OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 17 June 1997 *

1. This reference for a preliminary ruling from the Tribunal Superior de Justicia (High Court of Justice) de la Comunidad de Extremadura (Sala de lo Social (Chamber for Labour Matters)) (hereinafter: 'the Tribunal Superior') concerns the interpretation of Article 47(1)(e) (now (g)) of Council Regulation (EEC) No 1408/71 [1] (hereinafter 'the regulation') in relation to the same national legislation as, and facts similar to, those referred to in the judgment in *Lafuente Nieto* [2] which was delivered by the Court after the closure of the written procedure in these cases.

I. — Subject-matter of the dispute in the main actions

2. Like Mr Lafuente Nieto, Messrs Naranjo Arjona and Vicente Mateos and Mrs García Lázaro, all of whom are of Spanish nationality, having been employed in the territory of the Kingdom of Spain for several years exercised their fundamental freedom of movement and went to work in the territory of the Federal Republic of Germany in the same capacity and there remained.

More specifically, Mr Naranjo Arjona had paid compulsory insurance contributions under Spanish law from April 1951 to June 1968 and on the basis of German law from January 1966 until March 1991; Mr Vicente Mateos had paid those contributions (but not continuously) in Spain (under the earlier SOVI social security scheme and later under the *Régimen General de la Seguridad Social* (General Social Security Scheme)) between April 1942 and February 1962, and in Germany between January 1963 and January 1989; finally, Mrs García Lázaro had also paid social security contributions (also not continuously) under Spanish law between February 1961 and December 1964 and under German law between January 1961 and July 1987.

3. It appears from the order for reference that in 1994 the Instituto Nacional de la Seguridad Social ('the INSS') awarded Mr Naranjo Arjona, with effect from 1 April 1991, a retirement pension calculated according to the average of his contribution bases for the period 1960-1968 (that is, for the last eight years of contributing to the Spanish

* Original language: Italian.

1 — 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 (OJ, English Special Edition 1971 (II), p. 416), as subsequently amended, updated and adapted *inter alia* by: Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6); Annex I, Part VIII, of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter: 'the Act of Accession'; OJ 1985 L 302, p. 23, especially p. 170); Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), whereby subparagraph (e) of Article 47 became subparagraph (g) of that article. The regulation has been further amended, even following the publication of a consolidated version in December 1992 (OJ 1992 L 325, p. 1).

2 — Case C-251/94 *Lafuente Nieto* v *INSS* [1996] ECR I-4187.

social security scheme, before emigrating to Germany), revalorized (with the exception of the bases for the last two years) according to the monthly variations in the general consumer price index.

Mr Naranjo Arjona contested the INSS decision before the Juzgado de lo Social (Social Court), Badajoz ('the Juzgado'). He did not dispute the method of calculation used by the social security institution but maintained *inter alia* that it should be applied to his contribution bases for the last eight years of his working life (1982-1991), even though he had only paid social security contributions in Germany during that period.

4. Mr Vicente Mateos, for his part, having become permanently and totally incapacitated for work in Germany in 1989, obtained a pension from the competent German social security institution (apparently only in respect of insurance contribution periods completed in Germany) and then in 1990 was awarded a pension by the INSS under the SOVI scheme, at a permanently fixed amount, based solely on his contributions paid at the relevant time in Spain.

He argued in court that the pension should be calculated according to the average of the *maximum* contribution bases laid down in Spanish law for the period 1981-1988 (supplemented, during months for which no contributions had been paid, by reference to the minimum bases), but, as in the case of Mr Naranjo Arjona before him, the Juzgado dismissed his application in a judgment which is now the subject of an appeal to the Tribunal Superior in one of the three main proceedings.

5. As far as Mrs García Lázaro is concerned, after the competent German institution had awarded her a pension (which I believe was also paid only in respect of insurance contribution periods completed in Germany), on account of her total incapacity for work as from July 1987, the Juzgado finally recognized her entitlement to a pension from the Spanish social security institutions in 1995.

