OPINION OF ADVOCATE GENERAL COSMAS

delivered on 5 July 1995 *

1. In the present case, the Court is requested, by order of the Sozialgericht Speyer (Social Court, Speyer) (Germany), to give a preliminary ruling on the interpretation of Regulation (EEC) No 1408/71 of the Council 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 ('the regulation'), [1] and, in particular, on the combined provisions of Article 6 of that regulation and of Articles 48(2) and 51 of the EEC Treaty.

I — The proceedings

2. These proceedings concern the question whether the social security convention of 10 July 1950 concluded between the Federal Republic of Germany and the French Republic, [2] which entered into force on 1 January 1951 [3] ('the Franco-German Convention'), is applicable for the purposes of calculating the invalidity pension due to the first plaintiff in the main proceedings, Mr J.-L. Thévenon.

3. Mr Thévenon, a French national born on 23 May 1950, worked in France from 1 July 1964 to 31 December 1977 in employment subject to compulsory insurance. He thereafter worked in Germany, in employment which was also subject to compulsory insurance.

On 1 June 1992 Mr Thévenon applied to the defendant insurance office, the Landesversicherungsanstalt Rheinland-Pfalz (Rhineland-Palatinate Regional Insurance Office), for an invalidity pension. By decision of 20 July 1992 the insurance office declared that application admissible and granted the plaintiff an interim invalidity pension from 20 July 1992 to 31 December 1992. The amount of that pension was fixed on a provisional basis, since the aforementioned insurance office did not yet know the extent of the total insurance periods completed in France by Mr Thévenon.

4. On 4 January 1993 the Stadt Speyer — Sozialamt (Social Assistance Office of the City of Speyer, hereinafter 'the Sozialamt') applied, in its capacity as the institution having local responsibility for social assistance, for a review of that decision pursuant to Article 91a of the Bundessozialhilfegesetz (Federal Law on Social Assistance). In its

* Original language: Greek.

1 — OJ, English Special Edition 1971 (II), p. 416, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and by the acts subsequent to that regulation (see OJ 1992 C 325, p. 1).

2 — BGBl. 1951 II, p. 178.

3 — BGBl. 1952 II, p. 437.

application, the Sozialamt argued that the insurance periods completed by Mr Thévenon in France had to be taken into account, in accordance with the Franco-German Convention. The defendant insurance office rejected that application on the ground that the pension had to be calculated in accordance with the regulation, which had replaced the Franco-German Convention, so that the latter no longer applied in the circumstances. On 18 March 1993 the defendant insurance office finally calculated, in accordance with the regulation, and taking into account the insurance periods completed in France, a monthly invalidity pension of DM 723.28, payable with effect from 1 May 1993.

5. Mr Thévenon lodged an objection to that decision, contesting the method in which the pension had been calculated. That objection was rejected by decision of 13 May 1993. The aforementioned rejections formed the subject of actions brought within the prescribed period by Mr Thévenon and the Sozialamt before the Sozialgericht Speyer, which ordered them to be joined.

6. In the proceedings before the national court, the plaintiffs maintained that the insurance periods completed by Mr Thévenon in France should be taken into consideration for the purposes of calculating the invalidity pension, in accordance with the Franco-German Convention. According to Article 1 of that convention, German and French employees and persons in an equivalent position are subject to the social security legislation respectively applying in France and in Germany, and are eligible for benefits on the same conditions as nationals of the country concerned. Article 9(3) provides that invalidity pensions are to be calculated in accordance with the provisions of the legislation which applied to the person concerned when the illness was first medically diagnosed or on the date when the accident occurred, and that the burden of paying them is to be borne by the competent agency under that legislation. That agency must take into consideration, for the purposes of calculating the amount of the pension, the insurance periods completed in the other Contracting State.

Article 9(1) provides for the aggregation of the insurance periods completed by French or German employees or persons in an equivalent position who have been successively or alternately affiliated in the two Contracting States to one or more invalidity insurance schemes.

7. As is apparent from those provisions, the principle of apportionment provided for by the regulation is not applicable, under the Franco-German Convention, to invalidity pensions. According to the convention, the burden of paying invalidity pensions is not borne jointly by the insurance agencies of the two States but solely by the agency of the State in which the person concerned was insured at the time when the contingency materialized. To that end, insurance periods completed in the other Contracting State are taken into consideration for the purposes of calculating the amount of the pension.

