OPINION OF ADVOCATE GENERAL LENZ

delivered on 24 March 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The reference for a preliminary ruling from the Chambre Sociale of the French Cour de Cassation which gives rise to these proceedings raises a question of the interpretation and application of Article 49 of Regulation (EEC) No 1408/71 [1] with respect to the determination of the rate and amount of an old-age pension. The national court seeks an interpretation in particular in the context of the principle of equal treatment laid down in Article 3(1) of the regulation.

2. The facts at the origin of the main proceedings are as follows. The plaintiff in the main proceedings (hereinafter 'the plaintiff'), who was born on 6 April 1924 and has dual French and British nationality, was employed during his working life both in Great Britain and in France. He was employed first in Great Britain from 1948 to 1955 and then from 1956 to 1985 in France, where he was made redundant on 16 December 1985 at the age of 61. He thereupon applied to the competent unemployment insurance institution, Assedic, [2] in order to receive unemployment benefit. On the basis of Article L.351-18 of the Code du Travail and the implementing Decree 82-991 of 24 November 1982, which exclude from unemployment benefit claimants who are over 60 years old *and* have completed 150 quarterly periods recognized for the purposes of pension insurance, Assedic referred the plaintiff to the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (hereinafter 'the CNAVTS').

3. On 15 May 1986 he made an application to the CNAVTS, giving as the date for receipt of the pension 1 May 1989, the first day of the month following his 65th birthday. The application was returned to him on 25 August 1986 with the observation that the date for receipt of the pension was too far ahead. The CNAVTS invited the plaintiff

* Original language: German.

1 — Consolidated version of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 C 325, p. 1), in the version relevant for these proceedings, that of Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

2 — Association pour l'emploi dans l'industrie et le commerce.

to reformulate the application, indicating that there were two possibilities:

— First possibility: the plaintiff had at least 150 quarterly periods, completed under the French and British systems without overlapping. Since the English legislation provided for payment of a pension only from the age of 65, the pension insurance institution would pay the claims exclusively on the basis of the French system, for which reason the choice of the date from which the plaintiff received the pension was of importance.

— Second possibility: the plaintiff had not completed 150 quarterly periods. The pension insurance institution would refuse the application, so that Assedic could continue to pay him benefits.

4. On the date when the plaintiff was made redundant he had completed 120 quarterly periods under the French system and 53 quarterly periods under the British system. He made a fresh application to the CNAVTS dated 13 August 1987. On the basis of the 120 quarterly periods completed under the French social security system, the plaintiff was allocated a pension which in his submission amounted to approximately two-thirds of a full pension, which he would have been entitled to if he had completed 150 quarterly periods under the French system.

5. The French Government has stated that the plaintiff received a supplementary benefit from Assedic at the expense of the French State until his 65th birthday, when his contingent right to a pension in Great Britain became an actual right to a benefit.

6. The plaintiff considered himself disadvantaged by being allocated only a (partial) pension and took legal proceedings. From the administrative procedure before the pension insurance institution through to his submissions to the Cour de Cassation the plaintiff's argument was that either he should be awarded a full pension from the French pension insurance institution on the basis of the 150 completed quarterly periods, or else only the 120 quarterly periods completed under the French scheme should be taken into account, which would have resulted in his continuing to receive benefits from the unemployment insurance scheme.

7. In addition to objections of illegality based on national law, the plaintiff considers that the legal position conflicts with Community law, since it has discriminatory effects compared with employees who have spent their entire working life subject to the French social security scheme. A comparable person who had completed 150 quarterly periods under the French insurance scheme would have been entitled to a full pension, whereas he had been awarded only a partial pension. An employee who had completed only 120 quarterly periods under the French scheme, without the quarterly periods completed by him in another Member State

being taken into account, would also be better placed, since he would be able to continue claiming a benefit under the unemployment insurance scheme. That unequal treatment is in his opinion incompatible with the prohibition of discrimination in Article 3(1) of Regulation No 1408/71 and with Article 51 of the EEC Treaty. [3]

8. The Cour de Cassation, which has to decide on the plaintiff's claim as the highest court of appeal, refers the following question to the Court of Justice:

Are Article 3(1) and Article 49 of Regulation No 1408/71 of 14 July 1971 to be interpreted, where entitlement to an old-age pension is available from the age of 60 under the basic statutory scheme of a Member State to a worker under the age of 65 who has completed periods of employment in that State and in another Member State where there is no entitlement to a pension before the age of 65 years, as precluding the taking into account of the periods completed in the latter State solely in order to determine the rate of the pension which may be paid immediately by the institution of the former State?