The judgment of the Juzgado, against which an appeal (by the INSS) is also pending before the referring court, had based the amount of the pension payable to Mrs García Lázaro on the maximum contribution bases provided for in Spanish legislation, for the period 1979-1987, for workers in her occupational category, revalorizing the benefit payable on the basis of the monthly fluctuations in the general consumer price index.

II — Legislative background and relevant case-law

6. As we all know, the regulation, Article 47(1) of which forms the subject-matter of the question referred to us for a preliminary ruling, was adopted by the Council pursuant to Article 51 of the EC Treaty ('the Treaty') and seeks not to harmonize but rather to coordinate the domestic laws of the Member States in matters of social security. In other words, the regulation did not set up a common system of social security but allowed different national 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'. [3] Thus, the substantive and procedural differences between the Member States' social security systems and hence in the rights of persons working in the Member States are unaffected by Article 51 of the Treaty. [4]

As can be seen from the fifth recital, the regulation seeks to ensure effective freedom of movement for Community workers: the scheme aims to secure equal treatment for the latter under the various national legislations and social security benefits for workers regardless of their place of employment or of residence within the Community.

7. More specifically as regards these cases, the applicability of Article 47(1) of the regulation becomes important in all cases where a migrant worker's acquisition, maintenance or recovery of entitlement to invalidity or retirement pensions [5] derives, under the legislation of a Member State, from applying the mechanism of aggregating all periods of insurance or residence completed by the worker in question in the various Member States concerned, introduced under Article 45 of the regulation.

8. Article 46 of the regulation lays down the method for calculating the amount of benefit to be awarded which is to be applied by the competent institution of each Member State at the request of the worker concerned.

3 — See the Opinion of Advocate General Cosmas in Case C-475/93 *Thévenon* [1995] ECR I-3813, especially at p. I-3828.

4 — Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 13.

5 — Only for workers affected by invalidity who have been subject at various times to the legislation of two or more Member States, *at least one* of which is based on a distributive type of insurance scheme (in other words one based on risk), under which (as in the Spanish social security system) the amount of invalidity benefits is independent of the length of the insurance periods completed. In fact, Article 40(1) of the regulation provides that the provisions of Chapter 3 of Title III of the regulation containing specific provisions on retirement and old-age pensions shall apply to such workers by analogy.

Under paragraph 1 of that article, in Member States where a migrant worker claims entitlement to benefit without the need for aggregation, the competent institution is to carry out a dual calculation and determine: (a) the amount of so-called independent or autonomous benefit which the worker could claim, taking into consideration only those periods of insurance or residence completed under that legislation, and (b) the amount of pension which would be payable under the aggregation and pro rata method in the contrasting situation — governed by Article 46(2) of the regulation — where the minimum contribution or residence periods required by national legislation for acquisition, retention or recovery of the right to benefit have not been completed. [6]

9. Furthermore, as I said, Article 46(2) provides that in Member States where entitlement to benefit is acquired only by applying the aggregation mechanism, each institution responsible for payment is to calculate the so-called proportional benefit payable by it, in other words the theoretical amount of benefit and the actual pro rata amount for which it is liable.

As the Court established long ago, calculation of the theoretical amount pursuant to Article 46(2)(a) of the regulation seeks to ensure that a worker receives the maximum amount to which he would be entitled if all his insurance periods had been completed in the Member State in question. By contrast, calculation of the actual amount in accordance with subparagraph (b) of the same provision is aimed solely at sharing the relevant burden of payments between the institutions of the various Member States concerned in proportion to the length of the insurance periods completed before the risk materialized in each of those States. [7]

10. Finally, under Article 46(3) of the regulation, [8] each institution responsible for payment is to determine the amount of benefit actually payable in accordance with its own legislation, this being the highest amount as between the independent benefit and the pro rata benefit. [9] In other words, a migrant worker will be entitled to receive a *total* payment from the various competent national institutions which is equal to the sum of the highest individual benefits (payable by the Member States in which aggregation was not necessary) and the actual pro rata amounts (payable by States in which it was necessary).