Article 36 of the Franco-German Convention provides that it is concluded for a period of one year from the date of its entry into force and that it is to be tacitly renewed from year to year unless denounced by notice given three months prior to the expiry of the term. As is apparent both from the order for reference and from the observations submitted to the Court by the German Government, Germany has not to date denounced the Franco-German Convention and it therefore remains in force in accordance with Article 36 thereof.

8. The plaintiffs allege that the method of calculation laid down by the Franco-German Convention must be applied in the present case, since it produces a more favourable result than Article 46(2) of the regulation. According to the plaintiffs, workers exercising their right to freedom of movement must not be deprived of the advantages enjoyed by them under social security conventions which are incorporated into national law where those conventions are more favourable than the Community rules. The plaintiffs rely in support of their arguments on the judgment of the Court in the case of *Rönfeldt*. [4]

9. The defendant insurance office contends, for its part, that, by virtue of Article 6 thereof, the regulation has replaced social security conventions binding two or more Member States exclusively. According to the defendant, those conventions may at any time be renegotiated between the Contracting States, and the aforementioned Article 6 must be regarded as the result of such a renegotiation. The defendant also contends that the judgment in *Rönfeldt* was based on entirely different facts and that the decision given in it cannot therefore be applicable in the present case. The defendant states, more particularly, that the person entitled in *Rönfeldt* was not in a position, by reason of the differences in the age limits applied by the two Contracting States, to plead rights arising from insurance periods completed abroad. According to the defendant, the situation is different, however, in the case of Mr Thévenon. To the extent to which he fulfils the relevant administrative and medical criteria, Mr Thévenon can obtain benefits from the French insurance institution. Moreover, according to the defendant, the Franco-German Convention in issue does not constitute 'legislation' within the meaning of Article 1(j) of the regulation, and it cannot therefore be maintained that the insured is being deprived of his social rights under national law by reason of the exercise by him of his right to freedom of movement. According to the defendant insurance office, it is necessary, in order to assess whether or not the insured is losing any of his social rights, to compare him with a person who has completed the whole of his insurance record in a single Member State. In such a case, however, the insured cannot, according to the defendant, claim advantages arising from a bilateral convention, since he has only been employed in one State.

Lastly, the defendant relies on Article 30(3) of the Vienna Convention on the Law of

4 — Case C-227/89 [1991] ECR I-323.

Treaties of 23 May 1969, which provides that, where all the parties to an earlier treaty are also parties to a later treaty and the earlier treaty is still in force, that earlier treaty is to apply only in so far as its provisions are compatible with those of the later treaty.

10. The national court acknowledges, first, that the regulation is applicable to the plaintiff, as regards both its scope *ratione personae* and its scope *ratione materiae*. It further observes in its order for reference that the action will be successful if the application of Article 46(2) of the regulation is excluded and the invalidity pension granted by the defendant falls to be calculated according to the Franco-German Convention. It goes on to state in its order for reference that Mr Thévenon is not at present receiving any pension from the French insurance institution and that, if the Franco-German Convention were found to be applicable, the defendant would be obliged to pay the plaintiff a much higher pension than the one it pays him at present, amounting, according to the defendant's calculations, to DM 1 548.23 per month. On the other hand, the order for reference states that, if the Community rules, particularly Article 46(2) of the regulation, are found to be applicable, the action will have to be dismissed.

In those circumstances, the national court has felt it necessary to make the present reference to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty.

II — The question referred for a preliminary ruling

11. In its order for reference, the Sixth Chamber of the Sozialgericht Speyer requests the Court to give a preliminary ruling on the following question: [5]

'Is the application of Regulation (EEC) No 1408/71, which, according to Article 6 thereof, replaces, as regards persons and matters which it covers, conventions binding two Member States exclusively (in this case, the Franco-German Social Insurance Convention of 10 July 1950) with regard to the calculation of pension levels (Article 46(2) of Regulation (EEC) No 1408/71), excluded by Articles 48(2) and 51 of the EC Treaty even in the case where an insured person has, prior to the date of the entry into force of Regulation (EEC) No 1408/71 of 14 June 1971, completed periods of insurance in only one of the signatory States and the application of the undenounced bilateral social insurance convention proves to be more advantageous for the insured person?'

That question thus raises the issue whether, in the case of insured persons who have completed insurance periods in two Member

5 — OJ 1994 C 43, p. 6.

States which concluded, prior to the enactment of the regulation, a social security convention which has not yet been denounced, the Community regulation prevails over that bilateral convention even where the provisions of the convention are more favourable.