9. The plaintiff, the French Government, the German Government and the Commission have taken part in the proceedings. I will return to the arguments of the parties as part of my analysis of the law.

B — Analysis

The question referred for a preliminary ruling

10. The question formulated by the national court suggests that it desires to be informed whether the periods of insurance completed by the plaintiff in Great Britain are to be taken into account only for determining the rate of the pension, or whether they should also be taken into account in determining the amount of the benefits. That would mean that the national court was concerned only with the question whether the plaintiff can claim only a partial pension on the basis of the 120 quarterly periods completed in France or full pension on the basis of the total of 150 relevant quarterly periods.

11. The German Government evidently understood the question in that way, adopt-

3 — From 1 November 1993 the EC Treaty, in accordance with the Treaty on European Union of 7 February 1992 (OJ 1992 C 224, p. 1).

ing the following starting point in its observations:

'These proceedings for a preliminary ruling concern the basic question whether a Member State under whose legislation there is a right to payment of a pension must also pay a benefit on the basis of periods of insurance completed in another Member State, because no right to a benefit has yet accrued in that State, in this case because of a higher age limit.'

The observations further state that

'The plaintiff would like to be treated as if he had worked in France all his life, with the consequence that a period of employment of 150 quarterly periods would have to be taken into account in calculating the French pension.'

12. It can be seen from the context of the question referred for a preliminary ruling and also from the submissions of the parties that the question as to the taking into account of periods of insurance completed in another Member State when calculating the amount of the benefit is only part of the point of Community law involved. From the point of view of Community law it is already doubtful whether periods of insurance completed in another Member State could or should be taken into account in determining the rate of the pension. The Court of Justice has to interpret questions referred for a preliminary ruling in their context in order to give the national court an answer which is complete from the point of view of Community law and to provide it with all the criteria it needs for reaching a decision in the case pending before it. Both aspects of the point of Community law must therefore be examined below.

Taking into account of periods of insurance completed in another Member State for the calculation of the amount of the benefit

13. Calculation of old-age pensions [4] under Regulation No 1408/71 takes place in accordance with Article 44 et seq. thereof. Article 44(2) states that:

'Subject to the provisions of Article 49, when a claim for the award of a benefit is lodged, such award must be made having regard to all the legislations to which the employed or self-employed person has been subject. Exception shall be made to this rule if the

4 — And other pensions too in certain cases, such as invalidity benefits, widows' pensions and orphans' pensions (see Article 39(5) and Article 44(1) of Regulation No 1408/71 as amended).

person concerned expressly asks for postponement of the award of old-age benefits to which he would be entitled under the legislation of one or more Member States.'

14. The award procedure is therefore set in motion by the application from the claimant. The plaintiff has submitted that he only made his application to the CNAVTS for award of his pension because he was compelled to do so. [5] That submission is to be understood as meaning that he would have preferred benefits under the unemployment insurance scheme.

15. Article 45, in fulfilment of the obligation stated in Article 51(a) of the EC Treaty, regulates the 'consideration of periods of insurance or residence completed under the legislations to which an employed or self-employed person has been subject, for the acquisition, retention or recovery of the right to benefits'. [6]

16. Article 46 contains the actual provisions on the calculations to be carried out by the competent institution for the award of the benefit. The calculation is necessarily done in several stages.

