period giving rise to entitlement under that legislation has been completed, even if the scheme concerned is a special scheme for a particular occupation and the periods completed in another Member State were not completed within an equivalent scheme.

For the purpose of determining the amount referred to in the first subparagraph of Article 46 (1) it is not permissible to apply a national rule designed to prevent the overlapping of domestic and foreign benefits.

The amount found to be higher, on the basis of the comparison prescribed in the second paragraph of Article 46 (1), is to be reduced where appropriate in accordance with Article 46 (3).

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 January 1986 *

Mr President,
Members of the Court,

1. By a judgment of 5 December 1983 the cour du travail [Labour Court], Mons, has for the second time requested a preliminary ruling from this Court in the dispute between Mr Antonino Sinatra and the Fonds national de retraite des ouvriers mineurs [Mine-Workers' National Pension Fund].

Mr Sinatra, an Italian national and the appellant in the main proceedings, worked from 1948 to 1956 as an employed person in Italy and then from 1957 to 1970 as an underground mine-worker in Belgium.

Those activities have entitled him to the following benefits:

(i) In Italy, since 1 December 1970, an invalidity pension under the general insurance scheme, apportioned pursuant to Article 46 of Regulation 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 (hereinafter referred to as 'the regulation');

(ii) In Belgium, since 1 April 1971, an underground mine-worker's invalidity pension at the 'married rate', pursuant to the Belgian Royal Decree of 19 November 1970 (Articles 1 to 4); it is a flat-rate pension whose amount is unrelated to the exact length of the insurance periods completed but which may be awarded only after a minimum of five or 10 years of insurance. A pension for occupational disease contracted in Belgium was deducted from it with effect from 10 May 1971.

On the first occasion on which the cour du travail, Mons, requested this Court to give a preliminary ruling, on 7 January 1981 (Case 7/81 *Sinatra* v *FNROM*, judgment of 2 February 1982 [1982] ECR 137), the question which arose was, in essence, whether in view of Article 51 of the regulation a change in Mr Sinatra's personal circumstances which occurred in 1976 — his wife had found gainful employment and the

* Translated from the French.

'household rate' of the Belgian invalidity pension was reduced to the 'single rate' — entitled the Fonds national de retraite des ouvriers mineurs [hereinafter referred to as 'the Fund'] to use the opportunity, as it did, to conduct a thorough review of the appellant's file. Citing all the Community regulations on the matter, the respondent in the main proceedings had reduced the Belgian benefit by the amount of the Italian pension for the period from 1 April 1971 to 1 July 1975, calling upon the appellant in the main proceedings to refund an 'overpayment' of BFR 38 000; it also recalculated the Belgian benefit in accordance with the provisions of Article 46 of the regulation with effect from 1 January 1975 taking into account various amendments, including the withdrawal of the married person's supplement with effect from 1 January 1976.

In its judgment of 2 February 1982 the Court ruled: 'A recalculation in accordance with the provisions of Article 46 of Regulation No 1408/71 is necessary in respect of any alteration in benefits paid by a Member State', subject to exceptions which do not include changes in the personal circumstances of the insured. The Fund was therefore entitled to carry out a revision of the benefit for which it was responsible, and this was what the national court held on 2 November 1983, whilst calling upon the parties to present argument on other issues relating to the compatibility of the applicable Belgian law (namely Article 23 (1) of a Royal Decree of 19 November 1970) with Community law, and in particular Articles 45, 46 and 12 of the regulation. The question was whether, and to what extent, the Italian pension could be deducted from the Belgian pension. The parties to the main proceedings are in disagreement on that point.

Article 23 (1) of the aforesaid Royal Decree establishes a rule against overlapping benefits which the national court describes as an 'external' rule, that is to say, equally applicable to benefits obtained abroad. Before it was amended by a further Royal Decree of 3 August 1983, Article 23 (1) was worded as follows:

'An invalidity pension granted under this decree may be aggregated with one or more retirement or invalidity pensions only up to the annual amount of the pension as laid down by Article 4 (1), (2) or (4), according to whether the worker is married, single, widowed, divorced or separated.'

The amendment of 3 August 1983 prohibited the overlapping of the invalidity pension with one or more retirement or invalidity pensions 'granted pursuant to Belgian or foreign legislation'.

At paragraph 8 of its judgment of 2 February 1982 (cited above) the Court, reiterating the principles laid down in its previous decisions, held as follows:

'The right . . . conferred upon the migrant worker to benefit from the most favourable social security system implies in principle that, wherever there is an alteration in the benefits granted under that system, a fresh comparison between the national system and the system of aggregation and apportionment is to be carried out in accordance with Article 46 of Regulation No 1408/71, in order to determine which system is the most advantageous following the alteration.'

