1. Where a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not preclude that legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety. If, however, the application of that national legislation is less favourable to the worker than the application of Article 46 of the said regulation, the provisions of that article must be applied. If those provisions fall to be applied, paragraph (3) of Article 46, which limits the overlapping of benefits acquired, in accordance with paragraphs (1) and (2) thereof, is applicable to the exclusion of rules against overlapping laid down in the national legislation.

2. An early retirement pension acquired under the legislation of one Member State and an invalidity pension acquired under the legislation of another Member State are to be regarded as benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71, according to which the legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits acquired in that Member State or under the legislation of that or another Member State do 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 the Member State concerned, in accordance, in particular, with Article 46 of that regulation.

REPORT FOR THE HEARING
delivered in Case 128/88 *

I — Facts and procedure

A — *The main proceedings*

Mr Di Felice (the plaintiff in the main proceedings), of Italian nationality, worked in Belgium as a self-employed person from 1950 to 1964. Already receiving an Italian invalidity pension, he applied on 24 November 1983 for an early retirement pension with effect from his 60th birthday on 28 April 1984.

The Institut national d'assurances sociales pour travailleurs indépendants (hereinafter referred to as 'the Institute') fixed the amount of his retirement pension as a self-

* Language of the case: French.

employed person at BFR 36 568 per year, with effect from 1 May 1984, but refused payment thereof on the basis of Article 30a of Belgian Royal Decree No 72 of 10 November 1967.

Mr Di Felice then brought an action against that refusal before the tribunal du travail, Brussels. That court accepted that the plaintiff was entitled to a retirement pension for a single self-employed person on the basis of 16/45ths of a complete career, that is to say, BFR 39 007 per year from 1 May 1984, taking account of a reduction of 25% (5% per year for each year from the date of grant of early pension until his 65th birthday). However, before deciding on the actual payment of that pension, the national court decided to refer the following quesions to the Court of Justice for a preliminary ruling:

'(i) Do the continuing lack of provision in Belgian national legislation with regard to overlapping pensions (in this case, individual old-age pensions) for self-employed persons with other retirement benefits or . . . an advantage taking the place thereof (in this case, an . . . invalidity allowance) granted under a foreign old-age pension scheme . . . and the practice consequently adopted by the competent national paying body

(ii) constitute, or could they constitute, "discrimination on grounds of nationality" as referred to in the first paragraph of Article 7 of the Treaty, whether direct or indirect or based on nationality, through the application of criteria neutral in form but leading in practice to the same result, which is that non-nationals are placed at a disadvantage owing to a disproportionate obstacle,

(iii) fall, or could they fall, under the second paragraph of Article 52 and Article 53 of the Treaty and Articles 12(1) and (2) and 43 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community as well as Chapter III of that regulation, in particular Articles 44(1) and (2) and 46 thereof?

(iv) Are, in fact, the Italian invalidity pension (in this case *"ab initio"* not yet converted into an old-age pension) and the Belgian early retirement pension for a self-employed person to be regarded as "benefits of the same kind"?'

B — *Written procedure*

1. The judgment of the tribunal du travail, Brussels, was received at the Court Registry on 27 April 1988.

2. Pursuant to Article 20 of the Protocol of the Statute of the Court of Justice of the European Communities, written observations were submitted on 21 July 1988 by the Commission of the European Communities, represented by Dimitrios Gouloussis, a member of its Legal Department, acting as Agent, on 27 July 1988, by the Institut national d'assurances sociales pour travailleurs indépendants, represented by Ludo Paeme, General Manager.

3. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — The applicable Belgian legislation

As has been pointed out above, the refusal on the part of the Institute to pay Mr Di Felice's retirement pension is based on Article 30a of Belgian Royal Decree No 72 of 10 November 1967, which provides as follows:

'The benefits referred to in this chapter . . . are payable only if the recipient does not exercise an occupational activity and is not in receipt of an allowance for illness, invalidity or involuntary unemployment . . . under Belgian or foreign social security legislation or under the rules applicable to the staff of an institution subject to public international law.'

Furthermore, Article 31 of the said Royal Decree provides as follows:

'As regards the benefits referred to in this chapter, the King shall determine:

(1) The extent to which they may overlap;

(2) The extent to which they may overlap with an old-age or survivor's pension or an advantage taking the place thereof granted under a Belgian or foreign old-age and survivor's pension scheme (or a statute applicable to the staff of an institution governed by public international law) or with an advantage which is assimilated thereto by the King, enjoyed either by the person entitled or by his or her spouse.'

