OPINION OF ADVOCATE GENERAL JACOBS
delivered on 30 September 1992 *

My Lords,

1. This case concerns the problem of the overlapping of social security benefits awarded under the legislations of two different Member States. The question it raises is whether a Member State is entitled to reduce the amount of invalidity benefit awarded under its own legislation, in order to take into account invalidity benefit to which the claimant would have been entitled under the legislation of another Member State, but which he has renounced in order to receive an old-age pension from the latter.

2. The case arises by way of a reference for a preliminary ruling made by the Tribunal du Travail, Brussels, which asks the Court:

'whether Article 36(4) of Regulation (EEC) No 574/72 and the second subparagraph of Article 46(1) *in fine* of Regulation (EEC) No 1408/71 which Regulation No 574/72 implements prevent an institution of a Member State to which an institution of another Member State has referred a claim for invalidity pension on the basis of Article 40 of Regulation (EEC) No 1408/71 from awarding a migrant worker an old-age pension instead of an invalidity pension where it appears that the old-age pension to which there is entitlement by virtue of the national legislation alone is more beneficial than the invalidity pension calculated in accordance with the aggregation and apportionment system, that is to say, the defendants' interpretation of Articles 241(1) of the Royal Decree of 4 November 1963, adopted pursuant to the Law of 9 August 1963 introducing and organizing a system of compulsory sickness and invalidity insurance, and the new first subparagraph of Article 76 quater (2) of that law.'

The reference is made in the course of an appeal by Mr Iacobelli ('the applicant') against a decision to discontinue his invalidity benefit, as from 1 October 1983, which was taken by the Institut National d'Assurance Maladie-Invalidité ('INAMI'). INAMI is the first defendant in the main proceedings, and has submitted written observations to the Court as well as being represented at the hearing. The second defendant, the Union Nationale des Fédérations Mutualistes Neutres, has taken no part in the proceedings before the Court.

The background to the case

3. The applicant was born on 8 November 1920, and worked in Italy until 1964. From 13 August 1964, he was employed in Belgium. On 27 December 1976 he suffered an accident at work, for which he was awarded compensation, and as a result of which he

* Original language: English.

was unable to continue working. From 1 January 1979, he was entitled, in principle, to Italian invalidity benefit, and from 1 August 1980 he was entitled to Belgian invalidity benefit. From 1 December 1980, he became entitled to an Italian old-age pension, on condition however that he renounce any right to Italian invalidity benefit. Accordingly, by a letter to the Italian authorities dated 6 December 1982, the applicant indicated he wished to renounce his Italian invalidity benefit, which had been awarded to him but not paid.

4. It appears that, as a result of an amendment made in July 1984, the applicable Italian legislation now makes provision for the conversion of invalidity benefit into old-age benefit. Prior to that date, however, the only option open to a claimant who wished to receive the latter benefit, when he reached the appropriate age, was to renounce any claim to invalidity benefit. The result of such a renunciation in the present case was that the applicant was unable to receive either kind of benefit under Italian law in respect of the period 1 January 1979 to 30 November 1980. However, the more advantageous terms of the old-age benefit to which the applicant then became entitled made it worth his while retrospectively to forgo invalidity benefit for that period.

5. By a letter to INAMI dated 4 June 1985, the applicant requested application to him of Article 235 bis of the Royal Decree of 4 November 1963, which permits the cumulation, up to a certain limit, of invalidity benefit and old-age benefit. INAMI refused Mr Iacobelli's request, on the ground that he had only obtained the Italian old-age benefit by renouncing invalidity benefit. In the view of INAMI, the applicable Belgian legislation, namely Article 70(2) (now Article 76 quater (2)) of the Law of 9 August 1963 and Article 241 of the Royal Decree of 4 November 1963, prevents the award of Belgian invalidity benefit to the extent that the invalidity in question is compensated under the law of another Member State. It appears that the application of those provisions could not be avoided by renouncing the Italian invalidity benefit and claiming the old-age benefit instead. In his appeal against that decision to the Tribunal du Travail, the applicant argued that the refusal of his request was contrary to Community law.

