OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 8 February 1990 *

My Lords,

1. This case comes to the Court by way of a request for a preliminary ruling concerning the rules on the overlapping of social security benefits and on the effects of recalculation of benefit.

2. Mr Cabras worked for 635 weeks in Italy and 506 weeks in Belgium. Incapacitated for work since 19 September 1972, he has been receiving invalidity benefits in both countries since 1 October 1973.

3. The Belgian legislation is of Type A (i.e. the amount of benefit does not depend on the length of insurance periods completed), whereas the Italian legislation is of Type B (i.e. the amount of benefit does depend on the length of insurance periods completed).

4. By virtue of Article 40(1) of Council Regulation (EEC) No 1408/71 as amended (see Annex I to Council Regulation (EEC) No 2001/83, Official Journal 1983, L 230, p. 6), the provisions of Article 46 of that regulation were applicable to the calculation of Mr Cabras's benefits. The Italian benefit was calculated in accordance with the rules on aggregation and apportionment laid down in Article 46(2). The Belgian benefit was calculated solely on the basis of national legislation, under which Mr Cabras was entitled to a full pension. The Belgian social security institution, the Institut national d'assurance maladie-invalidité ('the Institut national'), then applied a national rule against the overlapping of benefits and reduced the full Belgian pension by the amount of the Italian benefit.

5. Mr Cabras does not appear to have challenged the original calculation of his benefit or the application of the Belgian rule against overlapping. What he is challenging is a subsequent decision recalculating the Belgian benefit and the retroactive application of that decision. The circumstances in which the Belgian benefit came to be recalculated are as follows.

6. Over the years both the Italian and Belgian benefits were adjusted to take into account increases in the cost of living. The increase in the Italian benefit was particularly steep, apparently because of an error in the interpretation of the Italian provisions on indexation. Originally fixed at a rate equivalent to BFR 51 per day on

* Original language: English.

1 October 1973, it had risen by 1 August 1981 to the equivalent of BFR 377. During this period the Belgian benefit was also index-linked but no account was taken, in applying the rule against overlapping, of the increases in the Italian benefit. The Institut national continued to deduct the same amount as it had deducted in October 1973, even though the Italian benefit, in respect of which the deduction was made, had risen sevenfold. In fact, the Institut national was prevented from taking into account the increases in the Italian benefit by Article 51(1) of Regulation No 1408/71, which provides that, when benefits are adjusted by a fixed percentage or amount in accordance with the cost of living, 'such percentage or amount must be applied directly to the benefits determined under the provisions of Article 46, without the need for a recalculation in accordance with the provisions of that article'.

7. With effect from 1 July 1982, the relevant Belgian legislation was amended with the result that Mr Cabras was, because of his wife's earnings, no longer considered a person with dependants. This led to a reduction in his Belgian benefit. It also had the unfortunate result, from Mr Cabras's point of view, of entitling the Institut national to recalculate his benefit in accordance with Article 46 and to take into account, for the purpose of applying the Belgian rule against overlapping, the increases that had taken place in the Italian benefit. The Institut national was able to do this because the amendment of the Belgian legislation constituted an alteration in the 'method of determining or the rules for calculating benefits' within the meaning of Article 51(2) of Regulation No 1408/71. It may seem strange that the Belgian authorities were prevented from taking into account the increases in the Italian benefit, for the purpose of applying their rule against overlapping, for a number of years, but then became entitled to take those increases into account simply because their own legislation was amended. That, however, appears to be the effect of Article 51(1) and (2) of Regulation No 1408/71, and is consistent with the way in which those provisions were interpreted by the Court in Case 7/81 *Sinatra* v *FNROM* [1982] ECR 137 and in Case 104/83 *Cinciuolo* v *Inami* [1984] ECR 1285.

8. The net result for Mr Cabras was that his Belgian benefit underwent a twofold reduction. First, it was reduced because he had ceased to be a claimant with dependants; secondly, it was reduced because the Institut national was able to deduct from it the full amount of the increased Italian benefit. To make matters worse for Mr Cabras, the Institut national wished to give effect to the recalculation as from 1 July 1982, the date on which the amendment to the Belgian legislation took effect. However, the decision recalculating his benefit was not notified to him until 23 February 1984. As a result, the Institut national seeks to recover the excess payments made in the intervening period. A sum of over BFR 60 000 is involved.