As the national court pointed out, that determination has not yet been made in regard to self-employed persons, whereas it was made on 30 March 1981 in regard to employed persons.

III — Written observations

Written observations were submitted by the Commission and by the Institut national d'assurances sociales pour travailleurs indépendants.

1. *The question whether Article 7 of the Treaty precludes the application of a national provision providing that a retirement pension for a self-employed person is not payable if the person concerned is in receipt of an invalidity pension under the legislation of another Member State*

The Commission argues that the reply to that question should be in the negative. It considers that it is clear from the Court's decisions on overlapping pensions that Article 7 of the Treaty has never been relied upon to call in question the application of a national rule against overlapping benefits such as the one at issue in the order for reference. If the application of national

legislation (including rules against overlapping) are less favourable to the worker than the provisions of Article 46 of Regulation No 1408/71, the latter are of course to be applied.

The Institute did not express a view on that question.

2. *The question whether the national provision against overlapping benefits described above comes within the scope of the second paragraph of Article 52 and Article 53 of the Treaty, and Articles 12(1) and (2), 43, 44(1) and (2) and 46 of Regulation No 1408/71*

With regard to that question, the Commission considers that once Council Regulation No 1390/81 of 12 May 1981 (Official Journal, L 143, p. 1) entered into force, the provisions of Regulation No 1408/71 on the payment and calculation of pensions are also applicable to self-employed persons. It follows that the provision at issue, which constitutes a suspensory provision within the meaning of Article 12(2) of Regulation No 1408/71, comes within the scope of the provisions of that regulation which the national court mentioned.

The Commission points out that the reference to Articles 52 and 53 of the Treaty is inappropriate because Regulation No 1390/81, which extended the scope of Regulation No 1408/71 to self-employed persons, is based on Articles 2, 7, 51 and 235 of the Treaty.

The Institute did not express a view on that question.

3. *The question whether an early retirement pension and an invalidity pension not yet converted into an old-age pension may be regarded as being of the same kind within the meaning of Article 12(1) of Regulation No 1408/71*

As regards this question, the Commission considers that the Belgian early retirement pension to which Mr Di Felice is entitled as a self-employed person and the Italian invalidity pension which has not yet been converted into an old-age pension are benefits of the same kind within the meaning of Article 12(1) of Regulation No 1408/71. According to the Court's case-law, social security benefits must be regarded as being of the same kind when their nature and purpose as well as the basis on which they are calculated and the conditions for granting them are identical (see, for example, the judgment of 6 October 1987 in Case 197/85 *ONPTS* v *Stefanutti* [1987] ECR 3855). In this case, both of the benefits involved are intended to provide the means of subsistence for a person who, for reasons of invalidity or old-age, is no longer able to work and the amount of the benefits is calculated on the basis of the insurance and contributions of the same person (judgment of 24 September 1987 in Case 37/86 *Coenen* v *Rijksdienst voor Werknehmerspensioenen* [1987] ECR 3589). It follows that the national provision against overlapping benefits is not applicable and that the amount referred to in Article 46(1) of Regulation No 1408/71 is the amount to which the worker would be entitled according to the national court if he were not in receipt of a pension by virtue of the legislation of another Member State (judgment of 2 July 1981 in Joined Cases 116, 117, 119, 120 and 121/80 *RWP* v *Celestre* [1981] ECR 1737,

at p. 1755). In calculating the pension, the *pro rata* amount should then be calculated on the basis of Article 46(2), a comparison should be made between the 'autonomous' benefit and the 'Community' benefit and the higher of those two benefits should be granted.

The Institute argues that the benefits involved, namely the Belgian early retirement pension, on the one hand, and the foreign invalidity pension not yet converted into an old-age pension, on the other, cannot be regarded as benefits of the same kind for the purposes of Article 12(2) of Regulation No 1408/71 and that, therefore, the provisions of the Belgian legislation concerning reduction, suspension or withdrawal where a retirement pension is combined with other social security benefits may be relied upon as against Mr Di Felice even though the benefits concerned were acquired under the legislation of another Member State.

J. C. Moitinho de Almeida
Judge-Rapporteur