III — The relevant legislation and case-law

12. The question referred for a preliminary ruling, as set out above, raises in essence the issue whether the loss of social advantages arising for the persons concerned from the inapplicability, by virtue of Article 6 of the regulation, of conventions concluded between Member States is compatible with Articles 48(2) and 51 of the EC Treaty.

As is well known, the regulation was adopted by the Council pursuant to Article 51 of the EC Treaty and is intended to coordinate the national social security systems. Its objective is to establish freedom of movement for workers by setting up a system guaranteeing nationals of Member States who move within the Community, first, equality of treatment under the various national legislations and, second, social security benefits regardless of their place of employment or of residence. [6]

6 — See the fifth recital in the preamble to the regulation.

13. Within the framework of that coordination, Title I of the regulation contains provisions governing the relationship between the regulation and international conventions concluded by the Member States. Thus, Article 6 of the regulation, headed 'Social security conventions replaced by this Regulation', provides as follows:

'Subject to the provisions of Articles 7, 8 and 46(4), this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively; or

(b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.'

14. Article 7, headed 'International provisions not affected by this Regulation', provides:

'1. This Regulation shall not affect obligations arising from:

(a) any convention adopted by the International Labour Conference which, after ratification by one or more Member States, has entered into force;

(b) the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe.

2. The provisions of Article 6 notwithstanding, the following shall continue to apply:

(a) the provisions of the Agreements of 27 July 1950 and 13 February 1961 concerning social security for Rhine boatmen;

(b) the provisions of the European Convention of 9 July 1956 concerning social security for workers in international transport;

(c) the provisions of the social security conventions listed in Annex III.'

In addition, Article 8(1) of the regulation, relating to the conclusion of conventions between Member States, provides that 'two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation'.

15. It follows from the wording of the aforementioned provisions that, save in the cases provided for by Articles 7, 8 and 46(4), the regulation replaces any social security convention concluded exclusively between two or more Member States. Moreover, that interpretation was adopted by the Court in its judgment in the case of *Walder*, [7] in which it stated that the principle that the provisions of social security conventions concluded between Member States are replaced by the regulation is mandatory in nature and does not allow of exceptions save for the cases expressly stipulated by the regulation. In particular, the Court observed that 'the fact

7 — Case 82/72 *Walder* v *Sociale Verzekeringsbank* [1973] ECR 599.

that social security conventions concluded between Member States are more advantageous (...) than the regulation itself is (...) not sufficient to justify an exception to this principle unless such conventions are expressly preserved by the regulation'. [8]

16. Consequently, the regulation replaces, in every case, conventions previously concluded between Member States, without there being any need to examine whether the application of their provisions is more or less advantageous to migrant workers than the regulation itself. Nevertheless, the international conventions referred to in Article 7(2) and in Annex III remain in force and continue, by way of derogation from the rule laid down in Article 6, to be applicable in principle, even if they contain provisions which are not compatible with those of the regulation.

17. In its judgment in *Rönfeldt* [9], the Court partially deviated from that interpretation. In view of the significance of the decision in that case with respect to the answer to be given to the question referred in the present case, it is appropriate briefly to recapitulate the facts giving rise to the dispute in that action. Mr Rönfeldt, a German national, contributed to the German old-age insurance scheme from 1941 to 1957. He then worked in Denmark until 1971, during which period he paid contributions to the Danish social insurance scheme. Thereafter he returned to Germany, where he was subject to compulsory insurance. Shortly before reaching the age of 63, Mr Rönfeldt took the necessary steps to obtain early retirement, as is permitted under German legislation. However, he was unable to do so because, according to the competent German insurance institution, the insurance periods completed by him in Denmark could be taken into account for the purposes of determining the waiting period and the criteria of entitlement to the pension, but could not be taken into consideration for the purposes of calculating the amount of the retirement pension to which he was entitled in Germany until he had reached the general statutory age-limit under Danish law. As is stated in the judgment, the retirement age in Denmark is 67, whereas in Germany it is 65, with the possibility of early retirement at the age of 63. In the circumstances, the German insurance institution refused to apply the social security convention concluded on 14 August 1953 between the Federal Republic of Germany and the Kingdom of Denmark, on the ground that the Community rules relating to social security had replaced the convention in question.

