OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 16 SEPTEMBER 1980

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling under Article 177 of the EEC Treaty by the Tribunal du Travail of Charleroi. The Plaintiff in the proceedings before the Tribunal is Mr Remo D'Amico, an Italian national living in Belgium; the Defendant is the Office National des Pensions pour Travailleurs Salariés (the "ONPTS"). The dispute between them is about Mr D'Amico's old-age pension.

The facts are these.

Mr D'Amico was born in Italy on 12 March 1932. From March 1947 (when he was 15) to September 1952 (when he was 20½) he was employed in Italy as an agricultural worker and completed 194 weeks of contributions to the Italian social security scheme. He then went to Belgium where he worked as a miner underground until 5 July 1973. He ceased work on that day owing to ill-health. He was awarded a Belgian invalidity pension under the special scheme for miners with effect from 1 November 1973. At the same time he became entitled to an Italian invalidity pension by virtue of the insurance periods that he had completed in Italy.

On behalf of Mr D'Amico we were told that he was entitled to that Italian pension as a result of aggregation and apportionment of his Italian and Belgian insurance periods under the provisions of Council Regulation No 1408/71, and that he would not have been entitled to it otherwise. On behalf of the Italian Government on the other hand we were told that Mr D'Amico had been insured for long enough in Italy to be entitled to an Italian invalidity pension by virtue of Italian law alone, without resort to the provisions of Community law. Happily I do not think that the solution of the problem with which the Court is confronted in this case depends upon which is correct. We were also told on behalf of Mr D'Amico that the amount of his Italian pension had been deducted from his Belgian invalidity pension in application of the Belgian rules against the overlapping of benefits.

Again nothing turns on that.

With effect from 1 October 1977 Mr D'Amico's Belgian invalidity pension was converted into a retirement pension. That resulted from an application that he made to benefit from certain provisions of Arrêté Royal No 50 of 24 October 1967, relating to retirement and survivors' pensions for employed persons (Moniteur Belge, 27 October 1967, p. 11258). In particular Article 10 (2) of that Arrêté Royal, as amended by a Statute of 26 June 1972 (Moniteur Belge, 30 June 1972, p. 7738) and further amended by a Statute of 28 March 1975 (Moniteur Belge, 8 April

1975, p. 4108) provides, so far as is material:

"le travailleur ... qui a été occupé habituellement et en ordre principal comme ouvrier mineur pendant au moins vingt années, peut obtenir une pension de retraite acquise à raison d'un trentième par année civile d'occupation comme ouvrier mineur. S'il ne totalise pas trente années civiles d'occupation habituelle et en ordre principal en qualité d'ouvrier mineur au fond des mines ... mais en compte vingt-cinq au moins il est censé faire preuve d'une occupation habituelle et en ordre principal en cette qualité pendant un nombre d'années civiles supplémentaires égal à la différence entre trente et le nombre d'années civiles d'occupation habituelle et en ordre principal prouvées en cette qualité."

Thus, under Belgian law, after 20 years work in the mines a miner may retire and take a reduced retirement pension calculated by reference to the number of years he has worked; if, on the other hand, he has worked underground for 25 years, he is deemed to have worked for a total of 30 years and is entitled to a pension at the full rate. It also appears that periods for which a miner has been entitled to invalidity benefit are treated, for the purposes of Article 10 (2), as periods of work. So, by October 1977, Mr D'Amico could claim to have completed the 25 years entitling him to a retirement pension at the full rate.

He was awarded such a pension by the ONPTS, except that the ONPTS, in accordance with what it described to us as being its normal practice in the case of migrant workers, reduced it to 26/30ths of the full amount, in order to avoid, as it explained, Mr D'Amico being credited with the same insurance periods twice, once as actual periods worked in Italy and a second time as notional periods worked in Belgium. The reason why the reduction was of 4/30ths only and not, as one might have expected, of 5½/30ths was that, under provisions of the Arrêté Royal with the details of which I need not trouble Your Lordships, the period for which Mr D'Amico worked in Italy was treated as being only 4 years.

The proceedings before the Tribunal du Travail of Charleroi were brought by Mr D'Amico in order to challenge the lawfulness of that reduction. There are of course dicta in judgments of this Court to the effect that a Member State is entitled to legislate so as to avoid an overlap between notional insurance periods credited by its own legislation and insurance periods actually completed in another Member State — see Case 12/67 the *Guissart* case [1967] ECR 425 at p. 434 (Rec. 1967 at p. 563) and Case 50/75 the *Massonet* case [1975] 2 ECR 1473 at p. 1484. The contention of Mr D'Amico before the Tribunal was not however that the reduction in his pension was incompatible with Community law but that there was no provision of Belgian law authorizing it. We were referred by Counsel for Mr D'Amico to a judgment of the Cour du Travail of Liège which supports that view (R.G. No 6463/78, *ONPTS* v *Schiabello,* judgment dated 29 June 1979). The question originally raised before the Tribunal was thus a pure question of Belgian law.

