REPORT FOR THE HEARING
delivered in Case C-342/88 *

I — Facts and procedure

1. *Legal background and facts*

Mr Spits, a Netherlands national, was born on 1 August 1914. In accordance with the Belgian rules he provided evidence that he had been employed in Belgium from 1932 to 1938. He can also claim periods of insurance completed in the Netherlands between 1 August 1929 and 31 July 1979. Since he had been subject to the legislation of two Member States, Mr Spits was therefore entitled to a pension calculated in accordance with Article 46 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (of which a codified version is annexed to Council Regulation (EEC) No 2001/83 of 2 June 1983, Official Journal 1983, L 230, p. 6). Article 46(1) and (2) provide as follows:

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

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

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

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence completed under the legislation of the Member States to which the employed or self-employed person has been subject had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount referred to in this subparagraph;

* Language of the case: Dutch.

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

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

(d) . . .'.

When Mr Spits submitted an application for a pension to the competent Netherlands institution, it informed the Belgian Rijksdienst voor Pensioenen (hereinafter referred to as 'the National Pension Office') in accordance with Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (of which a codified version is annexed to Council Regulation (EEC) No 2001/83 of 2 June 1983, Official Journal 1983, L 230, p. 6).

The National Pension Office calculated the pension payable to Mr Spits. For that purpose it applied the relevant national provision, Article 10 of Royal Decree No 50 of 24 October 1967 on retirement and survivors' pensions for employed persons (*Belgisch Staatsblad* of 27. 10. 1967, hereinafter referred to as 'the Royal Decree'). According to Article 10(1), the right to a retirement pension of a proportion of (actual, notional or standard) annual salary (up to a ceiling of 75 or 60% of such salary) is acquired for each calendar year of employment. The numerator of the fraction for each calendar year is one and the denominator is the number of calendar years contained in the period from 1 January of the year of the 20th birthday of the person concerned, being not before 1 January 1926, to 31 December of the year preceding the first day of the month following the 60th birthday, in the case of a woman, or the 65th birthday in the case of a man; the denominator may not, however, exceed 45 in the case of a man or 40 in the case of a woman.

Where the number of calendar years worked is more than 45, the years giving rise to the most advantageous pension are taken into consideration. Furthermore, according to an administrative practice, calendar years worked by the person concerned before his 20th birthday are taken into account where he does not have a complete record.

In order to calculate the benefit payable under Article 10 of the Royal Decree, the National Pension Office took into account both the periods completed in Belgium and the periods completed abroad. Since the total of the Belgian years (1932 to 1938)

and the Netherlands years (August 1929 to July 1979) clearly exceeded the denominator of the fraction (in this case, 45), the National Pension Office did not take into account 1932 and 1933, the two calendar years worked by Mr Spits before his 20th birthday, since it was not necessary to supplement an incomplete record. On the basis of that calculation Mr Spits was awarded a Belgian pension of 5/45 based on the years from 1934 to 1938.

He challenged that decision, claiming that there was no requirement in the Royal Decree that in order to determine whether there was a 'complete record' it was necessary to aggregate the years of employment in Belgium and the years of employment abroad. At first instance that argument was accepted: the court decided that the years 1932 and 1933 should be taken into account and awarded Mr Spits a retirement pension of 7/45. The National Pension Office appealed against that decision to the Arbeidshof Gent (Labour Court, Ghent). That court stayed the proceedings and referred to the Court for a preliminary ruling the question

'whether or not a person in the context described above can legitimately claim recognition of both the years at issue between the parties, namely 1932 and 1933, in respect of which adequate pension contributions appear to have been made in Belgium and which precede the 20th birthday of the person concerned, who claims a contribution record in the Netherlands on account of employment there as a result of which he is entitled to a pension under the Algemene Ouderdoms-Wet — AOW (General Law on Old Age) corresponding to a total insurance period of 50 years'.

2. *Procedure before the Court of Justice*

The judgment of the national court was registered at the Court on 28 November 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 10 February 1989 by the appellant, the National Pension Office, represented by R. Masyn, its General Manager, and on 17 February 1989 by the Commission of the European Communities, represented by B.-J. Drijber and Sean van Raepenbusch, members of its Legal Department, acting as Agents.

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 assigned the case to the First Chamber.

II — Summary of the written observations submitted to the Court

In its observations the National Pension Office states that the pension awarded to Mr Spits was calculated on the basis of Article 46(2)(b) of Regulation No 1408/71. In other words, the fraction of 5/45 relates to an apportioned pension as defined by Article 46(2)(b) and not an independent pension as defined by Article 46(1).

The National Pension Office further considers that the question asked by the national court concerns the method of calculating the theoretical pension and the apportioned pension as provided for by Article 46(2).

