OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 December 1991 *

Mr President,
Members of the Court,

1. Three questions have been submitted for a preliminary ruling by the Tribunal du Travail, Mons, La Louvière Division, and once again they concern difficulties of interpretation raised by Article 46 of Regulation (EEC) No 1408/71. [1]

2. Mr Tormen Guerrino, an Italian national, who was born on 4 January 1923, was an underground mineworker in Belgium from 1952 to 1977 (his period of invalidity from 1965 to 1977 being treated as a period of employment), that is to say for a period of 26 years. He also worked in Italy for two years within the period 1938 to 1943.

3. On 1 April 1978, the Belgian invalidity pension was converted into a retirement pension. It appears that Mr Guerrino also received an Italian invalidity pension as from 1965 on the basis of periods of insurance completed in Italy. He died on 12 January 1981.

4. Mrs Di Prinzio, the plaintiff in the main proceedings, the widow of Mr Guerrino, was notified on 2 March 1984 by the Belgian Office National des Pensions ('the ONP') of decisions fixing her husband's retirement pension as at 1 April 1978, her separated spouse's retirement pension as at 1 February 1980 and her survivor's pension as at 1 February 1981 (the latter comprising an annual sum of BFR 199 217 payable by Belgium and LIT 331 500 payable by Italy).

5. The Belgian legislation applicable to the inception and establishment of Mr Guerrino's rights on retirement was Article 10(2) of Royal Decree No 50 of 24 October 1967 [2] which provides that a person who has worked as a miner for at least 25 years is to be treated as having been employed for 30 years and is entitled to a complete pension (30/30). Such a person is thus credited with a number of notional years' employment equal to the difference between 30 and the number of years' actual employment.

6. The Law of 10 February 1981 inserted in Article 10-2.1 of Royal Decree No 50, with retroactive effect to 1 January 1981, a new subparagraph worded as follows:

'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

* Original language: French.

1 — Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

2 — *Moniteur Belge* of 27 October 1967 — amended by the Law of 26 June 1972 (*Moniteur Belge* of 30 June 1972, p. 7738) and by the Law of 28 March 1975 (*Moniteur Belge* of 8 April 1975, p. 4108).

persons, under a foreign scheme or under a scheme applicable to the staff of a public international organization'.[3]

7. Since Mr Guerrino had an insurance record of 26 years, the ONP credited him with four additional notional years so as to award him a pension on the basis of 30/30 for the period between 1 April 1978 (the date on which he stopped working) and 31 December 1980. His retirement pension was therefore a full pension for those two-and-a-half years.

8. For the period commencing on 1 January 1981, the ONP, applying the reduction (or anti-overlapping) clause inserted in Article 10-2.1 of Royal Decree No 50, deducted from the number of notional years awarded to Mr Guerrino the number of years that he had worked in Italy.

9. Since the two years spent as a worker under the general scheme in Italy corresponded to one year under the Belgian mineworkers' scheme,[4] one additional notional year was discounted and the pension was calculated on the basis of an insurance record of 29/30.

10. It is the use of that calculation method to determine the length of the insurance record by reference to which the retirement and survivor's pension were fixed that is contested by the plaintiff in the main proceedings. She contends that her husband's insurance record must be taken to be 30/30 without the deduction of a notional year, even after the entry into force of the Law of 10 February 1981.

3 — Article 11 of the Law, *Moniteur Belge* of 14 February 1981, p. 1699.

4 — Pursuant to Article 32 quinquies of the Royal Decree of 21 December 1967.

11. Before giving a decision in the proceedings before it, the national court was concerned to check that the application of Regulation No 1408/71 would not lead to a more favourable result than that arrived at under national law by the ONP, since if that were the case priority would have to be given to the Community regime. It submitted three questions for a preliminary ruling.

12. The first question might, it seems, be reformulated in the following terms: does the award of a retirement pension to a worker in receipt simultaneously of a retirement pension in one Member State and of an invalidity pension not yet converted into a retirement pension in another Member State fall within the scope of Article 46 of Regulation No 1408/71 where the retirement age has not been reached in the first Member State for award of the pension payable in respect of the years' contributions in the second Member State?

