employed may determine the legislation under which a period which was not in itself a period of employment must be deemed to have been completed. [7]

Mr Lepore and Mr Scamuffa were last employed in Luxembourg and Italy respectively and it appears from the case-file that they still reside in those Member States. Consequently there is no doubt that they were subject to the legislation of Luxembourg and Italy respectively during the periods of invalidity in question here.

12. Following this reasoning, it could be argued that the condition in Belgian law to

5 — See Case 14/67 *Landesversicherungsanstalt Rheinland-Pfalz* v *Welchner* [1967] ECR 427, Case 2/72 *Murru* [1972] ECR 333, paragraph 10, and Case C-302/90 *CAAMI* v *Faux* [1991] ECR I-4875, paragraphs 25 to 28.

6 — Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, paragraph 19. Conversely, the regulation does not preclude a Member State from treating periods completed in other Member States as periods completed on its territory: see Case 21/87 *Borowitz* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, paragraph 25.

7 — It is clear from Article 13(2)(a) of Regulation No 1408/71 that workers are subject to the legislation of the Member State where they are employed or where they were last employed (see Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821). However, the Court held that that provision was not applicable to workers who had finally given up all employment. In that case, the Member States may make membership of the national social security scheme subject to residence conditions. Conversely, it is for the national legislation in question to determine whether the fact that a person receives benefits connected with the cessation of his last employment means that he must be deemed to be insured under a social security scheme: see Case C-245/88 *Daalmeijer* [1991] ECR I-555. See also the recent judgment in Case C-253/90 *Commission* v *Belgium* [1992] ECR I-531, where the Court held that 'persons such as workers who have definitely ceased to work and who are not in one of the situations referred to in [Article 13(2) and Articles 14 to 17 of the regulation] may be subject simultaneously to the legislation of more than one Member State'. The question is not relevant here, as Mr Lepore and Mr Scamuffa still reside in the Member State where they were last employed.

the effect that the persons concerned must have been employed in Belgium at the time when invalidity supervened takes account of the requirement that they must have been subject to Belgian legislation during the period of invalidity or, in other words, that the period of invalidity must have been completed under Belgian legislation.

13. In this connection it could also be argued that:

— in the present case, Mr Lepore and Mr Scamuffa are not losing rights which they had acquired or were in the course of acquiring in Belgium, and

— the fact that their situation differs from what it would have been if they had remained in Belgium is merely a consequence of the fact that they were last employed and therefore completed the periods of invalidity in question under the legislation of Member States which lays down treatment for workers who become unfit for work by reason of invalidity which is different but not necessarily less favourable as regards the calculation of the old-age pension than it would be in Belgium.

As the Court has observed on several occasions, Article 51 leaves in being differences between the social security systems of each Member State and, consequently, in the rights of persons working in the Member States. Therefore the substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 51 of the Treaty. [8]

14. Moreover, there is nothing in the present cases to show that the disputed rule does not affect every person falling within its ambit in accordance with objective criteria without regard to nationality. [9]

15. If the Court were to accept the reasoning set out above it would be possible, on those grounds alone, to reply to the question from the national court by saying that a condition such as that at issue here is not contrary to Community law because it cannot be inferred from Community law that there is an obligation to treat periods of invalidity completed under the legislation of other Member States as periods of invalidity completed under the legislation of the Member State where the pension is claimed.

16. Although of some weight, those considerations are not necessarily decisive with regard to periods of invalidity which, under the law of one country, are treated as periods of employment. Thus the Court has settled, in a large number of cases concerning the

8 — See Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, paragraph 12, and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22.

9 — See Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, paragraph 18, where the Court held as follows:
'By prohibiting every Member State from applying its law differently on the ground of nationality, within the field of application of the Treaty, Articles 7 and 48 are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality.'
This is also to be found in Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 15.

social security schemes of the Member States,

— that whilst in principle 'the conditions governing the right or obligation to become a member of a social security scheme are a matter to be determined by the legislation of each Member State, provided always that there is no discrimination in that connection between the nationals of the host State and those of other Member States', [10] in some cases it is nevertheless necessary to give priority to the fact

— 'that the provisions of Regulation No 1408/71 were adopted to implement Article 51 of the Treaty and must be interpreted in the light of the objective of Article 51, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers, which is one of the foundations of the Community', [11]