18. Under the German-Danish convention, German nationals who have worked in Denmark and completed insurance periods in Germany may require that periods completed in Denmark, up to a maximum of fifteen years, be taken into account in the calculation of their German retirement pension. According to the regulation, insurance periods completed in different Member States are to be aggregated only for the purposes of establishing entitlement to a pension. By contrast with the system applying under the German-Danish convention, insurance peri-

8 — Judgment in *Walder*, paragraph 7.
9 — See footnote 4 above.

ods completed in one or more other Member States are not taken into consideration for the purposes of calculating the amount of the pension, which is determined on the basis of apportionment according to the contribution periods completed under the legislation of the Member State in which the pension is applied for. The person concerned would thus lose, however, the social security advantages accorded to him by the convention concluded between the two Member States in question.

19. Consequently, as in the present case, the question arose whether, in view of the loss of social security advantages to which it gives rise for the persons concerned, Article 6 of the regulation is compatible with Articles 48(2) and 51 of the EC Treaty.

In answer to that question, the Court ruled in its judgment in *Rönfeldt* that 'Articles 48(2) and 51 of the EEC Treaty must be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, of conventions operating between two or more Member States and incorporated in their national law'.

20. The Court arrived at that interpretation by the following line of reasoning.

It referred first of all to its judgment in *Walder*, pointing out that it had ruled in that judgment, with reference to Articles 6 and 7 of the regulation, that 'it was clear from those articles that the replacement by the regulation of the provisions of social security conventions between Member States was mandatory in nature and did not allow of exceptions, save for the cases expressly set out in the regulation'. [10]

21. The Court went on to examine the question whether, when such replacement results in a diminution of workers' rights, it is compatible with the principle of freedom of movement for workers under Articles 48 to 51 of the EC Treaty. In answering that question, the Court based its findings on the aim of Article 51 of the EC Treaty, which is to secure the widest possible application of the principle of freedom of movement for migrant workers — a principle which is one of the foundations of the Community. It stated that the provisions of the regulation must be construed in the light of the aim of that article, pursuant to which it had been adopted. The Court pointed out in that regard that Article 51 'requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers, by securing, for

10 — Paragraph 22 of the judgment in *Rönfeldt*.

the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, the aggregation of all the periods taken into account under the laws of the various countries'. [11] The Court also drew attention to the case-law laid down by the judgment in *Petroni*, [12] according to which the aim of Articles 48 to 51 'would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the legislation of a single Member State'. [13] The Court referred in addition to the judgment in *Gravina and Others*, [14] in which it ruled that the application of Community rules could not bring about a reduction in the benefits awarded by virtue of the legislation of a single Member State.

22. That case-law was extended by the Court, in its judgment in *Rönfeldt*, to international conventions between Member States; it held that '"benefits awarded by virtue of the legislation of a single Member State" must mean not only the benefits provided under national law alone, as formulated by national legislators, but also the benefits available under the provisions of the international social security conventions in force between two or more Member States and incorporated in their national law, which have the effect of placing the worker concerned in a more favourable position than is accorded by Community provisions'. [15]

23. The Court thus concluded that Articles 48(2) and 51 of the Treaty precluded the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of the regulation, of conventions previously concluded between two or more Member States and incorporated in their national law.

24. In its judgment in *Rönfeldt*, the Court observed in particular that any other interpretation, excluding the application of the provisions of conventions which entail greater advantages for workers than are available under Community provisions, 'would substantially restrict the scope of the aims pursued by Article 51, inasmuch as the worker exercising his right to freedom of movement would find himself in a less favourable position than if he had not availed himself of that right'. [16]

The Court thus applied the case-law laid down by *Petroni* to social security conventions concluded between two or more Member States exclusively. Moreover, as has already been observed, the judgment in *Rönfeldt* refers expressly to that case-law.

11 — Paragraph 25 of the judgment in *Rönfeldt*.

12 — Case 24/75 [1975] ECR 1149. See also the judgments in Case 254/84 *De Jong* [1986] ECR 671, paragraph 15, and Case C-168/88 *Dammer* [1989] ECR 4553, paragraph 21.

13 — Paragraph 26 of the judgment in *Rönfeldt*.

14 — Case 807/79 [1980] ECR 2205, paragraph 7.

15 — Paragraph 27 of the judgment in *Rönfeldt*.

16 — Paragraph 28 of the judgment in *Rönfeldt*.

