REPORT FOR THE HEARING
in Case C-5/91 *

I — Legislative background, facts and procedure

A. *Relevant domestic and Community provisions*

1. Article 10(2) of Royal Decree No 50 of 24 October 1967 (*Moniteur Belge* of 27 October 1967, p. 11258), as amended, provides that

'. . . a worker

1. 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 one thirtieth per calendar year of employment as a miner.

If he has not habitually worked by way of main occupation for a total of 30 years as an underground worker in a mine or quarry, but has so worked for at least 25 years, he shall be awarded a pension for his years of proved employment and for a specific number of additional notional years.

The number of additional notional years shall be equal to the difference between 30 and the number of years habitual employment by way of main occupation in that capacity for which evidence is produced.

. . .'.

2. Until 31 December 1980, that provision did not envisage any reduction of the pension in the event of the worker being already in receipt of another pension.

3. The Law of 10 February 1981 (*Moniteur Belge* of 14 February 1981, p. 1697) amended Article 10(2) of Royal Decree No 50 by incorporating an anti-overlapping clause with effect from 1 January 1981.

For that purpose the following fourth subparagraph was added to Article 10(2) of Royal Decree No 50:

'However, the said number of additional years shall be 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.'

* Language of the case: French.

4. Article 32, inserted in the Royal Decree of 21 December 1976 (*Moniteur Belge* of 16 January 1968, p. 441) by the Royal Decree of 30 March 1981 (*Moniteur Belge* of 11 April 1981, p. 4526), provides that:

'(1) For the application of the fourth subparagraph of Article 10(2) of Royal Decree No 50, there shall be assimilated to a retirement pension 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.

(2) For the application of the abovementioned fourth subparagraph of Article 10(2), there shall be aggregated all the periods in respect of which the worker may claim one or more retirement pensions or a benefit in lieu thereof under another Belgian scheme, with the exception of the scheme for self-employed persons, under a scheme in a foreign country or under a scheme applicable to the staff of a public international organization.'

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

'Award of benefits

(1) Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefit have been satisfied, without application of the provisions of Article 45 and/or Article 40(3) being necessary, the competent institution of that Member State shall, in accordance with the provisions of the legislation which it administers, determine the amount of benefit corresponding to the total length of the periods of insurance or residence to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph 2(a) and (b). Only the higher of these two amounts shall be taken into consideration.

(2) Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefits are not satisfied unless account is taken of the provisions of Article 45 and/or Article 40(3), the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to

which the employed or self-employed person has been subject had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded. 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;

(b) the institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph, and in the ratio which the length of the periods of insurance or residence completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance and residence completed under the legislations of all the Member States concerned before the risk materialized;

(c) if the total length of the periods of insurance and residence completed before the risk materializes under the legislations of all the Member States concerned is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers;

(d) the procedure for taking into account overlapping periods, when applying the rules of calculation laid down in this paragraph, shall be laid down in the implementing Regulation referred to in Article 98.

(3) The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2(a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with the provisions of paragraph 1.'

B. *Summary of the facts and of the procedure before the national court*

1. Antonietta di Prinzio, an Italian national residing in Belgium, is the widow of Guerrino Tormen, also an Italian, who was born on 4 January 1923 and died on 12 January 1981.

2. Mr Tormen's insurance record comprised 26 actual years or years treated as such as an underground miner in Belgium, he having also worked for at least two years as a worker (under the general scheme) in Italy.

3. In 1965, Mr Tormen was pensioned off on grounds of invalidity.

4. On 1 April 1978 Mr Tormen received an invalidity pension in Italy.

5. By three decisions of 2 March 1984, the competent Belgian institution, namely the Office National des Pensions (National Pensions Office, hereinafter referred to as 'the ONP') determined the retirement pension due to the late Mr Tormen as at 1 April 1978, the retirement pension payable to Mrs Di Prinzio as a separated spouse as at 1 February 1980 and the survivor's pension payable to Mrs Di Prinzio as at 1 February 1981 as 29/30ths of a complete insurance record.