— 'that Articles 48 to 51 of the Treaty and the Community legislation adopted in implementation thereof, in particular Regulation No 1408/71, are intended to prevent a worker who, by exercising his right of free movement, has been employed in more than one Member State from being placed in a worse position than one who has completed his entire career in only one Member State', [12] and

— 'that although, as the Court has held, Article 51 of the Treaty leaves in being differences between the social security systems of the Member States and hence in the rights of the people working there (...), it is also settled that the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State; such a consequence might discourage Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.' [13]

17. In this connection it is not hard to imagine cases in which the condition at issue here could discourage workers from exercising their right to freedom of movement if that condition applied to them.

10 — See, most recently, Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

11 — See Case 254/84 *De Jong* v *Soziale Verzekeringsbank* [1986] ECR 671, paragraph 14. See also Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraph 16.

12 — See *Masgio*, cited in footnote 11, paragraph 17.

13 — See the judgment in the *Paraschi* case, cited in footnote 10, paragraph 22, and the Opinion of Advocate General Darmon delivered on 14 January 1993 in Case C-165/91 *S. J. M. van Munster*, particularly paragraphs 37 to 40. Judgment has not yet been given in this case. See also the *Masgio* judgment, cited in footnote 11, paragraph 18.
In the judgment in the *Faux* case, cited in footnote 5, paragraph 28, the Court observed more particularly that 'the provisions defining insurance periods in Regulations Nos 3 and 1408/71 may not be interpreted as meaning that they may result in depriving migrant workers of the advantages which they could have claimed under the legislation of a single Member State, thus posing an obstacle to the objective pursued by Articles 48 to 51 of the Treaty ...'.

It is not unreasonable to assume that a worker who was employed for many years in Belgium and perhaps has health problems would not exercise his right under the Treaty to work in another Member State because this would cause him to lose the right to the recognition of any period of invalidity for the purposes of the Belgian retirement pension.

The disputed condition attaches very important legal consequences — full recognition or non-recognition of periods of invalidity — to a condition which can be fulfilled only by a person who continues to work in Belgium up to the time when incapacity supervenes.

18. In spite of this, it is not certain that the disputed condition is contrary to Community law. It should not be overlooked that if this condition were found incompatible with Community law it would mean that any employment in Belgium, for however short a period, would entitle the worker in question to have periods of invalidity recognized, wherever they in fact occurred, for the purposes of the calculation of a Belgian retirement pension.

19. The observations submitted by the Commission refer to a number of judgments to support its view *that* the disputed condition is contrary to the principle of equal treatment in Article 48 of the Treaty and Article 3 of the Regulation and *that* if employment in other Member States at the material time is not treated as employment in Belgium, this amounts to indirect discrimination contrary to the Treaty. [14] However, it does not seem to me that these judgments confirm the idea that Articles 48 to 51 of the Treaty preclude the Belgian authorities from introducing and applying a condition such as that in issue here, in the same way that I do not think that there are, in the rest of the Court's case-law concerning the application of the principle set out in Articles 48 to 51 of the Treaty, any judgments which are directly comparable, so far as their facts are concerned, to the present cases. [15]

14 — On this point the Commission refers to Case 15/69 *Ugliola* [1969] ECR 363, Case 184/73 *Kaufmann* [1976] ECR 517, Case 33/75 *Galati* [1975] ECR 1323, Case C-228/88 *Bronzino* v *Kindergeldkasse* [1990] ECR I-531, and Case C-12/89 *Gatto* v *Bundesanstalt für Arbeit* [1990] ECR I-557, and, with regard to cases where there were no grounds for the recognition of events in other Member States, the judgment in the *Kenny* case, cited in footnote 9, and Case 66/77 *Kuyken* [1977] ECR 2311.

