OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 20 June 1996 *

1. The questions submitted by the Sala de lo Social del Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Social Chamber of the High Court of Justice of the Basque Autonomous Community) concern two important aspects of the Community rules on social security laid down in Council Regulation (EEC) No 1408/71 (hereinafter 'the Regulation'). [1] The problems to be considered by the Court relate both to the method of calculation of what is known as the theoretical amount of the invalidity benefit and to the procedure for determining the actual amount of the benefits that the migrant worker is to receive from each of the various institutions to which he paid social security contributions during his working life.

2. The facts are, briefly, as follows. Eduardo Lafuente Nieto (hereinafter 'the appellant'), a worker of Spanish nationality, paid contributions under Spanish legislation for a total of 1 898 days before 1969. He then moved to Germany where he paid contributions to the competent institution in that country until 1990, when he became permanently incapacitated.

3. For reasons not mentioned by the national court, the competent institution in Germany awarded him an invalidity pension solely in respect of the period worked in Germany, in other words without taking account of his employment in his country of origin.

4. The appellant then asked the competent Spanish institution, the Instituto Nacional de la Seguridad Social (National Social Security Institute, hereinafter 'the INSS' or 'the respondent'), to award him an invalidity pension in respect of his period of employment in Spain.

Under the relevant national rules, the respondent recognized the appellant's entitlement to invalidity benefit and awarded him a pension of PTA 9 226 per month payable 14 times a year. That amount was determined by recourse to a legal fiction. Because the appellant had not worked in Spain in the period prior to the event which caused his invalidity, he was deemed, under national law, not to be subject to the obligation to

* 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). For the purposes of this Opinion, account has been taken of the text in force at the material time (July 1990).

pay contributions. [2] Consequently, the amount of his invalidity pension was calculated by reference to the trade-union minimum wage. [3] The part of the benefit due from the Spanish administration was thus calculated by reference to the time worked by the appellant in Spain as a proportion of his total working life.

5. The appellant did not consider the calculation method used by the respondent to be correct: both the basis for contributions used to determine the theoretical amount of the benefit and the criterion adopted for the purpose of apportionment were wrong. He therefore instituted proceedings before the Juzgado de lo Social (Social Court), Bizkaia. At first instance, the judge rejected the appellant's claim that, on the basis of a calculation different from that made by the respondent, he should receive invalidity benefit of PTA 56 485 per month. His action was therefore dismissed.

6. The appellant appealed against that decision to the Tribunal de lo Social del País Vasco, which has referred to the Court of Justice for a preliminary ruling the following six questions:

'(1) In the circumstances of fact which it covers, must Article 47(1)(e) of Regulation (EEC) No 1408/71 (as it stood in July 1990) be interpreted as including a statutory provision such as that in Article 3 of Law No 26/1985 of 31 July 1985, or does such a provision fall within the scope of Article 47(1)(b) of the Regulation?

(2) If the answer to Question 1 is that that statutory provision falls within the factual circumstances envisaged in

2 — The Spanish statute (Law No 26/1985 of 31 July 1985, Urgent measures for rationalization of the structure of social security protection and related action — BOE (Official State Gazette) No 183 of 1 August 1985, p. 1907), provides that the amount of the invalidity benefit for employees is not to vary according to length of insurance periods. If the conditions for pension entitlement are satisfied, the pension is calculated (Article 3(1)) by reference to the sum of the worker's contributions over the 96 months preceding the event which caused his invalidity, divided by a specified divisor (112). It should be noted (a) that the contribution depends on the worker's wages, the only corrective factors being a minimum and a maximum basis (the former being equivalent to the trade-union minimum wage) and (b) that the contributions for the 24 months prior to the event causing invalidity are to be taken into account at their nominal value, whilst those for the remaining months of the reference period are indexed to the official consumer price index. Under transitional provisions contained in the same measure (and in particular subparagraph 1(c) of the third such provision), in certain cases the reference basis is arrived at on the basis of a reference period of 84 months (the divisor in this case is 98). On this point, namely whether or not Mr Lafuente Nieto is covered by the transitional provisions, the parties differ. Since, however, the referring court considers that this case is to be treated as falling within the scope of the last-mentioned provision, this Opinion will proceed on the assumption that the reference period is 84 months.

3 — Article 3(4) of the abovementioned Law No 26/1985 provides that 'if the period to be taken into account for calculation of the reference basis includes months during which there was no obligation to pay contributions, the contributions for those months shall be deemed to be the lowest basis of those for the time being applicable to workers over 18'. Pursuant to Article 74 of the Ley General de la Seguridad Social (General Social Security Law), in the consolidated version approved by Decree No 2065 of 30 May 1975 (BOE of 20 and 22 July 1975), the minimum basis is equivalent to the minimum inter-occupational wage (paragraph 4) whereas the maximum basis, which applies to all activities and categories, is determined periodically by the Government on a proposal from the Minister for Employment (paragraphs 1, 2 and 3). Subject to certain amendments, which are not relevant to this case, the rules are at present contained in Articles 16(2) and 110 of the consolidated version of the Ley General de la Seguridad Social approved by Royal Decree-Law No 1 of 20 June 1994 (BOE of 29 June 1994, No 154, p. 1825).

Article 47(1)(e) of Regulation (EEC) No 1408/71:

(a) must it be regarded as introducing a specific Community law rule, in addition to the relevant Spanish rule, on the method of determining the average contribution basis, consisting in calculating it by reference to the arithmetical mean of the minimum and maximum contribution bases applicable in Spain?

(b) or must it be understood as not containing a specific rule on the method of determining the average contribution basis, so that the latter will have to be calculated in accordance with Spanish domestic law, although, for that purpose, no contributions made to the competent institution of another Member State, in accordance with the legislation of the latter, may be taken into account?

(c) or must it be interpreted as not containing a specific rule on the method of determining the average contribution basis, that basis having to be calculated in accordance with Spanish domestic law, but in such a way that, for those purposes, account is taken of the contributions paid to the competent institution of another Member State in accordance with the latter's legislation, to the extent that such contributions would also have been payable in Spain under Spanish legislation if the event giving rise to them in the other State were deemed to have occurred in Spain?

(3) If the correct interpretation of Article 47(1)(e) of Regulation (EEC) No 1408/71 is one of the two first alternatives indicated in Question 2, is that provision contrary to the requirements of Article 51 of the EEC Treaty concerning the freedom of movement for workers provided for in Article 48 thereof, and is it therefore invalid?

(4) If the answer to Question 1 is that the provisions of Article 3 of Law No 26/1985 of 31 July 1985 fall within the factual circumstances envisaged by Article 47(1)(b) of Regulation (EEC) No 1408/71:

(a) must the rule contained in that provision be interpreted as meaning that, in calculating the basis for the permanent invalidity or old-age

pension, account may not be taken of any contribution paid to the competent institution of the other Member State in accordance with the legislation of that State?

(b) or must it be interpreted, for the purposes of that calculation, as allowing account to be taken of contributions paid to the competent institution in the other Member State, under its legislation, to the extent to which those contributions would likewise have been payable in Spain, under Spanish legislation, if the event giving rise to them in the other State were deemed to have occurred in Spain?

