OPINION OF ADVOCATE GENERAL LENZ

delivered on 4 May 1995 *

A — Introduction

1. The present request for a preliminary ruling submitted by the Arbeidsrechtbank Antwerpen concerns the interpretation of Article 12(2) and Article 46 of Regulation (EEC) No 1408/71 [1] in connection with the review by the national court of the calculation by the Rijksdienst voor Pensioenen (Royal Pensions Authority) ('the defendant') of an old-age pension granted to the applicant.

2. The following are the facts of the case:

The applicant was born in Germany on 4 November 1921. From the end of 1937 to the beginning of 1948 [2] she worked in Germany. She acquired Belgian nationality when she married a Belgian on 31 January 1948. While married, she worked on a part-time basis from 1973 to 1979. The spouses have lived apart since March 1981. Their divorce was entered in the records of the Registry Office on 12 February 1991 and thereby became effective in law.

3. The applicant's pension position is as follows:

With effect from 1 December 1981, the applicant has, since her 60th birthday, been in receipt of a Belgian old-age pension as a single person on the basis of the seven years during which she worked in Belgium. With effect from 1 December 1986, she has, since her 65th birthday, been in receipt of a German pension on the basis of the eleven years during which she worked in Germany.

* Original language: German.

1 — Regulation (EEC) No 1408/71 of the Council 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, in the version contained in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) in force when the pension decision contested in the present case was adopted; see also the subsequent amendment to the relevant provisions by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), contained in the consolidated version of Regulation No 1408/71 (OJ 1992 C 325, p. 1) most recently amended by Council Regulation (EEC) No 1945/93 of 30 June 1993 (OJ 1993 L 181, p. 1).

2 — Information corresponding to that on page 1 of the reference and the applicant's observations.

The applicant's pension position changed from 1 July 1988 by reason of the fact that her husband became entitled to a pension on reaching the age of 65. She continued to draw her German pension and a Belgian pension as a *de facto* separated spouse. On 15 April 1988 she renounced her Belgian old-age pension until her divorce became legally effective on 12 February 1991, the date on which it was entered in the records of the Registry Office. This pension was thereupon suspended. The applicant's position with regard to pension entitlement changed yet again at the time of the divorce. By decision of 10 July 1991 the applicant was, with effect from 1 March 1991, awarded a pension as a divorcee on the basis of a recognized insurance period of 33 years (from 1948 to 1980), four years of which, however, were not taken into account as being in excess of a full pension unit.

4. The defendant made the following calculation:

Period to be reckoned for the pension as a divorcee: 33 years (1948 to 1980, from conclusion of marriage to *de facto* separation). For the old-age pension on basis of personal entitlement: 11 years (1936 and 1938 to 1947 [3] — work in Germany while unmarried) and 7 years (1973 to 1979 — work in Belgium while married), making a total of 18 years. A total of 51 years (33 plus 18) is to be reckoned, including 7 double years (1973 to 1979), with the result that a full unit (40/40) was exceeded by four years (51-7 = 44). By law [4] account may be taken only of the 40 years which led to the highest pension claims. No account is therefore to be taken of the least favourable years (1948 to 1951).

5. This calculation is based on Article 75 et seq. of the Belgian Royal Decree of 21 December 1967. [5] On the basis of those provisions a divorcee receives an old-age pension under the same conditions as if [6] she had been in paid employment during her marriage to her former husband. [7] The claims of a person entitled are to be examined *ex officio*. [8] The defendant has applied the provision against overlapping of benefits contained in Article 10a of Royal Decree No 50. [9] This provides as follows:

Where an employee is entitled to an old-age pension on the basis of the regulation and to

3 — The periods applied by the defendant are set out on page 3 of the reference.

4 — Article 3 of the Law of 20 July 1990.

5 — Royal Decree of 21 December 1967 (on the establishment of a general system of pensions for employees and members of their families), *Moniteur Belge* of 16 January 1968.

6 — 'La pension de retraite ... est acquise sous les mêmes conditions *comme si* le conjoint divorcé avait lui-même exercé une activité comme travailleur salarié pendant la durée de son mariage avec son ex-conjoint.'
'Het rustpensioen ... wordt verworven onder dezelfde voorwaarden *alsof* de gescheiden echtgenoot zelf een activitiet als werknemer zou hebben uitgeoefend tijdens de duur van zijn huwelijk met de gewezen echtgenoot.' (Emphasis added).