15 — See, in this connection, the judgments cited in footnotes 10 to 13, and particularly the recent Opinion of Advocate General Darmon delivered on 14 January 1993 in Case C-165/91 *S. J. M. van Munster*.
On the other hand, there is perhaps one judgment supporting the opposite view. This is the judgment in the *Welchner* case, cited in footnote 5, which concerned certain German rules for the calculation of invalidity benefits which required, as a condition for periods of military service to be treated as so-called substitution periods within the meaning of the German legislation, the person concerned to have begun work in Germany entailing compulsory membership of the invalidity insurance scheme within a certain time-limit which began to run shortly after the end of military service.
The plaintiff in the main action argued that the fact that he had taken up such work in France was sufficient for the abovementioned purpose.
On the basis of an interpretation of Regulation No 3, which applied at that time and which basically corresponds to Article 1(r) of Regulation No 1408/71, the Court held that Germany was not obliged, in the circumstances of that particular case, to take account of a period completed under the legislation of another Member State. Therefore it was not contrary to Community law to require, as a condition for recognizing a period as equivalent, the person concerned to have been an employee in the Member State shortly after the end of the period in question.
However, it should perhaps be mentioned that the grounds of the judgment also referred to specific provisions of an annex to the regulation and that those provisions may have been of decisive importance to the decision.

20. In my opinion, the question as to whether the application of Article 46(2) of Regulation No 1408/71 supplies an appropriate answer to the issues raised in this case is worth asking.

21. It appears from Article 46(1) that the competent institution cannot calculate the old-age pension merely on the basis of the periods to be taken into account under the legislation of the Member State, but must also calculate it in accordance with the principle of pro-rata calculation set out in Article 46(2). The recipient is entitled to the higher of the two amounts.

Under Article 46(2)(a), the competent institution must for this purpose calculate the so-called theoretical amount, that is to say, the amount which

'the person concerned could claim if all the periods of insurance or residence completed under the legislations of the Member States to which the employed (...) person has been subject had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded.'

On the basis of the theoretical amount the institution then determines the actual amount in accordance with Article 46(2)(b)

'in the ratio which the length of the periods of insurance or residence completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance and residence completed under the legislations of all the Member States concerned'. [16]

22. If Article 46(2)(a) could be interpreted as meaning that the competent Belgian authorities must, when calculating the theoretical amount, always take account of periods of invalidity as periods treated as periods of insurance, even if the disputed condition is not fulfilled, in my opinion this would produce a result which would take sufficient account of the interests of migrant workers. In such a case, I consider that the condition in question would not constitute a restriction contrary to Articles 48 to 51 of the Treaty.

23. However, it is not possible to construe Article 46(2)(a) in a way which would lead to this conclusion.

This provision requires the aggregation of periods 'completed under the legislations of the Member States to which the employed or self-employed person has been subject'. It cannot be inferred from this that the Belgian authorities have an obligation directly to treat periods of invalidity as periods of employment in Belgian law. Moreover, as the Commission has observed, it follows from Article 1(r) of the regulation that the extent to which a period must be deemed to be treated as a period of insurance must be governed by the legislation under which that period was completed. [17]

16 — As regards the application of these calculation rules, see most recently Case C-5/91 *Di Prinzio* [1992] ECR I-897 and Joined Cases C-90/91 and C-91/91 *Casagrande* [1992] ECR I 3851.

17 — See the judgment in the *Murru* case, cited in footnote 5

24. Since the abovementioned interpretation of Article 46(2)(a) is not possible, it must be concluded that, at least in certain situations, the rights of migrant workers under the Treaty will not be adequately protected if the Commission's view of the law is not upheld.

Therefore it seems to me to accord with the basic thrust of the Court's case-law to conclude that it follows from Articles 48 to 51 of the Treaty in conjunction with Article 3 of Regulation No 1408/71 that the Belgian authorities cannot, as a condition for the treatment of periods of invalidity as periods of insurance require migrant workers to have been employed in Belgium at the time when incapacity for work supervened.

25. The problems which this conclusion may entail for the Belgian authorities can, it seems to me, be resolved by them by amending the relevant legislation. A possible solution is mentioned below in connection with the reply to the third question.

Second question

26. In its second question the national court seeks an interpretation of Article 15 of Regulation No 574/72. Article 15 contains general rules on the aggregation of periods, particularly with the object of settling problems of overlapping where insurance periods completed in two or more Member States 'coincide'. In the context of the present cases this provision is important for the purpose of calculating the old-age pension under Article 46(2) of Regulation No 1408/71. In fact it is clear from Article 46 of Regulation No 574/72 that Article 15(1)(b), (c) and (d) is applicable to this situation.

