

Member State B which is reduced by the amount of the full pension granted by the competent institution in Member State A, it is not compatible with Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the amount of the advance payments made to the

recipient recovered by the competent institution in Member State A to exceed the amount of pension or arrears of pension transferred to that institution by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.

In Case 98/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail [Labour Tribunal], Brussels, for a preliminary ruling in the action pending before that court between

GIUSEPPE ROMANA

and

INSTITUT NATIONAL D'ASSURANCE MALADIE-INVALIDITÉ [National Sickness and Invalidity Insurance Institution], Brussels,

on the interpretation of Decision No 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 29 May 1975 concerning the date to be taken into consideration when determining the rates of conversion to be applied when calculating certain benefits (Official Journal, C 44 of 26 February 1976, p. 3), having regard to the provisions of Article 7 of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1972 (I), p. 159),

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keefe and G. Bosco, Judges,

Advocate General: J.-P. Warner

Registrar: H. A. Rühl, Principal Administrator

gives the following

## JUDGMENT

## Facts and Issues

The order making the reference and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

## I — Facts and written procedure

*The facts*

Mr Romano, an Italian national living in Belgium, received a full invalidity pension from the Alliance Nationale des Mutualités Chrétiennes [National Alliance of Christian Mutual Insurance Associations] from 29 August 1970 to 31 December 1975. From 1 January 1976 he was awarded a retirement and survivor's pension.

By a decision sent to the Institut National d'Insurance Maladie-Invalidité (hereinafter referred to as "the Belgian Institution") on 6 April 1976 and completed on 1 July 1976 the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institution] (hereinafter referred to as "the Italian Institution") at Palermo awarded Mr Romano an invalidity pension under Italian legislation back-dated to 1 September 1970.

The Belgian Institution took the view that by virtue of Article 70 (2) of the

Belgian Law of 9 August 1963 instituting and implementing a compulsory sickness and invalidity insurance scheme the invalidity pension paid in Belgium in respect of the period 1 September 1970 to 31 December 1975 had to be reduced by the amount of the Italian invalidity pension. Accordingly, by a decision notified to Mr Romano on 24 September 1976 it reduced the amount of the Belgian pension by the amount of the Italian pension using the exchange rate applicable on 1 January 1975 which was LIT 1 = BFR 0.05784. That decision stated that a recovery of the provisional advances reckoned on the same basis at BFR 107 848 would be made. It continued:

"If the payment made to us does not exactly cover the amount of allowance paid on a provisional basis we will instruct your insurance institution to arrange, with your agreement, for the recovery of the difference. If, however, there is a balance in your favour, this will be paid by ourselves".

Without questioning the principle that the Belgian benefits should be adjusted, on 7 October 1976 Mr Romano brought against that decision an action in which he challenged the exchange rate used by the Belgian Institution to calculate the sums to be recovered and the view that any difference could be recovered.

On 29 July 1977 the Italian Institution remitted to the Belgian Institution

LIT 3 109 670 representing the arrears of Italian pension in respect of the period 1 September 1970 to 30 June 1977. The Belgian Institution converted that sum into Belgian francs on the basis of the exchange rate obtaining on the day of payment which was LIT 1 = BFR 0.040355. That gave BFR 125 491. The difference of BFR 17 643 between that sum and the sum at which the provisional advances to be recovered had been calculated was paid to Mr Romano.

Mr Romano did not believe that his claim was thereby satisfied. In his view only the amount due from the Italian Institution in respect of the period at issue, namely 1 September 1970 to 31 December 1975, could be recovered. On the other hand, he asks that the Belgian Institution be ordered to pay him the equivalent in Belgian francs of the benefits payable by the Italian Institution in respect of the period 1 January 1976 to 30 June 1977 subject to a deduction of the BFR 17 643 already paid.