7 — First paragraph of Article 76 of the Royal Decree.

8 — Second paragraph of Article 76 of the Royal Decree.

9 — Royal Decree No 50 of 24 October 1967 (concerning pensions of employees and members of their families), *Moniteur Belge* of 27 October 1967. Article 10a was added by Royal Decree No 205 of 29 August 1983, *Moniteur Belge* of 6 September 1993.

an old-age pension or advantage on the basis of one or several other systems and the total of the fractions denoting the importance of each of those pensions exceeds a full pension unit, the period to be taken into account in calculating the employee's pension is to be reduced by the number of years necessary to reduce that total to the unit. [10]

For the application of that article, the term 'other system' is to be understood as meaning any other Belgian pension system, with the exception of that for self-employed persons, and any comparable system in another State or any system applicable to the staff of an institution established under public international law. [11]

6. The applicant objects to the defendant's failure to take account in its decision of 10 July 1991 of the years of her marriage between 1948 and 1951. She claims that she is entitled to an old-age pension under German law and also to one under Belgian law. Both old-age pensions are, in her view, benefits of the same kind for the purposes of Article 46 of Regulation No 1408/71 and the Belgian old-age pension should for that reason not be reduced.

7. The national court takes the following view in its request for a preliminary ruling:

The overlapping of pensions from different Member States of the European Community is governed by Regulation No 1408/71 and in particular by Articles 12(2) and 46, as interpreted by the Court of Justice. Under Article 12(2) of that regulation, the provisions in the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other benefits are applicable only where benefits overlap with other social-security benefits. The Community-law prohibition of the application of national rules against overlapping applies only where there is overlapping of 'benefits of the same kind' awarded by the institutions of two or more Member States in accordance with Articles 46, 50, 51 or 60(1)(b). Regarding the definition of the term 'benefits of the same kind', the national court refers to Article 46a of Regulation No 1408/71. [12] It takes the view that the reply to the central question in the present dispute as to whether the provision against overlapping contained in Article 10a of Royal Decree No 50 is applicable depends on the reply to the question whether an old-age pension to which a person is entitled as a divorcee and an old-age pension to which a person is entitled in her own right are benefits of the same

10 — First paragraph of Article 10a of Royal Decree No 50.

11 — Fourth paragraph of Article 10a of Royal Decree No 50.

12 — This provision was first incorporated in Regulation No 1408/71 by Regulation No 1248/92.

kind for the purposes of Article 46a(1) of Regulation No 1408/71.

B — Opinion

The arguments of the parties

8. The national court has submitted the following question to the Court:

'Are (i) a German retirement pension obtained under the *Angestelltenversicherungsgesetz* (German Law on Insurance for Employed Persons) on the basis of periods of insurance which the beneficiary personally completed in Germany, and (ii) a Belgian retirement pension as a divorcee granted under the Belgian pensions legislation, in particular Articles 75 and 76 of Royal Decree No 50, [13] on the basis of periods of insurance completed by the former spouse and obtained subject to the same conditions as if the divorcee had personally been in paid employment during his/her marriage to the former spouse, benefits of the same kind within the meaning of Article 12(2) of Regulation (EEC) No 1408/71 of the Council so that Articles 46 and 46a of Regulation No 1408/71 and Article 7 of Council Regulation (EEC) No 574/72 apply?'

9. The *applicant* contends that the provision against overlapping in Article 10a of Royal Decree No 50 was wrongly applied in the calculation of her pension as a divorcee. The overlapping of pensions from different Member States is, she argues, governed by Articles 12(2) and 46 of Regulation No 1408/71, as interpreted by the Court of Justice. Under those provisions, national rules against overlapping can be applied only if they result in a higher pension than that calculated under Article 46 of the regulation. For that reason the applicant seeks calculation of her pension under Article 46 of the regulation in order that a comparison can be made between her pension calculated under national provisions (including the application of Article 10a of Royal Decree No 50) and that calculated in accordance with Article 46 of Regulation No 1408/71. In her submission, the applicant proceeds on the assumption that the old-age pension to which she is entitled in her own right and the retirement pension for a divorcee are benefits of the same kind. She relies in this connection on Article 76 of the Royal Decree of 21 December 1967 and on Belgian legal writing, as well as on the judgment of the Court of Justice in Case 37/86 *Van Gastel*. [14]

13 — Both the applicant and the defendant point out that the case does not relate to Articles 75 and 76 of Royal Decree No 50, but rather to Articles 75 and 76 of the Royal Decree of 21 December 1967. Since the national court also refers to this latter Decree on page 7 of the request for a preliminary ruling, it must be assumed that there is a typing error in the question submitted for a preliminary ruling.

