JUDGMENT OF THE COURT (Second Chamber)
18 February 1992 *

In Case C-5/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the La Louvière section of the Tribunal du Travail (Labour Court), Mons (Belgium), for a preliminary ruling in the proceedings pending before that court between

Antonietta Di Prinzio

and

Office national des pensions

on the interpretation of Article 46 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

THE COURT (Second Chamber),

composed of: F. A. Schockweiler, President of the Chamber, G. F. Mancini and J. L. Murray, Judges,

Advocate General: M. Darmon,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: French.

after considering the written observations submitted on behalf of:

— Antonietta Di Prinzio, by D. Rossini, trade-union delegate of the CSC, Brussels,

— the Office National des Pensions, by R. Masyn, Administrator General,

— the Commission of the European Communities, by M. Patakia, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Antonietta Di Prinzio, the Office National des Pensions, represented by J.-P. Lheureux, and the Commission of the European Communities, represented by D. Gouloussis, Legal Adviser, acting as Agent, at the hearing on 22 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1991,

gives the following

Judgment

1 By judgment of 21 December 1990, which was received at the Court on 10 January 1991, the La Louvière section of the Tribunal du Travail, Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 46 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 Those questions were raised in the course of a dispute between Antonietta Di Prinzio and the Office National des Pensions (hereinafter referred to as 'the Office') regarding the calculation, by the competent Belgian institution, of the retirement pension due to the husband of Mrs Di Prinzio and, following his death, the survivor's pension due to Mrs Di Prinzio.

3 It is apparent from the papers sent to the Court of Justice by the national court that Mrs Di Prinzio is a widow of an Italian national, Guerrino Tormen, who was born on 4 January 1923 and died 12 January 1981, whose insurance record comprised 26 actual years, or years treated as such, as an underground miner in Belgium. He also completed a period of two years as a worker (under the general scheme) in Italy.

4 In 1965 Mr Tormen was pensioned off on grounds of invalidity. On 1 April 1978 the invalidity pension that he received from the competent Belgian institution was converted into a retirement pension. At that time, he also received, in Italy, an invalidity pension that could not be converted into a retirement pension.

5 On 2 March 1984 the Office determined the retirement pension due to the late Mr Tormen, as at 1 April 1978, and the survivor's pension due to Mrs Di Prinzio, as at 1 February 1981, on the basis of $^{29}/_{30}$ of a complete insurance record.

6 The applicable Belgian legislation provides that a worker who has habitually been employed by way of main occupation as a miner for at least 20 years may obtain a retirement pension on the basis of $^{1}/_{30}$ per calender year of employment as a miner. He is entitled to a full pension ($^{30}/_{30}$) if he has been employed as a miner for 30 years. If he has not worked as a miner for 30 years, but has so worked for at least 25 years, he is awarded a number of notional additional years equal to the difference between 30 and the number of actual years of employment.

7 Under an anti-overlapping clause added to the relevant Belgian legislation by a Law of 10 February 1981 with retroactive effect from 1 January 1981, the number of additional notional years is reduced by the number of years for which the worker can claim a retirement pension or benefit in lieu thereof under another Belgian scheme, with the exception of the scheme for self-employed persons, under a foreign scheme or under a scheme applicable to the staff of a public international organization. For the application of that provision, an invalidity pension, or any benefit in lieu thereof, granted under a scheme in a foreign country or under a scheme applicable to the staff of a public international organization is assimilated to a retirement pension.

8 Since Mr Tormen's insurance record comprised 26 actual years or years treated as such as an underground miner in Belgium, four notional years were added to his insurance record to enable him to claim a full miner's pension. Mr Tormen therefore satisfied in Belgium all the prescribed conditions under the Belgian legislation for the acquisition of a right to a retirement pension of $^{30}/_{30}$.

