OPINION OF ADVOCATE GENERAL ALBER

delivered on 18 May 1999 *

A — Introduction

1. The present reference for a preliminary ruling from the Tribunal du Travail (Labour Court) Mons concerns, in respect of the calculation of a Belgian employee's retirement pension, the interpretation of Article 46b(2) in conjunction with Article 46(1)(a)(i) of Council 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. [1]

2. The plaintiff in the main proceedings (hereinafter 'the plaintiff') receives a German pension in respect of periods of employment between 1938 and 1945. Subsequent to the award of the German pension by the German institution, the Belgian pension was recalculated by the Belgian institution.

3. The applicable Belgian provision [2] contains a so-called 'war years presumption' to the effect that 'an employed person who was in employment in the period between 1 January 1938 and 31 December 1944 shall be deemed to have continued to be an employed person under the same conditions as regards duration throughout the period between the date on which his employment ceased and 31 December 1945'. [3] This presumption may be rebutted only for periods of employment in respect of which the person concerned can claim a pension under another Belgian scheme, with the exception of the scheme for self-employed persons, or under a scheme of a foreign county. [4]

* Original language: German.

1 — Consolidated version of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 (OJ 1992 C 325, p. 1).

2 — See Article 32(1) of the Royal Decree of 21 December 1967 (*Moniteur Belge* of 16 January 1968).

3 — See page three of the order for reference.

4 — The relevant passages state:

'...

Le travailleur salarié qui exercé en cette qualité une activité au cours de la période comprise entre le 1er janvier 1938 et le 31 décembre 1944 est censé avoir continué cette activité de travailleur salarié dans les mêmes conditions de durée pendant toute la période se situant entre la date à laquelle son occupation a pris fin et le 31 décembre 1945.

...

Cette présomption n'est renversée que pour les périodes d'occupation pour lesquelles l'intéressé peut prétendre une pension en vertu d'un autre régime belge, à l'exclusion de celui des travailleurs indépendants, ou d'un régime d'un pays étranger.

...'

This provision was repealed by the Royal Decree of 4 December 1990 but Article 50 of that decree provides that it is to remain applicable to pensions which became payable before 1 January 1991 (*Moniteur Belge* of 20 December 1990).

4. The case arose in the context of the following dispute. The plaintiff in the main proceedings (hereinafter 'the plaintiff') is seeking to have the years 1943 and 1944 recognised as giving rise to a pension entitlement in regard to a Belgian retirement pension for employed persons. The defendant in the main proceedings, the Office National des Pensions (hereinafter the 'defendant'), considers that the presumption of regular employment during the time period in question, established in the first paragraph of Article 32 of the Royal Decree, is rebutted because the plaintiff receives a pension for this period under a foreign scheme.

5. By decision of 30 September 1986, the plaintiff born on 18 June 1922, was awarded with effect from 1 July 1986 a Belgian retirement pension payable under the Belgian scheme for employed persons calculated on the basis of a representative fraction of his employment record of 6/45 for the years 1941 to 1946. The statutory presumption established in the first paragraph of Article 32 of the Royal Decree of 21 December 1967 covered the years 1943 to 1945.

6. The plaintiff was, however, recognised as having been deported and forced to work from 29 March 1943 to 30 April 1945 in Luckenwalde in the future, now former, GDR. As the former GDR did not award pensions in such cases, the plaintiff did not apply for one.

7. On 4 May 1994, following German reunification in 1990, the plaintiff lodged an application for the award of a German pension. By decision of 6 July 1995, the competent German institution, the Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office for Rhine Province), acknowledged a German pension entitlement in the amount of DEM 465.12 p.a. covering the period from 29 March 1943 to 30 April 1945.

8. The acknowledgment of a pension entitlement by the German institution led the Belgian authority, for its part, to recalculate the pension it had awarded. By decision of 31 July 1995, with effect from 1 January 1992, the Belgian authority acknowledged a pension entitlement for the years 1941, 1942, 1945 and 1946. [5]

9. It transpired from the pension calculation required under Community law by Article 46 of Regulation No 1408/71 that the sum of the two pensions (4/45 plus 2/45) was less than the amount of a Belgian pension calculated for the same period (6/45) and the plaintiff was accordingly

5 — The year 1946 was recognised on the basis of the military service completed during that time.

awarded a pension supplement to bring his pension up to the level of a Belgian pension.