14 — Judgment in Case 37/86 *Van Gastel, née Coenen* v *Rijksdienst and Rijkskas* [1987] ECR 3589.

10. The *defendant*, in contrast, argues that the applicant's pension as a divorcee is to be determined exclusively under Belgian law. The divorcee pension is not granted on the basis of her own completed periods of insurance, but rather on the basis of those of her former husband. It is therefore not appropriate to focus on Article 46 of Regulation No 1408/71 for the method of calculating the pension in question, since that provision is applicable only where similar benefits from different Member States overlap in the case of one person. Even if Regulation No 1408/71 was applicable, Article 12(2) of that regulation would still not preclude application of the provision against overlapping contained in Article 10a of Royal Decree No 50 given that there is in the present case no question of benefits of the same kind.

11. Article 10a of the Royal Decree, the defendant continues, is not a provision against overlapping in the true sense, but rather a limiting rule. [15] In order to determine the applicant's pension claims, it is necessary to make two quite separate calculations: first, the calculation of the personal pension for the eleven years worked in Germany and the seven years worked in Belgium, on the basis of Regulation No 1408/71; second, the calculation of the pension as a divorcee, solely on the basis of Belgian legislation. Finally, both pensions are awarded and paid together. In consequence, the defendant submits that the question submitted should be answered in the negative.

15 — 'Beperkingsregel' or 'règle de limitation'.

12. The *Commission* begins by pointing out that, while the national court refers to Articles 12, 46 and 46a of Regulation No 1408/71, Articles 12 and 46 were amended by Regulation No 1248/92 with effect from 1 June 1992 [16] and Article 46a was added to Regulation No 1408/71. When the contested decision was taken on 10 July 1991, the 'old version' of Regulation No 1408/71 was still in force. The question of law must therefore first be examined on the basis of those provisions. Regulation No 1248/92, on the other hand, added to Regulation No 1408/71 an Article 95a, under which pensions may, on application, be reviewed in accordance with Regulation No 1248/92, with the result that the legal position must also be examined in the light of the new provisions.

13. The Commission sets out the legal position both before and after the amendment introduced by Regulation No 1248/92 in order to cast light on the question of law for decision in the present case. The issue is whether a pension under the German *Angestelltenversicherungsgesetz* and a Belgian pension for a divorcee are benefits of the same kind within the meaning of the provisions as interpreted by the Court. It is necessary to examine whether the purpose and object of the benefits, along with the bases of their

16 — Although the Commission mentions 1 July 1992, it would appear from Article 95a(1) that the intended reference must be to 1 June 1992. Article 3 of Regulation No 1248/92 provided that the regulation was to enter into force on the first day of the month following its publication in the *Official Journal of the European Communities* on 19 May 1992 — in other words, 1 June 1992.

calculation and the conditions under which they can be awarded, are identical.

14. In the view of the Commission, the purpose and object of the German pension is to ensure that employees have adequate means of subsistence when they become entitled to a pension. The basis of calculation and the conditions of award are determined by the number of years during which an employee has actually worked and by the level of earnings during that period. This is a pension in the classical sense.

15. In contrast, the purpose and object of the Belgian pension is to ensure that the divorcee, who no longer has access to the income of his/her former spouse, should have adequate means of subsistence from retirement age or from the date of the divorce, if the latter should occur later in time. In the Commission's view, this pension represents compensation for the fact that the person entitled no longer has access to the income of the former spouse, since a condition of award is that the person entitled does not remarry. The pension is acquired under the same conditions as if the spouse had worked as an employed person during the period of the marriage.

16. The Commission refers to the judgments in *Stefanutti* [17] and *Van Gastel* [18] and concludes from them that benefits calculated or paid on the basis of the periods of employment of two different persons, as in the present case, cannot be treated as benefits of the same kind. Although the Belgian pension for a divorcee is to be treated as a personal pension, as if the person entitled had herself exercised the trade or profession of her former husband, this, in the opinion of the Commission, amounts to nothing more than a formal characteristic of the Belgian legislation. The Commission's view is therefore that a German pension under the *Angestelltenversicherungsgesetz* and a Belgian pension granted to a divorcee cannot be regarded as benefits of the same kind either within the meaning of Article 12(2) of Regulation No 1408/71 (old version) or within the meaning of Article 46a(1) of Regulation No 1408/71 (new version).