25. In its judgment in *Petroni*, the Court ruled that 'a limitation on the overlapping of benefits which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone is incompatible with Article 51'. [17] Article 46(3) of the regulation was consequently held incompatible with Article 51 of the Treaty, inasmuch as it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of the benefit acquired under national legislation alone.

In that judgment, the Court stated in that regard that 'the regulations in the field of social security for migrant workers have as their basis, their framework and their bounds Articles 48 to 51 of the Treaty' and that the aim of those articles 'would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State'. [18]

26. In its judgment in *Petroni*, the Court observed in that connection that Article 51 of the Treaty provides, in respect of a worker who has been successively or alternately subject to the laws of two or more Member States, for the aggregation of the insurance periods completed under the laws of each of those States. Such aggregation is to take place where the laws of one Member State do not by themselves allow the person concerned the right to benefits by reason of the insufficient number of periods completed under its laws, or only allow him benefits which are less than the maximum. The Court noted, however, that the system of aggregation and apportionment based on Article 51 of the Treaty which is set up by the regulation (Article 46) cannot be applied if its 'effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State'. [19]

27. That judgment has been confirmed by subsequent case-law, of which the judgments in *Rossi*, [20] *Gravina and Others* [21] and *Laterza* [22] are characteristic examples. In those judgments, the Court held that the Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State or to lead to a reduction in the benefits payable by virtue of that legislation. The Court based that interpretation on the finding that the regulations on social security for migrant workers did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law.

17 — Paragraph 21 of the judgment.

18 — Paragraphs 11 and 13 of the judgment in *Petroni*. See also the earlier judgments in Case 100/63 *Kalsbeek* [1964] ECR 565 and Case 34/69 *Duffy* [1969] ECR 597.

19 — Paragraph 16 of the judgment in *Petroni*.

20 — Judgment in Case 100/78 [1979] ECR 831.

21 — Cited in footnote 14 above.

22 — Judgment in Case 733/79 [1980] ECR 1915.

28. That interpretative approach has resulted in a finding by the Court that, where the competent insurance institution applies the regulation, it must compare the benefits which would be due in application of national law alone, including its anti-overlapping rules, and those which would be due in application of Community law, and allow the migrant worker whichever benefit is greater in amount. [23] Consequently, if the Member State's national legislation alone is less favourable for the worker than the Community rules, and more particularly Article 46 of the regulation, the provisions of that regulation must be applied. If, on the other hand, the legislation of the Member State in question is more favourable, the national rules will apply.

29. The Court adopted the same solution in the case of *Sinatra*, [24] in which it was requested to rule on the question whether Article 51 of the regulation must be interpreted as meaning that an alteration in the personal circumstances of the person insured which entails a reduction in the benefits paid to him necessitates a recalculation of benefits in accordance with Article 46 thereof. The Court held in that judgment that the system of aggregation and apportionment provided for in Article 46 of the Regulation 'may not ... be applied if its effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws. However, where the application of such national laws proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 of Regulation No 1408/71, be applied'. [25]

30. It is clear from the above analysis of the case-law that, in the Court's view, the aims pursued by Articles 48 and 51 of the Treaty are such that the provisions of the regulation must be interpreted as meaning that, as between the Community rules and the national rules, it is those which produce the greatest advantages for the migrant worker which must be applied. Moreover, as the Court has held, the rules laid down by the regulation for coordinating national laws are 'in fact guided by the fundamental principle stated in the seventh and eighth recitals of the preamble to the regulation, that the aforesaid rules must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst limiting them "to the greatest amount" of such benefits'. [26]

31. Moreover, it will be noted that substantially the same approach was followed in the case-law preceding the adoption of the regu-

23 — See the judgments in Joined Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 17, and in Case C-5/91 *Di Prinzio* [1992] ECR I-897, paragraph 18.

24 — Judgment in Case 7/81 [1982] ECR 137.

25 — Paragraphs 6 and 7 of the judgment in *Sinatra*.