10. On 30 January 1996 the plaintiff lodged an application for review of the retirement pension awarded on the basis of Regulation No 1408/71 as amended by Regulation No 1248/92. [6]

11. That application led to the contested decision, notified to the plaintiff on 16 April 1996, in which the defendant refused to continue recognising the war years presumption for the years 1943 and 1944. It was against that decision that the plaintiff took legal action.

12. The referring court considers this assessment correct. In coming to this conclusion it cites the opinion of the 'auditeur' (representative of the public interest) who was party to the main proceedings: the legal presumption is available only if there were no actual contributions already or also giving rise to a retirement pension for the same period. This rule is a rule concerning the arising of pension entitlement, a condition for the award of a pension, not an anti-overlapping rule. In the absence of such a condition, two pensions would be granted in respect of the same contributions or for the same years. It is not here a case of overlapping but one of notional superposition of insurance periods.

13. The referring court further states that the advantages granted to the plaintiff by Germany represent not reparation in respect of the plaintiff's deportation and forced labour but, rather, a retirement pension in respect of contributions made in Germany.

14. As regards the calculation of the pension payable to the plaintiff by the Belgian institution, required under Community law, the referring court has already upheld the application in part. However, before handing down a final decision, it asks the Court to clarify the question whether the provision that the war years presumption may be rebutted by evidence of an insurance period completed elsewhere, in respect of which a pension is actually being paid, represents an anti-overlapping provision within the meaning of Regulation No 1408/71 as amended by Regulation No 1248/92, which, when calculating a pension only under the provisions of the

6 — Council Regulation of 30 April 1992 amending 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 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71; this regulation is incorporated in the consolidated version of Regulation No 1408/71, published in OJ 1992 C 325.

legislation administered by the competent institution, [7] do not apply. [8]

15. The questions referred by the national court for a preliminary ruling are worded as follows:

'Do the new provisions of Regulation (EEC) No 1248/92 require Belgium to grant a beneficiary the right to a retirement pension calculated on the basis of an employment record comprising in part years in the course of which presumed or notional contributions must be taken into account — unless the person concerned can claim a pension under a foreign scheme for those periods of employment (principle that there is a legal presumption in respect of the war years, as laid down by Article 32(1) of the Royal Decree of 21 December 1967 establishing general rules for the retirement and survival pension scheme for employed persons prior to its repeal by the Royal Decree of 4 December 1990 — although it remains applicable to retirement pensions which became payable for the first time before 1 January 1991) in circumstances where, specifically, the person concerned has been awarded a retirement pension payable by Germany on the basis of actual contributions corresponding to the presumed or notional contributions which may be taken into account under the Belgian legislation?

In other words, must the new provisions of Regulation No 1248/92 be interpreted as authorising overlapping, without reduction, suspension or withdrawal, of a retirement pension awarded to a Belgian national, payable by Belgium and calculated on the basis of presumed or notional contributions by virtue of the principle that there is a legal presumption in respect of the war years, as laid down by Article 32(1) of the Royal Decree of 21 December 1967 (subject to the reservation contained in that provision whereby the person concerned may not, however, claim a pension under a foreign scheme for those periods of employment) with a retirement pension payable by Germany calculated on the basis of actual contributions covering the same period or, on the contrary, does the exception provided for by Article 32(1) of the Royal Decree of 21 December 1967 (no legal presumption in respect of the war years if the person concerned can claim a pension under a foreign scheme for those periods of employment) not constitute a provision on reduction, suspension or withdrawal declared inapplicable by the new provisions of Regulation No 1248/92?'

16. The defendant and the Commission are parties to the present procedure. Their submissions will be considered in the legal analysis.

7 — See Article 46(1)(a)(i) of Regulation No 1408/71.

8 — See Article 46b(2) of Regulation No 1408/71.

B — Analysis

17. The *defendant*, citing the case-law,[9] contends that the Court has established a principle of most favourable treatment in the calculation of pensions. In the defendant's view, the most favourable result is to be chosen, as between that produced by a purely internal calculation applying the national anti-overlapping provisions, on the one hand, and that produced by a method based on Community law, on the other, in which the anti-overlapping provisions prescribed under the national legislation of the Member State must not be applied.

