2. Where there is only one institution providing an independent benefit for the purposes of Article 46 (1) of Regulation No 1408/71, that institution alone must reduce its benefit pursuant to the second subparagraph of Article 46 (3) and must reduce it by the full amount by which the total sum of the benefits calculated in accordance with Article 46 (1) and (2) exceeds the limit referred to in the first subparagraph of Article 46 (3).

REPORT FOR THE HEARING
delivered in Case 323/86 *

I — Facts and procedure

Giuseppe Collini, an Italian migrant worker, spent seven years of his working life employed in Italy and 35 years employed in Belgium. Consequently, he is entitled to an old-age pension in both those countries.

The Office national des pensions pour travailleurs salariés (National Pensions Office for Employed Persons, hereinafter referred to as 'ONPTS') calculated the amount of his Belgian old-age pension by applying the rule against overlapping benefits contained in Article 11 ter of Royal Decree No 50 on retirement pensions and survivor's pensions for employed workers (hereinafter referred to as 'Royal Decree No 50').

Under the Belgian legislation, the 35 years of employment in Belgium would themselves, that is to say regardless of the period of employment in Italy, have entitled Mr Collini to a pension of BFR 326 389. That amount would have been arrived at by the addition to the 35 years of actual employment of eight additional years of notional cover, pursuant to Article 11 bis of Royal Decree No 50.

However, the ONPTS applied the rule against overlapping benefits contained in Article 11 ter of Royal Decree No 50 to take into account Mr Collini's seven years of employment in Italy. Pursuant to that rule, it reduced the number of years of notional cover from eight to three. In view of the fact that a complete working life in Belgium cannot exceed 45 years, and of the fact that Mr Collini actually worked 35 years in Belgium and seven years in Italy, three additional notional years were sufficient to make up the maximum of 45 years. On the basis of that national rule against overlapping benefits, the ONPTS finally gave Mr Collini a pension of BFR 300 490.

The Belgian pension, adjusted in that way, was paid in addition to an Italian pension of about BFR 23 829. That pension was granted by the competent Italian institution on the basis of the total of the periods of

* Language of the Case: French.

insurance completed in Italy and in Belgium (the period of seven years in Italy could not of itself serve as a basis for an Italian pension).

Mr Collini lodged an appeal against the ONPTS decision, challenging the manner in which the latter had calculated the amount of his Belgian old-age pension. His appeal is based on the fact that the sum of the Belgian pension, adjusted pursuant to the anti-overlapping rule contained in Article 11 ter of Royal Decree No 50 (BFR 300 490), and of the Italian pension (BFR 23 829) falls short of the amount of the Belgian pension which would have been payable to him under the Belgian legislation if his working life had been limited to 35 years' employment in Belgium (BFR 326 389). Mr Collini considers that he is entitled at least to the latter amount. He considers that entitlement to be a right acquired under Belgian legislation. According to Mr Collini, the ONPTS has penalized him for his mobility as a migrant worker.

He also wishes the ONPTS to adjust the amount of his Belgian pension by applying not the abovementioned national anti-overlapping rule but the more favourable 'Community' anti-overlapping rule contained in Article 46 (3) of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community ('Regulation No 1408/71').

In those circumstances the tribunal du travail (Labour Tribunal), Nivelles, by judgment of 16 December 1986, submitted two questions to the Court on the interpretation of Article 46 (3) of Regulation No 1408/71, concerning the procedures for the calculation of the old-age benefits to which an employed worker who has worked in several Member States is entitled. The questions are as follows:

'(1) In the cases in which a benefit determined under Article 46 (1) of Regulation No 1408/71 is subject to the reduction provided for in Article 46 (3), must that reduction always be applied, or only where insurance periods are duplicated, as the preamble to the regulation (eighth recital) would appear to suggest?

(2) Having regard to the fact that the first subparagraph of Article 46 (3) refers to Article 46 (1) and (2) whilst the second subparagraph refers only to the provisions of Article 46 (1), how exactly is the adjustment factor to be determined when only one of the benefits in question is determined according to the provisions of Article 46 (1)?'

According to the eighth recital in the preamble to Regulation No 1408/71, Article 46 (3) is designed 'to avoid unjustified overlapping of benefits, which could result in particular from the duplication of insurance periods and other periods treated as such' where a migrant worker is entitled to old-age benefits in different Member States.

