OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 22 OCTOBER 1981 [1]

Mr President,
Members of the Court,

The case before the Court concerns the interpretation of Article 51 of Regulation 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 (Official Journal, English Special Edition 1971 (II), p. 416).

The case is complicated by the interplay of the various rules for determining the amount of the benefits due.

Let us briefly recall the facts of the case.

Antonino Sinatra, a married Italian national, first worked from 1948 to 1956 as an employed person in Italy then from 1957 to 1970 as an underground mine-worker in Belgium, thus for more than 10 years.

That record of employment entitled him to an Italian invalidity pension, a Belgian invalidity pension and, in addition, to pension payments solely under Belgian law for occupational disease contracted in Belgium.

The amounts of those benefits have since 1970 been subject to variations, some of them the result of normal adjustments, other owing to changes in the claimant's family situation and others, finally, owing to the decision of the Mine-workers' National Pension Fund which, having conducted a comprehensive review of Antonino Sinatra's case, established that he had received an "overpayment" of BFR 38 000 in respect of the period from January 1976 to January 1979. Those are the facts which led to the plaintiff's bringing a claim before the Tribunal du Travail [Labour Tribunal], Charleroi, and then to his appeal to the Cour du Travail [Labour Court], Mons, and thence to the questions referred to the Court of Justice by that court.

I — I think it would be helpful, for an understanding of this case, which involves difficult questions of interpretation of the rules against the overlapping of benefits, to set out in chronological order the history of the benefits paid.

1. As from 1 December 1970 Antonino Sinatra has been, pursuant to Article 46 of the Regulation of the Council, in receipt of an Italian pension the amount of which varies in accordance with the length of the insurance periods.

That benefit has been revalorized several times to take account of inflation and of measures taken as a result of fluctuations in the value of the Italian currency.

These modifications did not, by virtue of Article 51 (1) of the regulation, entail a recalculation under Article 46.

2. As from 1 April 1971, the claimant had also been in receipt of a separate mine-worker's invalidity pension, at the "underground married rate" pursuant to the provisions of Articles 1 and 4 of the Belgian Royal Decree of 19 November 1970 concerning pension schemes for mine-workers.

Under that legislation the amount of pension does not depend on the length of the insurance period but a minimum period of 5 or 10 years is stipulated.

1 — Translated from the French.

On 10 May 1971 the Mine-Workers' National Pension Fund reduced the amount of the pension on the ground that the claimant received a pension for occupational disease.

For an analysis of that legislation I would refer to the account given of it by Mr Advocate General Warner in his opinions in the *Manzoni, Mura* and *Greco* cases ([1977] ECR 1657, at pp. 1672-1673), and again in the case of *Mura* ([1979] ECR 1830) in which this Court delivered judgments on 13 October 1977 ([1977] ECR 1647, 1699, 1711) and on 16 May 1979 ([1979] ECR 1819) respectively.

3. As from January 1976 the Belgian invalidity pension was reduced owing to a change in the amount of family income received by Antonino Sinatra whose wife had begun to work and was thus no longer dependent on her husband. "The household rate" was altered to the "single rate" which was distinctly less favourable. It should be noted that the change from one category to another was not of such a nature as to affect the amount of the Italian pension.

4. It was then that the Mine-workers' National Pension Fund conducted a thorough review of the file in the light of Community regulations and finally established that Antonino Sinatra had received an "overpayment" which is fixed at BFR 38 000.

In fact, in respect of the period from 1 April 1971 to 1 July 1975, the Belgian benefits were *reduced* by the amount of the Italian pension, in application of the provisions of Article 11 (2) of Regulation No 3 of the Council (superseded by Article 12 (2) of Regulation No 1408/71) which applies to benefits of the same kind *paid* by the institutions of two or more Member States *in accordance with* the provisions of Articles 46, 50 and 51 of the regulations and of Article 23 (1) of the Royal Decree.