13. The second and third questions may be considered and answered together. I propose that they be reformulated in the following terms: what are the conditions for applying Article 46 — in particular paragraph 3 thereof — of Regulation No 1408/71 in circumstances where notional years are added to years of actual employment to create a full retirement pension in one Member State and an invalidity pension not converted into an old-age pension is payable in another Member State?

14. Consideration of the first question — which is thus intended to determine whether Article 46 is applicable to the present case — must be preceded by the following statement: the effect of the Belgian national anti-overlapping clause has been to create a situation in which a person who has worked in two Member States

receives from the first State a retirement pension of a lesser amount than he would have received if he had never worked in the second State.

15. Similarly, his widow — whose survivor's pension represents a percentage of the retirement pension received by her husband in the first Member State — may, because of the reduction of that pension, find herself in a less favourable situation than the widow of a worker who was employed in only one Member State: the latter will in fact receive a survivor's pension based on a retirement pension which has not been subject to any reduction.

16. A migrant worker who has worked successively in more than one Member State and those claiming through him may therefore receive benefits of a lower amount than they would have received if the worker concerned had been employed in only one State. This is therefore a case of an obstacle to the free movement of workers within the Community.

17. Regulation No 1408/71, which was adopted on the basis of Article 51 of the EEC Treaty, was designed precisely to eliminate such obstacles.

18. Article 46 of that regulation, which lays down the conditions for the award of benefits where a worker has been subject to the legislation of two or more Member States, takes account of the requirements of Article 51 of the EEC Treaty by providing for the *aggregation* of the periods of insurance completed in different Member States and for calculation of the benefit payable by each Member State *pro rata temporis* to the length of the period of insurance completed in each State.

19. Before considering whether Article 46 may be applied to the present case, I think it will be useful to summarize its provisions concerning the calculation of benefits.

20. Where a person is entitled to a pension in a Member State without relying on the periods of insurance completed in other Member States (as is the case here as regards the Belgian pension), Article 46 applies in two stages. The institution awarding the pension must first determine, under its own legislation, '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',[5] without applying the national anti-overlapping rules.[6] That is what is known as the *independent benefit*. It also calculates, pursuant to the second subparagraph of Article 46(1), the amount of benefit which would be obtained by recourse to the aggregation and apportionment provided for in Article 46(2)(a) and (b), which is known as the *pro rata benefit*. The higher of these two benefits is adopted.

21. How is the *pro rata* benefit provided for in Article 46(2) calculated? That provision covers situations in which a person's entitlement to benefits arises only in respect of the periods of insurance completed in more than one Member State. It provides that the institution that awards the benefit in the first State must first calculate the *theoretical amount* of the benefit to which the person concerned could expect to receive if all the periods of insurance completed by him in the different Member States had been completed in the Member State in question, and then the *actual amount*[7] 'on the basis of the theoretical amount ... in the ratio which

5 — First subparagraph of Article 46(1).

6 — Judgment in Case 296/84 Sinatra [1986] ECR 1047, paragraph 21.

7 — Or pro rata amount.

the length of the periods of insurance . . . completed before the risk materializes [8] under the legislation administered by the institution bears to the total length of the periods of insurance . . . completed under the legislation of all the Member States concerned'. [9] According to Article 46(2)(c), the total length of the periods of insurance taken into account is subject to the ceiling of the maximum period required by the legislation of one of the States in question for receipt of full benefit. As we have seen, the institution awarding the pension adopts the higher of the independent benefit and the *pro rata* benefit. The benefit obtained may be subject to adjustment pursuant to Article 46(3). [10]

22. Having thus recalled the terms of Article 46, let us determine its scope: appearing as it does in Chapter 3 of Regulation No 1408/71, which is entitled 'Old Age and Death (Pensions)', does it apply to the award of all benefits? Does it apply more particularly where a retirement pension overlaps with an invalidity pension, as in the present case?

23. Where a person receives invalidity, old-age or death benefits *of the same kind* (for example, two invalidity pensions) awarded by the institutions of two or more Member States, the Court has upheld the following principle: the worker is entitled, in the Member State where the award is sought, to the higher of (a) the benefit to which he would be entitled under the legislation of that State alone (applied in its entirely, *including the national anti-overlapping rules* and the age conditions for entitlement to a retirement pension) and (b) the benefit to which he might be entitled under Regulation No 1408/71 *in its entirety*, including the second sentence of Article 12(2) [11] of that regulation and Article 46(3), which contains what one might describe as a Community anti-overlapping rule. [12]

24. Does that principle apply where a retirement pension is awarded in one Member State and an invalidity pension not yet converted into a retirement pension is awarded in another Member State?