The Auditeur du Travail attached to the Tribunal raised, however, on his own initiative a new point, which was that Mr D'Amico was precluded by Article 25 of the Arrêté Royal from receiving any

Belgian retirement pension at all. That Article, as amended by Article 10 of a Statute of 27 July 1971 (Moniteur Belge, 11 August 1971, p. 9410), is, so far as is material, in these terms:

"Sauf dans les cas et sous les conditions déterminées par le Roi, la pension de retraite et la pension de survie ne sont payables que si le bénéficiaire ... ne jouit pas d'une indemnité pour cause ... d'invalidité ... par application d'une législation de sécurité sociale belge ou étrangère".

The Auditeur du Travail considered that that was a provision for "suspension" of benefit that could be invoked by virtue of the first sentence of Article 12 (2) of Regulation No 1408/71, and therefore that the fact that Mr D'Amico was in receipt of an Italian invalidity pension precluded him from being paid his Belgian retirement pension.

Article 12 (2) is, so far as material, in these terms:

"The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits ... may be invoked even though the right to such benefits was acquired under the legislation of another Member State ... However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity [or] old age ... which are awarded by the institutions of two or more Member States in accordance with the provisions of Article ... 46 ...".

The reason why that point had not been taken by the ONPTS was that a departmental memorandum ("note de service") of 4 July 1972 conveying instructions from the Ministre de la Prévoyance Sociale, and replacing earlier instructions, said that a foreign invalidity pension payable after what would be normal retirement age in Belgium should be treated as a retirement pension. That however was brushed aside by the Auditeur du Travail on the ground that ministerial instructions or circulars could not alter the provisions of an Arrêté Royal.

It is the point thus raised by the Auditeur du Travail that has given rise to the reference to this Court by the Tribunal. It was suggested on behalf of Mr D'Amico that his Italian invalidity pension was not an "indemnité" within the meaning of that term in Article 25 of the Arrêté Royal, but the Tribunal does not seem to take that view.

If the Auditeur du Travail is right, the effect is startling. Some of those who submitted observations to this Court used stronger adjectives. For instance Counsel for Mr D'Amico called it "iniquitous" ("inique"), the Commission said that it was "shocking"("choquant") and the Council that it was "unacceptable" ("inacceptable"). It means that Mr D'Amico, having opted to convert his Belgian invalidity pension into a retirement pension, as he was prima facie entitled to do under Belgian law, is in the result deprived of any right whatever to a pension in Belgium in respect of the period of over 20 years for which he worked there, and is left with only the invalidity pension earned for him by the 5½ years for which he worked in Italy, mostly in his teens. The figures, which are set out in the order for reference, are significant. Mr D'Amico's full Belgian pension amounts to BF 254 133 per annum. Reduced to 26/30ths it comes to

BF 234 925, to which must be added an allowance of BF 9 405 in lieu of free coal. The amount of his Italian pension amounts to the equivalent of BF 28 293.

There can be no doubt that, if Mr D'Amico's Italian pension had been converted into an old-age pension at or about the same time as his Belgian pension, no problem would have arisen. It is however common ground that, under the relevant Italian legislation, Mr D'Amico's Italian pension can never be converted into an old-age pension.

The principle that would have applied if Mr D'Amico's Belgian and Italian pensions had remained of the same kind is clear, nor was there any disagreement about it among those on whose behalf observations were submitted to the Court. It is the principle established by a familiar line of authorities, to which, apart from the Belgian Government, everyone referred us, namely Case 22/77 the first *Mura* case [1977] 2 ECR 1699, Case 37/77 the *Greco* case, ibid. p. 1711, Case 98/77 the first *Schaap* case [1978] ECR 707, Case 105/77 the *Boerboom-Kersjes* case, ibid. p. 717, and Case 236/78 the second *Mura* case [1979] ECR 1819. Those authorities establish that, in such a situation, the person concerned is entitled in the Member State where the question arises to whichever is the greater of, on the one hand, the pension that he can claim under the legislation of that Member State alone in its entirety, including any anti-duplication provision that it may contain, and, on the other hand, the pension that he can claim under the provisions of Regulation No 1408/71 in their entirety, including the second sentence of Article 12 (2), which excludes national anti-duplication provisions, and Article 46 (3) which contains what may be called a Community anti-duplication provision. (There are authorities that show that the same principle, in essence, applies where the relevant Community legislation is the old Regulation No 3 — see in particular Case 26/78 the *Viola* case [1978] ECR 1771.) Thus, in that situation, Mr D'Amico would, if the effect of a Belgian anti-duplication provision was to deprive him entirely of his right to a Belgian pension, have been entitled in Belgium to a pension computed in accordance with the provisions of Regulation No 1408/71, in particular Article 46, without regard to the Belgian anti-duplication provision.