9 However, since Mr Tormen had also completed a period of two years in Italy as a worker, which corresponded under the Belgian legislation to one year in the mine-workers scheme, and received, on that basis, an invalidity pension from the competent Italian institutions, the Office applied the anti-overlapping clause incorporated into the Belgian rules, and discounted one of the notional additional years granted to Mr Tormen. Accordingly, the Office calculated Mr Tormen's retirement pension and survivor's pension due to his widow on the basis of $^{29}/_{30}$ of a complete insurance record.

10 Mrs Di Prinzio considered that the proper insurance record to be taken into consideration in calculating the benefits was $^{30}/_{30}$ and could not be reduced; she therefore appealed against the Office's decisions before the Tribunal du Travail, Mons.

11 By judgment of 21 December 1990, that court upheld part of Mrs Di Prinzio's appeal. It held that since, until 31 December 1980, the Belgian legislation had not contained an anti-overlapping clause in the event of entitlement to another pension, Mr Tormen's retirement pension for the period from 1 April 1978 to 31 December 1980 was to be determined on a $^{30}/_{30}$ basis.

12 With regard to the remainder of her appeal, the national court examined whether the application of Regulation No 1408/71, in particular Article 46, did not produce a more favourable result for the worker than that resulting from the application of national law by the Office, in which case priority would have to be given to the Community rules.

13 Considering that the case raised questions of interpretation of Community law, the Tribunal du Travail, Mons, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Irrespective of the nature of the benefits awarded in the various Member States, must Article 46 of Regulation No 1408/71 be applied by a Member State when the retirement age has not been reached in that first Member State as regards benefits awarded in the second Member State, inasmuch as the calculation of the theoretical pension appears to be impossible to carry out if the employment record in the first Member State is not complete since benefits in the second Member State cannot be taken into account, in view of the fact that the retirement age has not been reached as regards those benefits?

(2) When the theoretical pension is calculated by the first Member State leaving out of account years awarded in a second Member State, is there apportionment? If so, must it correspond to the theoretical pension or to the independent pension or must it be calculated by leaving out of the numerator notional years, whether within the period or not, or even actual years

awarded by the first Member State in calculating the theoretical pension, corresponding to the number of years awarded by the second Member State?

(3) — Must a *pro rata* pension equal to the independent pension be precluded under the second subparagraph of Article 46(1) with the result that it may not be awarded even where it is more favourable than the pension under national legislation and the corrected pension under Article 46(3)?

— May or must Article 46(3) be applied not only to the independent pension but also to the *pro rata* pension equal to the independent pension, or when the *pro rata* pension increased by the pension awarded by the other Member State exceeds the theoretical amount?

— Must the grant of a *pro rata* pension smaller than the independent pension under the second subparagraph of Article 46(1) be precluded even if that *pro rata* pension may prove to be more favourable than the pension under national legislation and the Community benefit?'

14 Reference is made to the report for the hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

15 It is apparent from the reasoning in the judgment making the reference and the context of the main proceedings that by this question the national court is seeking, essentially, to establish whether the competent institution of a Member State is required to apply Article 46 of Regulation No 1408/71 in respect of the award of benefits due to a migrant worker who satisfies all the conditions for the award of a full retirement pension in that Member State and who also receives an invalidity pension which has not been converted into a retirement pension in another

Member State, even where that worker has not reached the prescribed retiring age under the legislation of the first Member State for acquiring a right to benefits in respect of periods of insurance or employment completed in the second Member State.

16 In order to reply to that question it should be pointed out at the outset that, where benefits granted by the competent institutions of two or more Member States overlap, the Court has consistently held (see in particular the judgments in Case 22/77 *FNROM* v *Mura* [1977] ECR 1699; Case 236/78 *FNROM* v *Mura* [1979] ECR 1819; Joined Cases 116, 117, 119, 120 and 121/80 *RWP* v *Celestre* [1981] ECR 1737; Case 128/88 *Di Felice* v *INASTI* [1989] ECR 923; Case C-108/89 *Pian* v *Office National des Pensions* [1990] ECR I-1599) that, where a migrant worker receives a pension by virtue of a Member State's national legislation alone, the provisions of Regulation No 1408/71 do not preclude that national legislation from being applied to him in its entirety, including any rules in that legislation against the overlapping of benefits.