The amount of that reduction was itself *increased* by the application of the *coefficient* provided for by Article 7 (1) (c) of Regulation No 574/72 of the Council of 21 March 1972 (Official Journal, English Special Edition 1972 (I), p. 159), by decisions of the Mine-Workers' National Pension Fund of 5 August 1975. The Commission states in its observations that this operation "had as its object the application" of Article 46 (3) of Regulation No 1408/71. However the application of the coefficient appears to conflict with the judgment of this Court of 20 October 1977 in the *Giuliani* case ([1977] ECR 1865) in which it was held that that provision is applicable only in cases where, for the purpose of acquiring the right to benefit within the meaning of Article 51 (a) of the Treaty, it is necessary to have recourse to the arrangements for aggregation of the periods of insurance.

The Mine-Workers' National Pension Fund itself considered, as is apparent from the submissions which it made to the national court on 25 April 1979, that the provisions of Article 7 (1) (c) which constitute the corollary of the provisions of Article 46 (3) of Regulation No 1408/71, cease to apply once the latter may no longer be invoked.

A review of the Belgian benefits was thus carried out and a "recalculation" made, with effect from 1 January 1975, pursuant to the provisions of Article 46 of Regulation No 1408/71, account being taken of the various changes made, even for the purpose of *adjustment to the cost of living*, and also of the cessation of the increase in respect of a spouse.

Thus, while in the cases mentioned above the Mine-Workers' National Pension Fund applied the national rules against the overlapping of benefits to reduce the amount due from the Belgian institution by the amount of the benefit paid by the institution of another Member State, in this case the Fund applied *Community rules as to recalculation* in order to *restore to its proper proportions* a pension acquired by virtue of Belgian law alone and to deduct the amount due from the Italian institution from the amount due from the Belgian institution.

II — Antonino Sinatra brought the matter before the Tribunal du Travail [Labour Tribunal], Charleroi, for he contested, essentially, the taking into consideration the amount of the Italian benefits as from 1 January 1976.

The Tribunal dismissed his claim, holding that "it is of little importance that in this case the Italian benefit was *not* altered and it is sufficient that an alteration could have been made, as frequently occurs in all pension schemes following a change in civil status".

The claimant appealed to the Cour du Travail [Labour Court], Mons, and requested that court to refer to the Court of Justice the following preliminary question:

"Where, in accordance with the legislation of a Member State, a pension granted at the 'household' rate is transformed into a pension at the 'single' rate, must a fresh calculation of *all* benefits be carried out in accordance with the provisions of Article 46 of Regulation No 1408/71 *even though* the alteration effected by the institution of the State concerned has no effect on the pension paid in another State?" (emphasis added).

The questions which have been referred to this Court are concerned in their essentials to ascertain whether:

1. *Article 51* of Regulation No 1408/71 may only be applied in the case where the amount of benefits has been reviewed upwards;
2. A change in the *personal* situation of the recipient of a benefit entails, within the meaning of Article 51 (2), a recalculation of all the benefits drawn by the recipient in accordance with the provisions of Article 46.

III — Article 51 of Regulation No 1408/71 which appears in Chapter 3 thereof entitled "Old-age and death (pensions)" but which also applies by analogy to Section 2 of Chapter 2 concerning "invalidity" is headed *"Revalorization* and recalculation of benefits" (emphasis added). It provides as follows:

"1. If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the States concerned are altered by a fixed percentage or amount, such percentage or amount must be applied *directly* to the benefits determined under Article 46, *without the need for a recalculation* in accordance with the provisions of that Article.

2. *On the other hand,* if the method of determining, or the rules for calculating benefits should be altered, a *recalculation shall be carried out* in accordance with Article 46" (emphasis added).

That article thus clearly distinguishes, by treating them separately, between the case of *revalorization* where there is no need for a recalculation under Article 46, and the case of a *fresh payment* made necessary by an alteration in the method of determining benefits or in the rules for calculating them, in which case there must be a recalculation under Article 46. Article 51 (1) is concerned with those variations which, whilst not fundamen-

tally altering benefits, have the effect of increasing them since the cost of living and the level of wages have a general tendency to rise.