Jurisdiction of the Court of Justice

17. The defendant refers to the judgment in *Adlerblum*, [19] in which the Court ruled that it had no jurisdiction 'to give a preliminary ruling on the question of the classification under French social security legislation of a benefit awarded under the German Compensation Law (*Bundesentschädigungsgesetz*)', in order to demonstrate that it is not for the

17 — Judgment in Case 197/85 *ONPTS* v *Stefanutti* [1987] ECR 3855.

18 — Cited above in footnote 14.

19 — Judgment in Case 93/75 *Adlerblum* v *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* [1975] ECR 2147.

Court to classify the Belgian pension granted to divorcees.

18. In the *Stefanutti* case, the Court, in reply to questions as to how a Member State should classify benefits granted in another Member State when applying its own national provisions, held that such questions were governed by national law alone. It was therefore for the national court or tribunal to determine the substance of, and to interpret the provisions of, its own legislation as regards the overlapping of benefits. [20]

19. In accordance with its established case-law, the Court pointed out in the *Van Gastel* case that it had no jurisdiction, in proceedings brought under Article 177 of the EEC Treaty, to apply the rules of Community law to a specific case or, consequently, to classify provisions of national law with respect to such a rule. It could, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful in assessing the effects of such provisions of national law. [21] The Court should also proceed thus in the present case.

The scope of Regulation No 1408/71

20. There can be no doubt that the applicant comes within the scope *ratione personae* of Regulation No 1408/71, as defined in Article 2. She was employed in two Member States of the Community. The defendant also proceeds on the assumption that the pension to which the applicant is entitled in her own right is to be calculated in accordance with Regulation No 1408/71.

The reply to the question submitted in the light of the 'old version' of Regulation No 1408/71

21. The question of law raised will first be examined with reference to the version of Regulation No 1408/71 in force when the contested decision was taken. [22]

22. The first sentence of Article 12(2) in principle allows national provisions against overlapping to be applied. The second sentence of Article 12(2) establishes an exception to this principle for benefits of the same kind, including those in respect of old age.

20 — Paragraph 16 of the judgment in *Stefanutti*, cited above in footnote 17.

21 — Paragraph 8 of the judgment in *Van Gastel*, cited above in footnote 14.

22 — The text of the relevant provisions is set out in an Annex to the present Opinion.

While it must be accepted at the latest since the Court's judgment in *Fabrizii* [23] that a provision such as Article 10a of Royal Decree No 50 is a provision against overlapping within the meaning of Article 12(2), the Court's previous case-law on similar rules already suggested such a conclusion. [24]

23. With regard to the calculation of pension entitlement, the following principles can be laid down on the basis of the Court's extensive case-law on Articles 12(2) and 46 [25] of Regulation No 1408/71 and in the light of Article 7 [26] of Regulation No 574/72:

— If a pension is calculated exclusively on the basis of national provisions, national (external) provisions against overlapping will also apply. [27]

— If, however, a calculation is based on Article 46, Regulation No 1408/71 must be applied in its entirety, with the result that national provisions against overlapping will not be applicable in respect of benefits *of the same kind* within the meaning of the second sentence of Article 12(2), not even in the case of the calculation of independent benefits within the meaning of Article 46(1). [28]

24. In view of the fact that the competent institution is required under the second sentence of Article 46(1) to calculate the amount of benefit in accordance with Article 46(2), and thus by applying the method of calculation under Community law, in order to compare the amounts and enable payment of the higher amount, inapplicability of national provisions against overlapping may have a positive effect on the amount of the pension actually to be paid.

25. If the benefits to be taken into consideration are not of the same kind, Community law will in no way preclude application to those benefits of national provisions against overlapping.

26. The question to be decided is thus whether the Belgian benefit here in issue is a benefit of the same kind as a retirement pension, with the result that it comes within the scope of Article 46 [29] and national provisions

23 — Judgment in Joined Cases C-113/92, C-114/92 and C-156/92 *Fabrizii and Others* v *ONP* [1993] ECR I-6707, paragraphs 12 and 40.

24 — See the judgments in Case C-5/91 *Di Prinzio* [1992] ECR I-897, paragraph 35, and in Joined Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 21.

25 — See Part A of the Annex.

26 — See Part A of the Annex.