9. Mr Cabras applied to the tribunal du travail, Brussels, contesting the decision recalculating his benefit and the decision to reclaim the undue payments. The tribunal du travail referred the following questions to the Court:

'(1) Does the theoretical amount referred to in Article 46(3) of Regulation (EEC) No 1408/71 constitute an absolute limit which may not be exceeded even where as a result of the application of Type A legislation the theoretical pension corresponds to the national pension?

If so, is it compatible with Article 51 of the Treaty that the claim conferred in one State by Community law should be fully absorbed by the claim conferred in another State by national law alone?

If not, how is the corrective factor to be determined where only one of the benefits paid is determined in accordance with the provisions of Article 46(1)?

(2) Where the institution of a Member State reviews the situation of a migrant worker on the basis of Article 51(2) of Regulation (EEC) No 1408/71 and the recalculation leads to a reduction of the worker's entitlement after taking into account the benefit paid by another State where the recalculation does not apply, is the first institution entitled to recover retroactively the overpayment which has arisen as a result of the application of Community law (Articles 46 and 51 of Regulation No 1408/71) or must it waive recovery pursuant to Article 112 of Regulation No 574/72 when the institution of the other State paying the benefit which is not subject to review holds no arrears due which might be retained for the benefit of the first institution?'

The first question

10. Before considering the specific points raised by the first question, I should like briefly to summarize the provisions of Article 46 concerning the calculation of benefits, for it is only by understanding the scheme of the article that one can understand the logic of paragraph 3.

11. Where a person's entitlement to benefit arises without its being necessary to have recourse to insurance periods completed in other Member States, Article 46(1) applies. The institution of the Member State concerned must calculate, pursuant to the first subparagraph, the benefit on the basis of the insurance periods completed under its legislation. It must also, pursuant to the second subparagraph, calculate the benefit that would be due under the system of aggregation and apportionment laid down in Article 46(2)(a) and (b). Only the higher of the two amounts is to be taken into consideration.

12. Article 46(2) deals with the situation where a person's entitlement to benefit in a Member State does not arise unless account is taken of insurance periods completed in another Member State. In such a case the institution of the first Member State must calculate the theoretical amount of benefit that the person concerned could claim if all the insurance periods completed by that person in the various Member States concerned had been completed in the Member State in question (Article 46(2)(a)). It must then determine the actual amount of benefit on the basis of the theoretical amount and in the ratio which the length of insurance periods completed under its legislation bears to the total length of insurance periods completed in the various Member

States (Article 46(2)(b)). Thus if X worked in Member State A for 10 years and in Member State B for 20 years, then even if under the legislation of Member State A he would not be entitled to a pension for an insurance period of 10 years, he will be entitled in Member State A to one third of the benefit that he could claim if he had worked there for 30 years. The procedure thus described is known as aggregation and apportionment.

13. The above system could in certain circumstances lead to the unjustified overlapping of benefits. That should not occur where all the benefits have been apportioned under Article 46(2) because in such a case all the benefits will, by definition, be proportionate to the length of insurance periods completed. The problem of unjustified overlapping only arises when one or more of the benefits is calculated under the first subparagraph of Article 46(1), in particular when Type A legislation is applied, under which a full pension may sometimes be obtained on the basis of a relatively short period of insurance.

14. It was to deal with the type of situation just described that paragraph 3 was added to Article 46. It provides as follows:

'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.'

15. On the face of it, that provision is complex and not easy to understand. If, however, it is viewed in the light of the scheme of Article 46, as described above, it is very simple. It does two things. In the first subparagraph it places an upper limit on the total amount of benefit that the person concerned may receive in the various Member States. In the second subparagraph it lays down a mechanism to ensure that that upper limit is not exceeded. The mechanism is defined in somewhat complex language. But, once again, it is easily understood if one looks at the scheme of Article 46. The basic assumption is that apportioned benefits calculated in accordance with Article 46(2) will not need to be reduced because they are, by definition, proportionate to the length of insurance periods completed. Only the benefits determined in accordance with the first subparagraph of Article 46(1) need be reduced because, as I have already observed, they are the ones that give rise to the unjustified overlapping. Obviously, if the upper limit laid down in the first subparagraph of Article 46(3) is to be complied with, the entire amount by which that limit is exceeded must be deducted from the benefits determined under the first subparagraph of Article 46(1). If only one institution is paying such a benefit, it must deduct the entire amount of the excess from that benefit. That is what the Court decided in Case 323/86 *Collini* v *ONPTS* [1987]

ECR 5489. And that is what the Institut national did in Mr Cabras's case. In fact, the complexity of the formula laid down in the second subparagraph of Article 46(3) is due to the fact that it is designed to provide also for the more complicated situation that arises when more than one institution is paying benefits determined under the first subparagraph of Article 46(1). Its function in such a case is to apportion the deduction between those institutions. When there is only one institution paying benefits of that kind, there is of course no need for any such apportionment.