17 However, it is also apparent from that case-law that if the Member State's national legislation alone is less favourable for the worker then the Community rules laid down in Regulation No 1408/71, the provisions of that regulation must be applied in their entirety.

18 The competent institution must, therefore, compare the benefits which would be due in application of national law alone, including its anti-overlapping rules, and those which would be due in application of Community law, including the anti -overlapping provisions contained in Regulation No 1408/71, and allow the migrant worker whichever benefit is greater in amount.

19 In order to calculate the benefits due in application of Community law, the competent institution will therefore have to take into account in particular the fact that, under the second sentence of Article 12(2) of Regulation No 1408/71, the provisions of the legislation of a Member State for reduction, suspension or with-

drawal of benefit in cases of overlapping with other social security benefits acquired in the same Member State, or under the legislation of 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 two or more Member States in accordance with Articles 46, 50, 51 or Article 60(1)(b) of Regulation No 1408/71.

20 In this respect it should be stated that, according to the case-law of the Court (see the judgment in Case 4/80 *D'Amico* v *ONPTS* [1980] ECR 2951; judgments in *Celestre* and *Pian*, cited above), where a worker is in receipt of invalidity benefits converted into a retirement pension by virtue of the legislation of a Member State and invalidity benefits not yet converted into a retirement pension under the legislation of another Member State, the retirement pension and the invalidity benefits are to be regarded as benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71.

21 The Court concluded (judgments in *d'Amico* and *Celestre*, cited above), that in such a situation, first, the application of the national rules against overlapping was precluded by virtue of the second sentence of Article 12(2) of Regulation No 1408/71 and, secondly, the provisions of Chapter 3 of that regulation and, in particular, Article 46 within that chapter, were applicable to determine the worker's entitlement.

22 It is apparent from the judgment making the reference that the national court considers that, where a migrant worker has not yet reached, in the Member State where the award of benefits is sought, the retirement age prescribed for the grant of benefits in respect of periods of insurance or employment completed in another Member State, it is impossible to calculate the theoretical pension in accordance with Article 46(2)(a) of Regulation No 1408/71.

23 In this respect it should first be stated that the theoretical amount of the benefit provided for by Article 46(2)(a) of Regulation No 1408/71 is that which the worker would be able to claim if all the periods of insurance completed by him in different Member States had been completed in the Member State in question and under the legislation administered by the competent institution on the date the benefit is awarded.

24 Moreover, under Article 46(2)(c) of Regulation No 1408/71 the total of the insurance periods is subject to an upper limit of the maximum period required for the receipt of full benefit by the legislation of the Member State whose institution is awarding the benefit.

25 In a situation such as that in the main proceedings, the worker is entitled to a full pension by virtue of a Member State's legislation alone, with the result that it is not necessary to take into account periods completed by the person concerned in other Member States to supplement the periods completed by the worker under the legislation of the Member State in which the award of benefits is sought, for the purpose of the acquisition of the right to benefits.

26 It therefore follows that, in such a situation, the theoretical amount of benefits must be determined by the competent institution whose legislation gives a right to a full pension without taking into account insurance periods which the worker has completed in another Member State.

27 It must be added that there is no condition relating to the age of the recipient of social security benefits for those benefits to be capable of being regarded as benefits of the same kind within the meaning of the second sentence of Article 12(2) of Regulation No 1408/71.

28 Consequently, the interpretation of Community law laid down by the Court in its judgments in *D'Amico* and *Celestre*, cited above, is not called into question by the fact that in the main proceedings the migrant worker had not yet reached, in the Member State where the award of benefits was sought, the prescribed retirement age for the grant of benefits in respect of the periods of insurance or employment completed in another Member State.