27 — See judgment in Case C-31/92 *Larsy* [1993] ECR I-4543, as well as those in *Di Prinzio* and in *Di Crescenzo and Casagrande*, cited above in footnote 24.

28 — Judgments in *Di Prinzio* and *Di Crescenzo and Casagrande*, cited above in footnote 24, and in *Fabrizii*, cited above in footnote 23.

29 — With regard to this question, see the judgment in Case 171/82 *Valentini* v *ASSEDIC* [1983] ECR 2157, paragraph 10.

against overlapping cannot be taken into consideration in the necessary comparative calculations.

27. In its previous case-law, the Court has described the criteria for determining *benefits of the same kind* in the following terms:

'According to the established case-law of the Court, social security benefits must be regarded, irrespective of characteristics peculiar to the various national laws, as being of the same kind when their *purpose* and *object* together with the *basis on which they are calculated* and the *conditions for granting them* are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.' [30]

28. It is therefore necessary to consider whether the determining criteria for a Belgian pension granted to a divorcee are comparable to those for a typical pension under the German *Angestelltenversicherungsgesetz*. The *purpose* and *object* of the Belgian pension for a divorcee is undoubtedly, as in the case of any ordinary retirement pension, to guarantee a basis for subsistence in old age. Conditions governing the award and level of the benefit are thus in principle linked to the *personal employment career of the person entitled*. In the case of the Belgian pension for a divorcee, the legal fiction [31] contained in Article 76 of the Royal Decree of 21 December 1967 enables years of marriage to be taken into account as years personally worked.

29. The social-policy background to the adoption of that measure has no bearing on the legal form which it took. The defendant has provided extensive information on the legal and political background to the legislative measure, which was adopted in the context of the reform of the divorce laws in Belgium. The intention, which acquired legal force through Article 76 of the Royal Decree of 21 December 1967, was to give a divorced spouse a personal entitlement which would be largely independent of the former spouse's pension entitlement.

30. This autonomy has several aspects. Contrary to what the Commission argues, the periods to be taken into consideration for the calculation are precisely not those worked by the former spouse, but rather the

30 — Judgment in *Valentuni*, cited in the preceding footnote, paragraph 13 (emphasis added). See also the judgments in *Van Gastel*, cited above in footnote 14, paragraph 10, and in *Stefanutti*, cited above in footnote 17, paragraph 12.

31 — The defendant, at p. 5 of its observations, also uses this description of Article 75 of the Royal Decree of 21 December 1967.

years of marriage, in other words, a condition which persons entitled must themselves satisfy. This analysis is corroborated by the judgment, which the defendant cites, [32] delivered on 14 February 1994 by the Belgian Cour de Cassation, [33] to the effect that Articles 75 and 76 of the Royal Decree of 21 December 1967 are to be interpreted as meaning that they do not provide that the divorced spouse must be regarded as having exercised the same trade or profession as the former spouse. [34] Nor is the former working spouse's entitlement to benefit reduced. It would for that reason be wrong to suggest that the pension for a divorcee is granted on the basis of the contributions paid by the former spouse or that the benefit is to be regarded as part of the pension earned by the former spouse. All insured persons jointly bear the additional expenditure required for payment of the pension granted to a divorcee.

31. The autonomy of the pension granted to a divorcee is not precluded by the fact that *calculation* of the amount of the benefit is, in accordance with Article 77 of the Royal Decree of 21 December 1967, quantitatively linked to the income of the former spouse during the years of marriage which are to be taken into consideration. [35] If the divorced spouse has in fact paid no contributions, the pension founded on the legal fiction contained in Article 76 of the Royal Decree of 21 December 1967 and even the conditions for the award of that pension are in large measure based on the conditions for the award of a pension based on personal contributions in so far as the actual income of the spouses during the material period is taken as the basis for purposes of the calculation. An extensive equalization of the *conditions for awarding* the pension is achieved by virtue of the fact that there is a link to the personal employment career of the person entitled.

32. It seems to me that the Commission is not being entirely consistent when it argues that the purpose and object of the Belgian pension for a divorcee differ from those of the German pension under the *Angestelltenversicherungsgesetz*, since according to its argument the pension granted to a divorced spouse functions as compensation for the fact that the person entitled no longer has access to the income of the former spouse, a condition for the award of the benefit being that the person entitled does not remarry. Remarriage has no bearing on the question whether the person entitled has or has not access to the income of her former spouse. On the assumption that she would have access to her spouse's income if the marriage were to continue, she forfeits this power of access at the latest on divorce, and probably from the date of separation, for which reason this situation already has consequences for pension entitlement. [36]

33. The pension granted to a divorcee appears to have features of a right to public

32 — Page 5 of the defendant's observations.