18. Citing the judgments in *Romano*[10] and *Di Crescenzo*[11] concerning a Belgian provision on the recognition of notional insured periods for miners which the Court qualified as anti-overlapping provisions, the defendant contends that the present case concerns a fundamentally different provision. The statutory war years presumption may be rebutted. In its view, the rule of evidence represents a condition of pension entitlement laid down by the Belgian legislature. The system of a legal presumption for specific periods of time, which can be rebutted by evidence of periods of employment giving rise to a pension entitlement, does not constitute an anti-overlapping provision. The underlying objective of the provision is to prevent more than one pension being awarded in respect of the same period.

19. As the contested provision constitutes a condition for entitlement, the defendant contends that it cannot constitute a reduction clause, because only a benefit that has already been awarded may be subject to reduction.

20. The defendant suggests that the question referred to the Court be answered in the following terms:

The concept of a provision on reduction, suspension or withdrawal referred to in Articles 12 and 46 of Regulation No 1408/71 is to be interpreted as meaning that it does not include a national provision which establishes, as a condition to entitlement, a rule in the form of a statutory war years presumption which may be rebutted by evidence of specific insurance periods completed under another national or foreign scheme.

21. The *Commission* contends first that the pension payments at issue undoubtedly constitute benefits of the same kind within the meaning of Regulation No 1408/71. It then goes on to compare the relevant

9 — See page 4 of the defendant's written observations Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149; Case 236/78 *FNROM* v *Mura* [1979] ECR 1819; Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679; Case 117/84 *ONPTS* v *Ruzzu* [1985] ECR 1697; Case 296/84 *Sinatra* v *FNROM* [1986] ECR 1047; Case 37/86 *van Gastel* v *Rijksdienst and Rijkskas* [1987] ECR 3589; Case 323/86 *Collini* v *ONPTS* [1987] ECR 5489; Case 128/88 *Di Felice* v *INASTI* [1989] ECR 923; Case C-199/88 *Cabras* v *INAMI* [1990] ECR I-1023; and Joined Cases C-90/91 and C-91/91 *ONP* v *Di Crescenzo and Casagrande* [1992] ECR I-3851.

10 — Case 58/84, cited in footnote 9.

11 — Joined Cases C-90/91 and C-91/91, cited in footnote 9.

provisions in the versions of the Regulation in force before and after 1 July 1992, concluding that neither version authorises 'provisions on reduction, suspension or withdrawal' to be applied when calculating a national pension under the Belgian scheme. Thus, in the Commission's view, the only question is whether Article 32(1) of the Royal Decree of 21 December 1967 [12] is an anti-overlapping provision within the meaning of Article 46b of Regulation No 1408/71.

22. In order to resolve this question, the Commission examines the *Romano* [13] and *Conti* [14] cases in greater detail. In those cases, notional insurance years [15] and a supplement [16] had been reduced in respect of years of actual employment under another scheme, and a pension entitlement acquired under such a scheme, respectively. The Court qualified calculation provisions of this kind as anti-overlapping provisions within the meaning of Regulation No 1408/71. The Commission is of the opinion, that this conclusion does not necessarily apply in the present case. It contends that the provision at issue in this case does not accord any notional years in the sense of crediting periods that could not be *localised in time*. There is, on the contrary, a presumption that the beneficiary was employed for a specific period of time in Belgium. That presumption can be rebutted. Finally the Commission holds that the provision constitutes a rule of evidence.

23. The Commission suggests that the question referred to the Court be answered as follows:

Provisions such as those contained in Article 32(1) of the Royal Decree of 21 December 1967 do not constitute provisions on reduction, suspension or withdrawal within the meaning of Regulation No 1408/71.

Assessment

24. Under Article 46(1)(a)(i) of Regulation No 1408/71 the competent institution is first required to calculate the amount of the benefit that would be due under the legislation which it administers. Under Article 46b(2) of the regulation, provisions on reduction, suspension or withdrawal of

12 — Cited in footnote 4.
13 — Case 58/84, cited in footnote 9.
14 — Case C-143/97 *ONP* v *Conti* [1998] ECR I-6365.
15 — *Romano*, cited in footnote 9.
16 — *Conti*, cited in footnote 14.

a benefit laid down by the legislation of a Member State are applicable only under specific conditions, clearly defined in paragraph (2)(a) and (b),[17] which are not fulfilled in the present case.