The Belgian Institution told the Tribunal du Travail that the reason for its application of two different exchange rates was that it believed that it had to apply,

- (a) the provisions of Article 107 (6) of Regulation No 574/72 of the Council as amended by Regulation No 639/74 of the Council of 15 October 1974 (Official Journal, L 283, p. 1) upon receiving the payment by the Italian Institution, and,
- (b) Decision No 101 of the Administrative Commission on Social Security for Migrant Workers of 29 May 1975 when determining the Belgian benefit.

Mr Romano argued before that court that, contrary to the provisions contained in Article 7 of Regulation No 574/72, according to which the amounts of

benefit recovered may not exceed the amounts received under other legislation, the result of the method of calculation used by the Belgian Institution was to reduce the Belgian invalidity pension by an amount higher than that of the Italian invalidity pension actually received by him in respect of the period in question.

*The relevant regulations*

Article 107 of Regulation No 574/72 of the Council, as amended by Regulation No 2639/74, determines the rules to be applied for converting into any given national currency amounts shown in another national currency when benefits come to be awarded and paid.

Paragraph (6) of that article lays down the following general rule:

“In cases not covered by paragraph (1), the conversion shall be made at the official rate of exchange on the day of payment both for the payment and reimbursement of benefits”.

Paragraph (1) contains specific rules for various cases in which provisions of Regulation No 1408/71 apply (for example — to keep to cases more or less akin to the one in point — Article 12 (2), (3) or (4), and Article 46 (3)).

Paragraph (4) of the same article provides:

“The date to be taken into account for determining the rates of conversion to be applied in the cases referred to in paragraph (1) shall be fixed by the Administrative Commission on a proposal from the Audit Board”.

In accordance with Article 107 (4), the Administrative Commission, by its Decision No 101 of 29 May 1975, fixed the date to be taken into consideration

when determining the rates of conversion to be applied when calculating the benefits provided for by the Community provisions listed in Article 107 (1). In addition Decision No 101 contains a transitional rule in paragraph (5):

“For pensions to which a right was acquired before 1 January 1975 and which have not been put into payment by the date of entry into force of the present decision, the rate of conversion to be taken into consideration shall be that applicable on 1 January 1975 in accordance with Article 107 (1) of Regulation (EEC) No 574/72 as amended by Regulation (EEC) No 2639/74.”

#### *The question referred to the Court*

By order of 6 March 1980 the Tribunal du Travail, Brussels, decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

“Decision No 101 of 29 May 1975 of the Administrative Commission of the EEC published at page 3 of the Official Journal of the European Communities No C 44 of 26 February 1976 states *inter alia* that for pensions to which a right was acquired before 1 January 1975 and which have not been put into payment by 1 March 1976, the rate of conversion to be taken into consideration shall be that applicable on 1 January 1975, that is, a rate of conversion of 1 lire = 0.05784 Belgian francs, as published in the Official Journal, C 143 of 18 November 1974 at page 1;

Is that decision lawful and if so how must it be interpreted in view of the provisions contained in Article 7 of Regulation (EEC) No 574/72 which provides in effect that sums recovered may not exceed the amount actually received under another legislation?”

#### *Procedure*

An authenticated copy of the order making the reference was received at the Court Registry on 13 March 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Mr Romano, represented by Xavier Xhardez, of the Brussels Bar, by the Belgian Institution, represented by Jean-Jacques Masquelin of the Brussels Bar, and by the Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, acting as Agent.

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 and to assign the case to the First Chamber.

#### II — Written observations submitted to the Court

Mr *Romano* contends that if the legality of Decision No 101 of 29 May 1975 cannot be contested, that decision should, however, be applied by taking into account the limits fixed by Article 7 of Regulation No 574/72 so that the provisional advances recovered may never exceed the amount of the arrears of pension due under the foreign scheme in respect of the period in which overlapping occurred, which in this case is the equivalent in Belgian francs of the arrears of Italian pension in respect of the period 1 September 1970 to 31 December 1975 calculated at the rate obtaining on the day of payment by the Italian Institution to the Belgian Institution.

