Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 April 2021 [1]

Case C-866/19

SC
v
Zakład Ubezpieczeń Społecznych I Oddział w Warszawie

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Social security – Insured person having completed contribution periods in a Member State other than the competent Member State – Right to a retirement pension – Regulation (EC) No 883/2004 – Calculation of pension benefits)

1. This reference for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland) ('the referring court') seeks clarification of the Court's ruling in *Tomaszewska* [2]. The referring court asks essentially whether, in the circumstances of the main proceedings, pension contribution periods completed by an insured person [3] in a Member State other than the competent Member State [4] ('host state contribution periods') must be taken into account, as a matter of EU law, in the calculation of the amount of pension benefits to be paid by the competent Member State, in this instance, Poland, to that insured person. The judgment in *Tomaszewska* answered such a question only with respect to the acquisition of pension benefits. To what extent do the principles elaborated in that case apply to the calculation of benefits payable?

2. The circumstances of the main proceedings are as follows. Under Polish law, the length of Polish non-contribution periods that can be taken into account in the calculation of pension benefits is capped at one third of Polish contribution periods. [5] The question that arises for consideration is whether host state contribution periods undertaken in the Netherlands by an insured person, must be added, as a matter of EU law, to Polish contribution periods, thereby lengthening the duration of Polish non-contribution periods to be taken into account in the calculation of a Polish pension.

1 Original language: English.

2 Judgment of 3 March 2011 (C-440/09, EU:C:2011:114; '*Tomaszewska*').

3 The order for reference does not specify whether or not the insured person is a 'worker' within the meaning of Article 45 TFEU. Any reference to this provision in this Opinion must, therefore, be read subject to this variable. It is worth noting that the personal scope of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), the provision applicable *ratione temporis* in the main proceedings (see footnote 6 below) extends beyond workers. A person claiming social security rights must be an 'insured person' under Article 1(c) of Regulation No 883/2004, and pursuant to Article 2(1), Regulation No 883/2004 'shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors'.

4 See Article 1(s) of Regulation No 883/2004.

5 See point 12 below.

3. I have reached the conclusion that, under EU law, host state contribution periods must be taken into account in the calculation of the theoretical amount of the pension benefit payable under Article 52(1)(b)(i) of Regulation No 883/2004.[6] More particularly, the rule of Polish law which provides that non-contribution periods undertaken in Poland can only be relevant to the calculation of the amount of a pension to a cap of one-third of contribution periods completed in Poland, ('the one-third cap for non-contribution periods'), must be read as including host state contribution periods completed by the insured person concerned in the Netherlands. Any other outcome would be inconsistent with the objectives of Regulation No 883/2004 and the principles on which it is based,[7] and contradict the principle of aggregation, of which Article 52(1)(b)(i) of Regulation No 883/2004 is a specific expression. The outcome prescribed here is also consistent with the purpose of Article 52(1)(b)(i) of Regulation No 883/2004, which is to ameliorate any harm done to insured persons who have exercised their right to work in Member States other than the competent Member State[8] through the method of calculation of the theoretical amount of the pension payable.

4. However, host Member State contribution periods are irrelevant to the calculation of the one-third cap for non-contribution periods with respect to the actual, pro rata pension benefit payable under Article 52(1)(b)(ii) of Regulation No 883/2004. This purpose of Article 52(1)(b)(ii) is different from the purpose of Article 52(1)(b)(i) of Regulation No 883/2004. Article 52(1)(b)(ii) calculates the pro rata benefit payable in an exercise known as apportionment.[9] The provision reflects the status of Regulation No 883/2004 as a measure of coordination of Member State social security systems, rather than one of harmonisation, and which seeks to secure a fair apportionment among the Member States of the amount of pension payable, by calculating it on the basis of the ratio of the length of service completed in each Member State before the materialisation of the insurance risk,[10] in this instance the attainment of retirement age.

I. Legal framework

A. EU law

5. Article 48(a) TFEU states:

'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement of workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of

6 In accordance with Article 91 of Regulation No 883/2004, as amended, read in combination with Article 97 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), Regulation No 883/2004 was applicable from 1 May 2010. Under Article 90 of Regulation No 883/2004, all provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), pertinent to the main proceedings were repealed and replaced. The equivalent of Article 6 of Regulation No 883/2004 is Article 45(1) of Regulation No 1408/71. The equivalent of Article 52(1) of Regulation No 883/2004 is Article 46(2) of Regulation No 1408/71.

7 Judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114, paragraph 27).

8 It is established in the case-law that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having exercised their right to free movement. See, for example, judgment of 21 February 2013, *Salgado González* (C-282/11, EU:C:2013:86, paragraph 43 and the case-law cited).

9 See Opinion of Advocate General Jacobs, with respect to Article 46(2) of Regulation No 1408/71, in *Stinco and Panfilo* (C-132/96, EU:C:1997:436, point 5).

10 Judgment of 26 June 1980, *Menzies* (793/79, EU:C:1980:172, paragraph 11).

acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries.'

6. Recital 14 of Regulation No 883/2004 states:

'These objectives must be attained in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by this Regulation.'

7. Article 1(t) of Regulation No 883/2004 states:

'" period of insurance" means periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.'

8. Article 6 of Regulation No 883/2004 entitled 'Aggregation of periods' states:

Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

– the acquisition, retention, duration or recovery of the right to benefits,

– the coverage by legislation, or

– the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.' [11]

[11] Previously Article 45(1) of Regulation No 1408/71, in the version modified and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) as modified by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) provided as follows; 'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had been completed under its own legislation.'