29 It follows from the foregoing that the reply to the national court's first question is that the competent institution of a Member State is required to apply Article 46 of Regulation No 1408/71 when awarding benefits due to a migrant worker who satisfies all the conditions for entitlement to a full retirement pension in that State and also receives an invalidity pension that has not been converted into a retirement pension in another Member State, even where that worker has not reached the retirement age prescribed under the legislation of the first State for entitlement to benefits in respect of periods of insurance or employment completed in the second Member State.

The second and third questions

30 By these questions, which should be examined together, the national court seeks essentially to ascertain how the retirement pension due to a migrant worker must be calculated pursuant to Community law and, in particular, Article 46 of Regulation No 1408/71, where the worker satisfies the conditions prescribed for entitlement to a full retirement pension under a Member State's national legislation alone, which has taken into consideration in establishing that pension the years during which the worker was actually employed in that Member State or years treated as such together with a number of notional years in respect of a period before he became entitled to benefits, and where, before that employment, the worker completed a period of insurance or employment in another Member State, in respect of which he is entitled, in that State, to an invalidity pension which has not been converted into a retirement pension.

31 In order to reply to those questions, it must be borne in mind, first of all, that Article 46 of Regulation No 1408/71 contains the provisions to be applied in respect of the award under Community law of old-age benefits in the case of a worker who has been subject to the legislation of two or more Member States.

32 The Court has held (see its judgment in *Mura*, cited above,) that, in a situation such as that in the main proceedings where the person concerned is entitled to a full pension in a Member State without having recourse to periods of insurance or employment completed in other Member States, having regard to the fact that he satisfies all the conditions laid down by the legislation of the first State for entitlement to the benefit, the provisions of Article 46 of Regulation No 1408/71 must be applied in their entirety.

33 Calculation of the amount of benefits in accordance with Article 46 of Regulation No 1408/71 must be carried out in three stages.

34 First, the competent institution calculates the independent benefit pursuant to the first subparagraph of Article 46(1) of Regulation No 1408/71. To this end, it determines, in accordance with its own legislation, the amount of the benefit to which the worker would be entitled under that legislation if he were not entitled to a benefit under the legislation of another Member State.

35 It must be added, as stated at paragraph 17 above that, for the purpose of calculating benefits under Community law, the provisions of Regulation No 1408/71 are to be applied in their entirety and the competent institution must, therefore, also take into account the provisions of Article 12(2) of Regulation No 1408/71.

36 The Court has held (see the judgments in Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679 and in Case 117/84 *ONPTS* v *Ruzzu* [1985] ECR 1697) that a national provision which reduces the additional years of notional employment from which a worker may benefit by the number of years in respect of which he may claim a pension in another Member State constitutes a provision for reduction of benefit within the meaning of Article 12(2) of Regulation No 1408/71.

37 Moreover, as already stated at paragraph 20 of this judgment, a retirement pension due under the legislation of a Member State and an invalidity pension, which has not yet been converted into a retirement pension and is paid 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.

38 It follows that, in circumstances like those in the main proceedings, national anti-overlapping rules are, by virtue of the second sentence of Article 12(2) of Regulation No 1408/71, not to be applied in determining benefits in accordance with Community law.

39 Consequently, when the legislation of a Member State gives a right to a full pension, having taken into account a number of notional years added to the period during which the worker was actually employed or treated as such, the independent benefit under the first subparagraph of Article 46(1) of Regulation No 1408/71 is equal to that full pension, and periods completed in another Member State may not be deducted from the number of notional years added to the period of actual employment or period treated as such by applying a national anti-overlapping rule.

40 The second subparagraph of Article 46(1) of Regulation No 1408/71 provides that the competent institution is then to calculate the amount of the *pro rata* benefit in accordance with Article 46(2).

41 In order to do so, that institution first determines, under Article 46(2)(a) of Regulation No 1408/71, the theoretical amount of benefit that the person concerned could claim if all the periods of insurance completed by the person concerned in different Member States had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded.

42 It should be noted that Article 46(2)(c) of Regulation No 1408/71 provides that there is a limit on the aggregated periods of insurance of the maximum period required for the receipt of full benefit by the legislation of the Member State whose institution is awarding the benefit.