However, the two parties to the main proceedings agreed that the insurance periods in Belgium (14 years as a mine-worker) and in Italy (three years under a general scheme) were not capable of aggregation within the strict meaning of Article 45 (2) of the regulation in so far as they arise under different schemes.

Article 45 (2) provides as follows:

'Where the legislation of a Member State makes the granting of certain benefits conditional upon the periods of insurance having been completed in an occupation subject to a special scheme for employed persons or, where appropriate, in a specific employment, periods completed under the legislations of other Member States shall be taken into account for the granting of such benefits only if completed under a corresponding scheme or, failing this, in the same occupation . . . '.

Nonetheless, the appellant in the main proceedings, referring to paragraph 8 of the Court's judgment of 2 February 1982, asserted before the cour du travail, Mons, that the above rule had no meaning unless there was aggregation and apportionment in accordance with Article 46; the Fund, on the other hand, citing the Court's judgments in Cases 22/77 (judgment of 13 October 1977, *Mura* v *FNROM* [1977] ECR 1699) and 37/77 (judgment of the same date, *Greco* v *FNROM* [1977] ECR 1711), contended that aggregation in accordance with that case-law was impossible by virtue of Article 45 (2) of the regulation; consequently, the Belgian rule against overlapping benefits applies in its entirety.

In its judgment the cour du travail, Mons, stated that: '. . . it is necessary to determine whether the competent Belgian institution, since it need not have recourse to aggregation and apportionment in order to found entitlement to invalidity retirement pensions for mine-workers, must make a comparison, in accordance with Article 46 of Regulation No 1408/71, between the Community system under Article 46 (1) to (3), and the national system, including the provision against overlapping, in order to ascertain which is the more favourable for the migrant worker'.

It formulated its question in the following terms:

'Where the legislation of a Member State of the Community makes payment of invalidity benefit under a special scheme for mine-workers conditional upon the completion of a specified minimum period of insurance, although the amount of such benefit is not determined by the total length of the periods of insurance (there being no recourse to aggregation), and contains a rule against overlapping with benefits acquired under foreign legislation, must Regulation No 1408/71, particularly Articles 12, 45 and 46, be interpreted as meaning that the competent institution of that Member State must, in the case of a worker who is covered by that legislation but also receives an apportioned pension by virtue of a general scheme provided for by the legislation of another Member State, compare the Community benefit, obtained on the basis of Article 46 (1) without application of the national rules against overlapping and of Article 46 (3), which fixes as a ceiling the highest theoretical amount of pension, with the benefit obtained exclusively by application of the national legislation, including the rule against overlapping with benefits acquired under foreign legislation, in order to discover which system is more favourable to the migrant worker (yielding the higher pension)?'

2. *Mr Sinatra*, both in his written observations and at the hearing, argued that a distinction had to be drawn between the aggregation of

(a) the periods of insurance needed to confer entitlement to a benefit — which is not possible in this instance on

account of Article 45 (2) and the heterogeneous nature of the scheme involved — and

(b) the insurance periods to be taken into consideration in calculating the entitlement.

According to Mr Sinatra, Articles 45 and 46 of the regulation give effect to the objectives of Article 51 of the EEC Treaty, and the case-law to which the Fund refers shows that Article 46 is applicable in its entirety when it yields a more favourable result than could be achieved by the application of national rules.

Mr Sinatra claims a total insurance record of 17 years by aggregation; the apportionment in Belgium (by 14/17ths) gives a more favourable result than that achieved by the application of the Belgian scheme including the rule against overlapping benefits (the difference in his favour being BFR 596). Since it proves more favourable, Article 46 should therefore, in his view, be applied.

3. Repeating its main arguments from the proceedings before the national court, the *Fund* contends that it observed the principles laid down by the above-mentioned case-law of this Court, because the rule governing aggregation — and hence apportionment as well — was in its view inapplicable by virtue of the unequivocal terms of Article 45 (2) of the regulation.

4. According to the *Italian Government*, which has submitted observations to the Court, this case might induce the Court to revise its case-law on the matter. The safeguard provided by the Community system of calculation may prove ineffective where insurance periods are completed under different schemes, since in those circumstances Article 46 (2) of the regulation may not apply in view of the rule established by Article 45 (2) thereof. Once that safeguard disappears, the matter turns on the national rules against overlapping benefits, which may be freely introduced by Member States, enabling them to appropriate benefits from another State. There are thus grounds for revising the interpretation given to Article 12 of the regulation.