6 — The regulation also allows the competent institutions not to apply the aggregation and pro rata method where the result of that calculation is equal to or lower than the result calculated according to national legislation alone (all cases where the two calculations would lead to that result are indicated, for each Member State, in Annex IV, Part C, of the regulation).

7 — Case 793/79 *Menzies* [1980] ECR 2085, paragraph 9.

8 — As amended by Article 2(2) of Council Regulation (EEC) No 1248/92, cited in footnote 1.

9 — Without prejudice to any rules to prevent overlapping (reduction, suspension or withdrawal) which may be laid down by the national legislation pursuant to which benefit is payable, in which case the comparison is to be made between the amount of the autonomous benefit and the amount of the pro rata benefit as calculated *after* applying those rules (Article 46(3) of the regulation).

11. Article 47(1) of the regulation, for its part, contains various additional provisions designed to simplify administration, for calculating the theoretical amount of benefit and the actual pro rata amount for which each social security institution is responsible, as referred to in Article 46(2).

In particular, Article 47(1) provides in subparagraph (e) (now (g)) — a provision which was introduced on the Kingdom of Spain's accession to the Community [10] — that where, under the legislation of a Member State, benefit is to be calculated by the competent institution in that State on the basis of *average* contributions, that average is to be determined by reference only to those periods of insurance completed under the legislation of the said State.

12. Spanish social security legislation, which centres on a risk-based insurance scheme, does in fact provide that where the conditions governing entitlement to benefit are met, the amount of invalidity and old-age pensions for employed persons is to be calculated, in principle, on the basis of the sum of the contribution bases of the person concerned during the 96 months prior to materialization of the risk, divided by a predetermined figure (112).

Moreover, where there was no obligation to pay contributions for all or part of the reference period, including the case where a worker was required to contribute to the compulsory social security scheme of another Member State, the average contribution basis is replaced, to the corresponding extent, by the minimum basis laid down by law. [11]

III — The question referred

13. The Tribunal Superior asks the Court to clarify whether the reference in Article 47(1)(e) (now (g)) of the regulation — for the purpose of calculating the theoretical amount of benefit — to an average contribution basis, to be determined by reference only to insurance periods completed under the national legislation of the country paying the benefit, is to be construed as referring to: (i) the theoretical (maximum, minimum or average) contribution bases for the time being laid down by that legislation, or (ii) the average of the contribution bases corresponding to payments actually made by the individual worker concerned, regardless of what he would have had to contribute for

10 — Article 26 and Annex I, Chapter VIII, of the Act of Accession, cited in footnote 1.

11 — See *Ley 26/1985, de 31 de julio, de medidas urgentes para la racionalización de la estructura y de la acción protectora de la Seguridad Social*, Article 3 (BOE of 1 August 1985, No 183, p. 1907); that provision was reproduced later, with slight changes to its form, in Article 140 of the *Texto Refundido de la Ley General de la Seguridad Social (Real Decreto Legislativo 1/1994, de 20 de junio*; BOE of 29 June 1994, No 154, p. 5453).
For a more detailed description of the aspects of the Spanish social security scheme which are relevant for the purpose of this case, I refer to my Opinion of 20 June 1996 in Case C-251/94 *Lafuente Nieto* [1996] ECR I-4190, especially points 4 and 11 to 18.

the periods worked in Spain, in accordance with the legislation of that State.

14. Essentially, it appears to me that the referring court is asking the Court for an interpretation because the Spanish courts are encountering difficulties in applying Article 47(1) of the regulation. Earlier judgments of the referring court in fact depart from the approach taken by the Tribunal Supremo as regards the calculation, by the Spanish social security institution, of the theoretical amount of social security benefits to which a migrant worker would be entitled if all periods of insurance or residence completed by him under the legislation of the various Member States had been completed in Spain alone and under the legislation applied by that country on the date the benefit was awarded.