16. It will, I hope, be clear from the above account that, if we confine ourselves to the interpretation of Article 46(3), as opposed to the question of its validity, there can be no room for doubt. In a case such as the present one the Institut national, which is the only institution paying a benefit determined under the first subparagraph of Article 46(1), was required to deduct from that benefit the entire amount by which the highest theoretical amount was exceeded.

17. Mr Cabras, however, maintains that, if Article 46(3) must be interpreted in that way, it is incompatible with Article 51 of the Treaty. His basic argument is that because his Belgian benefit is reduced by the entire amount of his Italian benefit, he derives no advantage from his insurance periods completed in Italy. He is no better off, in terms of social security, than a worker who spent his entire working life in Belgium. To remedy this apparent injustice he proposes a special formula that would allow him to retain a part of the Italian benefit.

18. Similar arguments are put forward by the Italian Government, which submits furthermore that, by reducing the Belgian benefit by the entire amount of the Italian benefit, the Institut national has disregarded the 'principle of proportionality' underlying the method of calculation prescribed by Article 46(3). The Italian Government also proposes a special formula, which, though superficially different from that of Mr Cabras, gives the same result. It contends that the Belgian benefit should be reduced by a coefficient resulting from a fraction in which the numerator is the 'highest theoretical amount' and the denominator is the sum of the two benefits.

19. Notwithstanding the arguments put forward by counsel for Mr Cabras and counsel for the Italian Government (both of whom complained, at the hearing, of the perverse effects of Article 46), I believe that it is clear from what I have already said that the system of calculation prescribed by Article 46 is logical and coherent. Its overriding concern is to ensure, in conformity with Article 51 of the Treaty, that the migrant worker is not placed at a disadvantage as a result of having worked in more than one Member State and that none of the institutions involved has to bear a disproportionate burden. As I have sought to demonstrate, there are circumstances in which the worker could be unduly advantaged by overlapping benefits, in particular when one of the benefits does not depend on the length of insurance periods completed. It was therefore appropriate to place a limit on the extent to which benefits may overlap. The limit established by Article 46(3) is not ungenerous: the worker is entitled to the maximum amount that he could have obtained if all his insurance

periods had been completed in any one of the Member States in which he has worked. The fact that in Mr Cabras's case the limit established by Article 46(3) is equal to the pension payable under Belgian law, with the result that he does not receive any additional benefit in respect of his insurance periods completed in Italy, is immaterial. That circumstance could only be relevant if one were to accept Mr Cabras's premiss that a person who has worked in more than one Member State must receive additional benefit in respect of the insurance periods completed in each Member State. However, that basic premiss is misconceived. It is founded on the notion that under Article 51 of the Treaty a person who has worked in more than one Member State must be better off, in terms of social security, than a person who has spent his entire working life in one Member State. That view is surely mistaken: Article 51 merely requires that the former should not be worse off than the latter.

The second question

20. This question concerns in particular Article 112 of Regulation (EEC) No 574/72 as amended (see Annex II to Council Regulation No 2001/83, Official Journal 1983, L 230, p. 6), which provides that:

'When an institution has made payments which are not due, either directly or through another institution, and when their recovery has become impossible, the amounts in question shall remain finally chargeable to the first institution, save where the payment which was not due is the result of fraud.'

21. This provision cannot be understood unless it is examined in its context. It belongs to Title VI of Regulation No 574/72, which is headed 'Miscellaneous provisions'. Articles 111 and 112 form a section entitled 'Recovery by social security institutions of payments not due and claims by assistance bodies'. Paragraphs 1 and 2 of Article 111 provide in substance that, where a social security institution has paid benefit in excess of the amount due, it may request the institution of another Member State paying benefit to the person concerned to deduct the amount overpaid from the amounts that it pays to the recipient and to transfer the amount deducted to the first institution.