The *Belgian Institution* observes that the aim of paragraph (5) of Decision No 101 is to bring the date determining the applicable rate of conversion (1 January 1975) nearer to the date on which the benefit was awarded, and consequently to the later date on which the benefits were paid, in cases in which the award might have a considerable retroactive effect since inevitably it produces its effects before 1 January 1975. Therefore the purpose of paragraph (5) is to lessen to some extent the negative effect of currency fluctuations.

The Belgian Institution observes that Article 7 of Regulation No 574/72 by no means has the meaning bestowed on it by the question put to the Court. That article is a co-ordinating provision designed to cover the situation in which different benefits are subject to reduction or suspension by a like (third) benefit, income or remuneration. Furthermore, where the benefit liable to reduction or suspension is an apportioned or adjusted benefit (thus already reduced to some extent), that provision constitutes a rule which sets a limit to the amount of the benefit, income or remuneration to be taken into consideration so that, for the purposes of reduction or suspension, a fair and equitable balance is struck between the amounts to be taken into account. However, Article 7 does not limit the amount to be taken into consideration for applying a rule providing for reduction or suspension to the actual amount received by the claimant.

The *Commission* makes the following preliminary observations:

— The problems in the present case arise from the length of time which the Italian Institution needed first to award the Italian invalidity benefit due to Mr Romano (more than five years) and then to pay the arrears;

— The question whether the application in this case of Article 70 (2) of the Belgian Law of 9 August 1963 was compatible with the limits which have been prescribed by the Community rules on the application of national provisions against overlapping and which have been specified in decisions of the Court (cf. *inter alia* Case 98/77 *Schaap* [1978] ECR 707 and Case 236/78 *Mura* [1979] ECR 1819) was not raised before the Tribunal du Travail.

The Commission takes the view that the list of the cases in which the specific rate of conversion defined by Article 107 (1) of Regulation No 574/72 must be used, and in which Decision No 101 of the Administrative Commission may consequently apply, must be regarded as exhaustive. As those two provisions expressly indicate, they concern only benefits which are to be awarded and paid under specific provisions of Community law. On the other hand they do not govern the calculation of benefits made by the competent institution on the basis of its national legislation alone.

Therefore, when applying a provision of Belgian domestic law against overlapping benefits the Belgian Institution wrongly assumed that it could rely on the above-mentioned provisions as a basis for the application of the rate of conversion

which it used to determine Mr Romano's entitlement to invalidity benefit. In such a case, in which national legislation alone is applied, the rate of conversion to be used can be only prescribed by the relevant national legislation. Consequently the Commission doubts the relevance of the question put to the Court.

The reference to Article 7 of Regulation No 574/72, which applies only to quite specific cases enumerated in paragraph (1) thereof, is also lacking in relevance.

The special currency conversion rules contained in Article 107 (1) to (4) of Regulation No 574/72 and in Decision No 101 are mainly concerned with operations which are carried out in the process of awarding benefits pursuant to specific Community provisions: Article 12 (2), (3) or (4) and Article 46 (3), to keep to cases which are more or less akin to the one in point. The selection of the currency conversion rate poses a special problem in such cases:

- First, the official rate of exchange obtaining on the date of payment may not be used since inevitably there has been no payment;
- Secondly, the operations in question may be complicated, involving a comparison of the benefits or of (theoretical or actual) amounts of benefits payable under different laws and the successive involvement of social security institutions or organizations of different Member States;

they are bound to take a certain amount of time.

The Commission states that it is essential to counter the risk of the validity of the calculations being affected by day-to-day variations in the exchange rates of the various currencies. That necessarily entails the adoption of a fixed reference period applicable to all the institutions or organizations involved in the award of any given benefit. The selection of that reference period inevitably involves a certain degree of approximation and of rounding figures up or down.