(5) If the correct interpretation of Article 47(1)(b) of Regulation (EEC) No 1408/71 is the first of the two alternatives set out in Question 4, is that provision contrary to the requirements of Article 51 of the EEC Treaty concerning the freedom of movement for workers provided for in Article 48 thereof, and is it therefore invalid?

(6) Regardless of the answers to the questions above, must the factual circumstances envisaged by Article 46(2)(c) of Regulation (EEC) No 1408/71, as it stood in July 1990, be interpreted as covering pensions in respect of permanent invalidity caused by non-occupational illness provided for under the Spanish general social security scheme, and must it therefore be concluded that the maximum period referred to in that provision is, in such cases, the minimum contribution period necessary to obtain entitlement to it?'

7. Essentially, the first five questions are concerned with the method of calculating the amount of invalidity benefit. More specifically, the first question relates to classification of the current Spanish legislation by reference to the provisions of the Community regulation. The other four are concerned with whether the competent Spanish institution should determine the amount in question having regard to the contributions paid by the migrant worker to the competent institution in another Member State or whether other criteria may be adopted for that purpose: namely the one laid down by the national legislation, based on the minimum wage, or the other — deriving, in contrast, from case-law — based on the average of the minimum and maximum bases determined by the administrative authority. [4] In the alternative, the national court raises the question whether, if it is decided that the invalidity benefit cannot be calculated on the basis of the contributions paid by the migrant worker to the competent authorities

4 — The latter interpretation is in fact the one adopted, in most cases, by the Spanish Tribunal Supremo. See footnote 26 below.

in another Member State, the resultant rules are contrary to the principles laid down in Articles 51 and 48 of the Treaty.

8. By its sixth question the national court asks this Court to interpret the term 'maximum period' used in Article 46(2)(c) (now Article 47(1)(a)) of the Regulation. It wishes to establish whether the proportion of the social security benefit payable by the Spanish institution is to be calculated by reference to the whole period worked by the worker both in his country of origin and in the country in which he chose to live, or by reference to the minimum period provided for by the Spanish legislation for entitlement to an invalidity pension.

9. The Kingdom of Spain, the Council and the Commission presented oral argument at the hearing on 2 May 1996 and submitted written observations.

The first five questions referred to the Court

10. I think it is appropriate, before examining the substance of the first five questions, to place the provisions at issue in the context of the Regulation.

11. The rules on invalidity pensions in the Spanish and German legal systems are of different types. The Spanish legislation belongs to what is known as Type A. It is a risk-based system. Under that legislation, the amount of the invalidity pension *does not depend on the length of the insurance period* completed. The German legislation, on the other hand, belongs to Type B. It is a cumulative system. The amount of the invalidity pension is determined according to the length of the contribution periods. [5]

12. Payment of invalidity pensions to a migrant worker who, like Mr Lafuente Nieto, has been covered during his working life by social security schemes of both Type A and Type B is expressly provided for by the Regulation. Article 40(1) provides that if a worker has been successively or alternately subject to the legislations of two or more Member States of which at least one is not of Type A, he is to be awarded benefits under the provisions of Chapter 3 of the Regulation ('Old-age and death (pensions)' — Articles 44 to 51), which in such circumstances will be *applicable by analogy*.

13. Among the last-mentioned articles, Article 45(1) provides that, in order to ascertain pension entitlement, the competent social security institution is to take into account all periods of employment completed in the various Member States in which the migrant

5 — The classification according to 'types' is set out in Commission document COM (89) 370 final of 20 July 1989, *Proposal for a Council Regulation (EEC) 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*. See pp. 5 and 6.

worker has been employed as though they had been completed under the legislation which it administers. The worker must not be deprived of social security rights through the exercise of freedom of movement. [6]

14. In the present case, it should be noted, the appellant's right to an invalidity pension is not in dispute. The questions concern only the amount payable to him. In that regard, help is available from Article 46(2), which governs the award of social security benefits to which workers are entitled, as in this case, in accordance with the principle of aggregation.

15. The principles governing such awards are those of aggregation of the periods of residence and insurance completed in the various Member States and of rateable sharing as between the competent institutions (the term used is apportionment) of the benefits due to the person concerned. The Regulation also defines how those principles are to be applied.

The competent institution in each Member State must first calculate the *theoretical amount* of the benefit. In a Type A system like the one in Spain, the theoretical amount is determined in accordance with the second sentence of the provision: '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*' (Article 46(2)(a)) (emphasis added). In the present case, the theoretical amount within the meaning of the Regulation must therefore be determined in accordance with Spanish legislation.

16. Once the theoretical amount is thus determined, the competent institution determines the *actual amount* of the benefit. It is determined in the ratio which the length of the insurance periods or periods of residence completed *under the legislation administered by that institution* bears to the *total length of the insurance periods completed* before materialization of the risk *under the legislations of all the Member States concerned* (Article 46(2)(b)).

17. The rules in Article 47 (significantly entitled 'Additional provisions for the calculation of benefits') on the other hand clarify the procedures — of a technical nature, it might be said — which the national institutions are to use in determining the theoretical amount and the proportion of the social security benefits for which they are responsible.

6 — It should be noticed that, under the national legislation (Article 2(2)(b) of Law No 26/1985), two further conditions must be satisfied for entitlement to a pension:
— contributions must have been paid for at least one-quarter of the time between attainment of the age of 20 and the time of the event causing invalidity (subject to a minimum period of five years);
— at least one-fifth of that minimum contribution period must have been completed in the ten years immediately preceding the event giving rise to invalidity.
It was therefore on the basis of Article 45(1) of the regulation that Mr Lafuente Nieto was granted the right to invalidity benefits by the competent Spanish institution. As the national court indicates, he had in fact worked in Spain for fewer days (1 898) than the number prescribed by the national rules for that right to arise (2 555).

For the purposes of these proceedings, as is apparent from the questions submitted, two rules contained in that article are of importance.

The rule in Article 47(b) (now (d)) provides:

'where, under the legislation of a Member State benefits are calculated on the basis of the amount of earnings, contributions or increases, the competent institution of that State shall determine the earnings, contributions and increases to be taken into account in respect of the periods of insurance or residence completed under the legislation of other Member States on the basis of the average earnings, contributions or increases recorded in respect of the periods of insurance completed under the legislation which it administers'.

The rule contained in paragraph (e) — introduced, it is as well to point out straight away, *at the time* of the accession of the Kingdom of Spain to the Community [7] — for its part provides as follows:

'Where, under the legislation of a Member State, benefits are calculated on the basis of *average contributions*, the competent institution shall determine that average *exclusively* by reference to *those periods of insurance completed under the legislation of the said State*' (emphasis added).