9. Article 52 (1) of Regulation No 883/2004 [12] states:

'1. The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

b) by calculating a theoretical amount and subsequently an actual amount (pro-rata benefit), as follows:

(i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

(ii) the competent institution shall then establish the actual amount of the pro rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.'

10. Recital 2 of Decision No H6 of 16 December 2010 concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2011 C 45, p. 5) 'Decision No H6' states:

'(2) Article 6 of Regulation [No 883/2004] provides for the principle of aggregation of periods. This principle should be applied in a uniform way which includes the aggregation of periods which, under national legislation, count only in terms of qualifying for or in terms of increasing the benefit.'

11. Paragraphs 1 and 2 of Decision No H6 state:

'1. All periods of insurance – be they contributory periods or periods treated as equivalent to insurance periods under national legislation – fulfil the notion of "periods of insurance" for the purposes of applying Regulations [No 883/2004] and [No 987/2009].

[12] Article 52(1)(b) of Regulation No 883/2004 was previously Article 46 (2)(a) and (b) of Regulation No 1408/71. It stated that: 'Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and/or Article 40(3), the following rules shall apply: (a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph; (b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.'

2. All periods for the relevant contingency completed under the legislation of another Member State shall be taken into account solely by applying the principle of aggregation of periods as laid down in [Article 6 of Regulation No 883/2004] and [Article 12 of Regulation No 987/2009]. The principle of aggregation requires that periods communicated by other Member State shall be aggregated without questioning their quality.'

B. Member State law

12. The order for reference mentions Ustawa z dnia 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law of 17 December 1998 on retirement and other pensions provided by the Social Insurance Fund (Dz. U. of 2018, item 1270, as amended) ('the Law on Pensions'). The order for reference indicates that, under Polish law, the maximum amount of non-contribution periods that can be taken into account in calculating the amount of a benefit is one third of Polish contribution periods. [13]

II. The facts and the question referred for preliminary ruling

13. The question referred concerns only the calculation of the pension benefit for an insured person who completed the majority of his or her insurance periods in a Member State (the Netherlands) other than the competent Member State (Poland). No issue arises with respect to the acquisition of such benefits.

14. By a decision dated 24 February 2014, the Zakład Ubezpieczeń Społecznych, I Oddział w Warszawie (Social Insurance Institution, Branch No 1, Warsaw, Poland; 'the pension authority' [14]) granted a retirement pension to SC (the insured person) as of 5 November 2013 pursuant to the provisions of the Law on Pensions and Regulation No 883/2004.

15. In determining the insured person's entitlement to a retirement pension, the pension authority employed the following method: First, it determined the Polish contribution periods (104 months). Second, it included in the insurance period Polish non-contribution periods (34 months), an amount corresponding to one third of the Polish contribution periods; the formula provided under Polish law by Article 5(2) of the Law on Pensions. Third, in view of the fact that the insured person failed to reach the minimum insurance period on the basis of the Polish periods of insurance, the pension authority added to SC's national insurance period the contribution periods completed in the Netherlands (269 months) in order to grant him a retirement pension.

16. The insurance period thus determined (national contribution periods + national non-contribution periods + foreign contribution periods) was subsequently taken into account when calculating the theoretical amount of the benefit under Article 52(1)(b)(i) of Regulation No 883/2004. However the actual amount of the benefit under Article 52(1)(b)(ii) of Regulation No 883/2004 was calculated on a pro rata basis from 138 months of Polish periods of insurance (contribution periods plus non-contribution periods capped at one third of national contribution

[13] The cap referenced to one third of contributory periods that applies to non-contributory periods appears to be based on Article 5(2) of the Law on Pensions.

[14] Also the 'competent institution' under Article 1(q) of Regulation No 883/2004.

periods) on a total of 407 months of periods of insurance in Poland and the Netherlands. On that basis, it was calculated that out of the theoretical benefit of 974.78 Polish zlotys (PLN), the insured person should be paid 33.9% of this amount, that is, PLN 335.81.

17. The insured person appealed against the decision. In his appeal, he requested, inter alia, that more Polish non-contribution periods be taken into account in the calculation, and submitted that the pension authority had erred in not taking into account the judgment of the Court in *Tomaszewska*.[15] The Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) dismissed the appeal in its judgment of 19 November 2015.

18. The insured person appealed against the first-instance judgment of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) to the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland). It was argued that Article 45 of Regulation No 1408/71 had not been interpreted correctly, and that on the basis of the ruling in *Tomaszewska*, the one-third cap for non-contribution periods should be calculated on the basis of both Polish and Dutch contribution periods. In a judgment dated 9 August 2017, relying on *Tomaszewska*, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) accepted these arguments and amended the judgment under appeal.

19. The pension authority brought an appeal on a point of law before the referring court, challenging the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) in so far as that court ordered the pension authority, when calculating the benefit due to the insured person under Article 52(1)(b) of Regulation No 883/2004, to take into account more Polish non-contribution periods. The pension authority objected to the finding that a 'third' was not to be determined by reference to Polish contribution periods alone, but rather those periods plus contribution periods completed in the Netherlands. In other words, the appeal concerns only the calculation of the amount of the pension benefit.