Moreover that reference period must be sufficiently close to the time which is determinant for the operation in question so that it continues to correspond to the actual currency situation. If it is assumed that a comparison between the Belgian and Italian invalidity benefits would have led in this case to the application of Article 46 (3) of Regulation No 1408/71, then, according to paragraph (1) of Decision No 101, that time would be the time at which Article 46 (3) would have taken effect in regard to Mr Romano, that is to say, if the transitional provision contained in paragraph (5) had had to be applied, 1 January 1975. Therefore there are no grounds for doubting that the provisions in question are compatible with the requirements which they have to satisfy.

The benefits or apportioned benefits which are awarded in that way and are to be borne by the institutions of the various Member States concerned are paid by those institutions, in accordance with the provisions of Annex 6 to Regulation No 574/72, either directly or

through intermediary institutions (in which case under Article 107 (6) conversion from one national currency into another takes place at the official rate of exchange obtaining on the day of payment; the result in both cases is basically the same) In the case of invalidity benefits awarded pursuant to Article 46 of Regulation No 1048/71 each national benefit is then governed by its own national rules.

The Commission believes that it is not possible to conceive of a different system. Undoubtedly as a result of the present system recipients of benefits have to bear the unfavourable consequences (when the currency of the debtor State depreciates) or favourable consequences (if that currency should rise) of the fluctuations in exchange rates. That situation is the result not of the application of the Community regulations but of the distortion of the monetary situation which has existed for a decade.

The Commission observes that the present case is entirely different from the cases covered by Article 107 of Regulation No 574/72, first because it concerns the application of a national and not a Community provision against overlapping benefits and secondly because of the difficulties caused by the delay in the award and payment of Mr Romano's Italian invalidity benefit which were made worse by the fall in the value of the lira. That caused the Belgian Institution to adjust retroactively the Belgian invalidity benefit which had already been awarded. The Commission believes that such retroactive adjustment of the entitlement of claimants is not covered by the provisions of Article 107.

In any event it seems obvious to the Commission that the recipient of a pension or an apportioned pension payable by an institution of another Member State should not suffer any disadvantage as a result of delays (over which he has no influence) in the award and payment of his entitlements and as a result of the use of different exchange rates at the time when his entitlements are determined and at the time when the sums are transferred by the debtor institution of a Member State to the liaison body of another Member State. In the present case, it would not be in keeping with the requirements of the Community rules if, in so far as benefits are recovered, the Belgian Institution were able to fix the amount to be recovered at a sum higher than that corresponding to the Italian benefits to be taken into consideration. In practice that would constitute a real and unjustified reduction of the Belgian pension which had been duly granted. Nor would such a result be in conformity with the national provision adopted (in so far as this may be relied on), namely Article 70 (2) of the Belgian Law of 9 August 1963 according to which "in each case a recipient must receive sums which at least are equal to the amount of the insurance benefits".

The Commission proposes to answer the question put to the Court as follows:

"The provisions contained in Article 107 (1) of Regulation No 574/72 and in Decision No 101 of the Administrative Commission on migrant workers should be interpreted as meaning that they have no application either to cases in which provisions against overlapping are applied under national legislation alone or to cases in which an institution retroactively adjusts a benefit which has already been awarded.

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of the measures in question."

Mr Romano, represented by Xavier Xhardez of the Brussels Bar, the Belgian Institution, represented by E. Delhuyenne of the Brussels Bar, accompanied by Mr Van De Perre, an

official of that institution, and the Commission, represented by its Legal Adviser, Jean Amphoux, acting as Agent, presented oral argument at the sitting on 2 October 1980.

The Advocate General delivered his opinion at the sitting on 20 November 1980.