25. The Court held in the *d'Amico* [13] and *Celestre* [14] cases, relying in particular on Articles 48 to 51 of the EEC Treaty, that

'where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and of invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind, *the provisions of Chapter 3 of Regulation No 1408/71 are applicable for the purpose of determining the rights of the*

8 — Retirement or death.

9 — Article 46(2)(b).

10 — Which imposes a ceiling on the amount which may be received by a worker under Article 46, namely the higher of the theoretical amounts calculated in accordance with Article 46(2)(a).

11 — Which provides that provisions for the reduction of benefit do not apply where the person concerned receives benefits of the same kind.

12 — Judgments in Case 22/77 Mura I [1977] ECR 1709, Case 236/78 Mura II [1979] ECR 1819, Case 37/77 Greco [1977] ECR 1711 and Case 98/77 Schaap [1978] ECR 707.

13 — Case 4/80 [1980] ECR 2951.

14 — Joined Cases 116, 117, 119, 120 and 121/80 [1981] ECR 1737.

worker, and, by virtue of the last sentence of Article 12(2) of the regulation, the application of the national rules against overlapping is precluded'. [15]

26. Recently, in *Di Felice*, the Court held that

'Those decisions also apply in cases in which old-age (retirement) pensions due under the legislation of a Member State do not arise as a result of the conversion of invalidity benefits, provided that an old-age pension, whether or not arising from such conversion, is of the same kind as an invalidity pension.' [16]

27. From this the Court inferred that a worker in receipt of an early retirement pension in Belgium and an Italian invalidity pension not yet converted into a retirement pension (since the person concerned had not yet reached the retirement age laid down for such conversion) was the recipient of two benefits of the same kind within the meaning of Article 12(2) of Regulation No 1408/71 and the application of the national anti-overlapping rules was precluded. [17]

28. The *d'Amico* [18] and *Di Felice* [19] judgments thus show that the two types of benefit involved in the present case are 'of the same kind' within the meaning of Article 12(2), that the national anti-overlapping rules are excluded and that Article 46 is applicable in its entirety.

29. It should be noted that another solution, under which the anti-overlapping rules could be applied in a case such as this, would run counter to the objectives pursued by Article 51 of the Treaty and the Community regulations. *The national retirement pension would, in fact, be reduced by the number of years worked abroad whereas the pension of a person who had not worked in another Member State* would not be reduced.

30. As Mr Advocate General Caportorti stated in his Opinion in the *Brouwer-Kaune* case: [20]

'If the case concerns national rules against the overlapping of benefits which take into consideration the old-age pension drawn by the insured person in another State, for the purpose of reducing his invalidity pension, the different nature of the two concurrent pensions must not be used to render inapplicable those Community principles or rules which guarantee the worker's entitlement to benefits, acquired in the State in which the aforesaid rules against overlapping are in force, at least within the limits of the *apportionment* provided for in Article 46.' [21]

31. The fact that in the present case the Italian invalidity pension cannot be

15 — D'Amico, above, paragraph 18, emphasis added.

16 — Case 128/88 [1989] ECR 923, paragraph 14.

17 — Ibid., paragraphs 13 and 16; see also the judgment in Case C-108/89 Pian [1990] ECR 1611.

18 — In which the factual circumstances were exactly the same as in the present case: the Belgian invalidity pension granted to Mr d'Amico under the special scheme for miners was converted into a retirement pension pursuant to Royal Decree No 50 of 24 October 1967. Mr d'Amico also received an Italian invalidity pension which could not be converted into a retirement pension.

19 — Above.

20 — Case 180/778 judgment at [1979] ECR 2111, Opinion at p. 2123.

21 — Ibid., at p. 2129.

converted into an old-age pension does not render the application of Article 46 impossible and it enables the theoretical pension to be calculated despite the doubts expressed by the national court in its question.[22] It will be seen that that court also made its own calculation of the pension at page 6 of its judgment.

32. It must therefore be concluded that Article 46 of Regulation No 1408/71 is applicable to the award of pensions of the kind with which the national court is concerned.