25. It therefore appears that provisions on reduction, suspension or withdrawal, within the meaning of that provision do not apply to the calculation of the Belgian pension. It must accordingly be determined whether the national provision, under which the so-called 'war years presumption' may be rebutted in respect of insurance periods for which a pension can also be claimed under another national or foreign pension scheme exists, is to be qualified as a provision on reduction.

26. In its judgment of 22 October 1998 in *Conti*,[18] the Court defined a provision on reduction in the following terms:

'A national rule must be regarded as a provision for reduction of benefit if the calculation which it requires to be made has the effect of reducing the amount of pension which the person concerned may claim because he receives a benefit from another Member State.'[19]

27. However, in the present case it must first be ascertained how far the person concerned has a 'claim'. The first step must therefore be to define the conditions for entitlement before proceeding to the second, which involves calculating any reduction in line with this definition.

28. In the main proceedings, it appeared that the applicant was first awarded, and even paid for a number of years, a Belgian pension which was reduced on account of the German pension granted subsequently. In the light of its outcome, this situation might at first sight appear to result from 'provision on reduction'. However, it should not be forgotten that the sequence of events was an inevitable consequence of the political developments associated with the reunification of Germany. It is not an inherent element of the provisions governing the calculation of benefits. In order to arrive at a proper appraisal of these provisions, it is legitimate to ask how the pension would have been calculated if, when the application was made, there had been a corresponding pension entitlement for all periods of employment in German territory.

29. It seems beyond question that in that event, the war years presumption contained in the Belgian rule would not have been

17 — '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 materialised and a later date ... .'

18 — See Case C-143/97, cited in footnote 14.

19 — See Case C-143/97, cited in footnote 14, paragraph 25.

applicable to the period recognised by the German institution (29 May 1943 to 30 April 1945). A fraction of only 4/45 would then have been taken as a basis for the Belgian pension from the beginning, within the framework of the general pension scheme and no reduction, even of a purely computational kind, would have been made in the amount of pension initially fixed.

30. Since there is always a calculation involved in determining the amount of the pension to be paid, it is important to ensure that a comparatively lower pension award is not merely the result of applying a rule for calculating the amount. In its judgment in *Conti*, the Court already stated:

'... national provisions for reduction of benefits cannot be rendered exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules for calculating the amount payable'. [20]

31. There is no such risk of this in the case to be decided here, since the war years presumption comes into play at a stage preceding the actual pension calculation. The first step in the process of awarding a pension is to establish all the periods which are relevant for pension insurance purposes, i.e. periods of employment, social security covered by compulsory contributions and periods treated in the same way. [21] It is at this point that the war years presumption under the Belgian scheme comes into play. If the worker is unable, for various reasons which may be factual or administrative, to furnish evidence for all the war years of periods of employment that are relevant for pension insurance purposes, as long as a minimum period of employment has been completed, the worker will be deemed in accordance with the war years presumption to have been in employment covered by a compulsory social security scheme for the whole duration of the war.

32. This arrangement to the worker's advantage, which is designed to establish an insurance record as free from gaps as possible and which is necessitated by the difficult conditions prevailing during the war, can be dispensed with if it can be shown that the worker has completed relevant periods of employment for pension insurance purposes under another national or foreign scheme, which itself gives rise to a pension entitlement.

33. Considered in isolation this criterion for a valid pension claim — undoubtedly introduced for the worker's benefit — may be misleading inasmuch as it could be construed as meaning that a foreign pension is to be deducted from a national pension entitlement. Such an approach

20 — Case C-143/97, cited in footnote 14, paragraph 24.

21 — Such can, for example, be periods of sickness, invalidity or unemployment.

should not however be allowed to obscure the fact that the war years presumption takes effect systematically at the stage when the pension is determined. By establishing the qualitative criterion of a 'pensionable period of employment' the Belgian legislature is merely ensuring that such periods, to be credited to the employee for pension purposes, are treated as sufficient evidence of a period of employment.