22. Mr Cabras infers from the wording of Article 112 and from its proximity to Article 111 that in the circumstances of the present case the Institut national is precluded from recovering from him the excess payments made between 1 July 1982 and 23 February 1984.

23. Whatever may be the true meaning of Article 112 (and I readily concede that the matter is by no means free of doubt), I do not see how that provision can have the meaning attributed to it by Mr Cabras. I say so for the following reasons.

24. First, as the Institut national has pointed out, Regulations Nos 1408/71 and 574/72 provide only for the *coordination* of national law and the interpretation canvassed by Mr Cabras is inconsistent with the concept of

coordination. The regulations have not introduced a common system of social security and considerable differences continue to exist between the national systems, as regards both substance and procedure. In such a context it would be illogical for the Community legislature to purport to introduce a rule determining in what circumstances the competent institutions in the Member States are precluded from recovering undue payments. Such matters are in principle left for national law to determine.

25. Secondly, if the legislature had wished to adopt such a provision, I doubt whether it would have located it among the 'Miscellaneous provisions' in Regulation No 574/72, which merely lays down the procedure for implementing Regulation No 1408/71. Such an important provision of substantive law would surely have been located in Regulation No 1408/71 itself.

26. Thirdly, Article 45(1) of Regulation No 574/72, which was applicable by virtue of Article 49(1) thereof, required the Institut national to pay the benefits on a provisional basis. Inherent in the very notion of a provisional payment is the possibility that it may be recovered if it turns out not to have been due.

27. Fourthly, the interpretation advocated on behalf of Mr Cabras is based on a misunderstanding of the scope and purpose of Article 111 of Regulation No 574/72. Paragraphs 1 and 2 of Article 111 authorize an institution which has made excess payments to request the institution of another Member State to deduct the amount overpaid, first, from arrears that it pays to the person concerned and then from any other amounts that it pays him. It would be unreasonable to suggest that that is the only way of recovering excess payments from a person subject to the Community regulations and that an institution is prevented from recovering excess payments by a more direct method, for example, by withholding benefit for which it is itself responsible or by instituting proceedings in the appropriate national court. That view is confirmed — if confirmation is necessary — by the use of the verb 'may' in Article 111(1) and (2). The purpose of Article 111 is simply to facilitate cooperation between the institutions of different Member States in relation to the recovery of excess payments. It does not seek to lay down exhaustively the procedure for recovering such payments. I say that notwithstanding the Court's dictum in Case 111/80 *Fanara* v *Inami* [1981] ECR 1269 to the effect that Article 111 'deals exhaustively with the question of the recovery of the amount overpaid as regards social security benefits due to a worker to whom benefits have been paid on a provisional basis pursuant to Article 45(1) of Regulation No 574/72' (paragraph 14, at p. 1281). The Court's use of the word 'exhaustively' in that passage must be understood in the context of that particular case. All that it meant, I think, is that national legislation may not provide that, where the arrears received from a foreign institution exceed the amount of the undue payment, the balance is in certain circumstances not to be paid over to the person concerned.

28. Fifthly, even on a literal reading, Article 112 cannot be of much assistance to Mr Cabras because it comes into operation only when 'recovery [of the undue payments] has become impossible'. There are at least four ways in which an institution might recover undue payments: (a) by requesting a foreign institution, under Article 111(1) of Regulation No 574/72, to deduct the amount from arrears that it pays to the person concerned; (b) by requesting a foreign institution, under Article 111(2), to deduct the amount from other amounts that it pays to that person; (c) by deducting the amount from benefit that it itself pays him; (d) by instituting proceedings before the competent national court. In the present case only the first method of recovery seems to be impossible. It might of course be argued on behalf of Mr Cabras that the word 'impossible' in Article 112 does indeed refer to the impossibility of recovering the undue payment by that first method. I think, however, that, if that had been the intention of the authors of Regulation No 574/72, that is what they would have said, rather than use the vague formula 'when their recovery has become impossible'.