### Decision

- 1 By order of 6 March 1980 which was received at the Court on 13 March 1980 the Tribunal du Travail [Labour Tribunal], Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning, first, the interpretation of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1972 (I), p. 159) and, secondly, the validity of Decision No 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (Official Journal, C 44 of 26 February 1976, p 3).
- 2 That question was raised in the context of a dispute between the plaintiff in the main action, Mr Giuseppe Romano, and the defendant in the main action, the Institut National d'Assurance Maladie-Invalidité [National Sickness and Invalidity Insurance Institution] a Belgian social security institution, hereinafter referred to as "the Belgian Institution".
- 3 From 29 August 1970 to 31 December 1975 the plaintiff in the main action received a full Belgian invalidity pension. Since 1 January 1976 he has been in receipt of a Belgian retirement pension. By a decision adopted on 6 April 1976 and completed on 1 July 1976 the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institution], Palermo, (hereinafter referred to as "the Italian Institution") awarded the plaintiff an invalidity pension under Italian legislation as from 1 September 1970.

- 4 Article 70 (2) of the Belgian Law of 9 August 1963 (in the version contained in the Law of 5 July 1971) instituting and implementing a compulsory sickness and invalidity insurance scheme provides:

“The benefits for which this Law makes provision shall be awarded only on the conditions laid down by the King when the damage for which benefits are sought is covered by the ordinary law or by other legislation. In such cases the insurance benefits shall not overlap with the compensation granted under the other legislation. They shall be borne by insurance to the extent to which the damage covered by that legislation is not actually made good. In each case the recipient shall receive an amount which is at least equal to the amount of the insurance benefits.

The insurance institution shall be subrogated in law to the rights of the recipient . . .”.

- 5 In reliance on that provision the Belgian Institution took the view that the grant of the Italian invalidity pension should entail a proportionate reduction of the invalidity pension paid in Belgium in respect of the period 1 September 1970 to 31 December 1975. Consequently, by a decision notified to the plaintiff on 24 September 1976, it then amended the decision to grant a Belgian invalidity pension. That decision reduced the amount of the Belgian pension by the amount of the pension provided by the Italian Institution. In addition it specified that a recovery of the provisional advances reckoned at BFR 107 848 would be made. It stated that “if the payment made to us does not exactly cover the amount of allowance paid on a provisional basis we will instruct your insurance institution to arrange, with your agreement, for the recovery of the difference; if, however, there is a balance in your favour, this will be paid by ourselves”.
- 6 Eventually, on 29 July 1977 the Italian Institution paid the Belgian Institution a sum of LIT 3 109 670 representing the arrears of Italian pension in respect of the period from 1 September 1970 to 30 June 1977.

- 7 To calculate the amount to be recovered the Belgian Institution applied the exchange rate obtaining on 1 January 1975, which was LIT 1 = BFR 0.05784, whereas in order to convert the sum of LIT 3 109 670 paid by the Italian Institution into Belgian francs it used the exchange rate obtaining on the date of payment which was LIT 1 = BFR 0.040355. The amount paid was therefore BFR 125 491. Having deducted the amount of BFR 107 848, which, it claimed, represented the provisional advances, the Belgian Institution paid the balance of BFR 17 643 to the plaintiff.
- 8 In the result, owing to the difference between the exchange rate used to calculate the amount to be recovered and that used to convert the sum paid by the Italian Institution, the amount retained by the Belgian Institution was higher than the amount of benefits actually paid by the Italian Institution in respect of the period 1 September 1970 to 31 December 1975.
- 9 The action before the Tribunal du Travail, Brussels, was mainly concerned with the question whether the plaintiff was entitled to be paid by the Belgian Institution the amount transferred by the Italian Institution representing the Italian benefits in respect of the period 1 January 1976 to 30 June 1977. The plaintiff in the main action disputed the validity of the calculation carried out by the Belgian Institution. He contended that, whatever exchange rate had to be applied for the conversion, the amount of provisional benefit which was recovered might never exceed the amount of arrears of pension due under the foreign scheme in respect of the period in which the benefits overlapped.
- 10 For its part, the Belgian Institution stated that the amount to be recovered had been calculated by applying the exchange rate referred to in Article 107 of Regulation No 574/72 of the Council and Decision No 101 of 29 May 1975 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (hereinafter referred to as "the Administrative Commission").
- 11 Article 107 of Regulation No 574/72 as amended by Regulation No 2639/74 of the Council of 15 October 1974 amending Article 107 of Regulation No 574/72 (Official Journal 1974, L 283, p. 1) provides:

“(1) For the purposes of Article 12 (2), (3) and (4), the last sentence of Article 19 (1) (b), the last sentence of Article 22 (1) (ii), the penultimate sentence of Article 25 (1) (b), Article 41 (1) (c) and (d), Article 46 (3) and (4), Article 50, the last sentence of Article 52 (b), the last sentence of Article 55 (1) (ii), the first subparagraph of Article 70 (1) and the penultimate sentence of Article 71 (1) (b) (ii) of the regulation, and for the purposes of Article 34 (1) and Article 119 (2) of the implementing regulation, the rate of conversion into a national currency of amounts shown in another national currency shall be as follows:

- (a) in the case of two currencies in respect of which the difference between the market exchange rate and the rate that corresponds to their *de facto* parity ratio as understood under the first subparagraph of paragraph (2) may not exceed a margin of 2.25%; the latter rate as applied on the last business day of the reference period specified in the second subparagraph of paragraph (2) below;
  - (b) in the case of two currencies in respect of which the difference between the market exchange rate and the rate that corresponds to their *de facto* parity ratio may exceed 2.25%: a rate calculated by the Commission on the basis of the arithmetic mean on each of the two national foreign exchange markets during the reference period specified in the second subparagraph of paragraph (2) below.
- (2) By *de facto* parity is meant the parity declared to the International Monetary Fund or the central rate in force.

The reference period shall be:

- The month of January for the rates of conversion applicable from 1 April following;
- The month of April for rates of conversion applicable from 1 July following;
- The month of July for rates of conversion applicable from 1 October following;
- The month of October for rates of conversion applicable from 1 January following.

- (3) The exchange rates to be used for the purposes of subparagraph (1) (b) above shall be:
  - (a) for the Belgian franc and the Luxembourg franc: the average official rate quoted on each business day on the Brussels exchange;
  - (b) for the German mark: the average official rates quoted on each business day on the Frankfurt exchange;
  - (c) for the French franc: the average official rates quoted on each business day on the Paris exchange;
  - (d) for the Italian lira: the average of the average official rates quoted on each business day on the Rome and Milan exchanges;
  - (e) for the Dutch guilder: the average official rates quoted on each business day on the Amsterdam exchange;
  - (f) for the pound sterling and the Irish pound: the average rates recorded at noon of each business day on the market for these two currencies;
  - (g) for the Danish krone: the average official rates quoted at noon at the meeting presided over in Copenhagen on each business day by the National Bank of Denmark.
- (4) The date to be taken into account for determining the rates of conversion to be applied in the cases referred to in paragraph (1) shall be fixed by the Administrative Commission on a proposal from the Audit Board.
- (5) The rates of conversion to be applied in the cases referred to in paragraph (1) shall be published in the Official Journal of the European Communities in the course of the last month but one preceding the month from the first day of which they are to apply.
- (6) In cases not covered by paragraph (1) the conversion shall be made at the official rate of exchange on the day of payment both for the payment and reimbursement of benefits."