It explains that, in order to calculate the theoretical amount referred to in Article 46(2)(a), account must be taken of the seven years (1932 to 1938) shown to have been worked in Belgium and the period of 49 years, 11 months and 30 days completed under the Netherlands scheme from 1 August 1929 to 31 July 1979. However, pursuant to Article 46(2)(c) it took account only of the maximum period required by the Belgian legislation for receipt of full benefit. This period, as defined in Article 10 of the Royal Decree, is 45 years and in the case of Mr Spits would cover the years from 1934 to 1978. The National Pension Office then calculated the apportioned pension in accordance with Article 46(2)(b). Only the years completed under the Belgium scheme between 1934 and 1978 were taken into account, which gave a result of 5/45, based on the years from 1934 to 1938. The National Pension Office states that the years excluded from the calculation of the theoretical pension clearly could not be taken into account for purposes of calculating the apportioned pension.

The National Pension Office states that its calculation was wholly consistent with Article 46(2) of the regulation. The years of employment completed before the year in which the person concerned celebrated his 20th birthday or after the year in which he celebrated his 65th birthday could be taken into account in only two situations: first of all, where the aggregation of periods of insurance completed under the legislation of the different Member States does not give rise to a complete record and secondly, in the case of a complete record, to replace less advantageous years.

The National Pension Office therefore proposes that the question should be answered as follows:

'Where a person entitled to a pension has an insurance record in two or more Member States, so that he has completed the whole of the normal reference period — that is to say, in Belgium, the period between 1 January of the year of his 20th birthday and 31 December preceding the year of his 65th birthday — the years prior to his 20th birthday and after his 65th birthday are taken into account only in so far as they entitle him to a more advantageous pension than certain years within the reference period.'

The Commission considers that the Arbeidshof's question concerns the calculation made under Belgian legislation in accordance with Article 46(1) of Regulation No 1408/71. Although it does not disagree with the National Pension Office's interpretation of Article 46(2) the Commission considers that the years 1932 and 1933 ought to have been taken into account for purposes of the calculation provided for in Article 46(1).

Furthermore it refers to the restriction imposed by Article 46(3) of Regulation No 1408/71 on benefits payable pursuant to Article 46(1) and (2) and states that the Court held that in its judgment of 21 October 1975 in Case 24/75 *Petroni* v *Office national des pensions pour travailleurs salariés* [1975] ECR 1149, this restriction was partially incompatible with Article 51 of the EEC Treaty. According to the 'Petroni principle', which has consistently been confirmed in the judgments of the Court, the system of a ceiling introduced by Article 46(3) is not permissible in so far as it reduces the amount of benefit acquired solely by application of national legislation, including any clauses precluding the overlapping of benefits. In the Commission's opinion, it follows that the National

Pension Office ought to have made an additional comparison between the amount of benefit payable by application solely of Belgian legislation (including clauses precluding the overlapping of benefits) and the amount of benefit payable by application of Article 46 of Regulation No 1408/71 in its entirety.

The latter amount is determined as follows. First of all, it is necessary to calculate the benefit to which the person concerned is entitled on the basis of the periods completed under the Belgian system alone, disregarding any national provision precluding the overlapping of benefits, in accordance with Article 12(2) of Regulation No 1408/71 ('independent benefit'). According to the Commission, Mr Spits is entitled to an independent pension of 7/45 based on the years from 1932 to 1938 inclusive, in view of the Belgian administrative practice which permits periods prior to the 20th birthday of the person concerned to be taken into account. Secondly, the theoretical amount and the apportioned benefit must be calculated in accordance with Article 46(2), which gives rise to a fraction of 5/45; on this point, the Commission shares the opinion of the National Pension Office as regards the application of Article 46(2)(c). Since the amount of the independent benefit is higher, it is provisionally taken as a basis. Then, it is necessary to apply Article 46(3), which provides for a reduction of the amount paid where the sum of all the independent and apportioned benefits exceeds the highest theoretical amount. The Commission considers it likely that in the present case the theoretical amount calculated on the basis of Belgian legislation is higher. If the sum of the Belgian and Netherlands benefits — in each case independent benefits — exceeds this theoretical amount, each of these benefits is reduced by up to half of the difference. Finally, the additional comparison required by the judgment in *Petroni* is made.

It is therefore after examining in detail of the application of the Community rules to Mr Spits's case that the Commission proposes the following reply to the question:

'The application of Article 46 of Regulation (EEC) No 1408/71 does not preclude the competent institution from taking into account, at any stage in the calculation of an old-age benefit referred to by that article, additional periods recognized by the legislation which that institution applies to determine the benefit in question.'

Gordon Slynn
Judge-Rapporteur