18. The two last-mentioned provisions are those on which it is appropriate to concentrate for the purposes of the questions of interpretation in this case. As stated earlier, the respondent calculated the theoretical amount of the benefit under the national legislation. Under those rules, the invalidity benefit is calculated by reference to the worker's *basis for contributions* over the 84 months prior to materialization of the risk (the 'reference period'). The rules laid down by Article 3(4) of the national statute (Law No 26 of 31 July 1985) provide, however, that in the event of the worker not having been under an obligation to pay contributions during the reference period, that deficiency is to be made up for by reference to the trade-union minimum wage. And because the appellant was employed in Germany during the reference period and was not therefore under an obligation to pay contributions to the Spanish scheme, his *basis for contributions*, for the purpose of determining the amount of the benefit, was calculated by reference to the abovementioned trade-union minimum wage.

19. But it is precisely at this point that doubts arise which must be resolved in accordance with the Regulation. On the basis of the Community provisions, should the competent Spanish institution have determined the theoretical amount by reference not to the trade-union minimum wage used by the national legislation but to the wages

7 — Article 26 and Annex I, Point VIII, of the Treaty of Accession of Spain and Portugal (OJ 1985 L 302, p. 139, in particular p. 171).

received by Mr Lafuente Nieto in Germany during the period under consideration? Or could it have adopted other criteria, such as that of the average of the minimum and maximum bases for contributions?

20. According to the national court, the answer to those questions first calls for a preliminary finding: does the Spanish scheme, based on the concept of a *basis for contributions*, fall within the scope of paragraph (b) or paragraph (e) of Article 47(1)?

21. The parties take different views on that question. The Kingdom of Spain (and the national court itself) are of the opinion that the rule in paragraph (e) is applicable here. The appellant on the other hand considers that the Spanish legislation is of the kind covered by Article 47(1)(b).

22. Yet another view is taken by the Commission, which considers this case to be covered by Article 46(2)(a), relying on the Court's decision in *Weber*. [8] According to the Commission, that decision removed from the scope of Article 47(1) of the Regulation an invalidity benefit scheme of the kind in force in Spain (which is, as we have seen, of Type A).

8 — Case 181/83 [1984] ECR 4007.

23. Those are the various views confronting the Court. For my part, I shall first examine the Commission's view. I shall then consider in turn the submissions of the appellant and of the Kingdom of Spain.

24. The Commission's view is straightforward and has the advantage of considerably simplifying the solution to the problem: the applicable rules are to be found in a provision of the Regulation other than that mentioned by the national court. That would eliminate at a stroke the first five questions referred. The merits of the proposed solution deserve close scrutiny.

25. *Weber* concerned the Netherlands legislation on invalidity benefits, which, like the Spanish legislation at issue here, was Type A. In that case, however, in contrast to this case, the theoretical amount of the invalidity benefit was determined on the basis of the *daily income which the person concerned could have earned in the year following the onset of invalidity*. That, in the case of a single occupation, meant in practice taking account of the average income of the person concerned in the year immediately preceding the materialization of the risk. Mr Weber, after being employed in the Netherlands, went to work in Germany before becoming unfit for work. Unlike the INSS in this case, the Netherlands institution had calculated the theoretical amount of the benefit on the basis of the worker's last remuneration in the other Member State, that is to say Germany. Mr Weber claimed that that institution

should, under Article 47(1), calculate the theoretical amount on the basis of the average remuneration he had received in the Netherlands. In its decision, the Court established that the cases provided for by Article 47(1) *do not include the case of a system of invalidity benefits under which the amount of the benefit does not depend on the length of the insurance periods completed* and the calculation of the loss of earnings is based on the last fixed wage of the person concerned (received in his usual occupation before he became incapacitated for work) or on the average wage received by him during a specific period (not more than two years) before he became incapacitated for work. [9]

26. Similar views were expressed by Advocate General Jacobs in his Opinion in *Reichling*. [10] [11] In that case, the invalidity benefit was based, under the national legislation, *on the last wage paid to the claimant before he became incapacitated for work*. The issue was whether the competent Belgian social security institution ought to calculate the invalidity benefit on the basis of the wages received by the worker immediately before the event causing his incapacity in Luxembourg (where he had gone in search of employment in the exercise of freedom of movement) or on the basis of his last wages in Belgium, the country in which he had been employed previously. In that case too the social security schemes in the two countries were different. As in this case, the legislation to be applied by the competent institution (in Belgium) was Type A, whereas the Luxembourg legislation was of the same kind as the German (Type B). There was a further similarity with this case. The legislation applied by the competent institution provided that if, when the incapacity for work arose, the person concerned had ceased for more than 14 days to be subject to the Belgian insurance scheme, the theoretical amount of the benefit was to be calculated — again by way of legal fiction — on the basis of the minimum wage laid down for a category I employee by the Commission Paritaire Nationale Auxiliaire pour les Employés (National Auxiliary Joint Committee for Employees). The Advocate General concluded that the *Weber* decision was 'equally applicable to the Belgian legislation, which calculates invalidity benefit by reference to the claimant's final salary'. [12] The result of that reasoning was that Article 47(1) could not be applied to the case.

27. I agree with the Commission that the precedents just mentioned involve cases which are in several ways similar to the present one. I would add that the Commission's view has the merit of provoking reflection as to the meaning of the provisions of Article 47(1) and their scope. They were adopted principally in order to simplify the criteria for the calculation of benefits. That purpose is clear in relation to a scheme of the cumulative type, which is based on the amounts paid over time by the person concerned. Where, however, the institution responsible for paying the benefit is called on to apply a risk-based scheme and the worker, as in this case, is no longer covered

9 — Case 181/83, cited in the preceding footnote, paragraph 17.

10 — Case C-406/93 [1994] ECR I-4061.

11 — See the Opinion of Advocate General Jacobs in the case cited in the preceding footnote, p. I-4063, at paragraph 24.

12 — Paragraph 24 of the Opinion in the case last cited, at p. I-4071.

by a scheme of that type when he becomes incapacitated, the fiction provided for in Article 45(1) of the Regulation comes into play: periods of employment in another Member State are deemed to have been completed in the State of the competent social security institution and under the legislation administered by it.

28. I am aware of the problems which may arise from the application of the provisions of Article 47(1) to such a situation. The period which the applicable national law must take into account to determine the invalidity pension may extend back a long time; the benefit paid would then not reflect the present earning power of the person concerned. The Court took care to uphold the requirement — by which, in the abovementioned cases, moreover, both the Netherlands and the Belgian schemes were inspired — that the benefit payable should be linked to the wages received by the person concerned at the time when he became incapacitated. And that concern was without any doubt justified.

29. That does not mean, however, that the provisions of Article 47(1) as a whole are valid only for systems in which the amount of the benefit is conditional upon the length of the period of insurance. As shown by the Opinion of Mr Lenz and by the judgment of the Court itself in *Weber*, Article 47(1) can also be applied in cases covered by Article 46(2)(a). [13] The essential point is that the way in which invalidity is dealt with on the basis of the latter provision must not undermine the principles included in that article for the benefit of migrant workers. [14] It follows that the application of Article 47(1) to this case cannot be categorically excluded as the Commission contends. Although attractive, its view cannot prevail for the reasons set out below.