Those benefits were calculated on the basis of the Belgian legislation, including the anti-overlapping rules thereof. Thus, pursuant to Article 10(2) of Royal Decree No 50, four notional years were added to the 26 actual years or years treated as such worked by Mr Tormen as a miner in Belgium; however, in view of Mr Tormen's two years' employment in Italy, which correspond to one year under the mineworkers' scheme, one notional additional year was discounted pursuant to the combined provisions of Article 10(2) of Royal Decree No 50 and Article 32 of the Royal Decree of 21 December 1967, and as a result the benefits payable by the Belgian institution were calculated on the basis of an employment record of 29/30ths.

6. Considering that the proper insurance record to be taken into consideration was 30/30ths and could not be reduced, Mrs Di Prinzio appealed against the three decisions of 2 March 1984 before the Tribunal de Travail, Mons, Louvière Division.

7. By judgment of 21 December 1990, that court first upheld part of Mrs Di Prinzio's appeal. In view of the fact that, until 31 December 1980, the Belgian legislation contained no provision for reduction in the event of entitlement to another pension, the national court held that Mr Tormen's retirement pension should be determined on a 30/30ths basis for the period from 1 April 1978 to 31 December 1980.

8. Having established that, for the period commencing on 1 January 1981, the Belgian legislation included an anti-overlapping provision, the Tribunal de Travail then took the view that, in order to determine whether that provision was properly applied by the competent Belgian institution, it was necessary to decide whether the national law, including its rules against overlapping, was less favourable than Community law. Accordingly, it was necessary to calculate the benefits in accordance with Article 46 of Regulation No 1408/71 and then to compare the result with that arrived at under Belgian domestic law. The national court considered that, in doing so, it was necessary to distinguish two periods.

With regard to the month of January 1981, the Tribunal de Travail considered that a problem arose concerning calculation of the theoretical amount of the benefit pursuant to Article 46(2)(a) of the regulation in view of the fact that, at that time, Mr Tormen had not yet attained the retirement age in Belgium in respect of the benefits under the general scheme in Italy.

With regard to the period after 31 January 1981, the date on which Mrs Di Prinzio's survivor's pension became payable, the national court considered, for the purpose of calculating the Community benefit under Article 46 of the regulation, that, in the present case, the amounts of the independent pension (Article 46(1), of the theoretical pension (Article 46(2)(a) and of the *pro rata* pension (Article 46(2)(b) should correspond to 30/30ths. In the first place, the Belgian pension, without reduction, would be equivalent to that fraction; secondly, the same would apply to the theoretical pension calculated as if the recipient of the benefit had completed his entire insurance record in Belgium since, under Belgian law, the years during which the person concerned worked under the general scheme, in addition to a complete insurance record as a miner, do not give rise to any reduction of the pension calculated on a 30/30ths basis or to any pension supplement; finally, the *pro rata* pension would also correspond to that fraction since the theoretical pension would be determined solely on the basis of the activity undertaken in Belgium.

Nevertheless, the national court had doubts concerning determination of the *pro rata* pension in a case such as the one before it, where the theoretical pension is calculated by a Member State which does not take into account periods completed in another Member State, and concerning the question whether the *pro rata* pension may be granted in circumstances where it is equal to the independent pension and to the theoretical pension.

9. Considering that the case thus raised questions of interpretation of Article 46 of the regulation, the Tribunal du Travail, Mons, stayed the proceedings and, by judgment of 21 December 1990, referred the following questions to the Court of Justice 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?'

C. *Procedure before the Court*

1. The judgment of the Tribunal du Travail, Mons, was received at the Court Registry on 10 January 1991.

2. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 9 April 1991 by Antonietta Di Prinzio, represented by D. Rossini, Trade-Union delegate of the C. S. C., Brussels, and by the ONP, represented by the Administrateur Général thereof, R. Masyn, and on 19 April 1991 by the Commission of the European Communities, represented by Maria Patakia, a member of its Legal Service, acting as Agent.

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

4. Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 9 July 1991, assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. *Antonietta Di Prinzio*, the plaintiff in the main proceedings, observes that the distinction drawn by the national court between the periods before and after 31 January 1981 is otiose. Mr Tormen had already received — since 1 January 1965 — an invalidity pension in Italy and it had not been possible to convert that pension into an old age pension; moreover, in the light of previous case-law (see judgment in Case 128/88 *Di Felice* [1989] ECR 923) invalidity and old age pensions are to be regarded, in cases such as the present one, as benefits of the same nature, regardless of the age of the recipient.