- 12 The Administrative Commission was established pursuant to the provisions contained in Article 80 of Regulation 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). The duties of the Administrative Commission are stated in Article 81 and include *inter alia* that of dealing with all administrative questions and questions of interpretation arising from the regulation and subsequent regulations, or from any agreement or arrangement concluded thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of Member States, by the regulation or by the Treaty.
- 13 The Administrative Commission, considering that in view of the provisions contained in Regulations Nos 1408/71 and 574/72 of the Council a new decision should be adopted concerning the date to be taken into consideration for determining the rates of conversion to be applied when calculating certain benefits, decided, in its Decision No 101 of 29 May 1975, *inter alia*, that:

“For pensions to which a right was acquired before 1 January 1975 and which have not been put into payment by the date of entry into force of the present decision, the rate of conversion to be taken into consideration shall be that applicable on 1 January 1975 in accordance with Article 107 (1) of Regulation (EEC) No 574/72 as amended by Regulation (EEC) No 2639/74.”

According to Article 6 that decision was applicable as from 1 March 1975.

- 14 In those circumstances the Tribunal du Travail, Brussels, considered that if that decision was applicable in the present case the Belgian Institution was right to take into consideration, for the conversion of the advance payments of benefits, the rate applicable on 1 January 1975 and it referred the following question to the Court for a preliminary ruling:

“Decision No 101 of 29 May 1975 of the Administrative Commission of the EEC published at page 3 of the Official Journal of the European Communities No C 44 of 26 February 1976 states *inter alia* that for pensions to which a right was acquired before 1 January 1975 and which have not been put into payment by 1 March 1976, the rate of conversion to be taken into consideration shall be that applicable on 1 January 1975, that is, a rate

of conversion of 1 lira = 0.05784 Belgian francs, as published in the Official Journal, C 143 of 18 November 1974 at page 1;

Is that decision lawful and if so how must it be interpreted in view of the provisions contained in Article 7 of Regulation (EEC) No 574/72 which provides in effect that sums recovered may not exceed the amount actually received under another legislation?"

- 15 In the oral proceedings before the Court the Belgian Institution stated that the Belgian pension had been calculated according to Belgian legislation alone, which was considered to be more favourable to Mr Romano than the application of Article 46 of Regulation No 1408/71. It pointed out that that method of calculation involves the application of provisions of national law against overlapping benefits. It observed that the Court has said in its judgments of 13 October 1977 in Case 22/77 *Mura* [1977] ECR 1699 and Case 37/77 *Greco* [1977] ECR 1711 that when the last sentence of Article 12 (2) of Regulation No 1408/71 is not applicable (that is to say, in the cases in which the provisions contained in Article 46 (3) of the regulation are not applicable because they bring about a reduction in the benefit acquired by virtue of a Member State's national legislation alone), the first sentence applies, with the consequence that national legislative provisions for reduction, suspension or withdrawal of benefit may be invoked.
- 16 Consequently the Belgian Institution took the view that Article 107 of Regulation No 574/72 applies to the calculation of the Belgian benefit referred to in Article 70 (2) of the Law of 9 August 1963 which is applicable by virtue of Article 12 of Regulation No 1408/71.
- 17 If, however, as the Commission contended, Article 12 (2) of Regulation No 1408/71 did not apply in this case, then, according to the Belgian Institution, the provisions of Article 107 of Regulation No 574/72 apply by analogy, since, prior to 1 July 1976, the date on which Article 241 bis of the Royal Decree of 4 November 1963 entered into force, there was no provision of Belgian law governing the decision on the amount of the benefit

due from Belgium. Although the Belgian Institution's decision was adopted in September 1976, Mr Romano suffered incapacity for work and the Italian benefit took effect well before 1 July 1976.

- 18 As may be seen from the question referred to the Court, the Tribunal du Travail asks whether the above-mentioned decision of the Administrative Commission is lawful in view of Article 7 of Regulation No 574/72 which "provides in effect that sums recovered may not exceed the amount actually received under another legislation".
- 19 However, Article 7 of Regulation No 574/72 does not contain any provision having such a clearly defined effect as that contemplated by the question so that the article is irrelevant for the purpose of resolving the question submitted to the Court.
- 20 As regards that question, as framed by the Tribunal du Travail, it follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law. Whilst a decision of the Administrative Commission may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules. Decision No 101 of the Administrative Commission does not therefore bind the Tribunal du Travail.
- 21 It is in these terms, therefore, that the question put by the Tribunal du Travail, Brussels, should be answered.
- 22 However, it is appropriate to set out a number of further considerations which might help that court to arrive at a decision in the case pending before it.