33 — Judgment of 14 February 1994, *ONP* v *Szala Emilia*, No S.93.0083 F.

34 — '...; que cette disposition ne prévoit pas que le conjoint divorcé doit être considéré comme ayant exercé la même activité que son ex-conjoint.'

35 — Article 77 of the Royal Decree of 21 December 1967 provides that the calculation of the pension is to be based on earnings corresponding to 62.5% of the spouse's annual income.

36 — In the form of a pension for a *de facto* separated spouse, which, according to the documents on the case file, the applicant received from 1 June 1988 until the divorce.

maintenance. Considered in this light, disentitlement to the pension in the event of remarriage is logical, since a personal claim for subsistence arises at the time of marriage against the spouse — who in the event of entitlement to a pension may be able to claim a higher amount by virtue of his status as a married man — and this personal entitlement takes precedence over the 'right to public maintenance'. Ultimately, however, these considerations do not provide an answer to the question in the preliminary reference. Classification will be determined by the objective form of the pension benefit as defined by the statutory provisions.

34. It must be assumed in this regard that the Belgian pension granted to a divorcee is a personal pension which is statutorily treated as equivalent to a pension granted to an employed person. This equivalence is to the extent that the pension granted to a divorcee is integrated into the entitled person's uniform insurance history. Evidence of this equivalence lies in the method for calculating the pension under Royal Decree No 50, Article 1 of which constitutes a legal basis for the calculation of the pension for a divorcee in accordance with the rules governing the pension of an employed person. [37] The application of Article 10a of that decree lay at the origin of the present dispute.

35. In my opinion, the inclusion of the pension for a divorcee in a uniform personal insurance history and the reduction of excess periods to a full pension unit support the view that this is a pension of the same kind as an ordinary retirement pension. This equivalence follows from the Belgian legislation and is consistently maintained through the fiction in Article 76 of the Royal Decree with regard to the basis of calculation and the method of calculating the pension. The application of Article 10a of Royal Decree No 50 is an expression and consequence of this equivalence. It gives effect to the principle of uniform career and thereby effects pension reductions in the context of the conditions of calculation and not the reckoning of various benefits granted on different legal bases. Article 10a thus contains an internal as well as an external provision against overlapping. By reason of the fact that in this way even a pension obtained under the statutory provisions of another Member State is included in the constitution of an insurance history, it may be assumed that the Belgian pension for a divorcee is a pension within the meaning of Article 46 of Regulation No 1408/71 and that the pensions here in question are benefits of the same kind.

36. At this point it can therefore be held that pensions such as a German pension under the *Angestelltenversicherungsgesetz* and a Belgian pension for a divorcee are benefits of the same kind within the meaning of Regulation No 1408/71 in the version in force when the contested decision was adopted.

37. For the sake of completeness, I would point out that the Community-law provision

37 — 'Dit besluit bedoelt een regeling te treffen:
1. voor rustpensioenen ten voordele van de werknemers die in België te werk gesteld zijn geweest ...;
2. ...;
3. ...;
Voor de toepassing van dit besluit worden met werknemers gelijkgesteld ... al de personen tot wie de toepassing van de sociale zekerheidswetgeving voor werknemers, wat de rust-en overlevingspensioenen betreft, is uitgebreid.'
'Le présent arrêté a pour objet d'organiser un régime:
1. de pensions de retraite au profit des travailleurs salariés ayant été occupés en Belgique ...;
2. ...;
3. ...;
Sont assimilés aux travailleurs salariés pour l'application du présent arrêté ... et toutes les personnes auxquelles l'application de la législation sociale des travailleurs salariés en matière de pension de retraite et de survie est étendue.'

against overlapping in Article 46(3) also applies to a pension calculated in accordance with the Community-law rule in Article 46.

The reply to the question submitted in the light of the 'new version' of Regulation No 1408/71

38. The question arises as to whether the amendments to Regulations No 1408/71 and No 574/72 resulting from Regulation No 1248/92 may lead to a different outcome. This could be so, since the seventh recital in the preamble to Regulation No 1248/92 refers to a *new concept* of benefits of the same kind within the meaning of Chapter 3 of Title III of Regulation No 1408/71; ultimately, however, this will not be the case.