20. The order for reference states that the pension authority and the insured person essentially contended as follows.

21. The insured person agrees with the judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw). He submits that in determining the amount of the benefit to be paid to him, the pension authority must apply Article 45 of Regulation No 1408/71 as interpreted in the *Tomaszewska* judgment, and that the pension authority erred in taking into account solely non-contribution periods which amounted to one third of contribution periods completed in Poland. Under the *Tomaszewska* judgment, it should have taken into account non-contribution periods which amounted to one third of aggregated contribution periods completed in Poland and in the Netherlands.

22. The pension authority claims, first, that the interpretation of Article 45 of Regulation No 1408/71 does not apply to the main proceedings, as in order for the insured person to *acquire* the entitlement to a pension, it is sufficient to add to the Polish periods of insurance (both contribution periods and non-contribution periods amounting to one third of national contribution periods) the periods of insurance completed in another Member State, namely the Netherlands. According to the pension authority, the *Tomaszewska* judgment only applies if, after using the method for calculating the insurance period adopted in the present case, it is found that the insured person has *not* reached the required minimum insurance period for

[15] Judgment of 3 March 2011 (C-440/09, EU:C:2011:114).

acquiring a pension. However, in the main proceedings, the insured person had reached this threshold by applying this formula (see point 15 above). It is only if this threshold is not reached that foreign contribution periods can be added to national contribution periods and the maximum share of domestic non-contribution periods (one third of contribution periods) can be calculated on the basis of aggregated (national and foreign) periods of insurance.

23. Secondly, the *Tomaszewska* judgment concerns the interpretation of Article 45(1) of Regulation No 1408/71, the equivalent of which is Article 6 of Regulation No 883/2004, and not Article 52 of Regulation No 883/2004. For the pension authority, Article 52 of Regulation No 883/2004 is the provision governing the main proceedings.

24. Thirdly, the application of the interpretation of Article 45(1) of Regulation No 1408/71 adopted in the *Tomaszewska* judgment would result in more Polish non-contribution periods being taken into account than is provided for under Polish law, which would in turn lead, on the one hand, to an increase in the contribution of the Polish social security system to the benefit due to the insured person and, on the other, to a decrease in the contribution to the funding of that benefit by the insurance system of another Member State to which the insured person's contributions were paid for much longer than to the Polish system, namely the Netherlands.

25. Fourthly, it follows from paragraph 2 of Decision No H6 [16] that the periods accumulated with insurance institutions in other Member States shall be aggregated without questioning their quality, which means that the Polish insurance institution cannot be obliged to take into account more national periods of insurance (as a result of the addition of foreign periods of insurance) than required by national law.

26. In consequence of this disagreement, the Sąd Najwyższy (Supreme Court, Poland) therefore referred the following question by way of preliminary ruling.

'Should Article 52(1)(b) of Regulation No [883/2004] be interpreted as meaning that the competent institution:

(a) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States both for the purpose of determining the theoretical amount (point (i)) and the actual amount (point (ii)) of the benefit; or

(b) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States only for the purpose of determining the theoretical amount (point (i)) but not for the purpose of establishing the actual amount (point (ii)) of the benefit; or

(c) does not take into account, either for the purpose of determining the theoretical amount (point (i)) or the actual amount (point (ii)) of the benefit, periods of insurance in another Member State when calculating the limit on non-contribution periods under national law?'

27. Written observation were filed at the Court by the pension authority, the Czech Republic, the Hungarian and Polish Governments, and the European Commission. There was no hearing.

[16] See point 11 above.

III. Answer to the question referred

A. Introductory remarks

28. It is important to note, first, that the pension authority is right when it contends that the main proceedings are governed by Regulation No 883/2004 rather than Regulation No 1408/71, the former regulation being the provision applicable *ratione temporis*.[17] This does not make, however, case-law of the Court under Regulation No 1408/71 irrelevant to the resolution of the main proceedings, given that Regulation No 883/2004 contains successor provisions to Regulation No 1408/71.[18]

29. Second, the main proceedings are governed by Article 52(1) of Regulation No 883/2004, given that it concerns calculation of a pension benefit, as opposed to its acquisition under Article 6 of Regulation No 883/2004.

30. Third, the argument of the pension authority to the effect that *Tomaszewska*[19] does not apply to the main proceedings because no issue arises with respect to the insured person's *acquisition* of a right to a pension (see point 22 above), is unfounded. As will be explained below, (see points 39 to 49) *Tomaszewska* cannot be read as confining the principle of aggregation to the acquisition of pension rights under Regulation No 883/2004.[20]

31. Fourth, the non-contribution periods provided under Polish law, and in issue in the main proceedings, amount to a 'period of insurance' under the definition provided by Article 1(t) of Regulation No 883/2004. There seems to be no question that non-contribution periods are, under Article 1(t) of Regulation No 883/2004, equivalent to a 'period of insurance'.[21] It should be recalled that the Court has consistently held that the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between EU workers.[22]

32. Fifth, the following overarching principles governing the main proceedings are worth recalling, as reiterated recently by the Court in its ruling in *Crespo Rey*.[23]

'… it should be noted that Regulation No 883/2004 does not set up a common scheme of social security, but allows different national schemes to exist and its sole objective is to ensure the coordination of those schemes. Thus, according to the Court's settled case-law, Member States retain the power to organise their own social security schemes …

… in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, in particular, the conditions for entitlement to benefits …

[17] Footnote 6 above.

[18] Footnote 6 above.

[19] Judgment of 3 March 2011 (C-440/09, EU:C:2011:114, paragraph 12).

[20] Judgment of 5 December 2019, *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:1050, paragraph 33), and the Opinion of Advocate General Hogan (EU:C:2019:596, point 37).