33. In the second and third questions, the Court is asked to determine the procedures for applying Article 46 where there are notional periods of insurance, on the one hand, and, on the other, a retirement pension and an unconverted invalidity pension.

34. It should be remembered that where a worker is entitled to a pension without having to rely on the periods completed in other Member States, the application of Article 46 involves calculation first of the independent benefit and then of the actual benefit under Article 46(2)(b), the higher being awarded to the person concerned.

35. The independent benefit is, as we have seen, fixed by application of the national law alone, disregarding anti-overlapping provisions.

36. The Court held in its judgment in Romano[23] 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 ... 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.'[24]

37. It follows that where legislation provides for entitlement to a full pension, having regard to years of notional insurance, the independent pension under Article 46(1) is equal to that full pension and the number of notional years may not be reduced by the number of years worked in another Member State, the national anti-overlapping provision being inapplicable.

38. The theoretical benefit is, it will be remembered, the one that the person concerned might claim if all the periods of insurance completed by him under the legislation of more than one Member State had been completed within, and under the legislation of, only one Member State.

39. Must the notional years be taken into account? Pursuant to Article 15(1)(e) of Regulation No 574/72, 'where it is not possible to determine accurately the period of time in which certain periods of insurance or residence were completed

22 — For details of the calculation, see below, paragraph 36.

23 — Case 58/84 *ONPTS* v *Romano* [1985] ECR 1679.

24 — Ibid., paragraph 15 and operative part; emphasis added.

under the legislation of one Member State, such periods shall be presumed not to overlap with periods of insurance or residence completed under the legislation of another Member State and shall, where advantageous, be taken into account'.[25]

40. The Court has held that that provision applied to the aggregation and apportionment of periods of insurance and that a Member State could not apply less favourable anti-overlapping rules.[26] In circumstances such as those of the present case, it will therefore be necessary to take account of the full pension in the first Member State without any reduction of notional years.

41. What about the years worked in another Member State? Under Belgian law, the years during which the person concerned worked under the general scheme, in particular abroad, in addition to a complete insurance record as a miner, do not entail an increase in the pension calculated on the basis of a fraction of 30/30.

42. Pursuant to Article 46(2)(c) of Regulation No 1408/71, the addition of periods of insurance — needed to calculate the theoretical amount — is subject to the ceiling of the maximum period required for receipt of full benefit by the legislation of the State where the institution responsible for payment is located. The theoretical pension will therefore be equal to the full pension in the first Member State, without account being taken of the years worked in the second Member State. In such a case, the theoretical benefit is of the same amount as the independent benefit.

43. Pursuant to Article 46(2)(b), the next operation is to calculate the *actual* amount of the benefit on the basis of the theoretical amount, in the ratio which the length of the periods of insurance completed before materialization of the risk under the legislation administered by the institution bears to the total length of the periods of insurance or residence completed under the legislation of all the Member States concerned before the risk materialized.

44. Is 'apportionment' appropriate where there has been no 'aggregation' of the periods of insurance?

45. The ONP maintains, in its written observations, that since there was no 'aggregation' of all the periods of insurance completed in all the Member States, 'apportionment' is not appropriate. The theoretical benefit (equal to the full Belgian pension) is not therefore subject to the reduction resulting from the apportionment and from the application of Article 46(3).

46. In fact, the aggregation of the periods of insurance is limited by:

(1) the correcting effect of Article 46(2)(c) (which, as we have seen, provides that, if the total length of the periods of insurance is greater than the maximum period required by the legislation of one of those States for receipt of full

25 — Council Regulation No 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 159).

26 — *Celestre*, above, paragraph 15.

benefit, it is that maximum period that must be taken into account);

(2) the application of the Belgian Law which provides that the full Belgian benefit cannot be exceeded, even if additional years have been worked abroad.

47. In the present case, the aggregation is limited by the fact that the insurance period completed under Belgian legislation is, by itself, equal to the maximum period required by that legislation for receipt of a full benefit. The years worked in Italy are therefore, in a way, superfluous. It should be noted that if the worker had needed more years of insurance in order to qualify for the full Belgian pension, it would have been possible to add to the years worked in Belgium the years worked in Italy, up to the maximum period required for a full Belgian pension. [27]

48. I therefore consider it correct to say that aggregation has been carried out and that Article 46(2)(c) has had the effect of producing a full Belgian pension.