Thus, the problems raised by the national court with regard to the dispute as a whole boil down to the question of how to treat the two years worked in Italy for the

purposes of calculating the Belgian theoretical pension.

In that regard, Mrs Di Prinzio states that, according to Article 46(2)(a) of the regulation, the theoretical pension is the benefit that the person concerned could claim if all the periods of insurance completed by him under the legislation of two or more Member States had been completed in only one State.

However, under the Belgian legislation, a mineworker is entitled to a complete pension as if he had worked for 30 years in the mines provided that he has completed or is deemed to have completed 25 years working in mines. Thus, the years worked under the general scheme are disregarded both for determination of the insurance record and for calculation of the benefit.

According to Mrs Di Prinzio, it is apparent from Article 46(2)(c) of the regulation that, since the Belgian theoretical pension, calculated on the basis only of Mr Tormen's work in the mines and a maximum insurance record of 30 years, corresponds to the national independent pension, the Belgian institution must not take account of periods of insurance completed in Italy, just as it would not take account of them if they had been completed in Belgium. Therefore, the Italian invalidity pension should not influence the amount of the Belgian benefit.

Mrs Di Prinzio adds that in that connection the same rule must be applied as that provided for in Article 46(2) of Council Regulation (EEC) No 574/72 of 21 March 1971 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and members of their families moving within the Community, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 86), according to which the amount of benefits corresponding to periods of voluntary insurance are not taken into account for the purposes of Article 46(3) of the regulation.

In short, Mrs Di Prinzio suggests that the Court give the following answer to the questions submitted by the Tribunal du Travail:

'Where, pursuant to the legislation of a Member State, the theoretical pension calculated in accordance with Article 46(2)(a) of Council Regulation No 1408/71 corresponds to the national pension by reason of the fact that the insurance periods completed in another Member State have no effect on the determination of entitlement, Article 46(3) of that regulation must be applied without account being taken of benefits corresponding to the insurance periods which are not taken into consideration in calculating the theoretical pension.'

2. The *ONP*, the defendant in the main proceedings, first observes, in general terms, that the Court has consistently held (see most recently the judgments in Case C-108/89 *Pian* [1990] ECR I-1599 and Case 109/89 *Bianchin* [1990] ECR I-1619) that the most favourable social security scheme must be applied to a worker, being either the national legislation applied in its entirety, including the rules thereof against overlapping benefits, or the Community system, under which the benefits are awarded and reduced in accordance with Article 46 of the regulation, to the exclusion of the rules against overlapping benefits laid down in the national legislation.

Moreover, in proceedings under Article 177 of the EEC Treaty, the Court has no jurisdiction either to apply Community law to a particular case or to decide as to the compatibility of national provisions with Community law.

(a) With respect to the *first question* submitted by the national court, the ONP states first that the competent institution, which applies legislation whose conditions for entitlement to the benefits are fulfilled, calculates the amount of the benefits due in accordance with Article 46 of the regulation.

The ONP then states that, pursuant to Article 49(1)(a), which relates to the calculation of benefits where the person concerned does not satisfy simultaneously the conditions laid down by all the legislations under which the insurance or residence periods have been completed, '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' of the regulation.

It is apparent from Article 46(2)(a) of the regulation that the theoretical amount of the benefit is arrived at by reference to all the qualifying insurance and residence periods, as if those periods had been completed only under the legislation applied by the competent institution as at the date of award of the benefit. That theoretical amount would be equal to the independent benefit, determined in accordance with Article 46(1) of the regulation, if application of the legislation of the competent institution proved to be more favourable without account being taken of the periods completed under the other legislations. In those circumstances, the theoretical amount would nevertheless be necessary in order to determine the absolute limit on the award of the benefits pursuant to the first subparagraph of Article 46(3) of the regulation. On the other hand, in the event of the conditions of only one legislation being satisfied, only an independent benefit within the meaning of Article 46(1) of the regulation could be awarded.

From this, the ONP infers that Article 46 of the regulation must be applied by a Member State where the retirement age is not attained in that Member State in respect of the benefits in another Member State.

(b) With regard to *the second question* submitted by the national court, the ONP maintains that, in a case where the person concerned satisfies the conditions laid down by only one legislation, without its being necessary to have regard to the periods completed under the legislations whose conditions are not fulfilled, Article 49(1)(b)(ii) of the regulation provides that 'the amount of the benefit payable shall be calculated in accordance with the provisions of only that legislation whose conditions are satisfied, taking account of the periods completed under that legislation only'. Accordingly, a *pro rata* actual amount of benefit within the meaning of Article 46(2)(b) of the regulation cannot be awarded.