17. *Firstly*, the competent institution calculates the independent benefit, also known as the autonomous benefit, in accordance with Article 46(1). To do that it determines, in accordance with its own legislation, the amount of benefit the employed person would be entitled to under that legislation, taking into account only the periods of insurance or residence completed under that legislation. [7] Article 46(1) specifically states that the calculation is performed 'without application of the provisions of Article 45', that being the provision on the taking into account of periods of insurance or residence completed under the legislation of another Member State.

18. *Secondly*, the competent institution calculates the pro rata benefit, also called the proportionate benefit, under Article 46(2). That calculation also comprises two steps. The competent institution first, applying Article 45, adds together all the periods completed under the legislations of the various Member States and on that basis calculates a theoretical amount of benefit, as if all the periods to be taken into consideration had been completed under the legislation administered by it. Only after that does the competent institution reduce the theoretical amount proportionately in the ratio which the periods actually completed under that legislation bear to the periods completed under the legislations of one or more other Member States.

5 — 'Contraint et forcé', see page 3 of the plaintiff's observations.

6 — See the heading of the article.

7 — See the judgment in Case C-342/88 *Spits* [1990] ECR I-2259.

19. *Thirdly*, the competent institution, in accordance with the second subparagraph of Article 46(1) in the earlier version or Article 46(3) in the amended version, [8] compares the amount of the independent benefit with the amount of the proportionate benefit. Only the higher of the two amounts is relevant for the final calculation of the benefit.

20. The calculation of the proportionate benefit under Article 46(2) is the method of calculation which is typical of Community law, since by virtue of Community law [9] periods completed under another legislation also enter into the calculation with reference to the acquisition of the right. It must not be forgotten, however, that both calculations, that for calculating the independent benefit and that for calculating the proportionate benefit with the ensuing comparison, are requirements of Community law.

21. The award of the benefit made by the CNAVTS in the national proceedings corresponds to the calculation of the proportionate pension prescribed by Article 46(2). It is consistent with Community law in that the quarterly periods completed in another Member State — in this case Great Britain — entered into the calculation to establish a contingent right. The proportionate reduction of the theoretical amount to a benefit corresponding to the 120 quarterly periods completed under the French scheme was also carried out in conformity with the provisions of Community law on calculation. The periods completed in the system of another Member State do indeed have an effect for the establishment of the contingent right, in other words the acquisition of the right to the benefit, but they do not have the effect of increasing the benefit. The periods of insurance completed 'elsewhere' moreover do not have the effect of increasing the benefit with respect to calculation either of the independent pensions or of the proportionate pension. In the result, each competent institution is liable proportionately for the benefit acquired under its legislation.

22. The intermediate conclusion must therefore be that the plaintiff is not entitled under Community law to claim from the French institution a pension corresponding in amount to 150 quarterly periods.

Taking into account of periods of insurance completed in another Member State for the acquisition of the right

23. As I have already indicated above, that by no means exhausts the problems of Community law involved.

8 — See note 1.

9 — See Article 51 of the EC Treaty and Article 45 of Regulation No 1408/71.

24. Article 49 of the regulation contains a special rule for the calculation of the benefit when the person concerned does not simultaneously satisfy the conditions laid down by all the legislations under which he has completed periods of insurance or residence. [10] The plaintiff's case is such a case. The national court has therefore expressly asked for an interpretation of Article 49.

25. Article 49(1) states that:

'If, at a given time, the person concerned does not satisfy the conditions laid down for the provision of benefits by all the legislations of the Member States to which he has been subject ... but satisfies the conditions of one or more of them only, the following provisions shall apply:

(a) each of the competent institutions administering a legislation whose conditions are satisfied shall calculate the amount of the benefit due, in accordance with the provisions of Article 46 ...'

10 — Since being amended by Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), Article 49 also applies in cases where the person concerned expressly asks for postponement for the award of old-age benefits; see Article 44(2) and the second subparagraph of Article 49(1) of Regulation No 1408/71.

26. So far Article 49 contains a straightforward reference to the provisions on calculation in Article 46 of the regulation discussed above.