[21] See also paragraph 1 of Decision No H6, point 11 above, and the judgment of 18 April 2013, *Mulders* (C-548/11, EU:C:2013:249, paragraph 37 and the case-law cited).

[22] Judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114, paragraph 24 and the case-law cited).

[23] Judgment of 28 June 2018 (C-2/17, EU:C:2018:511, paragraphs 45 to 47 and the case-law cited).

In exercising those powers, Member States must nonetheless comply with EU law and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States.' [24]

33. Sixth, as for arguments of the pension authority based on Decision No H6, mentioned in point 25 above, it is to be noted that this decision interprets Article 6 of Regulation No 883/2004, rather than Article 52 of Regulation No 883/2004. That being so, reference will be made in this Opinion to Decision No H6 in so far as it is tangential to the issues arising in the main proceedings. [25]

34. These six points aside, I have concluded that option (b) of the three options provided by the referring court is the option that complies with EU law, as argued in the written observations of the Hungarian Government. I have done so against the backdrop of the following general principle, an example of its elaboration having appeared in the Opinion of Advocate General Mazak in *Bergström*. [26]

'The principle of aggregation is one of the basic principles governing Union coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State. Such a consequence might discourage Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom.' [27]

35. As one commentary has observed, the 'principle of aggregation of insurance periods is one of the oldest achievements of international social security law', and featured in the International Labour Organisation Convention No 48 of 1935. [28] However, option (c) in the order for reference is inconsistent with the principle and cannot be accepted.

36. This is so because the logical consequence of option (c) is wholesale exclusion of the principle of aggregation from the calculation of the one-third cap for non-contribution periods, and therefore this element of the insured person's benefits, because at no point under option (c) are host state contributions, completed in the Netherlands, taken into account with respect to this calculation; either at the stage of the calculation of the theoretical value of the insured person's pension under Article 52(1)(b)(i) of Regulation No 883/2004, or calculation of its actual value under Article 52(1)(b)(ii) thereof. This would be inconsistent with the fundamental status of the principle of aggregation, as set out in Article 6 of Regulation No 883/2004, in the operation of that regulation.

[24] Ibid. On Member State competence in matters relating to social security, see also Article 153(4) TFEU.

[25] It is to be recalled that Decision No H6 'is a measure implementing Regulations No 883/2004 and No 987/2009. According to settled case-law of the Court, an implementing act must be given, if possible, an interpretation that is consistent with the provisions of the basic act (see, to that effect, judgments of 14 May 2009, *Internationaal Verhuis- en Transportbedrijf Jan de Lely* (C-161/08, EU:C:2009:308, paragraph 38), and of 19 July 2012, *Pie Optiek*, (C-376/11, EU:C:2012:502, paragraph 34).' See judgment of 4 September 2019, *Bundesagentur für Arbeit, Familienkasse Baden-Württemberg West* (C-473/18, EU:C:2019:662, paragraph 30).

[26] Judgment of 15 December 2011, *Bergström* (C-257/10, EU:C:2011:839), and Opinion of Advocate General Mazák (EU:C:2011:407). See also, for example, Opinion of Advocate General Mengozzi in *Dumont de Chassart* (C-619/11, EU:C:2012:805, point 50).

[27] Judgment of 15 December 2011, EU:C:2011:839), and Opinion of Advocate General Mazák, *Bergström* (C-257/10,EU:C:2011:407, point 39). See judgment of 20 January 2005, *Salgado Alonso* (C-306/03, EU:C:2005:44, paragraphs 28 and 29). See also, for example, judgments of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114, paragraph 30), and of 14 March 2019, *Vester* (C-134/18, EU:C:2019:212, paragraph 33).

[28] Fuchs, M., and Cornelissen, R., (eds), *EU Social Security Law*, Nomas, 2015, p. 33. The Convention can be found at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C048. Article 2, for example, refers to insurance periods being 'totalised'.

37. In addition to this, under option (c), the Polish law imposing the one-third cap for non-contributory periods is inconsistent with the principle of equal treatment on the basis of nationality under Article 4 of Regulation No 883/2004, because it would, in practice, adversely affect the great majority of insured persons exercising free movement rights. The argument of the pension authority to the effect that the applicability of Polish rules on calculation of non-contribution periods to migrant workers and non-migrant workers alike rendered the rules compliant with EU law, has to be rejected. This is so because, if the rule on aggregation is excluded completely, the one third cap for non-contribution periods would more easily lead to large numbers of these periods being accumulated by Polish nationals, but less so for migrants exercising free movement rights, thereby running the risk that the rule would operate to the detriment of the latter.[29] This situation would require justification on the basis of the pursuit of a public interest objective, and on the condition that the Polish exclusion of contribution periods completed in other Member States, for the purpose of determining the amount of the one-third cap for non-contribution periods, was appropriate for the purpose of ensuring the attainment of the objective pursued and did not go beyond what was necessary to achieve it.[30]

38. Therefore, what falls for consideration in this regard is whether EU law requires the pension authority to take into account the 269 months of host state contribution periods completed in the Netherlands, in addition to the 104 months of contribution periods completed in Poland, when calculating the one-third cap for non-contribution periods imposed by Polish law. As a matter of EU law, and in particular Article 52(1) of Regulation No 883/2004, is the amount of this cap to be determined by reference to contribution periods completed in Poland only, as argued by the pension authority and the Polish Government, or is it to be indexed to the contribution periods completed both in Poland and the Netherlands combined, as argued by the European Commission, the Czech Republic, and to some extent the Hungarian Government?