According to the ONP, the same conclusion is valid where the person concerned satisfies the conditions laid down by several legislations, without its being necessary, however, to have regard to the periods completed under the legislation of the other

Member States in order to determine the theoretical amount, on the ground that reliance only on the periods completed under the legislation governing the competent institution proves more favourable. Indeed, a condition for the application of Article 46(2)(b) of the regulation would then be unsatisfied, namely the taking into account of the aggregate duration of the periods completed under the legislations of all the Member States in question.

The ONP concludes from this that the lack of aggregation excludes apportionment.

The ONP adds that the Administrative Commission of the European Communities on Social Security for Migrant Workers ('the Administrative Commission') expressed the view, in decision No 95 of 24 January 1974 concerning the interpretation of Article 46(2) of Regulation (EEC) No 1408/71 on the calculation of *pro rata* pensions (Official Journal 1974 C 99, p. 5), that 'The competent institution of a Member State whose legislation provides that the amount of benefits must be determined by taking into accounts periods presumed to have been completed after the occurrence of the event insured against shall take these periods into consideration solely for calculating the theoretical amount referred to in Article 46(2)(a) of Regulation No 1408/71, and not for calculating the actual amount referred to in Article 46(2)(b) of that regulation'. The ONP infers from this that, where the conditions of several legislations are satisfied but only the periods completed under the legislation of the competent institution are taken into account for calculation of the theoretical amount, on the ground that additional notional years are more favourable than the periods completed under the legislation of other Member States, those notional periods may be incorporated not in the numerator but in the denominator of the fraction if an actual *pro rata* amount of a death benefit were to be established, since they are notional periods post-dating the materialization of the risk, within the meaning of the abovementioned decision No 95.

The ONP states finally that, in its judgment in Case 793/79 *Menzies* [1980] ECR 2085, the Court held that a supplementary period which the legislation of a Member State adds to the periods of insurance completed before the risk materialized in order to evaluate the benefit awarded in the event of the premature invalidity or death of an insured person must be taken into account in the calculation of the theoretical amount but not in the calculation of the actual amount of the benefit.

(c) With respect to the *first part of the third question*, the ONP contends that the *pro rata* benefit cannot be equal to the independent benefit, since an amount determined *pro rata temporis* after aggregation cannot correspond to an amount determined only by reference to the periods completed under the legislation of the competent institution. According to the ONP, it follows from the second subparagraph of Article 46(1) that only the higher of the independent benefit or the *pro rata* benefit is adopted.

As regards the *second part of the third question*, the ONP states in the first place that the first subparagraph of Article 46(3) of the regulation sets the absolute limit on the award of benefits, namely the highest theoretical amount of the benefits calculated in accordance with Article 46(2)(a). Thus, the person concerned is entitled, within that limit, only to the sum of the benefits

calculated in accordance with Article 46(1) and (2).

The ONP then states that the second subparagraph of Article 46(3) authorizes any institution that applies Article 46(1) to adjust the amount payable by it where the highest theoretical amount is exceeded. Thus, that provision implies that in the event of independent benefits being granted and the prescribed limit being exceeded, the reduction must be applied exclusively to those benefits and it determines the ratio of the reduction to be applied to each independent benefit awarded by all the institutions that have not had to have recourse to the aggregation rules. That reduction ratio is equal to unity where only one institution awards an independent benefit and that single benefit is therefore reduced by the full amount by which the limit set in the first subparagraph of Article 46(3) is exceeded.

The ONP adds that, in its judgment in Case 323/86 *Collini* [1987] ECR 5489, the Court held that, where there is only one institution providing an independent benefit, that institution alone must reduce its benefit pursuant to the second subparagraph of Article 46(3) and it must reduce it by the full amount by which the total sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the limit referred to in the first subparagraph of Article 46(3). The Court has also stated (in Case C-199/88 *Cabras* [1990] ECR I-1023) that Article 46(3) must be interpreted as meaning that the highest theoretical amount of benefits, calculated according to Article 46(2)(a), constitutes the limit on the benefits which a migrant worker may claim under Community legislation, even where the theoretical amount is equal to the full benefit payable under the legislation of one Member State alone. As so interpreted, the provisions in question are not incompatible with Article 51 of the EEC Treaty, since Article 46 of the regulation may be applied only if it allows a migrant worker to be granted a benefit at least as high as that payable under the legislation of one State alone.