15. With specific reference to calculation of the theoretical amount of invalidity and old-age benefits for Spanish workers who have worked in Germany, the Spanish Tribunal Supremo (Supreme Court) has recently interpreted Article 47(1)(e) (now (g)) of the regulation as follows: the contribution basis to be taken into account for periods when compulsory insurance contributions were paid on the basis of German legislation is the 'theoretical' average of the maximum and minimum bases laid down by the Spanish legislation applicable, to workers in the same occupational category, during the reference period. [12]

16. The Tribunal Superior took a different view, namely that in the above situation, for periods when the compulsory contributions were not paid in Spain by a Spanish worker who had emigrated to Germany and was subject to compulsory insurance in that State, the calculation is based on the average not of theoretical contributions, but of the contributions actually paid, pursuant to Spanish legislation, during other periods.

17. According to the referring court, that view was corroborated *a posteriori* by the Community legislature in 1992 [13] — that is, after the three workers concerned in the main proceedings became entitled to benefits — by means of the insertion, as an 'authentic interpretation', [14] in Section D (concerning Spain) of Annex VI of the regulation, which

12 — See, most recently, the judgment of 27 March 1995 in *GJ*, B-105, July-August 1995, p. 59.

13 — Council Regulation (EEC) No 1248/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 7, especially p. 24). Under point 4(b) of heading D of Annex VI of the regulation, cited below in the text, the theoretical amount of the benefit obtained by applying the calculation described in the text is to be subject to the increases and revalorizations calculated for each year after and up to the year preceding the materialization of the risk for pensions of the same kind.

14 — As I pointed out in points 53 and 54 of my Opinion in *Lafuente Nieto*, cited in footnote 11, the provisions added in 1992 to Annex VI of the regulation with regard to the detailed rules for applying Article 47 in Spain merely expounded, with particular reference to that country, one of the underlying principles of the regulation, namely the principle of the effectiveness of social security benefits, to which the obvious corollary is the rule on updating the amount of contributions actually paid by a worker as laid down in point 4(b) cited above (see above, footnote 13).

contains special procedures for applying the legislations of certain Member States, of point 4(a), according to which 'under Article 47 of the Regulation, the calculation of the theoretical Spanish benefit shall be carried out on the basis of the actual contributions of the insured person during the years immediately preceding payment of the last contributions to the Spanish social security'.

IV — Reply to the question referred for a preliminary ruling

18. In my view, the question from the Tribunal Superior can now be fully resolved by applying the principles recently established by the Court in *Lafuente Nieto*.

19. In that judgment the Court clearly established that Article 47(1)(e) (now (g)) of the regulation relies on a system for calculating old-age and invalidity benefits according to an average contribution basis, similar to that laid down in Spanish legislation. [15] The Court held that the provision in question should be interpreted in the light of the aims set out in Article 51 of the Treaty, especially with reference to the protection of migrant workers from possible reductions in the amount of social security benefits to which they are entitled as an unwanted effect of having exercised their right of free movement.

20. On those grounds, the Court also held that Article 47(1)(e) (now (g)) of the regulation cannot be interpreted, even by way of exception, as allowing a method of calculation based on a *minimum*, rather than an *average*, basis, to the detriment of migrant workers. Moreover, according to that judgment, the calculation in question cannot be based on the amount of contributions paid in the Member State to which a worker has emigrated. The reference contribution basis must always be the same as that used where a worker has retained an obligation to pay contributions pursuant to the legislation of the Member State responsible for the payment of benefit. [16]

21. In that judgment, the Court accepted my conclusion, which I would like to reiterate here, that Article 47(1)(e) (now (g)) of the regulation, interpreted in the light of Article 51 of the Treaty, requires a social security institution, such as the Spanish institution in the main proceedings, on the one hand to calculate the average contribution basis, taking into account only those contributions actually paid to the migrant worker under national legislation and, on the other hand,

15 — See the judgment cited in footnote 2, paragraphs 16 to 29.