26 — Paragraph 8 of the judgment in *Laterza*. See also paragraph 7 of the judgment in *Gravina and Others*.

lation, with regard to the interpretation of Regulation No 3 concerning social security for migrant workers, [27] which was replaced by the regulation now in force. The same conclusion was reached by Advocate General Roemer in his Opinion in *Duffy*, in which he stated that 'the application of Regulation No 3 must not result in the reduction or loss of rights, or in insurance periods completed in one Member State not being taken into account for the purposes of pensions'. [28]

32. That interpretative approach was also followed by the Court in *Rönfeldt*, in which it assimilated the rules arising from international conventions concluded between Member States to national rules. The judgment in question consequently includes amongst 'benefits awarded by virtue of the legislation of a single Member State' not only the benefits provided under national law alone but also those available under the provisions of the international social security conventions in force between two or more Member States and incorporated in their national law. [29]

33. Moreover, the Court had previously assimilated international conventions to national legislation in its judgment in *Duffy*. As in its judgment in *Rönfeldt*, the Court held in *Duffy* that to reduce the rights of workers without conferring on them the compensating benefits would be to depart from the purpose and framework of Articles 48 and 51 of the Treaty, and that 'such limitations cannot be justified since they would result in placing the worker in a situation less favourable than that which, were it not for the regulations, would follow from the application of national law or of the special conventions between Member States'. [30] Furthermore, such assimilation is also compatible with the case-law of the Court relating to Article 1(j) of the regulation, according to which the term 'legislation' appearing in that provision is broad in scope. [31] It should be noted, however, that, according to a recent decision of the Court, national legislation does not include social security conventions concluded between a Member State and a third country. [32]

IV — The answer to be given to the question referred for a preliminary ruling

34. The national court is asking the Court once again to give a ruling on the relation-

27 — Journal Officiel 1958, p. 561.

28 — Opinion in *Duffy*, cited above (footnote 18), p. 608. See also, *inter alia*, the judgment in *Kalsbeek*, cited above, the judgment in Case 22/67 *Goffart* [1967] ECR 321 and the judgments in Case 2/67 *de Moor* [1967] ECR 197 and Case 9/67 *Colditz* [1967] ECR 229.

29 — Paragraph 27 of the judgment in *Rönfeldt*. It should be noted in that regard that social security conventions between States are not referred to in the definition contained in Article 1(j) of the regulation, according to which '"legislation" means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2)'.

30 — See paragraphs 7, 8 and 9 of the judgment in *Duffy*.

31 — See the judgment in Case 87/76 *Bozzone* [1977] ECR 687, according to which the definition in question includes all provisions laid down by law, regulation and administrative action by the Member States and must be taken to cover all the national measures applicable in the matter (paragraph 10 of the judgment). See also the judgments in Case 300/84 *van Roosmalen* [1986] ECR 3097 and Joined Cases 82/86 and 103/86 *Laborero and Sabato* [1987] ECR 3401.

32 — See the judgment in Case C-23/92 *Grana-Novoa* [1993] ECR I-4505.

ship between the provisions of the regulation and the provisions of international conventions concluded between two or more Member States before the entry into force of the regulation. A literal construction of Article 6 of the regulation, in conjunction with Articles 7 and 8, undeniably leads to the conclusion that the provisions of the regulation have replaced those of the Franco-German Convention. Moreover, the Court itself applied that interpretation in its judgment in *Walder*, as has been pointed out above.

35. However, such an interpretation is acceptable only in so far as it is consistent with the aims of Articles 48 and 51 of the Treaty. The foundation, framework and limits of Article 6, and of all of the other provisions of the regulation, are to be found in those articles of the Treaty. Having regard to the principles laid down by the consistent line of case-law referred to above, according to which the aim of Articles 48 to 51 is to apply to the worker concerned the most favourable provisions, with a view to securing as fully as possible the fundamental Community principle of freedom of movement, the automatic replacement of the provisions of the Franco-German Convention by those of the regulation is permissible only in so far as the former do not contain rules which are more favourable than the Community rules. Consequently, and subject to the rule that it is for the national court, rather than the Court of Justice, to determine whether a provision contained in a bilateral convention, such as that in issue here, is more favourable than the Community rules, I consider that, notwithstanding Article 6 of the regulation, the worker concerned can rely on the provisions of a convention concluded between Member States where they confer greater rights on him than are accorded to him by the regulation.

36. In the procedure before the Court, all of the Governments which submitted observations, as well as the Council and the Commission, have adopted the contrary view. The German Government and the United Kingdom request the Court to reconsider its decision in *Rönfeldt*, whilst the other parties submitting observations in the case advance the view that Mr Thévenon's circumstances are different from those of Mr Rönfeldt, and, in consequence, that the decision in *Rönfeldt* should not extend to cases such as that of Mr Thévenon.