43 Accordingly, as has already been stated at paragraph 25 of this judgment, in a case such as that before the court making the reference where the worker is entitled to a full pension under a Member State's legislation alone, without recourse to consideration of periods completed under the legislation of other Member States to which he has been subject, it is not necessary to take into account the latter periods to make up the periods completed under the legislation of the Member State in which the award is sought in order to acquire the right to benefits.

44 In such a case, the theoretical amount is therefore determined by the competent institution whose legislation gives a right to a full pension without taking into account insurance periods which the worker has completed in another Member State.

45 Moreover, with regard to the question of the taking into account of notional periods in calculating the theoretical amount of the benefit, it is apparent from the wording of Article 46(2)(a) that the competent institution is to apply its own legislation in its entirety and therefore, if the latter provides that the benefits must be

calculated not only by reference to actual periods or periods treated as such, but also to a number of additional notional years, that additional period must also be taken into consideration in calculating the theoretical amount of the benefit.

46 Furthermore, as stated above, for the purposes of calculating benefits under Community rules, the competent institution must apply Regulation No 1408/71 in its entirety and, in particular, take into account the second sentence of Article 12(2) thereof under which national provisions for reduction may not be invoked against the worker.

47 That institution cannot, therefore, apply national rules which are less favourable to the worker than those of Regulation No 1408/71 and, in particular, it is not permitted, by applying a national anti-overlapping rule, to reduce the number of notional years taken into account by the legislation administered by it.

48 In those circumstances, the theoretical amount of the pension is equal to that of the full pension in the Member State of the competent institution, without taking into account years completed in the other Member States.

49 The competent institution then calculates, in accordance with Article 46(2)(b) of Regulation No 1408/71, the actual amount of the benefit on the basis of the theoretical amount, and in the ratio which the length of the periods of insurance completed before the risk materializes under the legislation administered by it bears to the total length of the periods of insurance completed under the legislations of all the Member States concerned before the risk materialized.

50 That calculation must always be carried out, in view of the fact that, as noted at paragraph 32 of this judgment, the provisions of Article 46 of Regulation No 1408/71 are to be applied in their entirety (see also the Court's judgment in Case 296/84 *Sinatra* v *FNROM* [1986] ECR 1047).

51 Accordingly, the *pro rata* actual amount of the benefit must be calculated even when the worker is entitled, in the Member State where the award is sought, to a full pension by virtue of the legislation of that State without it being necessary to take into account the periods of assurance completed in another Member State.

52 That interpretation is moreover confirmed by the actual wording of Article 46 of Regulation No 1408/71, the first sentence of the second subparagraph of paragraph 1 of which provides that the competent institution 'shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph 2(a) and (b)'.

53 With regard to the taking into account of notional periods for the calculation of the *pro rata* benefit, it is apparent from Decision No 95 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 24 January 1974 concerning the interpretation of Article 46(2) of Regulation No 1408/71 (Official Journal 1974 C 99, p. 5), and from the Court's judgment in Case 793/79 *Menzies* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2085, that the competent institution of a Member State, whose legislation provides that the amount of benefits is determined by taking into account periods deemed to have been completed after the occurrence of the event insured against, is to take these periods into consideration solely for calculating the theoretical amount referred to in Article 46(2)(a), but not for determining the actual amount referred to in Article 46(2)(b) of Regulation No 1408/71.

54 However, in a case such as that in the main proceedings, where the notional periods recognized by the applicable national legislation are prior to the materialization of the risk, those periods must be included in the calculation of the actual amount of the benefit, as is, moreover, expressly apparent from the terms 'periods of insurance completed before the risk materializes' in Article 46(2)(b) of Regulation No 1408/71.

55 Moreover, on the same grounds as are set out in paragraphs 37, 38 and 39, and also in paragraphs 46 and 47 above, the competent institution is not permitted to deduct the period of employment completed by the worker in another Member State from the notional years added to the actual years of employment by virtue of the legislation of the Member State in question.