16 — *Ibidem*, paragraph 39.

to apply the appropriate increases and revalorizations to the theoretical amount of the benefit thus obtained *as if* the person concerned had continued to work under the same conditions in the Member State in question. [17]

22. I said at the time, and I will say again now, [18] that that solution flows from the fundamental premiss, mentioned above (see point 6), that the aim of the regulation is merely to coordinate (rather than to harmonize). This solution is, moreover, fully in line with the principle of equal distribution which governs the system established by the regulation. Unjustified discrimination against workers who have exercised their right to free movement is thus avoided, and such workers do not gain any undue advantage compared to non-migrant workers. It is worth expanding a little on this last point. Account must be taken of the wage disparities still existing between the Member States (in our case, between Spain and Germany). Article 47(1)(e) (now (g)) cannot therefore be interpreted as meaning that, when trying to match a social security benefit to the earning capacity of a worker in the period *immediately* prior to the materialization of the risk, the theoretical amount should be calculated by reference to the contribution bases of the person concerned in the last 96 months of employment, even where this was pursued in a *different* Member State, where wages are higher than in the country of origin. If this were the case migrant workers would have an advantage over non-migrant workers.

23. At the hearing, the special representative acting for Naranjo Arjona, Vicente Mateos and Mrs García Lázaro advocated the adoption of criteria which, he maintained, were simpler. [19] He claimed that the rules established in *Lafuente Nieto* were very obscure and difficult to apply in practice. The initially inconsistent experiences of the Spanish labour courts when applying those rules supported this contention.

24. The well-foundedness of this objection was disputed at the hearing by the Spanish Government. For my part, I see no reason in the context of this request for a preliminary ruling to reappraise the principles recently established in *Lafuente Nieto*.

Let us not forget the fact that the Court has already had occasion to give a ruling on the question which forms the subject-matter of

17 — *Ibidem*, paragraphs 30 to 43.

18 — See the Opinion of 20 June 1996 in *Lafuente Nieto*, cited above in footnote 11, points 47 to 61.

19 — More specifically, the adoption of the rule (whose compatibility with the Court's ruling in paragraph 39 of its judgment in *Lafuente Nieto* (see above, footnote 16) appears doubtful, to say the least) whereby the contribution bases for the 96 months immediately preceding the date on which the risk materialized are to be determined, under Spanish legislation, on the basis of the contributions actually paid by a worker during that period *in any other Member State, subject in all cases to the minimum and maximum contribution limits laid down in Spanish legislation in respect of workers in the same occupational category.*

this dispute. Furthermore, the referring court in *Lafuente Nieto* did not avail itself of the possibility of making a new reference to the Court prior to giving judgment in the main proceedings, an option which is open to it where it encounters difficulty in understanding or applying a judgment of the Court, or where it wishes to submit new considerations to the Court which might lead the Court to give a different answer to a question submitted earlier. [20] This shows that the principles laid down in the recent judgment referred to above do not raise the unsurmountable difficulties of application claimed by the special representative of the three Spanish workers involved in the dispute in the main proceedings. [21]

25. The argument put forward by the Commission at the hearing to the effect that the principles laid down in *Lafuente Nieto* should be seen in the light of the judgment in *Rönfeldt* [22] is more worthy of consideration. The Commission points out in this regard that in no circumstances can Article 47(1)(e) (now (g)) of the regulation — interpreted in the light of Articles 48(2) and 51 of the Treaty — result in the loss of social security advantages to which a migrant worker is already entitled under existing social security conventions between two or more Member States which have been transposed into the national legislation of those States. In other words, an advantage acquired by a worker pursuant to the provisions of such a convention is retained on the basis of that convention even where the latter is replaced by a Community regulation which regulates the matter differently.

26. Strictly speaking, the preservation of advantages conferred on individuals as a result of the combined operation of national law and social security conventions concluded between Member States which are subsequently replaced by different Community legislation fall outside the scope of the question referred for a preliminary ruling by order of the Tribunal Superior.

The Court has consistently held, however, that when giving a ruling under Article 177 of the Treaty it may also take into consideration provisions of Community law which the questions from the referring court have not raised but which appear to be relevant for the purpose of the decision in the main proceedings. [23]

20 — Order of 5 March 1986 in Case 69/85 *Wünsche* v *Germany* [1986] ECR 947, paragraphs 10 to 16, in which the Court held that the right of a referring court to refer further questions to the Court could not be used to contest the validity of the judgment delivered previously, as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article 177 of the Treaty.