49. Whenever a worker is entitled to a full pension in a Member State, the aggregation is reduced to the maximum period required for that pension to be obtained, without its being possible for the years worked abroad to be taken into account.

27 — See the judgment in Case 323/86 Collini [1987] ECR 5489, end of paragraph 10, which covers precisely such a case.

50. Article 46(2) does not thereby become inapplicable: on the contrary, it is applied *in full*: 'the competent institution . . . shall, *when applying the provisions of this paragraph*, take into consideration this maximum period instead of the total length of the periods completed'. [28]

51. Consequently, the apportionment provided for in Article 46(2)(b) must be applied even if it leads necessarily to a reduction in the final benefit, by reason of the fact that years were worked aborad.

52. Furthermore, the Court has already stated forcefully that Article 46 forms a whole and should be applied in its entirety.

53. In *Mura II*, [29] the Court held:

'Where the provisions of Article 46 of Regulation No 1408/71 are more favourable to the worker than the provisions of national legislation alone, by virtue of which the worker receives a pension, the provisions of that article must be applied in their entirety'. [30]

54. In its judgment in *d'Amico*, [31] the Court stated more specifically that Chapter 3 of Regulation No 1408/71 — *and therefore Article 46 in its entirety, including the*

28 — Article 46(2)(c), emphasis added.

29 — Above.

30 — Paragraph 30 and operative part.

31 — Above.

provision concerning apportionment — was applicable to the case of a miner receiving a full pension in Belgium and an unconverted Italian invalidity pension.

55. The Court also recognized in the important *Collini* judgment[32] that Article 46 applied in its entirety even where the aggregation of periods of insurance is in fact limited to the maximum period required for a full pension in the first Member State.

56. It is therefore clear — to reply to a precise question from the national court — that, where aggregation results in a period of the length required for a full pension in a Member State without its being necessary to take account of the periods of insurance completed in another Member State, apportionment is nevertheless applicable.

57. Having been taken into account for the calculation of both the independent and theoretical amounts, must the notional years awarded by Belgian legislation also be brought into the calculation of the *pro rata* pension?

58. As the Commission pointed out in its observations, it is apparent from Decision No 95 of the Administrative Commission of the European Communities and from the *Menzies*[33] judgment that the notional periods are discounted for the calculation of the actual amount referred to in Article 46(2)(b) where they come *after* the materialization of the risk.

32 — Above.

33 — Case 793/79 [1980] ECR 2085.

59. Where they come *before* the materialization of the risk, as in the present case, they must be treated, in accordance with the letter of Article 46, as 'periods of insurance completed before the risk materialized'.

60. They will therefore be taken into account for the calculation both of the total length of the periods of insurance in the different Member States and of the total length of the periods of insurance in the first Member State.

61. It will be seen that a contrary course of action would have the effect of placing a migrant worker at a disadvantage by comparison with a national worker under conditions that were incompatible with Article 51 of the Treaty.

62. It is not therefore appropriate to deduct a number of notional years equal to the number of years worked in the second Member State when carrying out the following calculation:

$$\text{apportioned benefit} = \text{theoretical benefit} \times \frac{A}{B}$$

A = number of years of insurance in the first Member State, including the notional periods

B = number of years of insurance in the two Member States, including the national periods within the ceiling imposed by Article 46(2)(c)

63. If the *pro rata* benefit proves to be less than the independent benefit,[34] it will be for

34 — Which is necessarily the case when the pro rata benefit is calculated on the basis of a theoretical benefit equal to the independent benefit.

the national court to take the latter into account.

64. The last operation will consist, pursuant to Article 46(3)(1), in checking that the sum of the independent benefit and the benefit due from the second Member State does not exceed the highest theoretical amount, which, in the present case, is the full Belgian pension. [35]

65. An unjustified overlapping of benefits may occur where a worker is in receipt of several independent benefits — which, *ex hypothesi*, have not been apportioned or, therefore, made to reflect the length of the period of insurance. A provision for reduction is contained in the second subparagraph of Article 46(3) for such cases. In *Collini* the Court laid down the conditions for the application of that article, where only one independent benefit — as in this case — is to be paid:

'The second subparagraph of Article 46(3) is thus intended to apportion the amount by which the ceiling referred to in the first subparagraph is exceeded amongst the various institutions paying independent benefits. That apportionment entails the determination of reduction factors depending on the proportion which each independent benefit bears to the total sum of the independent benefits.