B. Scope of the ruling in Tomaszewska

39. Central to the differences between the parties is the scope of the Court's ruling in the judgment of 3 March 2011, *Tomaszewska*.[31] Was application of the aggregation principle in that case confined to decisions as to whether or not a pension benefit is to be *acquired*, as argued by the pension authority, the Polish Government, and the Hungarian Government, or does the aggregation principle extend to the *calculation* of such benefits, as argued by the Commission and the Czech Republic?

40. While the *Tomaszewska* case itself provides no clear answer to this question, there is little support in the case-law of the Court for the confinement of the aggregation principle to the acquisition of the right to a pension. Nor is it supported by the wording of Regulation No 883/2004, its purpose, or primary EU law.

41. In *Tomaszewska*, the applicant could not prove that she had completed the mandatory minimum 30-year insurance period prescribed by Member State law, in Poland, which is why the dispute between the applicant and the pension authority concerned the acquisition of entitlement to a retirement pension, which fell within the scope of Article 45(1) of Regulation No 1408/71 (the

[29] Judgment of 5 December 2019, *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:1050, paragraph 41 and the case-law cited). For examples of indirect discrimination arising in the context of equal treatment as protected by Article 3(1) of Regulation No 1408/71, see judgments of 25 June 1997, *Mora Romero* (C-131/96, EU:C:1997:317), and of 21 February 2008, *Klöppel* (C-507/06, EU:C:2008:110).

[30] Judgment of 5 December 2019, *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:1050, paragraph 43 and the case-law cited).

[31] C-440/09, EU:C:2011:114.

equivalent of which is Article 6 of Regulation No 883/2004), rather than the calculation of the amount of benefits as laid down in Article 46 of Regulation No 1408/71, that provision being the precursor to Article 52 of Regulation No 883/2004. [32]

42. The Court, in *Tomaszewska*, recalled that the Member States remain competent to define the conditions for granting social security benefits, even if they make them more strict, provided that the conditions adopted do not give rise to overt or disguised discrimination between EU workers. [33] The Court held that the system put in place by Regulation No 1408/71 was merely one of coordination rather than harmonisation and concerned, inter alia, the determination of the social security legislation applicable to employed and self-employed persons who make use of their right to freedom of movement. [34]

43. The Court noted that it was inherent in such a system that the conditions governing the constitution of periods of employment or insurance will differ depending on the Member State in which the person concerned has worked. Those conditions are, in accordance with Article 1(r) of Regulation No 1408/71 (now Article 1(t) of Regulation No 883/2004) defined exclusively by the legislation of the Member State under which the periods in question were completed. [35] It was then noted that in laying down those conditions, however, 'the Member States are required to comply with European Union law. In particular the objective pursued by Regulation No 1408/71 and the principles on which it is based'. [36] The objective of Regulation No 1408/71, as stated in its second and fourth recitals, is to ensure free movement of employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation. [37]

44. The Court then held in *Tomaszewska* that Regulation No 1408/71, particularly pursuant to the fifth, sixth, and tenth recitals 'upholds the principle of equality of treatment of workers under the various measures of national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right of free movement'. [38]

45. In the course of reiterating, several times, that the main proceedings concerned only the acquisition of entitlement to a retirement pension, [39] the Court made the following more generalised finding with respect to the principle of aggregation.

' … the principle of aggregation of insurance, residence, or employment periods as laid down in Article 42(a) EC [now Article 48(a) TFEU, see point 5 above] … is one of the basic principles governing European Union coordination of social security schemes in the Member States, its purpose being to ensure the exercise of the right, conferred by the EC Treaty, to freedom of movement does not have the effect of depriving workers of social security advantages to which

[32] Ibid., paragraph 22 and the case-law cited.

[33] Ibid., paragraph 24 and the case-law cited.

[34] Ibid., paragraph 25 and the case-law cited. On the overarching principles governing Regulation No 883/2004, a measure aimed at coordinating Member State social security systems, see judgments of 28 June 2018, *Crespo Rey* (C-2/17, EU:C:2018:511, paragraphs 45 to 47, reproduced at point 32 above) and of 14 March 2019, *Vester* (C-134/18, EU:C:2019:212, paragraphs 29 to 33).

[35] Ibid., paragraph 26.

[36] Ibid., paragraph 27.

[37] Ibid., paragraph 28.

[38] Ibid., and the case-law cited.

[39] Ibid., paragraphs 29, 31, 32, 34, 36.

they would have been entitled if they had spent their entire working life in only one Member State. Such a consequence might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom'. [40]

46. The Court noted that Article 45 of Regulation No 1408/71, the provision in issue in *Tomaszewska*, was an instance of implementation of the principle of aggregation of insurance, residence or employment periods as laid down in Article 42(a) EC. [41]

47. Although the ruling in *Tomaszewska* may be taken as not being decisive on the question of the application of the principle of aggregation to the *calculation* of social security benefits, the broader case-law of the Court is clearer. The Court's ruling in *Dumont de Chassart*, [42] is unequivocal on the pertinence of the principle of aggregation to the calculation of benefits. There the Court held as follows;

'Moreover, it should be borne in mind that Regulation No 1408/71 was adopted on the basis of Article 51 of the EEC Treaty (later Article 51 of the EC Treaty and, subsequently, after amendment, Article 42 EC, now Article 48 TFEU), which empowered the Council of the European Union to adopt such measures in the field of social security as were necessary to provide freedom of movement for workers, making arrangements to that end to secure the aggregation for migrant workers and their dependants, for the purposes of acquiring and retaining the right to benefits and of *calculating* the amount of benefits, of "all periods" taken into account under the laws of the several countries.'