The ONP also states that the conditions for applying the reduction ratio provided for in the second subparagraph of Article 46(3) are limited to the award of independent benefits within the meaning of Article 46(1). However, the limit fixed in the first subparagraph of Article 46(3) applies to all cases where Community benefits are awarded, including cases where only *pro rata* benefits are awarded. Moreover, the Court stated in its judgment in *Collini*, *supra*, that the anti-overlapping rule in Article 46(3) of the regulation applies in all cases in which the total sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the limit of the highest theoretical amount of pension, even if the exceeding of that limit is not due to the duplication of insurance periods.

With respect to the *third subparagraph of the third question*, the ONP states that, pursuant to the second subparagraph of Article 46(1) of the regulation, only the higher of the independent benefit and the *pro rata* benefit

is taken into account before the application of the provision for reduction contained in Article 46(3). It infers from this that a *pro rata* benefit, of a lower amount than an independent benefit, is absolutely ruled out, even if it might prove more favourable than the Community benefit awarded after the adjustment envisaged in Article 46(3) was made.

Furthermore, the Administrative Commission, by decision No 91 of 12 July 1973 concerning the interpretation of Article 46(3) of Council Regulation No (EEC) No 1408/71 relating to the award of benefits due under paragraph 1 of the said Article (Official Journal 1974 C 86, p. 8) states that 'Article 46(3), second subparagraph, of Regulation (EEC) No 1408/71 shall only apply to benefits the amount of which, calculated in accordance with the provisions of paragraph 1, first subparagraph, of this Article, exceeds the amount that would be obtained by applying the rules of paragraphs 2(a) and (b) of the said Article to the calculation of these benefits'.

In conclusion, the ONP suggests that the Court reply as follows to the questions submitted by the national court:

'(1) Any institution applying legislation of which the conditions are fulfilled must calculate the benefit in accordance with Article 46 of Council Regulation No 1408/71.

(2) The absence of aggregation excludes apportionment.

(3) Only the higher of the independent benefit and the *pro rata* benefit is taken into account with a view to any reduction for the actual award within the limit of the highest theoretical amount guaranteeing equality of Community treatment, namely the right to the maximum amount receivable if all the insurance periods were completed in only one of the Member States.'

3. (a) The *Commission* states, with respect to the *first question*, that Article 45 of the regulation embodies the principle of aggregation with a view to the acquisition, maintenance or recovery of a pension, whereas Article 46 of the regulation lays down a calculation method for determining the amount of the benefit payable to the worker. Since the regulation does not establish a common social security scheme, it follows that the calculations to be made under Article 46 require the conditions for entitlement to the benefits to be fulfilled already, with Article 45 of the regulation being applied if appropriate.

In those circumstances, the problem of the legally prescribed age for entitlement to the benefits would be more likely to arise in relation to Article 45. That article provides that the competent institution of a Member State is to take into account, to the extent necessary, insurance or residence periods completed under the legislation of any other Member State as if they were periods completed under the legislation which it administers. Thus, the question of the legally prescribed age should arise only with respect to the legislation of the State which is to take account of the periods completed in any other Member State.

It is true that, in frequent cases where the persons concerned do not simultaneously satisfy the conditions laid down by all the legislations under which insurance or residence periods have been completed, Article 49 of the regulation provides that each of the institutions administering a legislation whose conditions are satisfied is to calculate the amount of the benefit due in accordance with Article 46, and those benefits are subsequently re-calculated progressively as the conditions laid down by the other legislations to which the person concerned was subject are satisfied.

In the Commission's view, this shows that the legally prescribed age, as a condition for entitlement to a pension, has no impact on the application of Article 46 of the regulation, which merely lays down the method for calculating the amount of the pension to be paid to the worker. Accordingly, a Member State should take account of the insurance or residence periods completed in another Member State even if the person concerned has not attained the legally prescribed age for entitlement to the pension under the legislation of that other Member State.

(b) The Commission considers that the *second and third questions* relate essentially to the principles to be observed and the procedure to be followed for the application of Article 46 of the regulation, in particular where it is necessary to take account of notional periods for the purposes of the calculation provided for by that article.