39. In its main features, the new rules correspond to the previous rules, in particular with regard to their interpretation in the case-law of the Court. Under Article 12(2) [38] national provisions against overlapping are in principle applicable, 'save as otherwise provided in this Regulation'. In the 'Community-law' calculation of a pension under Article 46(2), [39] national rules against overlapping are, pursuant to Article 46b(1), [40] not applicable in the case where benefits of the same kind overlap. When calculating the 'autonomous pension' under Article 46(1)(a)(i), national provisions against overlapping are applied only in the two cases of Article 46b(2)(a) and 46b(2)(b). The present case concerns neither a benefit under Article 46b(2)(a), the amount of which does not depend on the length of the periods of insurance completed, nor a benefit under Article 46b(2)(b), the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialized and a later date.

40. The only question to be addressed therefore is whether this case involves a benefit of the same kind within the meaning of Article 46a of the new version of Regulation No 1408/71, so that, in accordance with Article 46b, the national provision against overlapping contained in Article 10a of Belgian Royal Decree No 50 does not apply. The benefits here in question, that is to say, the German pension under the *Angestelltenversicherungsgesetz* and the Belgian pension for a divorcee, would have to be calculated or paid on the basis of periods of insurance completed by one and the same person. According to Article 1(r) of Regulation No 1408/71, 'periods of insurance' are, for the purpose of the regulation, '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*'. [41]

38 — See Part B of the Annex.
39 — See Part B of the Annex.
40 — See Part B of the Annex.
41 — Emphasis added.

41. As already discussed, years of marriage are treated under Article 76 of the Royal Decree of 21 December 1967 as equivalent to periods of insurance and are recognized as such. Periods personally completed on the basis of a trade or profession within the meaning of the German *Angestelltenversicherungsgesetz* and years of marriage satisfying the conditions of Articles 75 and 76 of the Royal Decree of 21 December 1967 thus confer entitlement to benefits which are to be treated as benefits of the same kind within the meaning of Article 46a.

42. This assessment is corroborated by consideration of Article 46a(3), which contains provisions *for the application* of national provisions against overlapping. Several references are there made to 'income acquired' and to the 'amount' of benefits acquired, which implies that different benefits acquired on the basis of other provisions must be taken in their totality for the purpose of the comparative calculation. The situation in the present case, however, as already mentioned, is that benefits earned in accordance with the provisions in the Member States are, at the end of the calculation, not 'thrown into the same pot', but rather a uniform insurance history of the person entitled is drawn up, to which a limiting rule under national legislation is applied at the beginning of the calculation of the specific claim to benefit.

43. Consequently, it must be held that pensions such as a German pension received under the *Angestelltenversicherungsgesetz* and a Belgian pension granted to a divorcee are to be treated as benefits of the same kind within the meaning of Regulation No 1408/71, as amended by Regulation No 1248/92.

C — Conclusion

44. In the light of the foregoing considerations, I propose that the question in the preliminary reference be answered as follows:

Benefits such as a pension received under the German *Angestelltenversicherungsgesetz* and a Belgian pension granted to a divorcee pursuant to Articles 75 and 76 of the Royal Decree of 21 December 1967 are to be treated as benefits of the same kind within the meaning of Regulation (EEC) No 1408/71.

Annex

A — Text of the relevant provisions in the version of Regulation No 2001/83 (OJ 1983 L 230)

Article 12(2) provides that:

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

Article 46(1) to (3) provides that:

'1. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefit have been satisfied, without application of the provisions of Article 45 and/or Article 40(3) being necessary, the competent institution of the Member State 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.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph 2(a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefits are not satisfied unless account is taken of the provisions of Article 45 and/or Article 40(3), the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to which the employed or self-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. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount referred to in this subparagraph;

(b) the institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph, and 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 before the risk materialized;

(c) if the total length of the periods of insurance and residence completed before the risk materializes under the legislations of all the Member States concerned is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when, applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this

method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers;

(d) ...

3. The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2(a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with the provisions of paragraph 1.'