The applicable provisions of Community law

6. The relevant provisions of Community legislation are to be found in Council Regulation No 1408/71, as amended, 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 Council Regulation No 574/72, as amended, laying down the procedure for implementing Regulation No 1408/71. Texts of the two regulations are contained in Annex I and Annex II respectively of Council Regulation No 2001/83 of 2 June 1983 amending and updating Regulations No 1408/71 and No 574/72 (OJ 1983 L 230, p. 8). I shall refer to those two regulations as 'the regulation' and 'the implementing regulation' respectively, a terminology which is followed in the regulations themselves. Subsequent amendments to the regulations, and in particular the substantial amendments made by Council Regulation

No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7) which came into force on 1 June 1992, are not applicable to the present proceedings, although it may be noted that by paragraph 4 of the new Article 95a of Regulation No 1408/71 inserted by Article 2(6) of Regulation No 1248/92:

'The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of Regulation No 1248/92.'

7. Chapter 2 (Articles 37 to 43) of Title III of the regulation contains special provisions relating to invalidity benefits. Article 40(1) provides as follows:

'An employed or self-employed person who has been successively or alternately subject to the legislations of two or more Member States, of which at least one is not of the type referred to in Article 37(1) [i. e. legislations according to which the amount of invalidity benefits is independent of the duration of insurance periods], shall receive benefits under the provisions of Chapter 3, which shall apply by analogy ...'.

It is common ground that Article 40(1) applies in the circumstances of the present case, Belgian, but not Italian, invalidity benefit being independent of the duration of insurance periods. It follows therefore that the rules for the calculation of the applicant's invalidity benefit are those laid down for old-age benefit in Chapter 3 of Title III, which are to be applied by analogy.

8. Article 43 of the regulation concerns the conversion of invalidity benefits into old-age benefits; it provides as follows:

'1. Invalidity benefits shall be converted into old-age benefits, where appropriate, under the conditions laid down by the legislation or legislations under which they were granted, and in accordance with the provisions of Chapter 3.

2. Any institution of a Member State which is responsible for providing invalidity benefits shall, where a person receiving invalidity benefits can, by virtue of the provisions of Article 49 [which applies where the person concerned does not simultaneously satisfy the conditions laid down by all the legislations to which he has been subject], establish a claim to old-age benefits under the legislation of other Member States, continue to provide such person with the invalidity benefits to which he is entitled under the legislation which it administers until the provisions of paragraph 1 become applicable as regards that institution.

....'.

9. As we have seen, in the present case, Chapter 3 (Articles 44 to 51) of Title III of the regulation, entitled 'Old age and death

(pensions)', is to be applied by analogy to the determination of the applicant's invalidity benefit. Article 44 provides as follows:

'1. The rights to benefits of an employed or self-employed person who has been subject to the legislation of two or more Member States ... shall be determined in accordance with the provisions of this chapter.

2. Subject to the provisions of Article 49, when a claim for the award of a benefit is lodged, such award must be made having regard to all the legislations to which the employed or self-employed person has been subject. Exception shall be made to this rule if the person concerned expressly asks for postponement of the award of old-age benefits to which he would be entitled under the legislation of one or more Member States.

....'.

Article 45(1) provides that:

'The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence shall take into account, to the extent necessary, periods of insurance or residence completed under the legislation of any Member State as if they were periods completed under the legislation which it administers.'

10. Article 46 of the regulation lays down detailed rules for the calculation of benefits. Where a claimant is entitled to benefit under the legislation of a Member State to which he has been subject, without the application of Article 45(1) being necessary, the competent institution of that Member State is required to perform a double calculation. First, it determines the amount of benefit to which the claimant is entitled under its own legislation, the so-called 'autonomous' amount. It must then perform the calculation provided for in Article 46(2), which applies where the claimant is entitled to benefit only where periods of insurance or residence in other Member States are taken into account, under the system known as 'aggregation and apportionment'. If the second calculation leads to a higher amount, that higher figure is taken into consideration for the purposes of Article 46. Where however the claimant has been subject to legislation under which such periods must be taken into account, the competent institution of that Member State need only perform the second of the two calculations. The sum of the amounts so determined is then awarded to the claimant, subject however to the upper limit imposed by Article 46(3), which is designed to prevent undue overlapping of the benefits thereby awarded.