The conversion of a pension at the "married" rate into one at the "single" rate, that is to say, in the case of the Belgian legislation, into a pension of a man "not having a dependent child under the age of 16 years, whose spouse is in receipt of income from a trade or profession or other social advantages which exceed those resulting from the permitted activity", entails an alteration downwards of the benefit and comes within Article 51 (2), even if that alteration results from the application of a provision of internal law "relating to the *amount* of the pension" and even if "as such" the internal rules of law "relating to the method of determining benefits" have not changed.

It is thus clear that, to adopt the terms used by the national court, the revalorization referred to in the heading to Article 51 of Regulation No 1408/71 of 14 June 1971 constitutes the normal area of application of paragraph (1) of that article with the result that the instances referred to in paragraph (2) mainly cover cases where a recalculation of the benefits results in a less favourable situation.

If the method of determining, or the rules for calculating *the benefits* should be altered, which appears to be the case here, a recalculation must be carried out in accordance with the provisions of Article 46 as interpreted by the case-law of this Court in particular in its judgment of 13 October 1977, *Greco* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711 and in its judgment of 16 May 1979 in *Mura* v *Fonds National de Retraite des Ouvriers Mineurs* [1979] ECR 1819. In this respect it is of little importance that the alteration affects *the* portion of benefits paid in *one* Member State. The recalculation must be carried out as regards *the* benefits of all the Member States concerned.

However, in order to reply usefully to the questions of the court making the reference, I would add that, whilst the provisions of Regulation No 1408/71 do not prevent national laws, including their rules against the overlapping of benefits (in this instance Article 23 (3) of the Royal Decree of 19 November 1970), from being applied in their entirety to a recipient of a pension in the appellant's situation, it is not permissible, on the pretext of applying Article 51 (2) of that regulation, to take into consideration, in order to reduce the "independent" national benefit, the re-assessments of a pension paid by another Member State which come under Article 51 (1). Nor may the provisions of Article 46 (3) and of its corollary Article 7 (1) (c) of Regulation No 574/72 be used for such a purpose. Such procedures go beyond the objective of coordination enshrined in Article 51 of the Treaty and properly belong to the sphere of the harmonization of national laws.

In other words when, in accordance with the legislation of one Member State (Belgium), an invalidity pension (acquired by virtue of Belgian law alone) granted at the "household" rate is converted into a pension at the "single" rate and that conversion has no effect upon another invalidity pension (acquired in Italy by virtue of Regulation No 1408/71), it is not permissible to take into consideration the revalorizations of one pension (the Italian pension) even if that were done in order to carry out a recalculation required in such a case by

Belgian law in order to avoid an undue overlapping of benefits.

It is not permissible to reduce the Belgian benefit (which is payable solely by virtue of Belgian law) by taking into account the pension paid in Italy, by virtue of the Community rules (and of increases made in that pension).

In the light of the foregoing observations I conclude that, in reply to the questions submitted to this Court by the Cour du Travail [Labour Court], Mons, the following ruling should be given:

1. Article 51 (2) of Regulation No 1408/71 is only to be applied to a benefit where, for the purposes of its payment, it was necessary to have recourse to aggregation and apportionment. If the reduction in the national pension merely results from the application of Article 12 (2) of that regulation Article 51 (2) is not to be applied.

2. Where the pursuit of a professional or trade activity by the spouse of a person in receipt of a pension entails an alteration in the rate on the basis of which a benefit is provided by one Member State pursuant to Article 46 of the Regulation, Article 51 (2) must be interpreted as meaning that the competent institutions of all the Member States concerned must undertake a recalculation of the benefits which they are obliged to award in accordance with the provisions of Articles 46 and 47 of that regulation.