56 Accordingly, the *pro rata* actual amount must be calculated by taking into account all the notional periods prior to the materialization of the risk that have been added to the years during which the worker was actually employed or years treated as such by the legislation administered by the competent institution.

57 Finally, in accordance with the second sentence of the second subparagraph of Article 46(1) of Regulation No 1408/71 the institution awarding the benefit must compare the independent benefit and the *pro rata* benefit and take into consideration the higher of those two amounts.

58 In this respect, it is sufficient to state that, in a case such as that in the main proceedings, where the theoretical amount of the benefit is equal to that of the independent benefit the *pro rata* actual amount is of necessity less than that of the independent benefit.

59 Consequently, in such a situation, no more favourable result for the worker can arise from the application of Article 46(2) of Regulation No 1408/71.

60 Thirdly, the competent institution must check whether the total of all independent and *pro rata* benefits that the worker can receive exceeds the upper limit provided by the first subparagraph of Article 46(3) of Regulation No 1408/71, that is to say, the highest theoretical amount.

61 In this respect, the Court has already held (judgment in Case C-199/88 *Cabras* v *Institut national d'Assurance Maladie-Invalidité* [1990] ECR I-1023) that the highest theoretical amount of benefits, calculated according to Article 46(2)(a) of Regulation No 1408/71, constitutes the limit on the benefits which a migrant worker may claim under Community legislation, even where, as in the main proceedings, that theoretical amount is equal to the full benefit payable under a Member State's legislation alone.

62 If that limit is exceeded the institution must apply the Community anti-overlapping rule laid down in the second subparagraph of Article 46(3) of the regulation which, the Court has consistently held, is applicable to the exclusion of national anti-overlapping rules (see, for example, the Court's judgment in *Pian*, cited above).

63 In a situation such as that in the case pending before the court making the reference, it is apparent from the Court's judgment in Case 323/86 *Collini* v *ONPTS* [1987] ECR 5489 that, where there is only one institution providing an independent benefit, that institution must adjust that benefit by reducing it pursuant to the second subparagraph of Article 46(3) by the full amount by which the total sum of its independent benefit and the *pro rata* benefit exceeds the limit referred to in the first subparagraph of Article 46(3).

64 As is apparent from paragraph 18 of this judgment, the competent institution must finally compare the amount of benefits which would be due in application of the applicable national law alone, including its anti-overlapping rules, and the amount which would be due in application of Community law in its entirety, including its anti-overlapping rules.

65 If the adjusted amount of the benefit under the second subparagraph of Article 46(3) of Regulation No 1408/71 exceeds that resulting from applying only the national legislation in its entirety, including its anti-overlapping rules, the adjusted amount is taken into consideration. On the other hand, if the amount of the benefit due by virtue of the competent institution's national law alone exceeds the

adjusted amount, the national amount is taken into consideration. In accordance with the Court's case-law, the calculation of benefits under Community law cannot result in a reduction in the amount of a benefit acquired under national legislation alone (see the judgment in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149) and consequently Article 46 of Regulation No 1408/71 may be applied only if it allows a migrant worker to be granted a benefit at least as high as that payable under the national legislation alone (see the judgment in *Cabras*, cited above).

66 It follows from all the foregoing that the reply to the second and third questions referred by the Cour du Travail, Mons, must be that, pursuant to Article 46 of Regulation No 1408/71, the retirement pension due to a migrant worker where the latter satisfies the conditions prescribed for entitlement to a full retirement pension under a Member State's national law alone, which took into consideration in establishing that pension the years during which the worker was actually employed in that Member State or years treated as such, together with a number of notional years in respect of a period before he became entitled to benefits, and where, before that employment, the worker completed a period of insurance or employment in another Member State, in respect of which he is entitled in that State to an invalidity pension which has not been converted into a retirement pension, must be calculated as follows:

(a) the amount of the independent pension must be determined pursuant to the first subparagraph of Article 46(1) of Regulation No 1408/71, that amount being equal to that of the pension due under the legislation of the Member State where the award of benefits is claimed, but without the periods completed in another Member State being deductible from the number of notional years which, in accordance with the legislation which the competent institution administers, are added to the years of actual employment or years treated as such;