The question is whether the same principle applies here despite the conversion of Mr D'Amico's Belgian pension only into a retirement pension. Most of those who submitted observations to the Court argued, in more or less forceful terms, that the answer was 'yes', and referred us in that connection to Article 43 of Regulation No 1408/71 and to Case 180/78 the *Brouwer-Kaune* case [1979] ECR 2111. No-one argued the contrary.

Article 43, which forms part of Chapter 2 of Title III of the Regualtion, i.e. of the Chapter relating to "Invalidity", is headed "Conversion of invalidity benefits into old age benefits". It has three paragraphs of which the first two are in these terms:

"1. Invalidity benefits shall be converted into old age benefits, where appropriate, under the conditions laid down by the legislation or legislations under which they were granted, and in accordance with the provisions of Chapter 3.

2. Any institution of a Member State which is responsible for providing invalidity benefits shall, where a person receiving invalidity benefits can, by virtue of the provisions of Article 49, establish a claim to old age benefits under the legislation of other Member States, continue to provide such person with the invalidity benefits to which he is entitled under the legislation which it administers until the provisions of paragraph 1 become applicable as regards that institution."

(Your Lordships will remember that Chapter 3, which comprises Articles 44 to 51, is the one relating to "Old Age and Death (Pensions)" and that it is, by virtue of Article 40, applicable "by analogy" to invalidity benefits except where the worker concerned has been subject only to legislations under which the amount of invalidity benefits is independent of the duration of insurance periods — commonly known as legislations of "Type A".)

Paragraph 3 of Article 43 contains a proviso applicable only in certain cases where invalidity benefits have been awarded under Article 39. That applies to workers who have been subject only to legislations of Type A. I do not think that paragraph 3 sheds more light on the present question than do paragraphs 1 and 2.

What paragraphs 1 and 2 make clear is that the authors of the Regulation envisaged a case where a worker, having been in receipt of invalidity benefits in several Member States, had his invalidity benefit in one of those States converted into an old-age benefit. Paragraph 2 expressly enacts that, in those circumstances, he should continue to receive his invaliditiy benefit in the other Member State or Member States concerned. It is, obviously, implicit that his continued receipt of such invalidity benefit is not to deprive him of the right to the old-age benefit into which his invalidity benefit has been converted in the first Member State.

The difficulty that then arises does so because nowhere in the Regulation does one find an express provision to the effect that, where Article 43 applies, the resultant concurrent invalidity and old-age benefits are to be treated as being "of the same kind" for the purpose of the second sentence of Article 12 (2).

Even apart from authority I would have come to the conclusion that such a provision must be implied, in order to avoid what would be an absurd result — and moreover a result inconsistent with the seventh and eighth recitals in the preamble to Regulation No 1408/71, which are in these terms:

"Whereas the provisions for co-ordination adopted for the implementation of Article 51 of the Treaty must guarantee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits;

Whereas to this end, persons entitled to benefits for invalidity, old age and death (pensions) must be able to enjoy all the benefits which have accrued to them in the various Member States; whereas, however, in order to avoid unjustified overlapping of benefits, which could

result in particular from the duplication of insurance periods and other periods treated as such, it is necessary to limit the benefits to the greatest amount which would have been due to a worker from one of these States if he had spent all his working life there".

Additional support for that view is however afforded by the opinion of Mr Advocate General Capotorti and by the judgment of the Court in the *Brouwer-Kaune* case. In particular Mr Advocate General Capotorti pointed out that, although each of the *Mura, Greco, Schaap* and *Boerboom-Kersjes* cases had been concerned with concurrent benefits of the same kind, the Court had not expressed its rulings in those cases as limited to such a situation; and he said that those rulings must be equally applicable where, as envisaged by Article 43, there were concurrent invalidity and old-age benefits. The Court, clearly, shared his view. Mr Advocate General Capotorti to some extent rested his opinion, as I do, on the seventh and eighth recitals in the preamble to Regulation No 1408/71.