According to the Italian Government, the Court has interpreted Article 12 (2) so as to rule out any award of benefit in accordance with Article 46 whenever one of the two benefits payable is awarded pursuant to national legislation alone; this is based on the principle that the Community system shall not interfere with national provisions.

In the opinion of the Italian Government, there are, nevertheless, grounds for contending that the imperative need — already emphasized by the Court — for the coordination of national legislative provisions, as specified by Community law and in particular Article 51 of the EEC Treaty, should suggest a solution which precludes arbitrary action on the part of Member States. That need should find specific expression in Article 12 of the regulation, which is designed to achieve that coordination when it speaks of benefits awarded 'in accordance with' Article 46 of the regulation and not 'by virtue' thereof. It follows, according to the Italian Government, that Article 46 (1) should be applied without regard to the national rule against overlapping benefits, and this is borne out by the second paragraph of Article 46 (3), which expressly provides for the possibility of reducing the benefit payable by virtue of national legislation alone. Even though Article 46 (3) has been

held to be incompatible with Article 51 of the EEC Treaty (judgment of 21 October 1975, Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149), it is evidence of a desire to extend the coordination of the systems to cover all the cases of concurrent benefits envisaged by Article 46.

It should therefore be concluded, according to the Italian Government, that Article 12 (2) prohibits national rules against overlapping from being applied to benefits acquired solely on the basis of national legislation, in order to avoid, in the context of Community coordination, a situation whereby national provisions may unilaterally cause insured persons to forfeit rights acquired elsewhere. Something which is not permitted by Community law cannot be authorized by national law.

Should the Court adhere to its case-law as interpreted by the Italian Government, the latter proposes that Article 46 (2), covering the aggregation of insurance periods and the apportionment of benefits, and possibly Article 46 (3), establishing a Community limit, should in any event be declared applicable by analogy, enabling a theoretical Community amount to be determined which is not subject to reduction pursuant to national rules against overlapping.

5. The *Commission* begins by observing that until 1 September 1983 Article 23 (1) of the Royal Decree of 19 November 1970 did not refer to overlapping with benefits obtained abroad; hence until that date it covered only domestic benefits and was later amended to cover foreign benefits.

The Commission then refers to the rules laid down by the Court, in particular in its judgment of 2 July 1981 (Joined Cases 116, 117, 119, 120 and 121/80 *Celestre* [1981] ECR 1737), and contends:

(a) that until 1 September 1983 the provision in question, covering only domestic benefits, could not have the effect of causing the Italian pension to be deducted from the entitlement to benefit acquired by Mr Sinatra by virtue of Belgian legislation alone; and

(b) that as from 1 September 1983 the provision, having been extended to foreign benefits, could be taken into consideration in calculating the benefits to be awarded, but only subject to the method established by the *Celestre* judgment, cited above, namely by comparing the benefit calculated in accordance with national law — including the provision against overlapping — with the benefit calculated under Article 46 of the regulation considered as a whole, as described by Advocate General Sir Gordon Slynn in his Opinion in the *Celestre* case. Where benefits are awarded under the Community rules, the national provision against overlapping must be disregarded in applying the national legislation by virtue of the second sentence of Article 12 (2). The amount thereby obtained (the 'independent' benefit) should, the Commission argues, by virtue of the second paragraph of Article 46 (1), be compared with the amount yielded by the application of Article 46 (2) (a) (dealing with the aggregation of all the insurance periods completed) and Article 46 (2) (b) (dealing with apportionment).

According to the Commission, since no aggregation is required for calculating the benefit acquired by virtue of completing the minimum insurance period, the independent benefit, which disregards the provision against overlapping, is equal both to the theoretical amount, acquired regardless of

the length of the periods completed, and to the actual amount.

The Commission observes finally that it is necessary, by virtue of Article 46 (3) and in the light of the theoretical Italian amount, to correct the independent benefit, where appropriate, so as to award whichever is the greater of the national and the Community benefit.

6. I would point out straight away that this case appears to raise a spurious problem and cannot possibly cast doubt on the previous case-law of the Court on the subject.

The question to be resolved is whether Article 45 (2) of the regulation represents an obstacle to the application of Article 46 (2) (a), which provides for the aggregation of the insurance periods completed by the person concerned. Where insurance periods have been completed under heterogeneous schemes — one being a special scheme and the other a general scheme — Article 45 (2) rules out the aggregation of those periods as far as the *acquisition, retention or recovery* of an entitlement to benefits is concerned. Article 46, on the *award* of benefits, differs in scope.