(b) the amount of the *pro rata* benefit must be determined pursuant to Article 46(2) of Regulation No 1408/71 taking into account all the notional periods prior to the materialization of the risk which, in accordance with the legislation which the competent institution administers, are added to the years of actual employment or years treated as such;

(c) the amount of the independent benefit and the amount of the *pro rata* benefit must be compared, pursuant to the second subparagraph of Article 46(1) of Regulation No 1408/71 and the competent institution must take into consideration the higher of those amounts;

(d) the amount of the adjusted benefit must be determined pursuant to Article 46(3) of Regulation No 1408/71, the competent institution being obliged, if necessary, to reduce the independent benefit by deducting from it the total of the benefits calculated in accordance with the provisions of Article 46(1) and (2) of Regulation No 1408/71 to the extent that that total exceeds the limit referred to in the first subparagraph of Article 46(3);

(e) the amount resulting from full application of the applicable national law in its entirety, including its anti-overlapping rules, must be compared with the amount arrived at after the calculation pursuant to Article 46 of Regulation No 1408/71 and the higher of those amounts is to be taken into consideration.

Costs

67 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Tribunal du Travail, Mons, Louvière section by judgment of 21 December 1990, hereby rules:

1. The competent institution of a Member State is required to apply Article 46 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the

application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, when awarding benefits due to a migrant worker who satisfies all the conditions for entitlement to a full retirement pension in that State and also receives an invalidity pension that has not been converted into a retirement pension in another Member State, even where that worker has not reached the retirement age prescribed under the legislation of the first State for entitlement to benefits in respect of periods of insurance or employment completed in the second Member State;

2. Pursuant to Article 46 of Regulation (EEC) No 1408/71, the retirement pension due to a migrant worker where the latter satisfies the conditions prescribed for entitlement to a full retirement pension under a Member State's national law alone, which took into consideration in establishing that pension the years during which the worker was actually employed in that Member State or years treated as such, together with a number of notional years in respect of a period before he became entitled to benefits, and where, before that employment, the worker completed a period of insurance or employment in another Member State, in respect of which he is entitled in that State to an invalidity pension which has not been converted into a retirement pension, must be calculated as follows:

(a) The amount of the independent pension must be determined pursuant to the first subparagraph of Article 46(1) of Regulation (EEC) No 1408/71, that amount being equal to that of the pension due under the legislation of the Member State where the award of benefits is claimed, but without the periods completed in another Member State being deductible from the number of notional years which, in accordance with the legislation which the competent institution administers, are added to the years of actual employment or years treated as such;

(b) The amount of the *pro rata* benefit must be determined pursuant to Article 46(2) of Regulation (EEC) No 1408/71 taking into account all the notional periods prior to the materialization of the risk which, in accordance with the legislation which the competent institution administers, are added to the years of actual employment or years treated as such;

(c) The amount of the independent benefit and the amount of the *pro rata* benefit must be compared, pursuant to the second subparagraph of Article 46(1) of Regulation (EEC) No 1408/71 and the competent institution must take into consideration the higher of those amounts;

(d) The amount of the adjusted benefit must be determined pursuant to Article 46(3) of Regulation (EEC) No 1408/71, the competent institution being obliged, if necessary, to reduce the independent benefit by deducting from it the total of the benefits calculated in accordance with the provisions of Article 46(1) and (2) of Regulation (EEC) No 1408/71 to the extent that that total exceeds the limit referred to in the first subparagraph of Article 46(3);

(e) The amount resulting from application of the applicable national law in its entirety, including its anti-overlapping rules, must be compared with the amount arrived at after the calculation pursuant to Article 46 of Regulation (EEC) No 1408/71 and the higher of those amounts is to be taken into consideration.

Schockweiler Mancini Murray

Delivered in open court in Luxembourg on 18 February 1992.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber