OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 18 MAY 1983 [1]

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling, the Court is asked to interpret certain provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416), in the light of Article 51 of the EEC Treaty and having regard to a French welfare benefit, namely the "guaranteed income retirement" allowance. In particular, the Court must establish whether a migrant worker may receive, wholly or in part, that benefit concurrently with the old-age pension which he receives in another Member State.

2. The facts may be summarized as follows. Biagio Valentini, the plaintiff in the main proceedings, is an Italian national and resides in France. He worked in Italy until 1957 and, since the age of 60, has received a contributory old-age pension amounting to FF 15 per day, paid to him by the Istituto Nazionale Previdenza Sociale [National Social Welfare Institution]. From 1 April 1963 he was employed in France in a joinery. On 23 September 1977, at the age of 63, he voluntarily left his employment and requested the Association pour l'Emploi dans l'Industrie et le Commerce [Association for Employment in Industry and Trade] (hereinafter referred to as "the Association"), Lyon, to grant him the "guaranteed income retirement" allowance. That benefit, which was provided for in the consolidated version of an inter-trade agreement concluded on 13 June 1977 and annexed to the regulation governing special allowances relating to the situation of unemployed workers over 60, is payable until the recipient has attained the pensionable age (which, in France, is normally fixed at 65 years of age). It amounts to 70% of the earnings received over the last three months of employment. The Association, Lyon, awarded the benefit to Valentini as requested. However, it deducted the amount corresponding to the Italian old-age pension.

By application of 14 May 1980, Mr Valentini brought an action against the Association before the Tribunal de Grande Instance [Regional Court], Lyon, requesting a declaration that the deduction was unjustified and an order that the institution pay him the amounts unlawfully withheld. In his opinion, the EEC Treaty and the Community law based thereon have not replaced the individual national systems of social security which guarantee to nationals of the Member States separate benefits for different periods. The Association, on the other hand, considers that the provisions of the above-mentioned agreement and, in particular, the rule which permits the reduction of the guaranteed income retirement benefit by an amount corresponding to the old-age pension received by the worker, are entirely in conformity with Community law.

1 — Translated from the Italian.

By judgment of 2 June 1982, the First Section of the Tribunal de Grande Instance, Lyon, stayed its proceedings and asked the Court of Justice to establish whether, in application of Article 46 of Regulation No 1408/71 of 14 June 1971 and of Article 51 of the EEC Treaty, "a worker of Italian nationality residing in France, who has been in receipt of an old-age pension paid in Italy since the age of 60 and who receives in France the guaranteed income (retirement) of 70% of his daily earnings, as provided for in the amendment of 13 June 1977 of the annex to the regulation on allowances for unemployed workers, may claim to have his Italian pension paid concurrently with the French allowance of 70% of his daily earnings or whether, on the other hand, the French organization which pays him that allowance, namely the Association pour l'Emploi dans l'Industrie et le Commerce, is entitled to deduct from that allowance the sums paid by the Italian institution".

3. I propose to begin by describing the provisions in force in France.

As I have already pointed out, the guaranteed income retirement benefit for workers who voluntarily cease work between 60 and 65 years of age is provided for in the consolidated version of the agreement concluded on 13 June 1977 between workers' and employers' organizations. Those instruments amended and supplemented the Intertrade Agreement of 27 March 1972, which had established the same benefit for workers who were made redundant ("guaranteed income redundancy"). They were extended *erga omnes* by the Decree of 9 July 1977 (Journal Officiel de la République Française [French Official Journal] 1977, p. 3666). It is worth noting that the guaranteed income retirement scheme, which was envisaged as a temporary arrangement applicable until 31 March 1979, has already been extended twice pending the reorganization of the entire French system of old-age pensions.

In order to qualify for the benefits, workers must satisfy the following conditions:

(a) they must have retired during the period of application of the agreement;

(b) at the time of their retirement they must be at least 60 years of age;

(c) they must have contributed to an insurance scheme for at least 10 years (of which one year of continuous contribution or two years' non-continuous contribution must have been in the five years preceding the retirement) completed under one or more of the social security schemes envisaged by the collective agreement of 31 December 1958 on supplementary unemployment insurance;

(d) they must have requested unemployment benefit granted by the State;

(e) they must not be entitled to the full amount of an old-age pension which is awarded to certain categories of workers from the age of 60 nor must they have been awarded, after the entry into force of the agreement, a reduced old-age pension, granted in certain cases to workers under the age of 65.

In addition, the recipients of the guaranteed income retirement allowance are registered at the Agence National pour l'Emploi [National Employment Agency]. They are not however required to sign on from time to time and, for obvious reasons, are not taken into account for the purpose of unemployment statistics. They lose the benefit in three circumstances: when they reach

the age of 65 years and three months (an extension provided for in order to give the social security institution sufficient time to award the pension); when they request award by the social security institution of rights matured under the old-age pension scheme; and when they resume paid employment.

Finally, I turn to the provision which as applied by the Association is at the origin of the action. According to Article 2 (2) of the agreement, which is repeated in Article 38 of the consolidated version, workers who prior to their retirement have been awarded an old-age pension continue to receive the guaranteed income retirement allowance, but that benefit is reduced by a sum equivalent to the amount of the other benefit.

4. In order to reply to the question submitted by the Tribunal de Grande Instance, Lyon, it is necessary, in the first place, to establish whether, in the light of its contractual origin, a benefit such as the guaranteed income retirement allowance is covered by Regulation No 1408/71. Before the national court, the Association, at least initially, denied that it was. I think that its contention is completely unfounded.

According to Article 1 (j) of the regulation, the word "legislation", relating to matters of social security which the Community provisions are intended to coordinate, does not include "provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities" which renders them compulsory or extends their scope, unless that restriction is lifted "by a declaration by the Member State concerned, specifying the schemes of such a kind to which this regulation applies." By letter of 23 March 1973, the French Government notified the President of the Council of Ministers of the Community that the regulation should be considered applicable "to the French unemployment insurance scheme established by a national collective agreement signed on 31 December 1958 by the French National Council of Employers and the National Confederation of Employees, approved in pursuance of Order No 59-129 of 7 January 1959 relating to measures for the relief of unemployed persons and extended by Order No 67580 of 13 July 1967 relating to income guarantees for unemployed persons" (Official Journal 1973, L 90, p. 1)

The objection may be raised that the agreements establishing the "redundancy" and "retirement" guarantees were concluded after that notification. I do not consider, however, that that fact alters the essential problem. Apart from the unusual nature of the benefit which they introduce, the agreements of 1972 and 1977 fall within the scheme of unemployment insurance set up by the Convention of 1958 or, at most, represent an extension of that scheme. It was therefore unnecessary to make a specific and formal declaration in respect of those agreements. Further, in any event, and this is the decisive factor, the French Government expressly affirmed in the course of the oral procedure that in its view the two "guarantees" fell within the field of application of the regulation.

5. At this point the classification of the retirement guarantee becomes a question of crucial importance inasmuch as the decision as to which rules govern the overlapping of benefits paid to a migrant

worker by the social security institutions of two or more Member States depends on that classification.

It is important to note that in establishing the field of application of Regulation No 1408/71, Article 4 thereof lists the nine traditional sectors established by the International Labour Organization Convention on minimum standards of social security (No 102, 28 June 1952). However, with the exception of a few cases (family benefits, death grants and the like) it does not define the various benefits. Nevertheless, as we shall see at a later stage, useful criteria for the classification of the benefit in question may be extracted from its wording and from the interpretation which the Court has given to it.

That benefit is of recent origin and despite that fact is granted in the social security systems of almost all the Member States. It should be stated immediately that it possesses a decidedly hybrid nature. Thus it reveals a complex mixture of typical elements of an unemployment benefit and features peculiar to an old-age pension. The benefit and the pension are mentioned in Article 4 (1) (c) and (g) respectively. On the question of whether one overrides the other, the defendant in the main proceedings, two Member States and the Commission are in disagreement. Those who see in the retirement guarantee a simple, if unusual, benefit (the Association and the French Government) or who, whilst recognizing the hybrid nature thereof, propose that it be assimilated to unemployment benefit (the Commission), produce arguments of an institutional nature and point to certain characteristics of the benefit in question.

Thus, for the former, special importance is attached to the fact that it is integrated into the unemployment insurance scheme; to the fact that it is financed by the funds of that scheme and that it is administered by the institutions which pay unemployment benefit; to the fact that the legislation making it compulsory appears under the "Code du Travail" rather than the "Code de la Sécurité Sociale". For the latter the fact that the principles which justify or govern the payment of the benefit and that of the unemployment benefit are identical is considered conclusive. The two benefits were introduced in the light of a specific economic situation. They are calculated on the same basis (though the amount of the "guarantee" is generally higher than that of the old-age pension). They are temporary in nature and are suspended when the recipient resumes work or reaches pensionable age.

There is no doubt that the retirement guarantee is linked to the unemployment insurance scheme. Indeed, it was both appropriate and inevitable that it should be; appropriate inasmuch as such a connection would permit the use of existing structures and funds and therefore only require a small increase in the charges payable by workers and undertakings. It was inevitable for reasons which we may call both historical and organizational. Inasmuch as it aimed to improve the lot of older workers who became redundant, who were therefore at a disadvantage in seeking fresh employment, the redundancy guarantee was inevitably identified with the unemployment allowance. As I have already stated, the retirement allowance is the offshoot of that benefit

and represents an extension thereof to workers accepting retirement. Only those who are not familiar with the highways and byways in which social security systems evolve can imagine that it was possible for it not to be associated for administrative purposes with benefit of which it is the offspring.

Despite all those considerations, a more careful examination of the retirement guarantee reveals the weakness of the arguments which I have listed. In particular, they do not seem to me to be conclusive for the classification of that guarantee. The point of departure for that examination is the principle which the Court has repeatedly upheld in assessing social security benefits granted by various Member States. The Court has stated that arguments based on national rights and national definitions are irrelevant. The benefit must be analysed in the light of Community law and on the basis of its constituent elements, in particular its purpose and the conditions in which it is granted (judgments of 6 July 1978, Case 9/78 *Gillard* [1978] ECR 1661 and now that of 5 May 1983, Case 139/82 *Piscitello* [1983] ECR paragraph 10 of the decision). Only in that way does it become possible to define coherently the limits within which the Council regulations apply.

If that criterion is taken as a standard, the political, social and economic motives which led to the introduction of the retirement guarantee, its administrative organization, its financing and the fact that it is governed by one code rather than another, seem suddenly to be facts of tenuous or dubious relevance. Such factors are linked essentially by events and conditions which are specifically French or which are at least not always in evidence in the systems of other States. They cannot therefore be regarded as factors which are conclusive for the classification of the benefit if, as is essential, it is sought to provide a coherent assessment of that benefit. To do that other factors must be adduced: in particular the fundamental features, that is, those which are common to the systems of the different States, characterizing the two benefits, old-age pension and unemployment benefit, between which the retirement guarantee maintains a delicate balance.

6. Let us therefore examine those features. It is clear that the purpose of the pension is to alleviate the state of need which age brings upon the insured person by reducing his *capacity* to work. On the other hand, the risk which the unemployment benefit is intended to cover is the *lack* of work which may have arisen. Thus the employed person is not incapable of work; he is prevented from working by force of circumstances and, in contrast to the pensioner, he is available to resume work. This doublesided state of affairs — the lack of intention on the one hand, and the availability on the other — is the feature which distinguishes with the most force and clarity the one "status" from the other and therefore the requirements of the two allowances. The old-age pensioner may stay at home, whilst the unemployed person must be registered as a person seeking work, he must sign on from time to time and accept any offers of work. Those requirements are elements of all the national systems and, in common with the latter, are referred to in Article 69 of Regulation No 1408/71. The Court has itself held that it is necessary to satisfy such requirements in order to acquire and to retain entitlement to the benefit (judgments of

9 July 1975, Case 20/75 *D'Amico* [1975] ECR 891, and 27 May 1982, Case 227/81 *Aubin* [1982] ECR 1991).

I may now turn to the retirement guarantee (or, to respect the terminology of the preliminary proceedings, to a benefit which has the characteristics of the retirement guarantee). The first striking feature of the benefit is the rôle played by age in the scheme; the relevant age, I may add, is only five years less than that at which a normal pension is paid. The fact that a person is 60 years old and satisfies certain requirements as to insurance removes the constitutional obligation to work and gives rise to the right to retire. It is difficult to imagine a status further removed from the position of an unemployed person and more closely analogous to that of a pensioner. However, even more revealing and, as I have observed, decisive on this question is the different effect which the factor of lack of intention and availability has on the two positions. In law, the concepts of unemployment and retirement are contradictory. It is not possible to be simultaneously unemployed and retired. The "guarantee" on the other hand, is acquired exclusively following retirement. Persons are entitled to receive it only if they have accepted retirement.

As the Italian Government has noted, we are therefore faced with a "reversal of the logic of social security". Thus rather than *compensate* for the involuntary exclusion from work, the benefit *rewards* the voluntary absention from work. Moreover, that reversal also characterizes the relationship, which I have described as a child-parent relationship between the retirement guarantee and the redundancy guarantee. Age plays a decisive role also in the case of the original or parent benefit. However, the fact that the person voluntarily leaves his position is not sufficient for the benefit to be classified as an unemployment allowance. I have already said that national academic writings and case-law are not relevant. Nevertheless I yield to the temptation to quote on that point a famous French scholar. The extension to persons accepting retirement — writes Jean-Jacques Dupeyroux — "has profoundly changed the meaning of that guarantee inasmuch as persons who are not compulsorily deprived of work and who are not seeking employment are entitled to receive it — persons who, in other words, are not "unemployed" ... Thus the right of workers to retire at 60 years of age has been established under the rubric of 'unemployment insurance'" (*Droit de la Sécurité Sociale,* 8th edition, Paris, 1980, p. 1158).