27. Article 49(1)(b), however, goes on to say:

'However:

(i) if the person concerned satisfies the conditions of at least two legislations without having recourse to periods of insurance or residence completed under the legislations whose conditions are not satisfied, these periods shall not be taken into account for the purposes of the provisions of Article 46(2).'

28. That special rule is certainly not applicable to the present case, since until his 65th birthday the plaintiff satisfies the conditions of the legislation of only one Member State. In those circumstances Article 49(1)(b)(ii) could apply; that provision reads as follows:

'If the person concerned satisfies the conditions of only one legislation without having recourse to periods of insurance or residence

completed under the legislations whose conditions are not satisfied, the amount of the benefit payable shall be calculated in accordance with the provisions only of that legislation whose conditions are satisfied, taking account of the periods completed under that legislation only.'

29. The parties disagree as to whether that provision applies in the present case. Thus the plaintiff's observations contain the phrase:

'it being understood that [the plaintiff] does not satisfy the conditions of either of the two cases in subparagraph (b)'. [11]

30. The French Government's observations, on the other hand, state that:

'More precisely, it is paragraph (1)(b)(ii) of Article 49 which must apply, since there is a right to a pension under French legislation only (in this case, the general scheme for employed persons), without its being necessary to take into account the periods completed in the United Kingdom'. [12]

31. Whether Article 49(1)(b)(ii) is applicable to the circumstances of the present case depends also on what meaning is attributed to it. In my opinion that provision assumes that the conditions for an independent pension are satisfied. The provision would then have to be understood as meaning that in the case of a right to an independent benefit, the benefit is determined by that method of calculation only, that is to say, the calculation of the proportionate pension and the ensuing comparison of the results of the two calculations do not take place.

32. It must be pointed out in clarification, in my opinion, that an independent benefit does not necessarily have to be a full benefit. An independent benefit can be characterized as follows: it must be a right to a benefit which is 'payable under national legislation alone on the basis solely of the periods completed under that legislation'. [13]

33. That approach, namely that an independent pension need not by any means be a full

11 — See page 9 of the plaintiff's observations.

12 — Pages 4 and 5 of the French Government's observations.

13 — See the *Spits* judgment, cited above, paragraph 12; see also Article 46(1).

benefit, is supported by the fact that it is perfectly possible for several independent benefits to exist alongside each other. Moreover, an independent benefit can be acquired on the basis of relatively short periods of insurance [14] compared with a complete insurance record, if that is provided for in the relevant legislation. If an independent pension was always a full benefit, the comparison prescribed in Article 46 of the independent benefit with the proportionate benefit would generally be superfluous, since the amount corresponding to a full benefit is the ceiling for a proportionate benefit. [15]

34. In its observations the Commission evidently assumes that an independent benefit must always be a maximum benefit. [16] In that respect the Commission proceeds from a false assumption. Although in two recent judgments [17] which also concerned the calculation of an independent benefit — in particular with respect to the applicability of anti-overlapping provisions — the independent benefit in question corresponded to a full pension, that characteristic is by no means a condition for the creation of an independent benefit within the meaning of Community law.

35. It is not for the Court of Justice to examine the French legislation to see whether the plaintiff is entitled to an independent pension as defined above. It is for the authorities of the Member State or the national court to apply national law to the facts. Nevertheless, the observations of the French Government permit the conclusion that that is the case. It is stated on page 5 of the observations that:

'Under Article L.351-1, first indent, of the French Social Security Code, "the old-age insurance scheme shall guarantee a retirement pension to an insured who requests payment thereof" (as Mr McLachlan did [18]) "from a specified age" (fixed at 60 by Article R.351-2), whatever the *rate* and *amount* [19] of that pension.'

36. In view of the independent benefit which most probably exists on the basis solely of the periods of insurance completed under the French system, the plaintiff's request could have been met by his not being excluded from the unemployment insurance scheme until he had acquired the right to a full benefit, whether in the form of an independent pension or by the cumulation of proportionate pensions (as in fact happened at the age of 65 years [20]).

14 — For instance, five or seven years (*Spits* case, cited above).