37. One of the fundamental arguments raised by all those submitting observations is that an interpretation permitting the application of the more favourable provisions of social security conventions concluded between Member States would undermine the system of coordination introduced by the regulation and would negate its effectiveness. The application of the regulation would depend, as appropriate, on the question whether or not conventions concluded previously between Member States contained provisions which were more favourable for migrant workers. Moreover, this would give

rise to serious practical difficulties, such as administrative complications, a lack of clarity and delays in the payment of benefits.

38. It should be noted in relation to that argument that the regulation does not set up a common scheme of social security, but allows different schemes to exist, creating different claims on different competent institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law. Consequently, the regulation essentially leaves national social security systems intact. Recognizing this, the Court concluded in its judgment in *Petroni*, as extended by its decision in *Rönfeldt* to cover international conventions, that the coordination introduced by the Community rules, which is designed to facilitate freedom of movement for workers, cannot be applied to the detriment of workers if its effect is to diminish the rights arising from favourable provisions of national law. The competent insurance institutions are obliged, therefore, to compare the benefits awarded under national law and those arising from the application of Community law. To the extent to which the provisions of social security conventions between States form an integral part of the laws of the contracting States, it is logical that that comparison should also cover the rules laid down by those conventions. Advocate General Warner had likewise previously defended, in his Opinion in *Giuliani*, [33] the application of the judgment in *Petroni* to conventions concluded between Member States, stating that it is immaterial 'whether the advantage of which the legislation of the Council purports to deprive a worker is derived from national law alone or from national law incorporating an international convention, and, I would add, whether such incorporation is effected by a national statute or simply because the constitution of the Member State concerned is "monist"'.

39. Furthermore, the argument referred to above is robbed of its force by the fact that the regulation itself authorizes the existence in parallel of rules arising from conventions between Member States. It will be recalled that Article 8 allows the Member States to conclude conventions with each other based on the principles and in the spirit of the regulation. [34] Favourable provisions contained in a convention predating the regulation could thus continue to apply in favour of workers if the Member States concluding the convention in question had included the relevant provisions in a new treaty postdating the regulation.

There exist, moreover, numerous other provisions of the regulation which authorize the Member States, in specific fields, to derogate from the Community rules by means of

33 — Opinion of 20 September 1977, published in the report of Case 112/76 *Manzoni* [1977] ECR 1647.

34 — Such as, for example, the agreement of 20 July 1987 concluded between the Federal Republic of Germany and the Grand Duchy of Luxembourg.

agreements concluded between them. A particular example is to be found in Article 17 of the regulation, which authorizes Member States to provide, in the interest of certain categories of persons or of certain persons, for exceptions to the provisions of Articles 13 to 16, relating to the determination of the legislation applicable.

40. It was further contended, in the procedure before the Court, that the interpretation arrived at in the judgment in *Rönfeldt* could not be equally applicable in the present case, since the facts are different. All those submitting observations have pointed out that, in *Rönfeldt*, the worker was insured in Denmark at a time when that State was not a member of the Community, and consequently that he had already potentially acquired the right to a pension under the German-Danish social security convention before the regulation entered into force in Denmark. In the present case, on the other hand, Mr Thévenon went to work in Germany after the entry into force of the regulation. Thus, since the worker concerned exercised his right to freedom of movement at a time when the regulation had already entered into force, the Franco-German Convention in issue could not apply in his case and he did not therefore acquire any right under that convention.

41. That is not a persuasive argument. There is nothing in the judgment in *Rönfeldt* to justify the contention that the Court's decision was linked to the particular facts of the case under consideration. On the contrary, as is clear from the grounds of the judgment in question, it was based on the fundamental Community principle of freedom of movement for workers, which Articles 48 to 51 are designed to secure.

42. It is clear from the case-law referred to above that the solution arrived at by the Court in its judgment in *Rönfeldt* is not an isolated decision, but forms part of a wider interpretational framework. That solution simply applies the principle underlying the case-law relating to the interpretation of the regulation, according to which its provisions must be interpreted in the light of the aim of Articles 48 to 51 of the Treaty, which constitute the foundation, framework and limits of the regulation. The aim of Article 51 of the Treaty is to establish the greatest possible freedom of movement for workers, which constitutes the criterion governing the application of the rules enacted for the implementation of that article. [35]

43. As is explained above, that approach has prompted the Court to specify the principle of the application of the social security system which is most favourable for workers. A migrant worker is thus afforded the right to benefit from the most favourable social secu-