30. In the first place, in advocating the solution just mentioned the Commission is overlooking a fact which is of decisive importance. Article 47(1)(e) was inserted at the time of the accession of the Kingdom of Spain to the Community — that is to say, after the judgment of the Court in *Weber*.

13 — See in particular the first of the solutions proposed by the Advocate General in Case 181/83: 'Article 47(1) of Regulation No 1408/71 continues, in principle, to apply where the second sentence of Article 46(2)(a) comes into operation; that is to say, where an invalidity benefit is to be determined under a risk scheme which is not concerned with the length of the insurance periods completed' (p. 4027, point C). Moreover, the Court, although not specifically expressing a view on the point, held in its judgment in the same case that Article 47(1) was not applicable to the case not only because of the lack of connection between the benefit and the duration of the insurance periods but also because of the specific features of the Netherlands scheme (see paragraph 15). Those views therefore appear to support the conclusion that membership of a Type A scheme is not sufficient to preclude the application thereto of the rules contained in Article 47(1).

14 — See on this point the views of Advocate General Lenz in his Opinion in the case last cited: 'The application of that provision [Article 47(1)] may not, however, lead to a result which conflicts with the national legislation to which Article 46 principally refers. Should such a conflict arise, the calculation rules under Article 46 have primacy over the additional provisions of Article 47, which serve merely to simplify administrative procedures' (p. 4026, point B).

31. Now, as I have already indicated, Article 40 of the Regulation expressly refers, as regards the rules on invalidity benefit, to the rules in Chapter 3, which include the provisions of Article 47(1). In the light of a textual reference of that kind, it cannot be denied, by relying on what the Court held in other cases, albeit ones which display certain similarities, that that provision applies to this case. Moreover, neither the operative part of the *Weber* judgment nor the Opinion of Advocate General Lenz in that case, nor even the passages dealing with that point in Advocate General Jacobs' Opinion in *Reichling*, allows such a radical result. In those cases the provisions of Article 47(1) were seen as inapplicable to cases which arose under the Belgian and Netherlands schemes, where the theoretical amount is determined by reference *to the last salary received by the person concerned.* The criterion adopted in those schemes thus differs from the *basis for contributions* during the reference period, as provided by the Spanish legislation. In my view the difference is significant since the concept of (average) basis for contributions is expressly provided for in the Regulation, and differs from that on which the schemes then considered were based.

32. The Commission also infers that the principles laid down in *Weber* imply that the rule in paragraph (e) is inapplicable to this case. It considers that the origin of that rule is connected with the need to adapt the Regulation solely to the Spanish scheme of old-age and death benefits. In reply to a question put to it by the Court in the course of the procedure, the Commission in fact stated that 'the rule in Article 47 refers exclusively to the *Spanish legislation on the calculation of old-age and death benefits*' (*sic*), adding that, if it had been intended to include other benefits, an addition would have been made to Title D of Annex VI to the Regulation, concerning Spain. However, it seems to me that the position now taken by the Commission differs greatly from that which it declared to be its view when proposing an amendment to Regulation No 1408/71 (a proposal which led to the adoption of Regulation No 1248/92 [15]). In particular, dealing with the rules inserted in part 4 of Annex D, the Commission said then:

'The new paragraph 4 of Annex VI, D, mentions the method of application of this article [Article 47(1)] for Spain. ... Point 4 contains a method for the adaptation of the pension obtained ... *For the calculation of old-age pensions and invalidity pensions* the aforementioned formula guarantees an adaptation ...' (emphasis added). [16]

33. According to the Commission's approach at that time, therefore, Article 47 was also applicable to the Spanish invalidity benefit scheme. I would add in that connection that the Council also appears to take the same view. As will be seen more clearly in my examination of the sixth question, Regulation No 1248/92 has 'transferred' the

15 — 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).

16 — See Commission document COM (89) 370 final of 20 July 1989 (cited in footnote 5), pp. 32 and 33.

rule originally contained in Article 46(2)(c) to Article 47(1) (in subparagraph (a)), but with an additional provision which limits its applicability to schemes of the cumulative type and therefore excludes it for Type A schemes. However, the Commission maintains that it follows from the *Weber* judgment that the provisions of Article 47 as a whole must necessarily apply only to schemes of the cumulative type. In 1992, eight years after that judgment, the Council (and the Commission itself, in its proposal for a regulation) referred to the need to limit the application of Article 47(1) to Type B schemes only as regards the rule contained in the new subparagraph (a) of that article: but why, I wonder, was it considered desirable and necessary to refer to only one rule in Article 47(1) and not to all the others? This seems to me to indicate that the applicability to Type A schemes of the provisions of Article 47(1) in their entirety had not been excluded outright.

34. The assumption on which the Commission relies thus falls far short of being proved. That being so, it must be concluded that Article 47 applies to this case too. The problem which makes it necessary for the Court in this case to give a ruling to clarify matters is in my view, however, the question not *whether* but *how* Article 47(1) can be *adapted* to the social security scheme provided for by the Spanish legislation.

35. Important to that aspect of the case are the views of the appellant and the Kingdom of Spain which, although different, both in fact start from the premiss that *Weber* is not valid as far as the Spanish legislation on invalidity benefits is concerned. Both views are based on the assumption that the provisions of Article 47(1) are applicable to this case.

36. What is the appellant's view? The concept of 'average contributions' in Article 47(1)(e) is a formal concept, substantively unconnected with national social security law. For the purposes of national law, the basis for contributions is in fact nothing more than one's salary. [17] The Spanish legislation should therefore, in his opinion, be viewed in the light of the term 'the amount of earnings' appearing in Article 47(1)(b) of the Regulation as worded at the material time. [18]

37. The appellant maintains that the concept of average basis for contributions is inappropriate, and cannot therefore operate, in a scheme of the kind adopted in Spain.

17 — The appellant refers *inter alia* to the rule in Article 109 of the consolidated version of the General Social Security Law approved by Royal Decree No 1 of 20 June 1994 which, in laying down the specific concept of the basis for contributions, states: '*the basis for contributions ... shall comprise the total remuneration*, in whatever form or however described, *which the worker is entitled to receive* ... by reason of his work as an employee' (emphasis added). See BOE No 54 of 29 June 1994, p. 825. See also Article 73 of the General Social Security Law of 30 May 1974.

18 — The appellant also maintains that Article 46(2)(a) requires the competent institution to take into account all the insurance periods completed by the worker under the legislations of the Member States, whilst the rule in Article 47(1)(e) contradicts that requirement by basing determination of the average contribution only to the contribution periods completed in Spain. The result is, he says, discrimination against Spanish migrant workers, in breach of the principle of aggregation laid down in Article 51 of the Treaty.

However, that assertion calls for two comments. In the first place, Article 47(1)(e) provides that *the benefits are to be calculated on the basis of the average contributions* and not that the theoretical amount *is* the average basis for contributions. However, the 'accounting' arrangements under the Spanish legislation, it seems to me, exactly meet the aim pursued. The application, under Law No 26/1985, of a fixed divisor (98) to the sum of the 84 individual contributions paid by the worker over the reference period in order to calculate the amount of the invalidity benefit is in fact tantamount to calculating the benefit by reference to an amount representing the average value of the contributions. [19] Essentially, therefore, provision is made for the benefit to be 'calculated on the basis of average contributions' in the terms used in the Regulation.