15 — Article 46(2)(c), former version; see also the judgment in Joined Cases C-113/92, C-114/92 and C-156/92 *Fabrizii and Others* [1993] ECR I-6707, paragraph 28.

16 — 'Mr McLachlan does not satisfy the conditions for an independent pension laid down by French legislation, in this case the completion of a period of insurance of 150 quarterly periods in France' (see page 7 of the observations). 'Mr McLachlan does not meet the conditions laid down by French legislation (150 quarterly periods) for him to claim equal treatment and thus receive an independent benefit (pension at full rate)' (see page 8 of the observations).

17 — Judgments in Case C-5/91 *Di Prinzio* [1992] ECR I-897 and in *Fabrizii and Others*, cited above.

18 — Under compulsion (contraint et forcé), according to his own submission.

19 — My emphasis.

20 — See the obligation to make a recalculation under Article 49(2) of the regulation and the French Government's submission with regard to the facts, page 6.

37. The above observations are made on the assumption that Article 49(1)(b)(ii) is applicable. I have assumed that that provision excludes the comparative calculation in Article 46. Even if Article 46 does apply, the legal consequences are comparable. For calculation of the independent benefit within the meaning of Article 46(1), the first stage in the calculation, what has been said above applies by analogy.

38. Calculation of an independent benefit must necessarily take place before the competent institution calculates the proportionate benefit in accordance with Article 46(2). Only if a comparison of the results of the two calculations shows that the amount of the proportionate pension exceeds that of the independent benefit is the proportionate pension paid.

39. If the plaintiff had had the right to an independent benefit and if that benefit mathematically had been at least as high as the proportionate benefit calculated, then that would have been that and the independent benefit would have had to apply. [21]

40. The plaintiff has repeatedly and emphatically asserted that he has been treated less favourably than an employee with the same periods of insurance in the same system, as a result of having completed additional periods of insurance in another Member State.

41. In applying Community law, the aim of the relevant provisions is to be taken into account. The Court has held with reference to the interpretation of Article 46 of Regulation No 1408/71 that:

'The aim of Articles 48 to 51 [of the Treaty] would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State.' [22] In a more recent judgment the Court went even further, making a statement of identical content and then adding the words 'or find themselves in a position less favourable than if they had worked all the time in one Member State'. [23]

21 — Under Article 46(1)(b) in its current version the competent institution may even 'waive the calculation [of the proportionate benefit] to be carried out in accordance with (a)(ii) if the result of this calculation ... is equal to or lower than the result of the calculation [of the independent benefit] carried out in accordance with (a)(i)'.

22 — Judgment in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, paragraph 13; similarly, on the interpretation of the comparable provisions of Regulation No 3, the judgment in Case 191/73 *Niemann* v *Bundesversicherungsanstalt* [1974] ECR 571, paragraph 5.

23 — Judgment in Case C-199/88 *Cabras* [1990] ECR I-1023, paragraph 24.

42. With reference to the aggregation of periods of insurance, the Court held that:

'Article 51 of the Treaty deals essentially with the case in which the laws of one Member State do not by themselves allow the person concerned the right to benefits by reason of the insufficient number of periods completed under its laws, or only allow him benefits which are less than the maximum.' [24]

43. The Court drew the following conclusion with respect to the proportionate pension:

'The aggregation and apportionment cannot therefore be carried out if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws.' [25]

44. The guiding principle of the cited decisions can be identified as the concept that a migrant worker must not be placed in a worse position as a result of the application of Community law than he would be in if only one of the legislations concerned were applied. That principle is in my opinion to be applied not only with respect to the arithmetical comparison of the benefits calculated using the different methods in accordance with Article 46, but also to other cases where migrant workers are placed in a worse position in the context of old-age insurance. It was therefore not permissible for the plaintiff to be put in a worse position than he would have been in if the law of the Member State applied exclusively. The comparison to see which method of calculation is the more favourable for the claimant must be done by the competent authority.