21 — The foregoing is without prejudice to the possibility that, should Article 47(1)(e) (now (g)) of the regulation be applied by the Spanish social security institution in future in a manner which conflicts with the principles laid down by the Court in *Lafuente Nieto*, as the special representative of Messrs Naranjo Arjona and Vicente Mateos and Mrs García Lázaro indeed intimated, that failure to fulfil obligations could be the subject of proceedings under Article 169 of the Treaty for failure to comply with its obligations.

22 — Case C-227/89 [1991] ECR I-323.

23 — See, among many others, Joined Cases 73/63 and 74/63 *Internationale Credieten Handelsvereniging Rotterdam* v *Minister van Landbouw en Visserij* [1964] ECR 1; Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453; Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207; Joined Cases C-153/88 to C-157/88 *Fauque and Others* [1990] ECR I-649; Case C-241/89 *SARPP* [1990] ECR I-4695; Case C-187/91 *Belgian State* v *Belovo* [1992] ECR I-4937; Case C-114/91 *Claeys* [1992] ECR I-6559. The matters of principle which the Court may decide to settle of its own motion, because they are essential to the decision to be made on the actual issues of the main action, may be raised by the Commission (see Case C-280/91 *Viessmann* [1993] ECR I-971).

27. Having said this, let us now examine the Commission's argument more closely. Pursuant to Article 6, the regulation replaces as a matter of principle, [24] purely in terms of the persons and matters which it covers, any pre-existing social security convention binding two or more Member States exclusively.

Since the regulation entered into force in Spanish law on 1 January 1986, the date of the accession of the Kingdom of Spain to the Community, any international social security conventions entered into by Spain with one or more Member States ceased to have effect as from that date (with the exception of any provisions expressly preserved [25]), including for the purpose of these cases the *Convenio entre la República Federal de Alemania y el Estado Español sobre Seguridad Social*, [26] which was signed on 4 December 1973 and entered into force on 1 November 1977 ('the Convention').

28. The Commission refers in particular to Article 25(1)(b) of the Convention, which concerns the calculation of the amount of old-age pensions (and also, by virtue of the reference to Article 26(1), invalidity pensions) by the competent Spanish institutions.

That provision is not subject to an express reservation under Annex III of the regulation and provides as follows: 'where all or some of the contribution period chosen by the claimant for the purpose of calculating the basis of assessment for his benefits was completed in the Federal Republic, the competent Spanish institution shall determine that assessment basis according to the contribution bases in force in Spain, during that period or portion thereof, for a worker in the same occupational category as the person concerned'. [27]

29. In the Commission's view, the solution provided for in Article 25(1)(b) makes it possible to take appropriate account of the level of the contribution basis — which depends on the pay which a worker received or was entitled to — which a worker reaches at the end of his working life, even in another Member State, without conflicting with the Spanish social security system (since for the purpose of calculating benefits reference is

24 — With the exception — as far as this Opinion is concerned — of the 'international provisions not affected by this Regulation' referred to in Article 7 of the regulation, including the specific provisions of social security conventions which 'the provisions of Article 6 notwithstanding ... shall continue to apply' inasmuch as they are specifically excepted under Annex III of the regulation (see Article 7(2)(c)).

25 — See Case 82/72 *Walder* [1973] ECR 599, paragraphs 6 and 7.

26 — See BOE No 258 of 28 October 1977, p. 2295, and *Bundesgestezblatt* 1977 II p. 687.

27 — My translation. The original provision is worded as follows: '*Cuando todo o parte del período de cotización elegido por el solicitante para el cálculo de su base reguladora de prestaciones se hubiera cumplido en la República Federal, el Organismo competente español determinará dicha base reguladora sobre las bases de cotización vigentes en España, durante dicho período o fracción, para los trabajadores de la misma categoría profesional que la persona interesada*'.

always made to the contribution bases applicable in Spain for the relevant occupational category).

30. Again in the Commission's view, applying Article 25(1)(b) of the Convention to the legal situation of Messrs Naranjo Arjona and Vicente Mateos and Mrs García Lázaro actually gives them more advantageous treatment overall than they receive under the mechanism in Article 47(1)(e) (now (g)) of the regulation. The entry into force of the regulation in Spain on 1 January 1986 therefore reduced the social security advantages to which they were formerly entitled under the Convention.