38. Apart from that, I am convinced by the arguments against the appellant's views put forward by the Spanish Government, which are outlined in the order for reference itself (which refers to the virtually unanimous opinion prevailing in Spanish case-law [20]). The rule in paragraph (e) was introduced at the time of Spanish accession to the European Community precisely because of the specificity of the Spanish social security system regarding invalidity and old age, which does not rely on the concept of earnings or contributions but rather on the *'base de cotización'* (basis for contributions). And this analysis of the legislation shows, clearly I think, that the intention was to adjust the Regulation to the new social security scheme which entered the Community sphere upon the accession of Spain.

Moreover, the conclusion which I have just suggested is supported by the fact that the provisions of Annex VI, D, 4, introduced in 1992 in relation to Spain, again refer to the actual 'base de cotización' of the insured person. [21] That concept is therefore specific to the Spanish legislation and characterizes the latter as seen by the Community legislature. [22]

39. Faced with such unequivocal legislative provisions, I think it may be concluded, with regard to the first question from the national

19 — Of course, the quotient arrived at by dividing the sum of several amounts is equivalent to the quotient arrived at by dividing the sum of the averages of those same amounts by the same divisor. It therefore seems legitimate to consider the system used under the Spanish legislation — for which the mathematical formula is annexed to the said Law No 26 of 31 July 1985 — to be in conformity with the criteria laid down in the Community legislation.

20 — See the order for reference, p. 7 (3M9413822), last line: 'In the opinion of this Chamber — and it is the almost unanimous opinion of the Spanish judicial institutions — it seems that the correct interpretation is the first', namely that the Spanish scheme is covered by the rule in Article 47(1)(e).

21 — Council Regulation No 1248/92, which amends Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 7, and in particular p. 24).

22 — A last clarification is called for in response to an objection raised by the appellant, referred to in footnote 18. As stated, the Article 47 rules are additional to those contained in Article 46(2)(a). They therefore presuppose that, in Type B schemes, calculation of the theoretical amount is based on all the insurance periods completed by the worker under the legislation of the Member States to which he has been subject, whereas, as stated, in Type A schemes that amount is determined in accordance with the procedure laid down by national legislation. The rule in paragraph (e) merely states that the *calculation* of that amount must be based on the average contribution recorded whilst the worker was subject to legislation of that type. In that respect therefore it is not qualitatively different, in my view, from the other provisions of paragraphs (b) and (c) of the same article. In fact, on the basis of those rules too, calculation of the theoretical amount must always be based on what is 'determined' and 'corresponds' to the periods completed under the legislation applied by the competent institution. Unlike the appellant, I do not therefore consider that that provision should be regarded as constituting *in itself* a breach of the aggregation requirement laid down by Article 51 of the Treaty simply because, within the scheme of those provisions, that operation is taken for granted.

court, that the provisions governing this case are those of Article 47(1)(e) of the Regulation. The fourth and fifth questions from the national court must therefore be regarded as devoid of purpose.

40. There thus remain to be considered the second and third questions, which are concerned specifically with the rule in Article 47(1)(e) and seek clarification as to the way in which that provision is to be applied.

41. I shall start with the second question. In it the court mentions different possible readings of that provision. Let us consider the following interpretation. According to the abovementioned *Reichling* judgment, the rule in Article 47(1)(e) is to be interpreted in the light of the principles laid down in Articles 48 and 51 of the Treaty, so as to confer on individuals the right to a social security benefit linked to their earnings in the last State in which they resided during the reference period.

42. In that case the Court in fact held: 'where under the applicable legislation of a Member State the amount of the invalidity benefit depends on the remuneration received by the worker at the time when the invalidity occurred, and the worker in question was not at that time subject to the social security system of that State because he was working in another Member State, *the competent institution must calculate the theoretical amount of benefit on the basis of the remuneration last received by the worker in the other Member State*' (emphasis added). [23]

43. That conclusion, it should be remembered, was inferred from the 'fundamental' principles underlying the social security system, as laid down by Article 51 of the Treaty. As Advocate General Jacobs pointed out in that case, Regulation No 1408/71 is intended to play a part in ensuring freedom of movement for workers by securing for migrant workers and their families aggregation, for the purpose of acquiring and retaining the right to benefit and of *calculating the amount of benefit,* of all the periods taken into account under the laws of the several countries. [24]

44. The application of those principles to the present case would result in the invalidity benefit due to the Spanish worker being calculated on the basis of what he earned in Germany during the reference period. The average of the worker's 'bases for contributions' over the last 84 months of his employment, as provided for by the Spanish legislation, corresponds, in other words, to 'the last wage received' as envisaged by the Belgian legislation. In the laws of both countries, those parameters serve to establish the theoretical amount on the basis of which the actual amount of the invalidity benefit is then determined. The mechanisms have the common aim of adjusting the social security benefit to the actual earning capacity of the worker prior to his invalidity.

23 — Operative part of the judgment in Case C-406/93 (cited in footnote 10).

24 — Opinion in Case C-406/93, cited above, paragraph 12.

45. Only if that functional assimilation of the Spanish and Belgian systems is taken as a starting point will it be possible to deal with the present case on the basis of the territorial fiction adopted by the Court in its earlier decision. The theoretical amount payable by the competent Spanish institution would have to be calculated by reference to the amount received by the person concerned in another Member State, in this case Germany. That logical step was anticipated by the national court when it stated: 'it is necessary to resort to the fiction of considering that the territory of another Community State ... forms part of our own territory and, therefore, to see whether, under Spanish legislation, contributions would have been made and, if so, on what basis'. [25]

46. However, the argument just described is not convincing. It is based on the assumption that the Spanish system must be placed side by side with others, which are nevertheless, for the present purposes, dissimilar; but it overlooks the wider context of the Community legislation and disregards the meaning of the provisions to which the Regulation expressly refers for determination of the invalidity benefit.

47. My reasons for reaching this conclusion are borne out by analysis of the second alternative put forward by the national court, which the Kingdom of Spain supports. It will be remembered that it is as follows: the basis for contributions must be calculated in accordance with national legislation and not take account of contributions paid in another Member State. It is a viewpoint which has the merit of treating the aim of the Regulation as coordination and not harmonization of national provisions, and of having correctly apprehended the provisions laid down expressly in connection with the accession of the Kingdom of Spain to the Community.