35 — See also in that regard, in addition to the case-law relating to Regulation No 1408/71 cited above, the Court's case-law concerning Regulation No 3, such as the judgments in Case 75/63 *Hoekstra* [1964] ECR 177 and Case 44/65 *Singer* [1965] ECR 965, as well as the judgments in *Kalsbeek* and *Goffart*, cited above.

rity system. [36] It is precisely that principle which the Court has applied with a view to interpreting Article 6 of the regulation. Moreover, it has applied the same principle in its interpretation of the following article of the regulation, Article 7. Thus it ruled in its judgment in *Callemeyn* [37] that 'within its field of application to persons and to matters covered, Regulation No 1408/71 takes precedence over the European Interim Agreement on Social Security Schemes in respect of old age, invalidity and survivors, signed in Paris on 11 December 1953, and referred to in Article 7(1)(b) of the Regulation, to the extent that this Regulation is more favourable than the said Agreement for those entitled'.

44. It has further been contended, during the procedure before the Court, that, according to the judgment in *Grana-Novoa*, which postdates that in *Rönfeldt*, bilateral social security conventions concluded between States cannot form part of the 'legislation' of a Member State within the meaning of the regulation. It should be noted that that judgment, which interprets Articles 3(1) and 1(j) of the regulation, relates exclusively to conventions concluded between a Member State and one or more third countries. The judgment in question is based on the argument that, in the absence of any specific rules, conventions concluded between a Member State and one or more third countries are excluded from the scope of the regulation, inasmuch as, according to its provisions, the regulation applies only to conventions concerning relations between Member States, that is to say, to conventions binding two or more Member States exclusively, and to conventions concluded between at least two Member States and one or more third countries. [38] It is not possible, therefore, to extend the solution arrived at in that judgment to conventions between Member States. On the other hand, the contrary conclusion may be drawn that, since they fall within the scope of the regulation in question, bilateral conventions between Member States are covered by the term 'legislation' within the meaning of the regulation. Furthermore, it should be pointed out that the Court's refusal to regard conventions concluded between third countries and a Member State as forming part of the 'legislation' of a Member State also results, as is additionally observed by Advocate General Van Gerven in the case in question, from an older line of case-law predating the judgment in *Rönfeldt*. [39]

45. It has in addition been contended that the principle of the primacy of Community law excludes the application of the provisions of conventions between States, even where they are more favourable than the regulation. As the Court has consistently held, the Treaty takes precedence, in the mat-

36 — See paragraph 8 of the judgment in *Sinatra*, cited above.

37 — Case 187/73 [1974] ECR 553. See also the judgment in Case 157/84 *Frascogna* [1985] ECR 1739.

38 — It should be noted that, according to Article 1(k) of the regulation, '"social security convention" means any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4(1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments'.

39 — See the Opinion in *Grana-Novoa*, cited above ([1993] ECR I-4521, at I-4526). See, *inter alia*, the judgments in Case 75/76 *Kaucic* [1977] ECR 495 and Case 21/87 *Borowitz* [1988] ECR 3715.

ters which it governs, over agreements concluded between Member States before its entry into force. [40] There can be no question of applying that principle, however, where Community law itself authorizes the application of provisions of social security conventions concluded between States which are more favourable to the insured. Moreover, the same rule also applies to the provisions of purely national legislation. It should be recalled in that regard that, in its judgments in *Petroni*, *Gravina and Others*, *Dammer*, *Rossi* and *Laterza*, cited above, the Court did not apply the principle of primacy, and thus authorized the application of national rules granting the insured advantages which would have been excluded in the event of the application of Community rules.

46. Reference has also been made to the law of treaties and, more particularly, to Article 30 of the Vienna Convention of 23 May 1969, which adopts, in essence, the principle *lex posterior derogat legi anteriori*. However, that article is of a residual nature and is applicable only in so far as the subsequent treaty contains no specific provisions in that regard.

V — Conclusion

47. In the light of the foregoing, I propose that the Court give the following answer to the question referred to it by the Sixth Chamber of the Sozialgericht Speyer:

'Articles 48(2) and 51 of the EC Treaty must be interpreted as precluding the loss of social security advantages arising for the worker concerned, in consequence of the entry into force of Regulation (EEC) No 1408/71 of the Council 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, from the inapplicability, by virtue of Article 6 of that regulation, of more favourable provisions contained in social security conventions concluded between two or more Member States prior to the regulation.'

40 — See, in particular, the judgments in Case 10/61 *Commission v Italy* [1962] ECR 1 and Case 235/87 *Matteucci* [1988] ECR 5589.