In that regard, the Commission describes the reasoning to be followed in relation to Articles 12(2) and 46 of the regulation for determination of an old-age pension, death benefit or invalidity pension due to a migrant worker.

According to the Commission, the first operation consists — as the Court confirmed in its judgment in Joined Cases 116/80, 117/80, 119/80, 120/80 and 121/80 *Celestre* [1981] ECR 1737 — in determining the amount of the benefit by applying national law alone, including the anti-overlapping rules thereof.

The second operation consists in fixing the amount of the benefit by applying the scheme provided for in Article 46 of the regulation. That calculation would be in three stages.

(i) Thus, it is first necessary to fix, in accordance with Article 46(1) of the regulation, the amount of the benefit corresponding to the total of the insurance or residence periods to be taken into account under the national legislation applied (independent benefit). At this stage, account must be taken of Article 12(2) of the regulation, which provides: -

> 'The provisions of the legislation of a Member State for reduction ... of benefit in case 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 ... 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 ... Articles 46, 50 and 51 or Article 60(1)(b).'

Accordingly, it is unnecessary, for the purposes of the calculation under Article 46(1), to apply anti-overlapping provisions of the national legislation in the case of benefits of the same kind, as defined by Article 12(2) of the regulation.

The Commission then states that, in the present case, it is necessary to decide whether the fourth subparagraph of Article 10(2) of the abovementioned Royal Decree No 50 must be interpreted as containing provisions for reduction within the meaning of Article 12(2) of the regulation. The Court has already answered that question in the affirmative in its judgments in Case 58/84 *Romano* [1985] ECR 1679 and Case 117/84 *Ruzzu* [1985] ECR 1697, in which it held that a national provision which reduced 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 within the meaning of Article 12(2) of the regulation which, by virtue of the last sentence of Article 12(2), is not to be applied when the amount of the pension is calculated under Article 46(1) of that regulation.

(ii) The Commission states that, secondly, it is necessary to calculate, pursuant to Article 46(2) of the regulation, first the theoretical amount of the benefit as if all the insurance periods had been completed under the legislation which the competent institution administers at the time of award of the benefit, and then the actual amount *pro rata* to the duration of the insurance periods completed or recognized under the legislation administered by the institution in question. Moreover, it is necessary to apply, where appropriate, the correcting factor provided for in Article 46(2)(c) of the regulation, where the legislation in question lays down a maximum limit for insurance or residence periods for entitlement to a complete benefit and, following aggregation, the total length of the periods exceeds that maximum limit.

The Commission then states that, where insurance periods completed in several States are taken into account, regard must also be had to Article 15(1)(c) of Regulation No 574/72, which provides: -

'when a period of insurance or residence, other than a period treated as such, completed under the legislation of one Member State coincides with a period treated as such under the legislation of another Member State, only the period other than a period treated as such shall be taken into account'.

Even if it is for the national court to define a period 'treated as such' within the meaning of that provision and to determine whether the two periods in question coincide in their timing, it nevertheless follows from Article 15(1)(e) of Regulation No 574/72 and the judgments in *Romano*, *Ruzzu* and *Celestre*, cited above, that, in the present case, the notional years added by virtue of Article 10(2) of Royal Decree No 50 and the periods of insurance that Mr Tormen completed in Italy do not overlap.

As regards the taking into account of notional periods for calculation of the *pro*

rata benefit, it must be considered in the light of the abovementioned decision No 95 of the Administrative Commission and the judgment in *Menzies, supra.* However, by contrast with that case, in which the notional period added by the competent institution related to a period after the materialization of the risk, the notional years granted in the present case under Belgian legislation are within a period prior to the materialization of the risk giving rise to the award of the pension. Accordingly, the inclusion, in the calculation of the actual amount of the benefit, of a notional period ante-dating the materialization of the risk does not run counter either to decision No 95 or to the relevant case-law. On the contrary, the terms 'periods of insurance completed' and 'periods of insurance . . . completed before the risk materializes' used in Article 46(2)(a) and (b) respectively militate in favour of such inclusion.

The Commission also considers that it is not appropriate to deduct from that notional period periods completed in another Member State where that notional period does not overlap with the periods completed in that other Member State.