11. Article 49 of the regulation applies where the claimant satisfies the conditions of some, but not all, of the legislations to which he has been subject. Article 49(1) provides that:

'...

(a) each of the competent institutions administering a legislation whose conditions are satisfied shall calculate the amount of the benefit due, in accordance with the provisions of Article 46;

(b) however:

...

(ii) if the person concerned satisfies the conditions of only one legislation without having recourse to periods of insurance or residence completed under the legislations whose conditions are not satisfied, the amount of the benefit payable shall be calculated in accordance with the provisions only of that legislation whose conditions are satisfied, taking account of the periods completed under that legislation only.'

12. Article 12(2) of the regulation deals with national rules against the overlapping of benefits, providing as follows:

'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).'

It appears therefore that, in the case of invalidity benefits, the second sentence of Article 12(2) prevents the application of national provisions against overlapping; unless, that is, the amount of benefit is calculated under national legislation alone. Thus, where benefit is determined in accordance with the provisions of Article 46, national rules against overlapping are to be ignored, even where the calculation is being made of the 'autonomous' amount of benefit under Article 46(1): see Joined Cases C-90/91 and C-91/91 *ONP* v *Di Crescenzo and Casagrande* [1992] ECR I-3851, at paragraph 20. National rules against overlapping may however be taken into account as long as benefit is determined under national provisions alone, and the application of those provisions, including national rules against overlapping, leads to a result which is more favourable to the claimant than the application of Article 46. As the Court stated in Case C-108/89 *Pian* v *ONP* [1990] ECR I-1599, at paragraphs 8 and 9:

'where a worker receives a pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not prevent that national legislation from being applied to him in its entirety, including any national rules against overlapping benefits.

It must be noted, however, ... that if the application of national legislation alone proves less favourable to the worker than the application of the rules laid down by Article 46 of Regulation No 1408/71, the provisions of that article must be applied ...'.

The Court has also made it clear that where, pursuant to the second sentence of Article 12(2), the national rules against overlapping may not be applied, the rule against overlapping contained in Article 46(3) of the regulation is to be applied instead: see Case 238/81 *Raad van Arbeid* v *Van der Bunt-Craig* [1983] ECR 1385, at paragraph 15 of the judgment, *Pian*, cited above, at paragraph 10, and *Di Crescenzo and Casagrande*, cited above, at paragraph 32. Article 46(3) is not however to be applied where to do so would reduce an amount of benefit which is acquired under national legislation alone, rather than under the provisions of Article 46: see Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, at paragraph 22 of the judgment, and Case C-5/91 *Di Prinzio* v *ONP* [1992] ECR I-897, at paragraph 65.

13. Chapter 3 (Articles 35 to 59) of Title IV of the implementing regulation is entitled 'Invalidity, old age and death (pensions)'. According to Article 36(1):

'In order to receive benefits under Articles 40 to 51 of the Regulation ... the person concerned shall submit a claim to the institution of the place of residence in accordance with the procedure provided for by the legislation administered by that institution ...'.

Article 36(4) provides as follows:

'A claim for benefits sent to the institution of one Member State shall automatically involve the concurrent award of benefits under the legislation of all the Member States in question whose conditions the claimant satisfies except where, under Article 44(2) of the Regulation, the claimant asks for postponement of any old-age benefits to which he would be entitled under the legislation of one or more Member States.'

By Article 37(d):

'if, under Article 44(2) of the Regulation, the claimant asks for the postponement of the award of any old-age benefits to which he would be entitled under the legislation of one or more Member States he must specify [in submitting his claim] the legislation under which he is claiming benefits'.

14. The investigation of claims for benefits in the cases covered by Article 36 of the implementing regulation is dealt with in Articles 41 to 50. By Article 43(1), the investigating institution (in the present case, INAMI) enters on the appropriate form the periods of insurance or residence completed under the legislation which it administers, and forwards a copy of the form to the competent institutions of other Member States with which the claimant has been insured. By Article 43(2):

'Where only one other institution is involved, that institution shall complete the said form by indicating:

(a) the periods of insurance or residence completed under the legislation which it administers;

(b) the amount of benefit which the claimant could claim in respect of those periods of insurance or residence only;

(c) the theoretical and the actual amount of benefits calculated in accordance with the provisions of Article 46(2) of the Regulation.

....'.

By Article 43(5):

'In the case provided for in Article 37(d) of the implementing Regulation, the institutions of the Member States to whose legislation the claimant has been subject but to which he has applied for the postponement of the award of the benefits shall enter on the form ... only the periods of insurance or residence completed by the claimant under the legislation which they administer.'

Consideration of the question referred

15. It is to be noted that the problem of determining the applicant's entitlement to benefit arises in respect of two distinct periods. In the first place, there is the question of the amount of Belgian invalidity benefit to which the applicant is entitled in respect of the period, admittedly brief, between 1 August 1980 and 30 November 1980, when he was entitled to the Italian invalidity benefit which he subsequently renounced, but was entitled to no other Italian benefit. Secondly, there is the problem of determining the amount of his total entitlement in the period beginning 1 December 1980, when he wishes to claim both Belgian invalidity benefit and Italian old-age benefit. In what follows, I shall first consider the position in respect of the latter period, which from the point of view of the applicant is obviously the more significant.

16. If Mr Iacobelli were entitled only to invalidity benefits, the application of the relevant Community provisions would present no particular difficulties. The submission of his claim to the Belgian institution under Article 36(1) of the implementing regulation would entail a concurrent award of Italian invalidity benefit, pursuant to Article 36(4). The competent institutions would be required to perform the calculations provided for in Article 46 of the regulation, and INAMI would be permitted to apply Belgian rules against the overlapping of benefits only if the result of applying Belgian legislation alone, including those rules, was at least as favourable to the applicant as an award of benefits under Article 46. In order to determine the final amount of benefits, the prescribed form is forwarded by INAMI to the competent Italian institution, pursuant to

Article 43(1) of the implementing regulation, and returned to INAMI when the Italian institution has entered details of the periods of insurance or residence completed, and of the amounts of benefit calculated in accordance with Article 46(2) of the regulation.

17. It will however be recalled that, in the present case, the applicant had a potential claim to two alternative Italian benefits. In those circumstances, the Tribunal du Travail considers that the determination of his invalidity benefit gives rise to the following difficulty. As we have seen, Article 36(4) of the implementing regulation provides that the applicant's claim for invalidity benefit entails the concurrent award of benefits under the legislation of all the Member States whose conditions the applicant satisfies. In the view of the Tribunal du Travail, the question accordingly arises whether the applicant can, consistently with that provision, be allowed to renounce Italian invalidity benefit in favour of Italian old-age benefit.

18. It will be observed that, as phrased, the question referred by the Tribunal du Travail bears upon the compatibility with Community law of the action of the Italian rather than of the Belgian authorities. The question to be resolved however is, in substance, that of the effect of the renunciation of Italian invalidity benefit on the applicant's cumulative entitlement under the relevant Community provisions, responsibility for the application of which devolves in the present case upon INAMI. Accordingly, the question is better understood as asking whether an institution of a Member State which has referred a claim for invalidity benefit to an institution of another Member State, pursuant to Articles 36 and 43 of the implementing regulation, is required to take into account, in determining the amount of benefit to be awarded, an old-age pension awarded by the latter institution, rather than an invalidity pension which might have been awarded in its place, but which the claimant has renounced pursuant to the legislation of the latter Member State.

19. As we have seen, the Tribunal du Travail considers that the applicant's renunciation of Italian invalidity benefit may be inconsistent with Article 36(4) of the implementing regulation. In the view of the Commission, on the other hand, the solution to the difficulty raised by the Tribunal du Travail is to be found in Article 36(4) itself, which, it will be recalled, permits benefits under the legislation of one or more Member States to be disregarded 'where, under Article 44(2) of the Regulation, the claimant asks for postponement of any old-age benefits to which he would be entitled'. The Commission suggests that, by virtue of Article 40(1) of the regulation, the second sentence of Article 44(2) is intended to apply by analogy to invalidity benefits, and hence that the related provision in Article 36(4) of the implementing regulation must similarly be taken so to apply.

20. It seems to me however that the power to disregard benefits, conferred by Article 44(2) of the regulation and Article 36(4) of the implementing regulation, may not be relevant to the issue arising in the present case. As the Commission points out, the current version of the second sentence of Article

44(2) was inserted by Council Regulation No 2595/77 of 21 November 1977 (OJ 1977 L 302, p. 1). In the original version of Regulation No 1408/71 (see OJ, English Special Edition 1971 (II), p. 416), that sentence read as follows:

'Exception shall be made to this rule [concerning the award of benefit] if the person concerned expressly asks for postponement of the award of old-age benefits to which he would be entitled under the legislation of one or more Member States, provided that the periods completed under that legislation or those legislations are not taken into account for the purpose of acquiring the right to benefit in another Member State.'

The first recital to Regulation No 2595/77 explains the purpose of the amendment as follows:

'... workers should ... be enabled to receive, without any restrictions, a pension acquired under the legislation of a Member State and to have a pension which was awarded under the legislation of another Member State postponed in order to receive the increase in pension due as a result of that postponement'.

Thus, the original version of Article 44(2) already made provision for the postponement of old-age benefits, subject to a restriction on the taking into account of insurance periods which was removed by the amendment in 1977. It appears that the purpose of the original provision, reaffirmed by the amendment, was to make it clear that a claimant is not obliged to draw immediately an old-age pension to which he has become entitled, if he can obtain increased pension rights by continuing to work and thereby accumulating further insurance periods. That principle had in fact already been established by the case-law of the Court in judgments interpreting Regulations No 3 and No 4 of the Council, which did not make any express provision for the postponement of pension rights: see Case 9/67 *Colditz* v *Assurance Vieillesse Paris* [1967] ECR 229 and Case 11/67 *ONPO* v *Couture* [1967] ECR 379. It seems that the provision for the postponement of benefits contained in Article 44(2) was included in Regulation No 1408/71 in order to give effect to those judgments.

21. In contrast, the national legislation at issue in the present case requires a claimant to renounce, rather than permitting him to postpone, benefit. That renunciation leads, not to an increase in the pension which has been forgone, but rather to the immediate award of a different pension as soon as the conditions for the latter are satisfied. It is to be noted, furthermore, that Article 36(4) of the implementing regulation refers only to the postponement of old-age, and not of invalidity benefits, even though Chapter 3 of the implementing regulation is entitled 'Invalidity, old age and death (pensions)'. The explanation for that, it seems to me, is that it is difficult to imagine any system of social security allowing an invalidity pension to be increased as a result of postponement:

an invalidity pension is, almost by definition, a benefit which is required immediately, in order to compensate for a present invalidity. I cannot therefore accept the Commission's argument that the provision for the postponement of old-age benefit contained in Article 36(4) of the implementing regulation is intended to extend by analogy to the renunciation of invalidity benefit.

22. However, in my view it is clear, equally, that no such extension is necessary in the present case; for Article 36(4) of the implementing regulation cannot have the effect of preventing the applicant from renouncing his Italian invalidity benefit. Here the same reasoning applies as that which guided the Court in its interpretation of the provisions for the award of benefits contained in Regulations No 3 and No 4 of the Council: see the *Colditz* and *Couture* cases, cited in paragraph 20 above. Thus, the requirement in Article 36(4) that a claim for benefits 'shall automatically involve the concurrent award of benefits under the legislation of all the Member States ... whose conditions the claimant satisfies' is a procedural provision which could not impose a requirement to award benefit additional to any laid down in Article 44(2) of the regulation, which Article 36(4) implements: compare *Couture*, at p. 389 of the judgment, and see the Opinion of Advocate General Roemer in the *Colditz* case, at p. 239. As far as the regulation itself is concerned, Article 44(2) stipulates only that the award of benefit must 'be made having regard to all the legislations to which the employed or self-employed person has been subject'. It does not seem to me that that provision need be interpreted as requiring a claimant to be awarded a benefit which national law permits him to renounce in favour of a more advantageous benefit. It is therefore unnecessary for the applicant to rely upon the exception to the concurrent award of benefits contained in Article 36(4) which, as I have already suggested, is intended to cover the specific case in which old-age benefit is postponed.

23. Thus, the question of what benefits are available under the legislation of a particular Member State is, in principle, a matter for national law alone. Accordingly, where national legislation requires a claimant to make a choice between two alternative benefits, the benefit to be taken into account, pursuant to the first sentence of Article 44(2) of the regulation, and for the purposes of the calculations to be performed under Article 46, is simply the benefit which the claimant elects to receive. It follows that, where a claimant applying for invalidity benefit in one Member State is able, under the legislation of another Member State, to elect to receive old-age benefit under that legislation in place of invalidity benefit, he must be treated as a person who can establish a claim to old-age benefit under the legislation of the latter Member State, and not as someone in receipt of invalidity benefit there.

24. In such circumstances, the provision of the regulation which is most in point would seem to be Article 43(2), which was cited above in paragraph 8. According to that

provision, where a person receiving invalidity benefit becomes entitled to old-age benefit in another Member State, the first Member State must continue to provide the claimant with invalidity benefit until the claimant becomes entitled to old-age benefit in that Member State also. As the Court explained in Case 180/78 *Brouwer-Kaune* [1979] ECR 2111, at paragraphs 6 and 7 of the judgment, in such a case the first Member State may not apply its rules against the overlapping of benefits unless that would lead to a result which is at least as favourable as the application of the scheme laid down by Article 46. Thus, where Article 43(2) of the regulation applies, invalidity benefit and old-age benefit are to be regarded as benefits 'of the same kind' for the purposes of the second sentence of Article 12(2): see Case 4/80 *D'Amico* v *ONPTS* [1980] ECR 2951, at paragraphs 16 and 17 of the judgment.

25. It is true that, as the Court pointed out in the *Brouwer-Kaune* case, at paragraph 3 of the judgment, Article 43(2) of the regulation presupposes a situation in which invalidity benefits are acquired in two Member States, and subsequently converted into old-age benefit in one of the Member States, in accordance with Article 43(1). Article 43(2) is not therefore primarily intended to apply to a situation in which a claimant is required to make a choice between the two kinds of benefit, rather than being permitted to convert one into the other. It is equally clear, however, that Article 43(2) is not to be interpreted restrictively. Thus, in the *D'Amico* case, the Court adopted an extensive interpretation of Article 43(2), holding, in paragraph 15 of the judgment, that:

'Although that provision only expressly refers to the obligation of an institution, responsible for providing the invalidity benefits which have not been converted into old-age benefits, to continue to provide benefits to a person receiving the invalidity benefits, when account is taken of Articles 48 to 51 of the Treaty that provision implies that an institution providing invalidity benefits which have been converted into old-age benefits is not empowered to stop granting those benefits on the ground that the recipient thereof is also in receipt of invalidity benefits which have not yet been converted.'

In the *Brouwer-Kaune* case, furthermore, the Court made it clear that Article 40(1) and Article 46 of the regulation, together with the Court's associated case-law, could be applied by analogy to a case not falling within the express terms of Article 43, observing in paragraph 8 of the judgment that:

'The protection of the rights which the person concerned possesses by virtue of national legislation alone, without having recourse to the system of aggregation and apportionment [laid down by Article 46 of the regulation], and respect for any advantages resulting from that system, are mandatory principles applying equally in all situations.'