- 23 It appears from the papers placed before the Court that the incapacity for work which gave rise to the grant of the benefits in question dates from before 1 January 1973 which is the date on which Regulations No 1408/71 and No 574/72 entered into force. However, the parties to the main action, the Tribunal du Travail, Brussels, and the Commission, which has submitted observations to the Court, appear to have taken the view that those regulations applied in the case in point. In the Court's view, unless the worker asked for the provisions of Regulation No 1408/71 to be applied, the provisions of Regulation No 3 of the Council of 25 September 1958 (Journal Officiel No 30, p. 561) should be applied in this case. In this respect, however, it should be observed that it makes no difference to the outcome of the dispute whichever system is applied.
- 24 It is appropriate to draw attention to the fact that the application of national rules against overlapping benefits is the outcome of a consistent line of decisions of the Court according to which a provision of the governing regulation having the effect of depriving a migrant worker of a part of the benefit to which he is entitled under the legislation of a single Member State is not in accordance with the objective of Article 51 of the Treaty. In its decisions the Court has held that when the grant of the full national pension upon the application of national rules against overlapping benefits is more favourable to a worker than the rules on aggregation and apportionment contained in the Community regulations, the national legislation is wholly applicable. Although that case-law might entail a reduction in the amount of benefits granted to a worker under the laws of several Member States, the underlying principle is that a worker should receive at least the whole amount of the most favourable pension to which he is entitled under the legislation of a single Member State.
- 25 Therefore, when a full pension is granted to a worker under the national legislation of Member State A alone and, in implementation of Community rules, he is also awarded a pension in Member State B which is reduced by the amount of the full pension granted by the competent institution in Member State A, it is not compatible with Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the amount of the advance payments made to the recipient recovered by the competent institution in Member State A to exceed the amount of pension or

arrears of pension transferred to that institution by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.

### Costs

- 26 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

### THE COURT (First Chamber)

in answer to the question submitted to it by the Tribunal du Travail, Brussels, by order of 16 March 1980, hereby rules:

1. Whilst a decision of the Administrative Commission of the European Communities on Social Security for Migrant Workers may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply Community law. Decision No 101 of the Administrative Commission does not therefore bind national courts.
2. When a full pension is granted to a worker under the national legislation of Member State A alone and, in implementation of Community rules, he is also awarded a pension in Member State B which is reduced by the amount of the full pension granted by the competent institution in Member State A, it is not compatible with

**Article 51 of the Treaty for that legislation to be applied in a way which in any given period would allow the amount of the advance payments made to the recipient recovered by the competent institution in Member State A to exceed the amount of pension or arrears of pension transferred to that institution by the social security institution in Member State B and converted into Member State A's national currency on the date of transfer.**

Koopmans

O'Keeffe

Bosco

Delivered in open court in Luxembourg on 14 May 1981.

J. A. Pompe  
Deputy Registrar

T. Koopmans  
President of the First Chamber

**OPINION OF MR ADVOCATE GENERAL WARNER  
DELIVERED ON 20 NOVEMBER 1980**

*My Lords,*

This case comes before the Court by way of a reference for a preliminary ruling by the Tribunal du Travail of Brussels.

The plaintiff in the proceedings before the Tribunal is Mr. Giuseppe Romano, who is an Italian citizen resident in Belgium. The defendant is the Belgian

Institut National d'Assurance Maladie-Invalidité (or "INAMI").

The question at issue in those proceedings is, in substance, how as between the parties an exchange loss, caused by the diminution in the value of the Italian lira between the time when an Italian pension to which Mr Romano was entitled accrued due and the time when it was actually paid, is to be borne.