27. As I have already said, it is clear from Article 46(1) of Regulation No 1408/71 that the competent institutions must always calculate the 'independent benefit' in accordance with Article 46(1) and the pro-rata benefit in accordance with Article 46(2), the recipient being entitled to whichever is the higher of the two.

However, calculation in accordance with paragraph (2) will hardly be of practical interest in the present case if the Commission's view is accepted and it is assumed that the plaintiffs in the main proceedings are entitled to have periods of invalidity taken into account for the purposes of the calculation of the old-age pension, given that the condition laid down by the Belgian legislation is not compatible with Articles 48 to 51 of the Treaty.

28. In its observations on the second question from the national court, the Commission states that Article 15(1)(c) of Regulation No 574/72 'refers to a situation where a period treated as a period of insurance under the legislation of one Member State (in the present case, Belgium) coincides with a period of insurance or residence other than a period treated as such, completed under the legislation of another Member State (here the legislation of Italy in one case and of Luxembourg in the other)', and that 'it is therefore necessary to ascertain whether or not the

periods when Italian and Luxembourg invalidity benefits were paid should be deemed to be insurance periods'. According to the Commission, a similar question arises with regard to Article 15(1)(d), where it is necessary to ascertain 'whether the Italian and Luxembourg legislation deems the respective periods to be periods treated as such'.

The Commission goes on to propose that the reply to the second question should be that the application of the relevant provisions of Regulation No 574/72 'depends on how the periods concerned are to be categorized under the national legislation in question.'

29. I propose that the reply to the question should be as the Commission has suggested.

Third question

The national court states that the Belgian legislation provides for notional remuneration to be taken into consideration in the context of taking account of periods treated as periods of insurance for the purposes of calculating the retirement pension [18] and, in the third question, asks the Court whether it must be considered that 'such remuneration is to be taken into account subject to the application of the same proportion as that on the basis of which the invalidity benefits themselves were awarded'.

The order for reference shows that on this point the ONP stated that 'although the interpretation suggested by that question is extremely interesting and fair, "it should rather be viewed in the context of a suggested change in Belgian law than as a question to be referred to the Court of Justice of the European Communities for a preliminary ruling"'.

The Commission has proposed the following reply to the third question:

'Where, for the purposes of calculating an old-age pension, the legislation of a Member State establishes notional remuneration for the purposes of taking into account periods treated as periods of insurance, there is nothing, as Community law stands at present, to prevent or to compel the apportionment of that notional remuneration on the same basis as that used for the apportionment of the invalidity benefits granted up to the date when the right to the old-age pension was acquired.'

I share the Commission's view that it is not possible to interpret the relevant Community provisions in such a way as to lead to the apportionment described in the question. [19] This objective must be achieved, if necessary, by adopting suitable national measures.

18 — See Article 24a of the Belgian Royal Decree of 21 December 1967

19 — On this point, see Case 50/75 *Massonet* [1975] ECR 1473

Conclusions

30. Consequently I propose that the Court reply as follows to the questions referred by the national court:

Articles 48 to 51 of the EEC Treaty and Article 3 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as meaning that, when a migrant workers' old-age pension is calculated, they prevent him from losing the right, laid down by national legislation, to have periods of invalidity treated as periods of employment, solely on the ground that he was not employed in the Member State in question at the time when incapacity for work supervened, provided that he was employed in another Member State at that time.

The question of the extent to which such periods of invalidity must be taken into account as periods of insurance for the purpose of calculating the theoretical amount in accordance with Article 46(2)(a) of Regulation No 1408/71 must be determined by the legislation under which those periods were completed or are deemed to have been completed. The question whether Article 15(1)(b), (c) and (d) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 should be applied will then depend on how the periods concerned are to be categorized under the legislation of the different Member States.

Where, for the purposes of calculating an old-age pension, the legislation of a Member State establishes a notional remuneration for the purposes of taking account of periods treated as of insurance periods, there is nothing, as Community law stands at present, to prevent or to compel the apportionment of that notional remuneration on the same basis as that used for the apportionment of the invalidity benefits granted up to the date when the right to the old-age pension was acquired.