34. The war years presumption is therefore to be regarded as a rule of evidence necessitated by the conditions which prevailed during the war, for substantiating periods relevant for pension purposes, a rule which will not come into play if another kind of pension cover has been shown to exist. The definition of the war years presumption as a rule of evidence cannot be seriously challenged on the ground that, in the main proceedings, the Belgian pension was retroactively reduced because of the actual conditions and political circumstances prevailing in Germany.

35. As regards the Court's definition of a provision on reduction, cited in point 26 above, it should be noted that the mechanism of the war years presumption and its rebuttal comes into play at the stage when it is determined whether the conditions for a pension claim are met.

36. In support of the view advanced here, it should be pointed out that the structure of the Belgian pension rules at issue in *Romano*,[22] *Di Crescenzo*[23] and *Conti*,[24] which the Court defined as provisions on reduction, is essentially different from that of the provisions at issue here. Those three cases concerned a fixed increase designed — by means of notional years, or a supplement — to bring the pension paid in respect of periods actually completed up to the level payable in respect of a full employment record in each case. In the present case, by contrast, the question is how to fill gaps in the record which can be accurately localised in time.

37. The purpose of the two sets of rules is also quite different. Whereas in those three

22 — Case 58/84, cited in footnote 9.
23 — Joined Cases C-90/91 and C-91/91, cited in footnote 9.
24 — Case C-143/97, cited in footnote 14.

cases[25] the rules that gave rise to the judgments were intended to 'compensate' for factors associated with the person of the beneficiary and the work done (at least 25 years underground in the mining industry), in the present case a rule of evidence is required to mitigate the problems maintaining regular employment in the difficult social and political conditions which prevailed during the war, on the one hand, and providing evidence of such regular employment, on the other. The earlier judgments do not therefore mean that the national provision at issue in the present case must be held to be a provision on reduction within the meaning of Regulation No 1408/71.

38. Considerations of justice likewise favour the interpretation suggested here. Neither the Belgian nor the Community legislature can have intended workers who had been obliged to work as forced labour in another Member State during the war, to be worse off as a result of that circumstance, when the time came to calculate their old-age pension than they would have been had they been in employment which was not subject to compulsory social security contributions, or which they could not substantiate.

39. In the first place, it may be assumed for the sake of argument that a pension is being paid from some other source in respect of periods not taken into consideration under the war years presumption,[26] and to that extent the potential shortfall corresponding to such periods will be made good by a claim that can be substantiated.

40. In calculating benefits in accordance with the relevant provisions of Community law, institutions must first determine the amount of the putative benefit[27] followed by that of the actual benefit,[28] which represents a fraction of the theoretical amount[29] and must then pay whichever amount is higher.[30] The sum total of all the benefits paid must not be less than the amount which the employed person would have been entitled to, had he been employed in the legal order of only one Member State. By way of a balancing provision, Article 50 of Regulation No 1408/71 provides for a supplement payable by the institution of the Member State in which the beneficiary lives.

41. There is consequently no valid reason for challenging on grounds of justice the conclusion reached on the basis of systematic considerations.

25 — Case 58/84, cited in footnote 9; Joined Cases C-90/91 and C-91/91, cited in footnote 9; Case C-143/97, cited in footnote 14.

26 — This represents a statutory condition for rebuttal of the presumption.

27 — See Article 46(1)(a)(i) of Regulation No 1408/71.

28 — See Article 46(2)(b) of Regulation No 1408/71.

29 — See Article 46(2)(a) of Regulation No 1408/71.

30 — See Article 46(3) of Regulation No 1408/71.

C — Conclusion

42. In the light of the foregoing considerations, I propose that the question referred to the Court be answered as follows:

A national provision under which the 'war years presumption' (being a presumption of uninterrupted employment subject to compulsory social security contributions throughout the Second World War) may be rebutted by insurance periods completed elsewhere, in respect of which there is a pension entitlement under the scheme of another Member State, is not to be regarded as a provision on reduction, suspension or withdrawal laid down by the legislation of a Member State which, in that case, would not apply to the calculation of a pension under Article 46(1)(a)(i) of Council Regulation (EEC) No 1408/71, as amended by Council Regulation (EEC) No 1248/92, pursuant to Article 46b(2) thereof.