Article 46 (1) sets out the operations to be carried out by the competent institution of a Member State which, in granting a benefit, *has no need* to apply the provisions of Article 45. In other words, it envisages a case in which the period or periods of insurance completed in a single Member State has or have *per se* conferred an entitlement to benefit. That is true in this case of the Belgian pension, because Mr Sinatra has completed the minimum insurance period required for claiming an underground mine-worker's invalidity pension, the amount of which is unrelated to the length of the period actually completed. On the other hand — and this concerns only the Italian pension — the first paragraph of Article 46 (2) presupposes the prior application of the provisions of Article 45.

Since the Fund is concerned solely with the application of Article 46 (1), how should it proceed? It should be recalled that, according to the case-law of the Court (the best-known illustration being the *Celestre* judgment), the institution called upon to apply Article 46 (1) will have had to ascertain the amount of the national benefit, taking into account the provision against overlapping, in order to compare the result with the figure under Community law arrived at by virtue of Article 46 as a whole.

At the stage referred to in the first subparagraph of Article 46 (1), the institution in question, which does not need to aggregate the insurance periods for the purpose of conferring entitlement, must begin by determining the 'independent' benefit corresponding to the total length of the insurance periods to be taken into account pursuant to its national legislation. The national rule against overlapping benefits is overridden by the second sentence of Article 12 (2) where the benefits are of the same kind. The national court found in the present case that the invalidity benefits accruing under Belgian law and the (apportioned) pension under Italian law are of the same kind. It follows that the rules set out by this Court in paragraph 12 of the *Celestre* judgment must be applied:

'. . . the amount referred to in Article 46 (1) is the amount to which the worker would be entitled under national legislation if he were not in receipt of a pension by virtue of the legislation of another Member State. If under the national legislation a worker who is able to establish a certain number of years

of insurance is entitled to a full pension, it is the amount of that full pension which must be taken into account' [1981] ECR 1737, at p. 1754).

Under the second subparagraph of Article 46 (1) the same institution must then establish the 'theoretical' amount of the benefit which would be obtained by aggregating the periods of insurance and residence completed in the various Member States (reference to Article 46 (2) (a)), and the 'actual' amount achieved by apportionment (reference to Article 46 (2) (b)). At this stage in the calculation Article 45 is still not applicable and thus cannot preclude the application of Article 46 (2) (a) (aggregation), the second sentence of which provides as follows:

'If, under that legislation, the amount of the benefit does not depend on the length of the periods completed, then that amount shall be taken as the theoretical amount referred to in this subparagraph.'

Where such legislation applies, therefore, it is possible for the 'independent' pensions and the 'theoretical' amount to be identical, as they are in this case, since the amount of the benefit is unrelated to the length of the periods completed. As regards the calculation of the 'actual' amount by apportionment of the insurance periods completed pursuant to Article 46 (2) (b), whilst there is disagreement between the appellant in the main proceedings and the Commission as to its interpretation, it should be noted that its application cannot in any event yield a result greater than the figure arrived at by the application of Article 46 (1), since the 'independent' pension is identical to the theoretical amount.

By virtue of the second subparagraph of Article 46 (1) the higher amount — which can only mean the independent pension — must be chosen.

It is clear that the national court has fully accepted the case-law of this Court and has rightly stated that, if the question which it has submitted must be answered in the affirmative — which in my view it should -, the task remains of ascertaining the Italian theoretical amount so as to enable the respondent in the main proceedings, as the institution applying Article 46 (1), to adjust its benefit where necessary pursuant to the second subparagraph of Article 46 (3). Lastly, a comparison must be made between the national amount and the Community amount, the greater of the two being paid to the insured person.

7. In the light of the foregoing observations I propose that the following reply be given to the cour du travail, Mons:

(i) Article 46 (1) of Regulation No 1408/71 does not call for the application of Article 45, because the conditions governing entitlement to the benefit are fulfilled under the legislation of a single Member State, without there being any need to add to the periods completed thereunder further periods completed in another, or several other, Member States.

(ii) When the competent institution of a Member State is required to award, under a special scheme, an invalidity pension which is obtained after completion of a minimum insurance period but which is unrelated to the exact length of the insurance periods completed, it is obliged, whenever the insured person is also in receipt of an apportioned invalidity pension under the general scheme operating in another Member State, to make a comparison between (a) the amount of the benefit payable by virtue of its national legislation, including any rules it may contain against overlapping benefits, and (b) the Community benefit obtained by the application of Article 46 as a whole, without the application of national provisions against overlapping if the benefits are of the same kind, the amount of the benefit calculated without regard to the length of the periods completed being treated as the 'theoretical amount' referred to in Article 46 (2) (a).