The Commission adds that, after establishing the *pro rata* amount in accordance with the above principles, the competent institution must compare the national amount, without regard to the national anti-overlapping rules, and the actual amount of the benefit. Pursuant to the second subparagraph of Article 46(1), the higher of those two amounts must be taken into consideration.

In the present case, where the retirement pension was acquired at the full rate under national legislation alone, it appears that no more favourable result could be arrived at by applying Article 46(2) of the regulation.

(iii) Finally, the Commission states that, if appropriate, it is necessary to apply the reduction provided for in Article 46(3) of the regulation. The sum of all the independent *pro rata* benefits available to the migrant worker may not exceed the highest theoretical amount which could have been arrived at if all the periods of insurance had been completed under the legislation of each of the Member States involved. To the extent to which that limit was exceeded, the institution in the State where the entitlement of the person concerned arose without recourse to aggregation should adjust the independent benefit by means of the calculation provided for in the second subparagraph of Article 46(3) of the regulation.

Summarizing, the Commission proposes that the following answers be given to the questions submitted by the Tribunal du Travail, Mons:

'1. A Member State must take account of the periods of insurance or residence completed in another Member State, for the purposes of Article 46 of Regulation No 1408/71, even where the person concerned has not attained the legally prescribed age for entitlement to the pension under his legislation.

The legally prescribed age, as a condition for entitlement to a pension, has no influence on the application of

the provisions of Article 46 of Regulation No 1408/71 which merely lay down the method for calculating the amount of the pension to be paid to the person concerned.

2. Article 46(2)(a) provides, for the purpose of calculating the theoretical pension, for account to be taken of all the periods completed in the various Member States. The actual amount pursuant to Article 46(2)(b) must be calculated having regard to the notional periods *prior to* materialization of the risk.

Furthermore, it is unnecessary to deduct from that notional period periods completed in another Member State where that notional period, not being allocated to a specific period of time, does not overlap with the periods completed in the other Member State.

3. The amount of an old-age, survivor's or invalidity pension must be determined by applying Articles 12(2) and 46 of Regulation No 1408/71 in accordance with the following rules:

(a) determination of the amount of the benefit by application of national law alone, including the anti-overlapping rules thereof (national amount, taking account of the national anti-overlapping rules);

(b) determination of the amount of the benefit by applying the conditions of Article 46 of the regulation:

(i) determination of the amount of the benefit corresponding to the total length of the periods of insurance or residence to be taken into account under the national legislation applied (Article 46(1)) and correlative application of Article 12(2) *in fine*, according to which any national anti-overlapping provisions must be disregarded for the purpose (national amount, without account being taken of national anti-overlapping rules or "independent benefit");

(ii) possible determination of the amount of the benefit in accordance with the rules for aggregation and apportionment (Article 46(1), which refers to the rules set out in Article 46(2)(a) and (b)); calculation of the *theoretical amount* of the benefit, as if all the periods of insurance had been completed in the Member State to whose legislation the worker was subject and of the *actual* amount *pro rata* to the length of the periods of insurance completed or recognized under the legislation administered by the institution in question in relation to the total length of the periods completed under the legislation of all the Member States concerned (*pro rata* benefit). Possible application of a correcting factor for the apportionment where the legislation in question provides for a maximum length of periods for the entitlement to a complete benefit and where, following the aggregation, the total length of the periods exceeds the

maximum period laid down (Article 46(2)(c)).

The higher of the two amounts (independent amount (b i) and actual amount (b ii)) must be taken into consideration (Article 46(1));

(iii) possible application of the reduction provided for in Article 46(3); the sum of all the independent *pro rata* benefits available to the migrant worker may not exceed the highest theoretical amount which could have been arrived at if all the periods of insurance had been completed under the legislation of each of the Member States involved. To the extent to which that limit is exceeded, the institution which applies Article 46(1), namely the institution in the State where the entitlement of the person concerned arose without recourse to aggregation, should adjust its (independent) benefit by a proportional amount in accordance with the second subparagraph of Article 46(3) (adjusted benefit).

In conclusion,

if the adjusted amount (b iii) exceeds the amount resulting from national law alone (including the anti-overlapping rules thereof) (a), the adjusted amount is adopted;

if the national amount exceeds the adjusted amount, the national amount is adopted.'

F. A. Schockweiler
Judge-Rapporteur