48. The various provisions of Article 47 make it clear that the competent institution must calculate the theoretical amount — on the basis of which it will then be required to pay the social security benefits payable by it by virtue of the principle of apportionment — solely on the basis of what the worker actually contributed to it. The rules thus interpreted show, therefore, that the Regulation was not intended to detract from the other, and likewise fundamental, requirement of economic and financial balance of the national schemes. That balance of course has repercussions for the ability to function of the systems which the Community legislation seeks to coordinate, and ultimately for the effectiveness of the social security protec-

25 — See the order for reference (3M9410833) at page 9, paragraph B. The fiction to be resorted to would, however, result in applying the Spanish provisions which impose an upper limit on the benefit by providing for an upper limit on contributions (see footnote 3). According to the appellant and the Commission, both in their written submissions and at the hearing, that was the system in force under the Social Security Convention between the Federal Republic of Germany and Spain of 4 December 1973 (see BOE No 258 of 28 October 1977, p. 2295), signed before Spain's accession to the European Community. I consider that the relevant provisions in that regard are those in Chapter I of Title III, 'Old-age, invalidity and survivorship', to which express reference is made by Article 26 of Chapter II ('Invalidity'). Article 25(1)(b), mentioned by the appellant in his submissions, reads: 'Where all or part of the contribution period elected by the applicant for calculation of the basis of his benefits has been completed in the Federal Republic, *the Spanish competent institution shall determine that basis by reference to the rates of contribution in force in Spain during that period or part thereof for workers in the same occupational category as the person concerned*' (emphasis added). I think it is appropriate to stress the fact that the reference made in that provision does not seem to be to the pay received by the worker in Germany but to the bases for contributions in force *under the Spanish provisions* for workers belonging to the same category as the migrant worker. According to my reading of the provision, therefore, the bases for contributions to be applied for calculation of the pension must be linked to the income that the migrant worker would have received had he continued to work in Spain, so that the wages received in Germany do not fall to be considered.

tion available to the migrant workers themselves. Thus, *without drawing a distinction between Type A and Type B systems*, the Regulation refers expressly and generally to provisions governing old-age benefits. Under the Community rules, every competent institution, as regards both the latter benefit and the invalidity benefit, *bears responsibility* on the basis of what the worker *actually paid* when he was subject to the applicable national law, and not on any other basis. [26]

49. Now, as has been seen, Article 47(1)(e) must extend to Type A social security schemes. That is a rule which is clearly compatible with the second sentence of Article 46(2)(a) where the scheme applicable is of the Spanish type. As we have seen, under the Spanish system the theoretical amount of the benefit is based on the concept of average basis for contributions during the reference period; the rule in paragraph (e) simply indicates the wage parameters to be taken into account for that purpose. It makes clear that the average contributions on which the theoretical amount of the invalidity benefit is to be calculated must be determined 'exclusively by reference to those periods of insurance completed under the legislation of the said State'. That means that the theoretical amount of the invalidity benefit payable to the appellant is to be calculated in accordance with the parameters laid down by national law, by reference to the contributions paid by the person concerned to the Spanish institution *when he was subject to the laws of his country of origin* (that is to say in the years before he emigrated to Germany), subject, of course, to application of the rules in force when the benefit is paid. I am therefore of the opinion that the rule in Article 47(1)(e) was adopted to clarify the provisions of the second sentence of Article 46(2)(a). [27]

50. Having set out the reasons for which I prefer, in its general outline, the view advanced by the Kingdom of Spain, I must nevertheless add that it can be upheld only if the fundamental principles laid down by Article 51 of the Treaty, which are also relevant here, are upheld.

51. Rigid application of the system, as presently conceived, that is to say without adjustments to mitigate its effects, may prove harmful to migrant workers. Suffice it to consider the consequences of linking the amount of the invalidity benefit to a specified basis for contributions by reference only

26 — Case C-146/93 *McLachlan* v *CNAVTS* [1994] ECR I-3229, paragraphs 29 and 30. See also the Opinion of Advocate General Lenz in that case (p. I-3231, paragraph 21).

27 — The conclusion just reached allows me, briefly, to clarify the interpretation of the national rules given by the Tribunal Supremo. That court has consistently held that the contributory basis to be taken into account in determining invalidity benefit is the average of the maximum and minimum values under the provisions in force in the reference period (see most recently the judgment of the Fourth Chamber of the Tribunal Supremo of 27 March 1995, in *Gaceta Jurídica* B-105, July-August 1995, and references therein to other cases). However, that case-law, even though it may be based on national legislation (a view rejected, however, by the referring court and the appellant), is not compatible with the requirements of the regulation. The only periods of insurance taken into account under Spanish legislation, pursuant to Article 47(1)(e), are those completed in that country by the person concerned before he moved to Germany. It is therefore solely by reference to the contributions required in that period that the average contributions must be calculated for the purposes of the invalidity benefit. I think it is appropriate to stress here that a similar (but certainly not the same) interpretation to that which I feel I must recommend to the Court today was put forward in the dissenting view of Mr Cachon Villar concerning the abovementioned judgment of the Tribunal Supremo. See *Gaceta Jurídica* B-105, July-August 1995, p. 61.

to the insurance periods completed under the legislation of the competent State. In most cases the wages to be taken into account for social security purposes would date back to years long past, so that the social security benefit would be reduced, as a result of inflation, to rather low values in today's terms. Furthermore, and with reference more particularly to the Spanish case, the approach whereby national law places on the same footing a migrant worker and a worker not subject to the obligation to pay contributions cannot be regarded as compatible with the principles of Community law. The ultimate effect of that legislative approach is to disregard the fact that a migrant worker does not lose his status as a worker or the safeguards attaching to that status merely because he goes to work outside his country of origin.

52. That said, we can outline the criteria which national law must observe if the principles of Community law are to be upheld as regards both the amount of the benefit and the prohibition of discrimination against migrant workers as compared with those who stay in their country of origin. In my view, the proper solution in this case rests on the provisions added by the abovementioned Regulation No 1248/92 to Annex VI of Regulation No 1408/71, with regard to Spain (heading D, 4), as follows:

'(a) 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 contribution to the Spanish social security.*

(b) The amount of the pension obtained *shall be increased by the amount of 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' (emphasis added).

53. The above provisions, it is true, are only indirectly relevant to this case. They came into force after the material time and cannot be directly applied to this case. However, it seems to me that, essentially, those provisions merely clarify the existing provisions of the Regulation by providing that the average contributions are to be determined '*exclusively by reference to those periods of insurance completed under the legislation of the said State*' (emphasis added). The provisions added to the annex merely serve the purpose of expounding a principle, that of the *effectiveness* of social security benefits, which is already to be found both in paragraph 2 of Article 47 [28] and, specifically in relation to subsequent adjustment of invalidity and old-age benefits, in Article 51 of the Regulation, entitled 'Revalorization and recalculation of benefits'. [29] I consider that that principle underlies, more generally, the equitable operation of the system provided for in the Regulation in order to ensure its compatibility with the principles laid down in Article 51 of the Treaty.

28 — Article 47(2) provides: 'The provisions of the legislation of a Member State concerning the revalorization of the factors taken into account for the calculation of benefits shall apply, as appropriate, to the factors to be taken into account by the competent institution of that State, in accordance with the provisions of paragraph 1, in respect of the periods of insurance or residence completed under the legislation of other Member States'.

29 — See most recently Case C-301/93 *Bettaccini* [1994] ECR I-4361, and also Case 7/81 *Sinatra* [1982] ECR 137.