29. If Article 112 cannot have the meaning attributed to it by Mr Cabras, how — one may ask — is it to be interpreted? It cannot be denied that the provision is somewhat obscure and no direct guidance is provided by the case-law of the Court, in which it appears never to have been considered. It was with a view to resolving the doubts created by the wording of Article 112 that the Court addressed a number of written questions to the Commission concerning the interpretation of Article 112 and of the previous article. In particular, the Commission was asked if it was in possession of any *travaux préparatoires* that might shed some light on the intentions of the authors of the regulation.

30. The Commission's replies to those questions have not entirely dispelled my doubts regarding the precise meaning of Article 112 but they have certainly been of some assistance. Thus, it appears that the insertion of Article 112 was decided upon at the final stage of the discussions. That does not come as a great surprise and it may well explain why Article 112 does not seem to fit smoothly into the scheme of the regulation. It also appears that the proposal to insert Article 112 into the regulation first originated within the Audit Board, a body whose principal task, under Article 78 of Regulation No 4 (Journal officiel, 1958, p. 597), was to assist the Administrative Commission on Social Security for Migrant Workers in preparing the annual accounts in connection with various provisions of Regulation No 3 (Journal officiel, 1958, p. 561) concerning the reimbursement, by the institution of one Member State, of sums paid out by the institution of another Member State. That circumstance confirms what I have already said about the interpretation of Article 112, for it seems highly unlikely that such a body would wish to enact a rule of substantive law determining in what circumstances a recipient of social security benefits should be relieved of the obligation to repay amounts paid in excess of the sum due. It seems far more probable that such a body would be concerned with determining where the loss should lie, as between the institutions of various Member States, when undue payments have been made and their recovery has become impossible owing, in particular, to the death or insolvency of the recipient or to the

expiry of the relevant limitation period. That is in substance the interpretation suggested by the Commission in its replies to the questions put by the Court and it is, I think, the correct interpretation. Admittedly, that does not remove all the doubts surrounding the interpretation of Article 112: the relevance of the proviso relating to fraud remains obscure. But I am satisfied that the provision cannot have the meaning attributed to it by Mr Cabras and that it was not intended to cover the kind of situation at issue in this case.

31. Before concluding, I would add one final comment. While Article 112 of Regulation No 574/72 cannot, on the view I take, assist Mr Cabras in this case, I think that circumstances might arise in which an institution would be precluded, by the principle of respect for legitimate expectations, from recovering benefit unduly paid. I take two examples which are hypothetical, since the provisions in question have not been invoked in this case.

32. First, Article 49(2) of Regulation No 574/72 provides that 'in the event of recalculation . . . the institution which has taken such a decision shall forthwith notify the fact to the person concerned . . . '. It seems to me that if an institution delayed unduly in carrying out a recalculation or in notifying the result to the person concerned, who had meanwhile continued to receive benefit at a higher rate in good faith, then circumstances might arise in which the decision could not take effect before the date on which it was notified to the person concerned. Secondly, under Article 49(1) of Regulation No 574/72 the provisions of Article 45 thereof apply by analogy whenever benefits are recalculated under Article 51(2) of Regulation No 1408/71. Under Article 45(1) of Regulation No 574/72, an institution may therefore be required to pay benefit on a provisional basis; and under Article 45(4) it must then 'forthwith inform the claimant of the fact, drawing his attention explicitly to the provisional nature of the measure taken . . . '. Again, if those provisions were not to be complied with, one can see that an issue of legitimate expectations might arise.

33. I am therefore of the opinion that the questions referred to the Court by the tribunal du travail, Brussels, should be answered as follows:

'(1) When the competent institution of a Member State applies the rule against the overlapping of benefits laid down in Article 46(3) of Regulation (EEC) No 1408/71, the fact that the "highest theoretical amount of benefits", within the meaning of the first subparagraph of that provision, corresponds to the benefit payable under its national legislation alone does not prevent it from reducing that benefit in such a way as to ensure that the total sum of benefits received by the person concerned does not exceed the highest theoretical amount.

(2) Article 46(3) of Regulation (EEC) No 1408/71 is not incompatible with Article 51 of the Treaty, in so far as it has the result, in such a case, that the benefit payable under the national legislation of the aforesaid Member State is reduced by the full amount of the benefit payable in another Member State.

(3) When the institution of a Member State carries out a recalculation pursuant to Article 51(2) of Regulation (EEC) No 1408/71 which results in a reduction of the amount of benefit payable, that institution is not precluded by Article 112 of Regulation (EEC) No 574/72 from recovering payments made in excess of the amount due.'