For that purpose, the first subparagraph of Article 46 (3) fixes the ceiling subject to which a migrant worker is entitled to the sum of those benefits. That ceiling corresponds to the amount to which the worker would have been entitled if he had completed all the insurance periods in question not in different Member States but in the Member State whose legislation would have given him the highest pension.

In other words, the ceiling corresponds to the highest of the 'theoretical' amounts referred to in Article 46 (2) (a). The second subparagraph of Article 46 (3) provides for the application of an adjustment factor where the sum of the benefits exceeds that ceiling.

The first question submitted concerns the conditions for the application of Article 46 (3). The tribunal du travail asks whether the rule against overlapping benefits contained in that article applies to all cases of unjustified overlapping, that is to say to all cases where the ceiling is exceeded, or only to those cases where the ceiling is exceeded as a result of the duplication of insurance periods. The second question submitted concerns the detailed arrangements for the application of the second subparagraph of Article 46 (3). The national court asks precisely how the corrective factor referred to in that provision is determined.

II — Written observations submitted to the Court

A — *The first question: Does the anti-overlapping rule contained in Article 46 (3) apply to all cases of unjustified overlapping or only where such overlapping is due to the duplication of insurance periods?*

Mr Collini maintains that Article 46 (3) applies only where there is duplication of insurance periods.

He concedes, however, that there is in fact a duplication in the present case. He explains that, on the one hand, the 43 years of insurance cover which he can claim in Belgium under Article 11 bis of Royal Decree No 50 (35 actual years and eight notional years) and, on the other, the seven years which he can claim in Italy, exceed by five years the period of 45 years which is considered in Belgium to represent a complete working life. In those circumstances, there is a duplication of insurance periods for at least five years. For that reason, the rule against overlapping benefits contained in Article 46 (3) applies to the present case.

According to the *ONPTS*, the application of Article 46 (3) is not limited only to the case of duplication of insurance periods. It is clear that the term 'in particular' used in the eighth recital in the preamble to Regulation No 1408/71 does not mean 'exclusively'. Article 46 (3) therefore applies to all cases of unjustified overlapping, that is to say to all cases where the sum of the benefits in question exceeds the limit of the highest theoretical amount determined by the first subparagraph of Article 46 (3). The ONPTS does not deny that that is so in the present case.

The ONPTS considers, moreover, that in the present case there is no duplication of insurance periods. The notional additional years granted in Belgium under Article 11 bis of Royal Decree No 50 do not duplicate the insurance periods completed in Italy because the notional additional years do not relate to a specific period of time.

The *Italian Government* also takes the latter view and maintains that, where there is another insurance period under the legislation of a second Member State, it does not necessarily follow that there is duplication as between that insurance period and

the notional additional years recognized by the legislation of the first Member State.

Like the ONPTS, the *Commission* considers that the application of Article 46 (3) does not necessarily require there to be a duplication of insurance periods. No one would deny, for example, that that provision is applicable to the overlapping of invalidity benefits, where one was acquired under national legislation which takes no account of the period of insurance for determination of its amount (known as 'type A' legislation). In such circumstances, it necessarily follows that there is no duplication of insurance periods because one of the benefits is calculated according to the length of the insurance period and the other is not.

B — *The second question: How is the adjustment factor provided for in the second subparagraph of Article 46 (3) determined where only one of the benefits concerned is determined in accordance with Article 46 (1)?*

It should be borne in mind, at the outset, that the benefit determined in accordance with 46 (1), to which the National Court refers, is one of the kind described as 'independent', that is to say those whose determination does not depend upon the completion of an insurance period in another Member State. The national court refers to the fact that in this case only the Belgian benefit can be determined in accordance with Article 46 (1), since Mr Collini would be entitled to it even if he had not worked in Italy. On the other hand, the competent Italian institution was able to grant him the Italian benefit only by reference to the total duration of the insurance periods completed in Italy and Belgium. That is a pro rata benefit of the kind provided for in Article 46 (2) (b).

In expressing their views on the question submitted by the national court, the parties have divided it into two subquestions: on the one hand, which competent institution must adjust its benefit and, on the other, what adjustment factor is to be adopted?

Mr Collini points out that the second subparagraph of Article 46 (3) provides that 'any institution applying paragraph (1) shall adjust its benefit'. He infers from this that only the ONPTS must adjust its benefit. Only the ONPTS in fact applies Article 46 (1) since only it grants an 'independent' benefit, the determination of which does not depend upon the completion of an insurance period in another Member State.