45. The French Government has submitted that the 150 completed quarterly periods had to be taken into account applying French law only. That argument should be countered by stating that the relevant authorities of the Member States, when applying the rules of national law, must interpret them in such a way that they are consistent with Community law. A rule of Community law, with reference to the calculation of an independent benefit, is that the benefit is 'payable ... on the basis solely of the periods completed under that legislation'. [26] Only when no right exists on that basis does — as stated above — the aggregation of periods com-

24 — See the judgments in *Petroni*, cited above, paragraph 14, and *Niemann*, cited above, paragraph 6. See also *Cabras*, cited above, paragraphs 25 and 26.

25 — *Petroni*, cited above, paragraph 16 and *Niemann*, cited above, paragraph 6.

26 — See the *Spits* judgment, cited above, paragraph 12.

pleted in different Member States come into play to establish a right.

46. The intermediate conclusion must therefore be that for the acquisition of the right to an independent benefit on the basis of the periods of insurance completed under the system of a Member State, *only* those periods are to be taken into account. Aggregation for the acquisition of a claim of all the periods of insurance completed in the various Member States takes place only for calculation of the proportionate benefit.

The prohibition of discrimination

47. The plaintiff complains that the application of the law in his case is incompatible with the prohibition of discrimination under Community law, which finds expression in Article 3(1) of Regulation 1408/71. Under that provisions:

'... persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State'.

48. As far as can be seen from the case-file, the relevant national provisions do not practise any unequal treatment on the grounds of nationality. [27]

49. Both the prohibition in Community law of discrimination on the grounds of nationality [28] and the prohibition of indirect discrimination [29] have the aim of preventing workers who take advantage of freedom of movement from being disadvantaged. That principle of Community law must also be observed when applying the law of a Member State. After all, the general principle of equality [30] is also a general principle of law in the Community legal system. If it does not apply directly in any case as a fundamental right in national law, it can be applied via Community law.

50. In case the French law of pensions also recognizes periods of insurance completed under another system as equivalent, it must

27 — According to the French Government, the plaintiff moreover possesses French nationality as well as British nationality.

28 — See, for example, Article 48(2) of the EC Treaty.

29 — See, for example, the judgments in Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 23, and Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 14.

30 — See, for example, the judgments in Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, paragraph 7; Joined Cases 124/76 and 20/77 *Moulins Pont-à-Mousson* v *Office Interprofessionnel des Céréales* [1977] ECR 1795, paragraphs 14 to 17; and Case 265/78 *Ferwerda* v *Produktschap voor Vee en Vlees* [1980] ECR 617, paragraph 7.

be examined whether these are periods to which a realizable right corresponds. Unjustified inequality of treatment could in certain cases result from the taking into account of periods of insurance completed in another Member State, if no realizable right corresponds to them.

51. Accordingly, the answer to be given to the national court, in response to its request for a preliminary ruling, should be that only the periods completed under the applicable system are to be taken into account for the calculation of an independent benefit with respect both to the rate and to the amount of the pension. If on the basis of those periods no right exists, or for the purposes of a comparative calculation, the periods of insurance completed in other Member States are aggregated to those completed under the applicable system. Those periods are disregarded, however, for calculation of the amount of the benefit to be calculated on that basis. Of the two calculations, only that which is the more favourable to the person concerned is taken into account in the further procedure.

C — Conclusion

52. I propose that the following answer be given to the question referred for a preliminary ruling:

Article 49 in conjunction with Article 46 and Article 3(1) of Regulation (EEC) No 1408/71 of 14 June 1971 must be interpreted as meaning that, in a case such as that in the main proceedings, in calculation of the pension by the competent authority the periods completed in another Member State are not taken into account for the acquisition of the right to an *independent benefit*. If there is no right to an independent benefit, the periods completed in another Member State are taken into account for the acquisition of a right, as also for the comparative calculation under Article 46 (second subparagraph of paragraph 1 in the former version, paragraph 3 in the present version). Those periods are disregarded, however, for the calculation of the amount of the *proportionate benefit*. Of the two calculations, only that which is more favourable to the person concerned is taken into account in the further procedure.