In a way the *Brouwer-Kaune* case was more difficult than this case. On the facts as interpreted by the Dutch court from which the reference there came, Mrs Brouwer-Kaune had never been entitled simultaneously to two invalidity pensions. Her German invalidity pension had been converted into an old-age pension before her Dutch invalidity pension was awarded to her. Her case was not therefore covered by the actual terms of Article 43 (2). But it was treated by the Court as evincing a lacuna that must be filled by analogy. The Court added that "if it were not possible to adopt that solution, it could even be said that the Council had failed to carry out completely the duty incumbent upon it, by virtue of Article 51 of the Treaty, to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers". The same would be true here if it were to be held that the second sentence of Article 12 (2) could not be interpreted as applicable to the case.

That leaves the problem how best to formulate an answer to the questions referred to the Court by the Tribunal du Travail of Charleroi. That problem arises because those questions are in such broad and, in some respects, inapposite terms. They are as follows:

"Where a former worker of Italian nationality, who is less than 60 years old and is resident in Belgium, is acknowledged to have completed in Belgium a full working life of 30/30ths as a miner underground, on the basis of having been for 25 years a miner underground, and has been awarded an invalidity pension in Italy on the basis of employment there:

(1) Is Article 25 of Arrêté Royal No 50 of 24 October 1967 relating to retirement and survivor's pensions for employed persons (as amended by Article 10 of the Statute of 27 July 1971) compatible with the purpose of Articles 12, 46 and 50 of Council Regulation No 1408/71?

(2) Is Article 25 of the Arrêté Royal of 24 October 1967 (as amended by

Article 10 of the Statute of 27 July 1971) compatible with Articles 48 to 51 of the Treaty of Rome?

(3) Are Articles 12, 46 and 50 of Council Regulation No 1408/71 compatible with Articles 48 to 51 of the Treaty of Rome?"

The formulation of those questions calls, I think, for the following comments.

First, it is immaterial from the point of view of Community law whether the worker concerned is under or over 60.

Secondly, this Court has no jurisdiction, on a reference under Article 177, to rule directly on the question whether Article 25 of the Arrêté Royal is or is not compatible with Community law. If, however, what I have said about that law is correct, no such question arises. The position is that, if the Auditeur du Travail is right in saying that, by reason of Article 25, Mr D'Amico is entitled to no pension under Belgian law alone, Mr D'Amico is entitled to claim a pension in Belgium under the relevant provisions of Regulation No 1408/71, regardless of Article 25.

Thirdly, it seems unlikely that Article 50 of Regulation No 1408/71 is in point. I imagine that the reason why the Tribunal du Travail has referred to Article 50 is that, seemingly, it has been the practice of the ONPTS, in the case of a migrant worker, to treat his full Belgian pension as a "minimum benefit" for the purposes of that Article and so, where the amount of his Belgian pension as reduced in accordance with the practice of the ONPTS that I mentioned earlier together with the amount of his benefits from other Member States has come to less than the full amount of his Belgian pension, to pay him a supplement equal to the difference. That did not apply here because the total of Mr D'Amico's reduced Belgian pension and of his Italian pension came to more than the full amount of his Belgian pension. At all events I do not think that Your Lordships can usefully add anything, as regards Article 50, to what the Court said in Case 64/77 the *Torri* case [1977] 2 ECR 2299, to which we were referred on behalf of the ONPTS, of the Council and of the Commission.

Fourthly, If I am right as to what is to be held implicit in the relevant provisions of Regulation No 1408/71, this case does not give rise to any question as to the compatibility of any of those provisions with Articles 48 to 51 of the Treaty.

Rather therefore than seek to answer directly the questions put by the Tribunal du Travail, I suggest that Your Lordships should endeavour to formulate such a ruling as will best assist the Tribunal in dealing with the case. That ruling might be in these terms:

If, by reason of an anti-duplication provision contained in the legislation of a Member State, a worker is precluded from claiming an old-age benefit to which he would otherwise be entitled under that legislation alone, the competent institution of that Member State must award to him such old-age

benefit as he is entitled to under the provisions of Articles 44 to 51 of Council Regulation No 1408/71. Where his old-age benefit results from the conversion of an invalidity benefit, any invalidity benefit that continues to be payable to him in another Member State in accordance with Article 43 (2) of the Regulation is to be treated, for the purposes of Article 12 (2) thereof, as being of the same kind as that old-age benefit.