48. Moreover, the central place of the principle of aggregation in the calculation of social security benefits is reflected in Article 48(a) TFEU (point 5 above). Indeed the Court has noted that 'Article 48 TFEU … provides that the European Parliament and the Council of the European Union are to adopt "such measures in the field of social security as are necessary to provide freedom of movement for workers" inter alia by making arrangements to secure for migrant workers the "aggregation … of all periods taken into account under the laws of the several countries". Such an aggregation system of periods was introduced by Regulation No 1408/71 then by Regulation No 883/2004'. [43] The importance of aggregation is also reflected in recital 14 of Regulation No 883/2004 (point 6 above), which refers specifically to the importance of aggregation to 'calculating the amount of benefits'. To this can be added recital 2 of Decision No H6. As noted above in point 10, aggregation is stated therein to be relevant to 'increasing the benefit'.

49. In consequence, the arguments set out in the written observations of the Polish Government, the pension authority, and the Hungarian Government to the effect that *Tomaszewska* has no relevance to the interpretation of Article 52(1) of Regulation No 883/2004, have to be rejected, to

[40] Ibid., paragraph 30 and the case-law cited. See more recently on the disadvantage experienced by a migrant worker when compared with a worker who has spent their entire working life in the Member State concerned the judgment of 28 June 2018, *Crespo Rey* (C-2/17, EU:C:2018:511, paragraph 69). See similarly the judgment of 23 January 2020, *Bundesagentur für Arbeit* (C-29/19, EU:C:2020:36, paragraph 33).

[41] Ibid.

[42] My emphasis. Judgment of 21 February 2013, *Dumont de Chassart* (C-619/11, EU:C:2013:92, paragraph 52) referring to the ruling in the judgment of 15 December 2011, *Bergström* (C-257/10, EU:C:2011:839, paragraph 42). The role of aggregation in the calculation of retirement benefits was explained in point 4 of the Opinion of Advocate General Jacobs in *Koschitzki* (C-30/04, EU:C:2005:272). See also point 45 of the Opinion of Advocate General Jääskinen in *Reichel-Albert* (C-522/10, EU:C:2012:114), where the Advocate General notes that one of the cardinal principles that must inform the interpretation of the predecessor regulation to Regulation No 883/2004 is, as the Court has consistently held, 'in the area of social security, insured persons may not claim that their move to another Member State should be without impact on the type or *level* of benefits for which they were eligible in their Member State of origin'. My emphasis.

[43] Judgment of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraph 34).

the extent that *Tomaszewska* features a broad formulation of the principle of aggregation. Indeed, the written observations of the Commission are closer to the mark in this regard when they acknowledge the indirect pertinence of the *Tomaszewska* ruling to the main proceedings. [44]

C. Rationale for selecting option (b) of the referring court

50. All this being so, why has the conclusion been reached here, and as argued by the Hungarian Government, that it is the second option (b) rather than the first option (a) suggested by the referring court that is the key to resolving the dispute in the main proceedings, given the primordial importance of the principle that insured persons who have exercised free movement rights are not to be deprived of social security advantages to which they would have been entitled if they had spent their entire working life in only one Member State? [45]

51. It is important to underscore that Regulation No 883/2004, like its predecessor Regulation No 1408/71, does not organise a common system of social security but allows the separate national arrangements to remain in place. It is designed to ensure that the systems are coordinated. [46] As Advocate General Jääskinen as observed, the 'fact that the effect of exercising the freedom of movement may not be neutral in this sphere, in that it may to varying degrees be advantageous or even disadvantageous, depending on the circumstances, is a direct result of the fact that the difference between the laws of the Member States has been maintained'. [47]

52. More specifically, the referring court's option (b) has been selected on the basis of the established case-law under the predecessor provision to Article 52(1) of Regulation No 883/2004, that is Article 46(2) of Regulation No 1408/71, the wording of Article 52(1)(b)(i) and (ii) of Regulation No 883/2004, the respective purposes and objectives of those latter two provisions, and their context. [48]

53. As explained in the Opinion of Advocate General Jacobs in *Koschitzki*, [49] the calculation of the theoretical amount under Article 46(2)(a) of Regulation No 1408/71, now Article 52(1)(b)(i) of Regulation No 883/2004, is in fact an instance of aggregation. The Court has held that Article 46(2) of Regulation No 1408/71, and therefore Article 52(1) of Regulation No 883/2004, 'must be interpreted in the light of the objective laid down in Article 48 TFEU, which implies in particular that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement'. [50] In other words, the theoretical amount 'must be calculated as if the insured person had worked exclusively in the

44 Article 5 of Regulation No 883/2004 can be put to one side for the purposes of the main proceedings. This is so because recital 10 of the regulation states that the principles reflected in Article 5 'should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State'. See analysis in Fuchs, M., and Cornelissen, R., (eds) *EU Social Security Law*, Nomos, 2015, p. 123. See also the Opinion of Advocate General Hogan in Joined Cases *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:596, point 44).

45 See the example provided in point 34 above.

46 Point 42 above.

47 *Reichel-Albert* (C-522/10, EU:C:2012:114, point 45). See more recently, for example, the judgment of 19 March 2019, *Vester* (C-134/18, EU:C:2019:212, paragraph 32 and the case-law cited).