It follows that such an apportionment is unnecessary where only one institution pays an independent benefit. In such a case, "the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with ... paragraph (1)" referred to in the second subparagraph of Article 46(3) is, by definition, equal to one. In those circumstances, the sole institution paying an independent benefit must adjust it by reducing it by the full amount by which the sum of the independent benefit and the *pro rata* benefit exceeds the ceiling referred to in the first subparagraph of Article 46(3).' [36]

66. The effect of applying Article 46(3) is therefore to bring about a reduction in a benefit acquired under national law alone: the independent benefit.

67. In circumstances such as those described by the national court, if Belgian national law is applied the full Belgian pension will be reduced by the effect of the national anti-overlapping provision and, if Community law is applied, the sum of the independent benefit and the Italian invalidity benefit will be reduced by the effect of the second subparagraph of Article 46(3), as interpreted by the *Collini* judgment.

68. The application of the latter article may prove more favourable to the worker than the application of the national anti-overlapping rules.

69. In the *Collini* case, where the aggregate period was equal to the number of years required for a full pension in the first

35 — For another example in which, in a case of invalidity, the independent benefit and the theoretical benefit are equal to the full benefit due under the legislation of one Member State alone, see the judgment in Case C-199/88 Cabras [1990] ECR 1049.

36 — Paragraphs 15 and 16, emphasis added.

Member State, the application of the legislation of that State alone would have been less favourable than that of the conditions laid down in Article 46 of Regulation No 1408/71.

70. In the present case, if the national court finds that the sum of the Belgian independent benefit and the Italian invalidity pension (the ceiling for the total being the higher of the theoretical amounts, namely the full Belgian pension) is higher than the national pension, account being taken of the *national* anti-overlapping rules, it must apply Community law.

71. On the other hand, if it were to find that the Community benefit were of a lesser amount than the national benefit, the latter would have to prevail in accordance with the *Petroni* principle.[37]

72. Thus interpreted, Article 46 of Regulation No 1408/71 duly attains the objective set by Article 51 of the Treaty, provided that it can be applied only if it enables a migrant worker to be granted a benefit of an amount *at least as high* as that due to him under national legislation alone.

73. As Mr Advocate General Jocobs indicated in his Opinion in the *Cabras* case,[38] Article 51 does not mean that 'a person who has worked in more than one Member State must be better off, in terms of social security, than a person who has spent his entire working life in one Member State. That view is surely mistaken: Article 51 merely requires that the former should not be worse off than the latter'.

74. I therefore propose that the Court reply as follows to the questions submitted:

(1) Where a worker is entitled to an old-age pension under the legislation of a Member State and an invalidity pension which has not been converted under the legislation of another Member State, the award of those pensions is a matter within the purview of Article 46 of Regulation No 1408/71. For the application of that article, the fact that the person has not reached the retirement age prescribed for the award of the benefits in the second Member State is immaterial.

37 — According to which the Community rules may be applied only if to do so is more favourable to the migrant worker than to apply, in its entirety, only national law, including the anti-overlapping rules thereof — see the judgment in Case 24/75 Petroni [1975] ECR 1149, paragraph 13.

38 — Case C-199/88, judgment at [1990] ECR 1023.

(2) (a) Article 46(2)(a) must be interpreted as providing, for the purpose of calculating the theoretical pension, for the insurance periods completed in the different Member States, including the notional insurance periods, to be taken into account.

(b) Article 46(2)(b) must be interpreted as meaning that the actual amount must be calculated taking account of the notional periods ante-dating the materialization of the risk.

(c) The notional insurance periods do not merge with the periods completed in the other Member States and it is not appropriate to reduce them in proportion to the periods completed in those States.

(d) Where the aggregate period is equal to the maximum number of years' insurance required for entitlement to the full pension in the first Member State without the addition of other periods of insurance completed in other Member States, apportionment is nevertheless applicable.

(e) Where only one institution provides an independent benefit within the meaning of Article 46(1) of Regulation No 1408/71, only that institution must reduce its benefit under the second subparagraph of Article 46(3); it must effect that reduction by deducting from the independent benefit the amount by which the sum of the benefits calculated in accordance with Article 46(1) and (2) exceeds the ceiling referred to in the first subparagraph of Article 46(1).