Article 7 of Regulation No 574/72, [42] which implements Article 12 of Regulation No 1408/71, provides as follows:

'1. Where a person entitled to a benefit due under the legislation of one Member State is also entitled to benefits under the legislation of one or more of the other Member States, the following rules shall apply:

(a) if the application of *Article 12(2) or (3)* of the Regulation entails the reduction or the concurrent suspension of those benefits, none of them may be reduced or suspended by an amount greater than the amount obtained by dividing the

42 — Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 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 amended by Regulation (EEC) No 2001/83 (OJ 1983 L 230, p. 86).

sum which is subject to reduction or suspension under the legislation by virtue of which the benefit is due by the number of benefits subject to reduction or suspension to which the person concerned is entitled;

(b) as regards *benefits* in respect of invalidity, *old age* or death (pensions) awarded *under Article 46(2)* of the Regulation by the institution of a Member State, that institution shall take into account any benefits of a different kind and any income or remuneration likely to entail the reduction or suspension of the benefit due from that institution, *not for the calculation of the theoretical amount referred to in Article 46(2)(a)* of the Regulation but exclusively for the reduction or suspension of the amount referred to in Article 46(2)(b) of the Regulation. However, only a fraction of the total amount of such benefit, income or remuneration shall be taken into account, and that fraction shall be determined in proportion to the duration of the periods of insurance completed, in accordance with Article 46(2)(b) of the Regulation;

(c) as regards *benefits* in respect of invalidity, *old age* or death (pensions) awarded *under the first subparagraph of Article 46(1)* of the Regulation by the institution of a Member State, that institution shall, where the provisions of Article 46(3) of the Regulation apply, take into account any benefits of a different kind and any income or remuneration likely to entail the reduction or suspension of the benefit due from that institution, *not for the calculation of the amount referred to in Article 46(1) of the Regulation*, but exclusively for the reduction or suspension of the amount resulting from the application of Article 46(3) of the Regulation. However, only a fraction of the amount of those benefits, income or remuneration shall be taken into account; such fraction shall be obtained by applying to that amount a coefficient equal to the ratio between the amount of benefit resulting from the application of Article 46(3) of the Regulation and the amount resulting from the application of the first subparagraph of Article 46(1) of the Regulation.

2. ...'. [43]

43 — Emphasis added.

B — Text of the relevant provisions in the consolidated version of Regulation No 1408/71 (OJ 1992 C 325, p. 1)

Article 12(2) of the new version is worded as follows:

'*Save as otherwise provided in this Regulation*, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.' [44]

Article 46(1) is worded as follows:

'Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

(ii) on the other hand, pursuant to paragraph 2;

(b) the competent institution may, however, waive the calculation to be carried out in accordance with (a)(ii) if the result of this calculation, apart from dif-

44 — Emphasis added.

ferences arising from the use of round figures, is equal to or lower than the result of the calculation carried out in accordance with (a)(i), in so far as that institution does no apply any legislation containing rules against overlapping as referred to in Articles 46b and 46c or if the aforementioned institution applies a legislation containing rules against overlapping in the case referred to in Article 46c, provided that the said legislation lays down that benefits of a different kind shall be taken into consideration only on the basis of the relation of the periods of insurance or of residence completed under that legislation alone to the periods of insurance or of residence required by that legislation in order to qualify for full benefit entitlement...'.

Article 46(2) corresponds substantively to Article 46(2)(a) and (b) of the old version. Article 46(3) is worded as follows:

'The person concerned shall be entitled to the highest amount calculated in accordance with paragraphs 1 and 2 from the competent institution of each Member State without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which this benefit is due.

Where that is the case, the comparison to be carried out shall relate to the amounts determined after the application of the said provisions.'

Article 46a, a new provision incorporated into the regulation, contains general provisions relating to reduction, suspension or withdrawal applicable to benefits in respect of invalidity, old age or survivors under the legislation of the Member States. Paragraphs 1 and 2 of Article 46a are worded as follows:

'1. For the purposes of this Chapter, overlapping of *benefits of the same kind* shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. For the purposes of this Chapter, overlapping of *benefits of different kinds* means all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.' [45]

Article 46b, also a new addition to the regulation, contains special provisions applicable in the case of overlapping of benefits of the same kind under the legislation of two or more Member States. Those provisions are worded as follows:

'1. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State *shall not be applicable to a benefit calculated in accordance with Article 46(2).*

2. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State *shall apply to a benefit calculated in accordance with Article 46(1)(a)(i) only if* the benefit concerned is:

(a) either a benefit, which is referred to in Annex IV, part D, the amount of which does not depend on the length of the periods of insurance or of residence completed,

or

(b) a benefit, the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialized and a later date. ...'. [46]

45 — Emphasis added.
46 — Emphasis added.