26. In *Brouwer-Kaune*, Article 43 was held to be inapplicable because the claimant became entitled to invalidity benefit in the first Member State after the date on which the invalidity benefit awarded by the second Member State was converted into an old-age pension. In contrast, in the present case the applicant established his claim to Italian old-age benefit after he became entitled to

Belgian invalidity benefit — which is precisely the sequence of events envisaged by Article 43(2). The only difficulty in the present case is that the claim to Italian old-age benefit was not established by way of conversion from invalidity benefit, but rather by means of an election between the two. In the light of the *D'Amico* and *Brouwer-Kaune* cases, however, there can in my view be no doubt that such a case is to be regarded as falling within Article 43(2) of the regulation, and hence within the system for the calculation of benefits provided by Articles 40(1) and 46; or, failing that, that those provisions are to be applied by analogy.

27. It seems to me, in fact, that it is Article 43(2) which must be taken to apply in the present case. It is clear that a claimant should not be disadvantaged by the fact that national legislation has required him to make a choice between receiving invalidity benefit or old-age benefit, rather than allowing him to convert one into the other: it would defeat the clear purpose of Article 43 for a claimant to be penalized in such circumstances. As I have already mentioned, it appears that the failure of the Italian legislation to provide for such a conversion has subsequently been remedied by an amendment of the relevant provisions in July 1984. It does not seem to me that the applicant's position should be affected by the fact that the relevant legislation did not yet make such provision when he established his claim to an Italian old-age pension in 1980. Thus, when the applicant finally became eligible for Italian old-age benefit, he was to be treated in exactly the same way as any other claimant who becomes eligible for old-age benefit after having been previously entitled to invalidity benefit.

28. It remains to consider the position which obtains during the brief period in which the applicant was not yet receiving Italian old-age benefit, but was entitled to (without receiving) the Italian invalidity benefit which he later renounced. As we have already seen, the applicant must, from the end of that period, be treated as someone entitled to Italian old-age benefit, and cannot be regarded as any longer entitled to the Italian invalidity benefit which he has renounced. It seems to me, however, that it would be inconsistent with that analysis to treat the applicant any differently in respect of the earlier period. Thus, in the light of his renunciation of invalidity benefit, the applicant must be treated throughout as someone who does not satisfy the conditions for the award of invalidity benefit in Italy. By Article 49(1)(a) and (b)(ii) of the regulation, therefore, the Belgian institution must calculate the amount of benefit due under the provisions of Belgian law alone, in accordance with Article 46(1). It follows that the Belgian institution is not permitted to apply national rules against the overlapping of benefits, which in this case would be bound to lead to a result less favourable to the applicant.

29. I therefore reach the conclusion that where, in circumstances such as the present ones, a claimant has been required to renounce invalidity benefit in one Member State in order subsequently to receive old-age benefit there, the institution awarding invalidity benefit in a second Member State is required to take into account the entitlement to old-age benefit established under the legislation of the first Member State. The two benefits are then to be regarded as benefits 'of the same kind', for the purposes of Article 12(2) of the regulation, and the provisions of Articles 40(1) and 46 are to be applied to the determination of the total amount of benefits awarded. National rules against the overlapping of benefits may then only be applied where the result is more favourable to the applicant than the amount determined under the scheme laid down by Article 46. During the period in which the claimant is not yet entitled to old-age benefit in the first Member State, national rules of the second Member State against the overlapping of benefits may not be applied in respect of the invalidity benefit which has been renounced.

Conclusion

30. I am accordingly of the opinion that the question referred by the Tribunal du Travail should be answered as follows:

Council Regulation No 1408/71 must be interpreted as meaning that, where a worker is required under the legislation of one Member State to renounce a claim to invalidity benefit in order to establish a claim to old-age benefit, an institution of a second Member State which is responsible for awarding invalidity benefit under Article 40(1) of the regulation is prevented from taking into account, for the purposes of that award, the invalidity benefit which has been so renounced, and must take into account instead the award of old-age benefit. Where such a claim to old-age benefit has been established in the first Member State, the provisions of Chapter 3 of Title III of the regulation are applicable for the purpose of determining the amounts of old-age and invalidity benefits to be awarded in the two Member States; and, by virtue of Article 12(2) of the regulation, the application of national rules against overlapping is precluded unless the result of applying the national legislation, including those rules, proves more favourable than the application of the scheme laid down by Article 46.