54. In those terms, the provision offers us a clear indication of how Article 47(1)(e) is to be understood. Adopted in 1992, it gives effect to the principle that the actual contributions paid by the worker must be *updated*. I repeat, it merely expounds the procedures for the application of Article 47 to Spain. [30]

55. The principle of updating the contributions paid reflects a fundamental requirement of every social security system. The updating must of course be applied so as to be *effective*. That result is pursued in various ways. In the first place, it is important to adjust the original contribution, bringing the nominal value of the benefit as far as possible into line with the real value. In the second place, the updating must take account of the variable represented by the *increments*. I use that term to cover all the increases of the social security benefits provided for under Spanish legislation for the category to which the worker belongs. The benefits to be increased are therefore those to which the worker would have been entitled by virtue of the fiction of uninterrupted employment in the latter Member State.

Thus, a principle of distributive justice governs the operation of the system envisaged by the Regulation. The rules giving effect to it must be taken into account by the national institution responsible for awarding the invalidity benefit and calculating its amount.

56. The other problem derives, as I have indicated, from the fact that the Spanish legislature took the view that migrant workers are not under an obligation to pay contributions during the reference period, so as to reduce to the trade-union minimum the amount of the benefits payable to them. That fiction (so similar to the one criticized by the Court in *Reichling*) conflicts with the principles of Community law in that the migrant is not treated as a worker and he is the subject of unjustified discrimination as compared with workers who have not exercised their right of free movement. I am in that regard fully in agreement with what Advocate General Jacobs said in his Opinion in that case: 'The aims and scheme of the Regulation would be seriously undermined if, in the case of a migrant worker, a Member State applying Type A legislation were permitted to replace the normal calculation by a *wholly artificial* one which led to a much lower theoretical amount than the amount of benefit payable to a worker in an equivalent situation who had been subject to the legislation of that State alone' (emphasis added). [31] The result of treating Mr Lafuente Nieto as not being subject to the obligation to pay contributions and the consequent application to his case of the trade-union minimum wage is to create a legal fiction which makes his situation less favourable than it would have been if he had not exercised his freedom of

30 — Thus, the proposal for a regulation also stated: 'Le nouveau point 4 de l'Annexe VI, rubrique D, *précise* les modalités d'application de cet article pour l'Espagne' (emphasis added) — see the abovementioned Commission document COM (89) 370 final, of 20 July 1989, p. 32. See also the 32nd recital in the preamble to Regulation No 1248/92. Moreover additional evidence of the merely explanatory nature of the content of Annex VI is provided by the fact that it was not felt necessary, when it was adopted, to make any changes to the wording of Article 47(1)(e).

31 — Opinion in Case C-406/93, cited above, paragraph 17.

movement: the result is incompatible with the aims and principles of Article 51 of the Treaty.

57. I consider therefore that the answer to the national court's second question should be that the rule in Article 47(1)(e) must be construed as follows: in a social security scheme in which invalidity benefit is calculated on the basis of average contributions, the competent institution must determine the theoretical amount of that benefit by taking account of the actual bases for contributions, that is to say what the worker actually paid during the period of insurance completed under the legislation administered by that institution. As indicated, the bases for contributions should nevertheless be properly revalorized and increased to take account of inflationary effects of monetary depreciation and any increases in social security that would have accrued to the person concerned if he had continued to work in his Member State of origin.

58. That conclusion leads on to the third question, which seeks to ascertain whether the rule at issue conforms with the principles laid down by the Treaty concerning the free movement of workers.

59. The answer to that question flows straightforwardly from what has been said above. The provision in question, construed in the manner indicated, can operate fully in conformity with the principles under consideration here. A migrant worker's position will not in fact be adversely affected because he has exercised his freedom of movement. The average of his contributions, on which the calculation of the invalidity benefit payable to him will be based, will, when updated, represent the amount actually paid by him into the Spanish social security scheme when he was covered by it: to that must be added, as a result of the incremental machinery, any increase that would have accrued to the worker if he had continued to work in Spain. The solution is fair. The wages received in another Member State are not taken into account. To offset this, the sums paid by the worker in the past are brought into line with today's values.

60. The adoption of that position is conducive — with reference both to the classification of the Spanish scheme and to the procedures for calculating the theoretical amount of the basis of the benefit — to a useful and correct interpretation of the provisions introduced when the Kingdom of Spain joined the Community. It corrects the disparity between schemes that adversely affects Spanish workers who have exercised their right of free movement and, at the same time, confers no privilege on migrants as compared with 'stay-at-home' workers, as would happen if the wage basis adopted were the income last received by the worker in Germany. In view of the wage differences still existing between Germany and Spain, that would unduly benefit a worker who had exercised his freedom of movement as compared with one who had not. The result is fully compatible with Article 51 of the Treaty: the worker is not placed in less favourable circumstances than if he had always worked in one Member State. [32]

32 — *Reichling*, cited above, paragraphs 23 to 26. See also Case 24/75 *Petroni* [1975] ECR 1149, paragraph 13; and Case C-199/88 *Cabras* [1990] ECR I-1203, paragraph 24.

Finally, and it is an argument which cannot be left out of account, the solution proposed does not call in question the financial stability of the Spanish social security scheme because its impact on it is directly linked to the amounts actually paid by the worker. And that is fully in conformity with the logic and aim of the provisions of Article 47 of the Regulation.

61. The foregoing reasoning confirms that the appellant's view must be rejected. I therefore suggest that the Court state in reply to the third question that the rule in Article 47(1)(e) does not conflict with the principles contained in Articles 48 and 51 of the Treaty.

The sixth preliminary question

62. We now come to the sixth question, concerning application of the apportionment mechanism to invalidity benefits by the competent Spanish institution.

63. This question raises problems of less complexity than the previous ones and can be resolved by recognizing that the apportionment made by the Spanish administration is substantially correct.

64. Article 46(2)(c) (now Article 47(1)(a)) provides:

'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' (emphasis added).

65. The national court — unlike the respondent — considers that, in making the apportionment, the competent institution must, in accordance with the provision under review, take account only of the periods completed by the worker under the legislation of other Member States that are *necessary to give rise to entitlement to the benefit* under national legislation. That would result in apportionment of the part of the benefit payable by Spain on the basis not of the whole period of employment in all Member States but only of the minimum period laid down by Spanish legislation. The appellant shares that view, claiming that, pursuant to Article 45(1) of the Regulation, the periods of insurance completed under the legislation of other Member States must be taken into account by the competent institution 'to the extent necessary' for the acquisition, retention or recovery of the right to benefits. The term 'maximum period' must therefore be taken to be the minimum period necessary for entitlement to the benefit.

66. The question must be dealt with by reference to the rationale of the provision. The provision at issue is intended to limit the exposure of the competent institutions of the Member States where their legislation lays down a maximum period for the acquisition of full benefit. In that regard, as the Commission recognizes, the provision relates to schemes of the cumulative type rather than those based on risk.