31. According to the case-law cited by the Commission, the Community social security rules cannot be applied in such a way as to reduce the benefits awarded to a migrant worker by virtue of the legislation of a Member State because that would be contrary to the Treaty rules on freedom of movement for workers. [28]

As the Court has held, this case-law also applies with respect to any benefits payable under bilateral or multilateral conventions between the Member States which have been incorporated in their national law, [29] provided that the worker concerned has exercised his right to freedom of movement *before* the date on which, notably as a result of later accessions to the Community, the Community legislation took effect in *all* the signatory States to the relevant convention. [30]

32. The three Spanish workers involved in the main actions exercised their right to freedom of movement before 1 January 1986, and hence at a time when the regulation had, as a result of the accession of the Kingdom of Spain to the Community, taken effect in Spanish law thus replacing the provisions of the Convention. There is no doubt, therefore — and here I support the Commission's view — that theoretically the principles of *Rönfeldt*, [31] cited above, could apply to them since the obstacle identified by the Court in *Thévenon* is not present. [32]

33. However, the Commission's conclusions do not entirely convince me inasmuch as it claims that the entry into force of the regulation in Spain on 1 January 1986 clearly resulted in a reduction of the social security benefits to which the three workers involved

28 — Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7.

29 — *Rönfeldt*, cited above in footnote 22, paragraphs 21 to 29.

30 — See Case C-475/93 *Thévenon* [1995] ECR I-3813, paragraphs 18 to 28.

31 — See above, footnote 29 and the relevant part of the text.

32 — See above, footnote 30 and the relevant part of the text.

in the main proceedings were previously entitled under Article 25(1)(b) of the Convention.

34. The Commission sets great store by the case-law in *Rönfeldt*. In that case, however, the loss of social security benefits by the plaintiff in the main action, as a result of the inapplicability of the German-Danish social security convention, following the entry into force of the regulation, was clear and undisputed. Pursuant to that convention, German workers were entitled to have periods of residence completed in Denmark taken into account, up to a maximum of 15 years, for the purposes of *calculating the amounts owing to them* by way of old-age pension in Germany. The aggregation of the insurance periods completed by German workers who migrate to other Member States provided for in the regulation had (and still has) the more limited aim of *creating entitlement* to an old-age pension, the actual amount of the benefit being fixed in relation solely to periods completed under the German scheme. [33]

35. The case which concerns us here is different. The procedure provided for in the Convention and advocated by the Commission at the hearing consists of calculating the basis for assessing benefits, for insurance and contribution periods completed by a migrant worker in Germany, by reference to the contribution bases applicable in Spain for workers in the same occupational category as the workers involved in the main action. This solution would be more beneficial than that provided for in the regulation, which, as the Court held in *Lafuente Nieto,* consists in calculating benefits according to an *average* contribution basis, determined solely in relation to the contributions *actually paid* by a migrant worker pursuant to Spanish legislation, and applying to the theoretical amount thus obtained all relevant revalorizations and increases.

36. This point of principle — on which the order from the Tribunal Superior fails to shed any light — was hotly disputed by the Spanish Government at the hearing. In the latter's view, application of the Convention actually results in less favourable pension treatment for the workers concerned than they would receive under Article 47(1) of the regulation.

In my view, the conflicting positions of the Commission and the Spanish Government on this question reflect two different interpretations of the phrase 'contribution bases in force in Spain for workers in the same occupational category as the person concerned' by reference to which the Spanish social security institution is required, pursuant to Article 25(1)(b) of the Convention, to

33 — Judgment cited in footnote 22, paragraphs 13 to 20. Likewise, in *Thévenon* it was accepted by the parties to the dispute that, since calculation of the amount of the invalidity pension on the basis of the provisions of the Franco-German social security convention also took account of insurance periods completed in France, the amount of benefit payable to Mr Thévenon by the German social security institution (as the competent institution of the State in which the claimant was registered at the time the risk materialized) was higher than the amount awarded, pursuant to the regulation, on the basis of the principle of pro rata allocation (judgment cited in footnote 30, paragraph 9).

determine the basis for assessing benefits for insurance and contribution periods completed by a migrant worker in Germany.