48 See broadly the analysis of the rules of interpretation of EU measures in my Opinion in *Pinckernelle* (C-535/15, EU:C:2016:996, points 35 to 70).

49 C-30/04, EU:C:2005:272, point 4. See also paragraph 23 of the judgment of the Court of 17 December 1998, *Lustig*, (C-244/97, EU:C:1998:619): '… the EC Treaty requires aggregation of all periods taken into account under the laws of the several countries not only for the purpose of acquiring and retaining the right to benefits but also for the purpose of calculating them.'

50 Judgment of 21 February 2013, *Salgado González* (C-282/11, EU:C:2013:86, paragraph 43 and the case-law cited. See also paragraph 50).

Member State concerned'.[51] This means, with respect to the main proceedings, that contribution periods completed in the Netherlands, along with those completed in Poland, must be taken into account when calculating the one-third cap for non-contribution periods for the purpose of determining the theoretical amount under Article 52(1)(b)(i) of Regulation No 883/2004.

54. Article 52(1)(b) reflects a legislative choice applicable when an insured person's pension entitlement does not arise, under Member State law, unless account is taken of periods of insurance completed in another Member State,[52] which is the case in the main proceedings (see point 15 above). As already mentioned, the first step of the procedure, namely the calculation of the theoretical amount of the benefit under Article 52(b)(i) of Regulation No 883/2004, is *aggregation*. The second step, under Article 52(1)(b)(ii) thereof, is the calculation of the pro rata benefit and is known as *apportionment*.[53] The whole point of the aggregation and apportionment exercise is to ensure that the benefit payable reflects the length of the period the insured person has spent working in the Member State paying that portion of the pension.[54] As pointed out in the written observations of the pension authority, each Member State pays the amount pro rata of the retirement pension completed under *their* legislation (my emphasis). The Member States thus finance only periods of insurance completed on their territory, and not periods of insurance completed in other Member States. As argued in the written observations of the Polish Government, the amount of the benefit paid must reflect, realistically, the amount of pension contributions paid, and periods of insurance completed in their own Member State.

55. As Advocate General Fennelly has observed, the actual amount of benefit is the proportion of the theoretical amount corresponding to the proportion of the retiree's total period of insurance or residence which was *actually spent* in the Member State in question.[55] Pursuant to the rule now reflected in Article 52(1)(b)(ii) of Regulation No 883/2004, the *actual* amount of the pension is established on the basis of the theoretical amount in the ratio of the length of the periods of insurance completed in the Member State in question to the total length of the periods of insurance completed in all Member States.

56. The case-law in general maximises the components relevant to the calculation of the theoretical amount,[56] termed in the case-law as a means of ensuring that workers do not lose social security advantages as a result of exercising free movement rights. It is established that, as

[51] Ibid., paragraph 41 and the case-law cited.

[52] See Opinion of Advocate General Jacobs, with respect to Article 46(2) of Regulation No 1408/71, in *Stinco and Panfilo* (C-132/96, EU:C:1997:436, point 4).

[53] Ibid., point 5. Advocate General Jacobs provides the following example. 'Thus if a person worked in Member State A for 10 years and in Member State B for 20 years, then even if under the legislation of Member State A he would not be entitled to a pension for an insurance period of 10 years (for example because that State required applicants to have worked there for 15 years), by virtue of Article 46(2) he would be entitled in Member State A to one third of the benefit he could claim if he had worked there for 30 years.' See recently the Opinion of Advocate General Hogan in Joined Cases *Bocero Torrico and Bode* (C-398/18 and C-428/18, EU:C:2019:596, point 39).

[54] Ibid., point 49.

[55] See point 7 of Opinion of Advocate General Fennelly in *Lustig* (C-244/97, EU:C:1998:419), with respect to the predecessor to Article 52(1)(b) of Regulation No 883/2004, namely Article 46(2)(b) of Regulation No 1408/71. My emphasis.

[56] For example, judgments of 26 June 1980, *Menzies* (793/79, EU:C:1980:172); of 23 September 1982, *Besem* (274/81, EU:C:1982:315);of 18 February 1992, *Di Prinzio* (C-5/91, EU:C:1992:76); of 24 September 1998, *Stinco and Panfilo* (C-132/96, EU:C:1998:427); of 21 February 2013, *Salgado González* (C-282/11, EU:C:2013:86) C.f. however, judgment of 21 July 2005, *Koschitzki*, (C-30/04, EU:C:2005:492). For further rules on the calculation of the theoretical and actual amounts of pension benefits, see Article 43(1) of Regulation No 987/2009 and the reference therein to Article 12(3), (4), (5) and (6) thereof. These provisions do not appear to be pertinent to the main proceedings.

regards the theoretical amount, that 'the express effect of Article 46(2)(a) [of Regulation No 1408/71] is that it must be calculated as if the insured person had carried out his occupational activity exclusively in the Member State in question'. [57]

57. The purpose, however, of Article 46(2)(b) of Regulation No 1408/71, and therefore Article 52(1)(b)(ii) of Regulation No 883/2004 is different. The Court has held as follows:

'Although the calculation to be carried out under subparagraph (a) is intended to give a worker the maximum theoretical amount which he could claim if all periods of insurance had been completed in the State in question, the purpose of the calculation under subparagraph (b) is different. The latter provision is intended solely to apportion the respective burdens of the benefit between the institutions of the Member States concerned in the ratio of the length of the periods of insurance completed in each of the said Member States *before* the risk materialised.' [58]

58. The objective of the calculation of apportionment is to preserve the balance of the burden of benefits between Member States. [59] As one leading commentary states 'the *opposite* of the principle of aggregation is the principle of pro rata calculation. According to this principle, each competent institution is obliged only to pay a portion of the benefit in relation to the relevant periods completed under its national social security legislation (see as an example, Art. 52 Reg. No. 883/2004)'. [60]

59. Thus, the Commission's submissions to the effect that the application of this method penalises insured persons who have exercised their free movement rights, as recognised in the case-law, cannot be accepted. These submissions overlook this key distinction between Article 52(1)(b)(i) and Article 52(1)(b)(ii) of Regulation No 883/2004.