However, it is not only the consideration advanced by Dupeyroux which leads to the conclusion that the benefits in question amount to a "right to retire". Other features of the benefit support that proposition. Thus the insurance requirements are much more severe — 10 years of work as against 3 months — than those imposed for unemployment benefit; further, the fact that according to the Law of 28 December 1979, the amount of the sickness contribution and benefits is identical for persons taking "guaranteed" retirement and pensioners in the strict sense of the word; finally, the fact that the retirement guarantee is subject to income tax, which is a typical feature of an old-age pension but not of an unemployment benefit.

On the other hand, that collection of facts does not nullify the arguments of the Association, the French Government and the Commission or other arguments in the same sense which might still be put forward (for example, that there is an analogy between the status of the person taking "guaranteed" retirement and that of the unemployed person inasmuch as they are both able to improve their insurance situation for the purposes of pension conditions). As it stated at the beginning of this Opinion, the retirement guarantee is a hybrid and has all the ambivalent features of hybrids. However, before accepting the existence of a *tertium genus,* a jurist who encounters phenomena of this nature must weigh up its contradictory characteristics in question. Having considered the case-law of the Court in this case I have no hesitation in opting for the view that the retirement guarantee is assimilated to an old-age pension.

7. In connection with that point, it remains to establish what effect the classification of this benefit under Article 4 (1) (c) of Regulation No 1408/71 has on the national provision against overlapping. In other words, it is necessary to ascertain whether a worker in the same position as Valentini receives the retirement guarantee benefit in its entirety or reduced by the old-age pension which he is granted in Italy.

The Court has already given its views on the overlapping of two benefits which are of the same kind. The Court stated that "so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No 1408/71 do not prevent the national legislation, including the rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules laid down by Article 46 of Regulation No 1408/71 the provisions of that article must be applied" (judgment of 14 March 1978, Case 98/77 *Schaap* [1978] ECR 707 and Case 105/77 *Boerboom-Kersjes* [1978] ECR 717). Thus the person concerned is entitled to receive the highest benefit, calculated on the basis of the scheme set up under Article 46 and the provisions which supplement that scheme, that is, as far as rules against overlapping are concerned, Article 12 (2). It is well known that the said provision establishes that such rules may be invoked against the recipient unless the benefits are "benefits of the same kind in respect of ... old age ... awarded by the institutions of two or more Member States".

That is precisely the position in this case. Thus it must be concluded that the reduction clause contained in Article 38 of the consolidated agreement of 13 June 1977 is not applicable to a worker such as Valentini. Article 46 (3) of Regulation No 1408/71 cannot affect that result. That article too contains a provision against overlapping, although in that case it is a Community provision. However, the Court has held that it is incompatible with Article 51 of the EEC Treaty inasmuch as it leads to a diminution of the rights which the persons concerned already enjoy purely on the basis of national legislation (judgment of 21 October 1975, Case 24/75 *Petroni* [1975] ECR 1149).

I consider that interpretation to be entirely consistent with the objectives of the regulation and, indeed, that it is implicit in its preamble (see the seventh

and eighth recitals therein). That is however contested by those who consider that it amounts to "discrimination in reverse", inasmuch as it favours those workers who, because they have been employed in different Member States, finally receive benefits which are higher than those which workers who have always been employed in the same country enjoy. However, as the Court has held, there is no discrimination when situations which are not comparable are treated differently and the situation of migrant workers is in general not comparable to that of non-migrant workers (judgment of 13 October 1977, Case 22/77 *Mura* [1977] ECR 1699). In any event, the fact that the former may gain some advantage cannot be attributed to the Court of Justice. If it is possible to speak of responsibility in that respect, it attaches to those who have as yet failed to set up a common system of social security or failed to provide for the harmonization of existing national systems.

8. On the basis of all the considerations which I have advanced above, I propose that the Court give the following reply to the question submitted by the First Section of the Tribunal de Grande Instance, Lyon, by judgment of 2 June 1982, in the course of the proceedings between Biagio Valentini and the Association pour l'Emploi dans l'Industrie et le Commerce, Lyon:

"(a) A financial benefit which is awarded to a worker who accepts retirement from a certain age until he is entitled to receive the old-age pension and for which he is not required to make himself available at the unemployment offices of the relevant State, has the character of an 'old-age benefit'. It is therefore classified under Article 4 (1) (c) of Regulation No 1408/71 and, consequently, the provisions contained in Chapter 3 of the same regulation apply to it.

(b) If a worker receives a pension by virtue of national legislation alone, Regulation No 1408/71 does not preclude such legislation from being applied in its entirety against that worker and that legislation may include provisions against overlapping. It is nevertheless to be understood that if such provisions prove less favourable for the worker than the scheme of Article 46 of Regulation No 1408/71, that provision is to be applied together with the rules forming part thereof. Under Article 12 (2) Regulation No 1408/71, legislative provisions for reduction, suspension or withdrawal which may be contained in national legislation may not be invoked against a worker who is in receipt of old-age benefits from two or more Member States".