According to the Commission, these are probably the *maximum* contribution bases applicable in Spain during the reference period; according to the Spanish Government, on the other hand, they are the *minimum* bases applied pursuant to Article 140(4) of the *Texto Refundido de la Ley General de la Seguridad Social* in cases where there is no obligation to pay contributions for one or more months in the period of reference used to calculate the assessment basis for pensions. [34]

37. Leaving aside any consideration of the merits of these two opinions, and leaving aside too the ambiguous reference, in Article 25(1)(b) of the Convention, to *the choice by the worker* of the contribution period to be used for calculating the assessment basis for his own pension, a choice for which Spanish social security legislation does not appear to make provision, [35] I will just make one comment. The principle of *updating* the contributions paid to the social security institution of the State awarding the pension, as upheld by the Court in *Lafuente Nieto,* makes it possible in principle to achieve the same objectives as regards the effectiveness of benefits as those pursued by the Convention. Both solutions resort to the theoretical existence of continuous occupational activity under Spanish law. Both make it possible to take account of the level of the contribution basis which a worker has reached at the end of his working life.

38. However, it cannot safely be ruled out that in the three main actions — as in other similar specific cases — the calculation of the benefits to be awarded by the Spanish social security institution could theoretically lead to different results, depending on which system is adopted. By applying the method of calculation in Article 47(1)(e) (now (g)) of the regulation, a migrant worker — and the persons concerned in this case — could even obtain overall social security treatment which is *less* favourable than that which would otherwise result from applying the method in Article 25(1)(b) of the Convention. In such a case, the entry into force of the regulation in Spain would actually reduce the social security benefits to which Messrs Naranjo Arjona and Vicente Mateos and Mrs García Lázaro would previously have been entitled under the Convention. However, it should be noted that in these cases, in contrast to the *Rönfeldt* case, the referring court can only conclude that the relevant provisions of the Convention remain applicable after having calculated the theoretical amount of the disputed social security benefits separately, on the basis of the Convention and of the regulation, and after having compared the two results.

This unquestionably involves extra work for the competent social security institutions and for the national court but it is the only

34 — See above, footnote 11 and relevant part of the text.

35 — See above, point 12.

possible way to ensure respect for the Court's rulings to the effect that Articles 48(2) and 51 of the Treaty do not under any circumstances permit a worker who has exercised his right to freedom of movement to be placed in a situation which is less favourable than that which he would have enjoyed if he had not availed himself of that right.

V — Conclusion

In the light of the foregoing observations I propose that the Court answer as follows the question referred by the Tribunal Superior:

The provision in Article 47(1)(e) (now (g)) of Council Regulation No 1408/71 — to the effect that the competent social security institution of a Member State which is required pursuant to its national legislation to calculate benefits according to an average basis for contributions shall determine that basis solely by reference to insurance periods completed under the legislation of that State — refers solely to the actual contribution bases completed by a migrant worker within the meaning of the legislation concerned and implies that the theoretical amount of benefit thus obtained is to be duly revalorized and increased as if the person concerned had continued to work under the same conditions in the Member State in question.

However, where as a result of applying Article 47(1)(e) (now (g)) of Council Regulation No 1408/71, a migrant worker suffers, upon calculation of the theoretical amount of his benefits, a reduction in the social security benefits to which he would have been entitled, prior to the entry into force of the regulation, under the provisions of a bilateral or multilateral convention between the Member States which has been incorporated into the national law of the debtor State, the latter provisions will remain applicable. Where there is no prima facie evidence of loss of social security benefits on the part of a worker where a convention which has been transposed into the domestic law of the debtor State is inapplicable, the referring court shall be required to calculate separately the theoretical amount of the social security benefits at issue, on the basis of the convention in question and on the basis of Community legislation, and to make a comparative assessment of the two results.