He goes on to claim that the ONPTS must adjust its benefit by multiplying it by the reduction factor provided for in the second subparagraph of Article 46 (3). That factor corresponds to a fraction which has as its numerator the ceiling established by the first subparagraph of Article 46 (3) (the highest theoretical amount) and as its denominator the sum of the benefits determined in accordance with Article 46 (1) (the 'independent' Belgian benefit) and Article 46 (2) (the pro rata Italian benefit).

The ceiling appearing as the numerator corresponds in this case to the benefit to which Mr Collini would have been entitled in Belgium if he had completed all the insurance periods in question; it amounts to BFR 336 748. The sum appearing as the

denominator is BFR 350 218 (BFR 326 389 + BFR 23 829). The fraction therefore gives a reduction factor of 0.9615382. Mr Collini concedes that the sum of the amount of the Belgian pension thus adjusted (BFR 326 389 x 0.9615382 = BFR 313 835) and of the unchanged amount of the Italian pension (BFR 23 829) is somewhat higher than the amount of the highest theoretical pension (BFR 336 748). He considers, however, that the latter amount does not constitute an absolute ceiling which cannot be exceeded in any way. In his view, it follows from the case-law of the Court that the Community regulations are designed to place a migrant worker in certain respects in a better position than that which he would enjoy if only internal law were applied.

The *ONPTS* refers, in the first place, to the Decision of 12 July 1974 (Official Journal 1974, C 86, p. 8) adopted by the Administrative Commission which, by virtue of Article 81 of Regulation No 1408/71, is responsible for interpreting that regulation. It recognizes that the Administrative Commission decided that the reduction provided for in the second subparagraph of Article 46 (3) applies only to 'independent' benefits determined in accordance with the first subparagraph of Article 46 (1).

It nevertheless contends that the adjustment must be made not only with respect to the 'independent' Belgian pension but also with respect to the pro rata Italian pension. It bases its argument on paragraph 24 of the judgment of 13 March 1986 in Case 296/84 *Sinatra* [1986] ECR 1047, in which it was stated that: 'The amount found to be higher, on the basis of the comparison prescribed in the second subparagraph of Article 46 (1), is to be reduced where appropriate in accordance with Article 46 (3)'. According to the ONPTS, it follows that the amounts referred to in the first and second subparagraphs of Article 46 (1) are both to be the subject of the reduction referred to in Article 46 (3).

As regards the calculation of the adjustment, the ONPTS suggests apportionment of the excess, that is to say the amount by which the sum of the 'independent' Belgian pension and the pro rata Italian pension exceeds the ceiling referred to in the first subparagraph of Article 46 (3) (BFR 13 470), between the two pensions. The sum of the amounts thus adjusted (BFR 313 836 and BFR 22 912 respectively), furthermore, corresponds exactly to the limit of the highest theoretical amount (BFR 336 748).

The *Italian Government* confines itself to stating that in the system introduced by Article 46 of Regulation No 1408/71, the highest theoretical amount fixes the limit beyond which the safeguards provided by Community law, which implement the principles of Article 51 of the EEC Treaty, do not operate in favour of the worker.

It states that, in any event, that theoretical amount must, in order to be lawful under Article 51, constitute a parameter representative of the working life of the migrant worker as a whole, therefore, of the sum of the insurance periods completed under the legislation of the Member States. However, that can only be the case if the theoretical amount is higher than the amount of the 'independent' benefit calculated pursuant to Article 46 (1).

The *Commission* 08001considers that only the Belgian 'independent' pension must be adjusted, being the only one whose amount was determined pursuant to Article 46 (1).

It maintains that that adjustment implies that the entire excess, that is to say the amount by which the sum of the benefits in question exceeds the ceiling referred to in the first subparagraph of Article 46 (3) (BFR 13 470) the amount of the Belgian

pension (BFR 326 398), is to be left out of account.

It points out that that calculation method leads to the same result as the tabular formula contained in Form E 209. That form was prepared by the Administrative Commission pursuant to Article 2 (1) of Regulation No 574/72 and relates to the determination of the amounts of pensions with a view to the application, in appropriate cases, of Article 46 (3) of Regulation No 1408. According to that calculation method, Mr Collini is entitled to BFR 312 919 from Belgium and BFR 23 829 from Italy. Moreover, the sum of those two amounts corresponds to the amount of the highest theoretical benefit.

R. Joliet
Judge-Rapporteur