67. The provision must be construed taking due account of the mechanism of apportionment. [33] The competent institution, in determining the *theoretical amount*, cannot determine an amount higher than the maximum benefit available to the person concerned under the applicable legislation. Otherwise, it would, when determining the *actual amount*, find itself obliged to pay the worker a benefit greater than that payable to him as the maximum benefit in respect of the insurance periods completed under the national social security scheme. The second sentence of the provision in question clarifies the point: the benefit paid may not exceed the amount of the 'full benefit' provided for by the applicable national legislation. This approach is clearly different from that of the risk-based benefit, for which the theoretical amount is calculated regardless of the length of the periods of insurance completed. In the latter case, the requirement of the 'maximum period required by the legislation of one of these States for receipt of full benefit' is not met.

68. The view of the national court according to which the term 'maximum period' must be understood as a 'minimum period' must therefore be rejected. Apart from anything else, that is a reading which distorts the apportionment mechanism and results in the competent Spanish institution being obliged to make a payment not required of it by the Regulation. The Community rules state unequivocally (Article 46(2)(b)) that the actual amount is to be determined '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* ...' (emphasis added). The portion payable by the Spanish institution must therefore be calculated by comparing, as far as the variable temporal element is concerned, the insurance periods completed by Mr Lafuente Nieto in Spain

33 — That is why I cannot share the view put forward by the appellant. He relies on a provision, Article 45(1), which is not directly relevant to the problem under discussion. That provision deals only with the procedure for aggregation, and there is no connection between it and the problems of awarding the benefit or calculating the apportionment, the rules for which, as stated, are to be found elsewhere. In other words, it is one thing to allow, for *the right to arise*, a requirement that account be taken of periods completed under another legislation to *the extent necessary* under national legislation (a provision clearly intended to ensure that a worker does not 'lose' contribution periods completed under different legislations); it is quite another thing to establish on what bases each competent institution will be responsible for actually paying out the benefit awarded to the worker by virtue of aggregation (those rules, by contrast, being linked with the requirement of giving the Member State the power to pay a benefit corresponding only to the period of insurance completed by the worker under its own legislation). As may be easily understood, these aspects are different and must remain so otherwise the logic and aims of the regulation will be distorted.

and those comprised in his entire working career before materialization of the risk. [34]

69. Furthermore, indirect confirmation of the correctness of that conclusion is to be found in the amendment to the Regulation made by Regulation No 1248/92 which, first, moved the provision to Article 47 (subparagraph (a)) — thus placing it among the 'Additional provisions for the calculation of benefits' — and, secondly, added a parenthesis whose importance must not be overlooked:

'The provision shall not apply to benefits, the amount of which does not depend on the length of insurance'.

70. That addition confirms that, by virtue of the logic inspiring it, the provision must be deemed to apply only to social security benefits governed by schemes of the cumulative type (Type B) and that it cannot therefore apply to the present case.

71. Having thus set out my reasoning, let me consider the appropriateness of limiting the effects of the judgment in time. I am well aware of the fact that the Court, by virtue of the general principle of legal certainty which prevails in the Community legal order, may limit the effects of its decisions only in exceptional cases. [35]

72. In this case, however, there are grounds justifying such a limitation. The Community provision objectively created uncertainties in Spanish law concerning its correct interpretation. It will be remembered that as well as the approach taken by the Spanish Tribunal Supremo (which I consider not to be in conformity with the requirements of the Regulation) there are the various (and often conflicting) solutions adopted by individual national courts which, in certain respects, go to the root of the present preliminary questions. Moreover, the fact that the Council itself, by Regulation No 1248/92, considered itself obliged to clarify the principles governing the calculation of invalidity pensions highlights the objective difficulties encountered in defining the social security rights of migrant workers and the related obligations of the competent Spanish institution.

34 — The same view is expressed by Advocate General Jacobs in his Opinion in Case C-406/93: 'The underlying aims and principles are nevertheless the same for both types of legislation [Type A and Type B]. Under Article 46 each State calculates the full amount of benefit due under its legislation for a person in the migrant worker's position (the theoretical amount) and then reduces it in proportion to *the period of insurance or residence in its territory*' (paragraph 16). I consider, moreover, that the provisions of the Convention between the Federal Republic of Germany and Spain (cited in footnote 25) also embody an apportionment mechanism which meets those criteria. Article 22(3)(b) of that instrument provides: 'The (competent) Institution (of each Contracting State) shall calculate ... the part of that pension corresponding to the ratio between all the insurance periods completed by that person before the event giving rise to the benefit, under the domestic provisions which that institution is required to apply, and *all the insurance periods which that person has completed under the legislation of both States*' (emphasis added).

35 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 142.

73. For those reasons, the effects of the judgment — having regard *inter alia* to the provisions of Article 95a(1), (4), (5) and (6) of Regulation No 1408/71 [36] — should be limited to the period following the entry into force of Regulation No 1248/92, with the sole exception of applications for recalculation of an invalidity pension where a worker entitled to the benefit has brought an action yet to be determined by a final judgment. In the event of the Court's accepting my suggestions, its judgment should not have any effect on legal relationships that are already settled.

Conclusion

Having regard to the foregoing considerations, I suggest that the Court give the following answers to the questions referred to it by the national court:

(1) The Spanish legislation on invalidity benefits, which provides that the calculation of invalidity benefits is to be based on an average basis for contributions, must be treated as falling within the scope of Article 47(1)(e) of Regulation No 1408/71 as in force in July 1990.

36 — Article 95a, inserted by Regulation No 1248/92, provides:
'1. Under Regulation (EEC) No 1248/92, no right shall be acquired for a period prior to 1 June 1992.
...
4. The rights of a person to whom a pension was awarded prior to 1 June 1992 may, on the application of the person concerned, be reviewed, taking into account the provisions of Regulation (EEC) No 1248/92.
5. If an application referred to in paragraph 4 is submitted within two years from 1 June 1992, the rights acquired under Regulation (EEC) No 1248/92 shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the persons concerned.
6. If the application referred to in paragraph 4 is submitted after the expiry of the two-year period after 1 June 1992, rights which have not been forfeited or not barred by limitation shall have effect from the date on which the application was submitted, except where more favourable provisions of the legislation of any Member State apply.'

(2) The rule in Article 47(1)(e) must be interpreted as meaning that, in a social security scheme in which invalidity benefit is calculated on an average basis for contributions, the theoretical amount of the latter is to be determined by taking account of the actual contributions paid by the worker when he was subject to the social security legislation administered by the competent institution, duly revalorized and increased to take account of the inflationary effects of monetary depreciation and any increases in social security deriving from legislative measures that would have applied to the category of workers to which the person concerned would have belonged if he had continued to work in Spain.

(3) The rule in Article 47(1)(e), thus construed, does not conflict with the principles contained in Articles 48 and 51 of the Treaty regarding freedom of movement for workers.

(4) The fourth and fifth questions do not require to be answered.

(5) The term 'maximum period' used in Article 46(2)(c) of the Regulation as in force in July 1990 cannot be interpreted as referring to the minimum period provided for by Spanish legislation for entitlement to an invalidity pension. The portion of benefit payable by the Spanish institution must be established by reference to the ratio between the periods of insurance completed by the worker in Spain and those comprised in his entire working life.