60. For example, the Commission refers to the ruling of the Court in *Zaniewicz-Dybeck*, [61] to support its position, but this ruling is only pertinent to the main proceedings in that it makes clear that aggregation is to take place in the calculation of the theoretical amount, but the Court does not extend this to the actual amount.

'In such a case, Article 46(2)(a) of Regulation No 1408/71 provides that the competent institution is to calculate the theoretical amount of the benefit to which the person concerned is entitled as if all the periods of work which that person completed in various Member States had been completed in the Member State of the competent institution. The competent institution is then required, pursuant to Article 46(2)(b) of the regulation, to determine the actual amount of the benefit on the basis of the theoretical amount, in accordance with the ratio of the duration of the

[57] Judgment of 26 June 1980, *Menzies* (793/79, EU:C:1980:172, paragraph 10). See more recently, for example, judgment of 3 October 2002, *Barreira Pérez* (C-347/00, EU:C:2002:560, paragraph 28), and Opinion of Advocate General Wathelet in *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:329, point 51) referring to judgment of 21 July 2005, *Koschitzki* (C-30/04, EU:C:2005:492, paragraph 28).

[58] Judgment of 26 June 1980, *Menzies* (793/79, EU:C:1980:172, paragraph 11). Emphasis in original.

[59] Ibid.

[60] See Fuchs, M., and Cornelissen, R., op. cit. p. 17. My emphasis. It is to be noted that there is no indication in the case file that the old age pension in issue in the main proceedings is part of a 'defined benefits scheme' within Article 1(2) of Commission Regulation (EU) 2017/492 of 21 March 2017, amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2017 L 76, p. 13); a provision which provides for waiver or non-application of pro-rata calculation of benefits. Annex VIII was previously amended with respect to Poland by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43).

[61] Judgment of 7 December 2017 (C-189/16, EU:C:2017:946).

periods of insurance and/or residence completed in the Member State of the competent institution to the total duration of the periods of insurance and/or residence completed in the various Member States – in other words, the pro rata method of calculation.'[62]

61. The written observations of the Commission further rely on the ruling in *Barreira Pérez*,[63] for the inclusion of non-contribution periods as calculated by reference to contribution periods of both the Netherlands and Poland combined, for the purposes of the calculation of both the theoretical amount under Article 52(1)(b)(i) of Regulation No 883/2004 and the actual amount under Article 52(1)(b)(ii) of that regulation. In that case an insured person, a Spanish national, who had worked in Spain and Germany sought a pension from the Spanish authorities by aggregating the periods of insurance completed under German and Spanish legislation, given that the insured person had no entitlement to a pension on the basis of the latter alone.

62. Under Article 46(2)(a) of Regulation No 1408/71, the competent authority in Spain calculated the theoretical amount of the benefit by adding the days of actual contribution completed in both Spain and Germany, and then adding a 'notional contribution' attributed to the insured person on account of his age under a transitional provision of a ministerial order.[64] The notional contribution was not taken into account, however, in the calculation of the pro rata benefit, or actual amount, under Article 46(2)(b) of Regulation No 1408/71.

63. After noting in paragraph 25 of its judgment that the notional contributions are 'added to periods of actual insurance in the calculation of the amount of the pension', so that they amounted to 'periods of insurance for the purposes of Article 1(r) of Regulation No 1408/71',[65] the Court considered whether the notional contribution was to be taken into account in the calculation of the pro rata amount of the pension.

64. Although the Spanish Government argued that an affirmative response to this inquiry risked 'bringing about a serious economic imbalance and making the Spanish social security system into a magnet for people trying to obtain an appreciable increase in their pension',[66] the Court ruled that the notional contributions were completed before and not after materialisation of the risk (attainment of retirement age) for the purposes of Article 46(2)(b) of Regulation No 1408/71.[67] For this reason, all the periods of notional contribution had to be taken into account in the calculation of the actual pro rata pension,[68] combined with the fact that a contrary finding would penalise a worker who had exercised free movement rights.[69]

65. In this regard, the following remarks might be made.

[62] Ibid., paragraph 42. See also Opinion of Advocate General Wathelet in *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:329, points 43 and 44). The Czech Republic also relies on paragraph 42 of the judgment in *Zaniewicz-Dybeck*, in support of the contention that Article 52 (1) of Regulation No 883/2004 requires the competent pension authority to take account of insurance periods completed in other Member States for determining both the theoretical and actual amount of the pension.

[63] Judgment of 3 October 2002 (C-347/00, EU:C:2002:560).

[64] Article 3(b) of Ministerial Order of 18 January 1967 concerning the application and payment of old-age benefits (BOE No 22 of 26 January 1967).

[65] Judgment of 3 October 2002, *Barreira Pérez* (C-347/00, EU:C:2002:560, paragraph 26). Article 1(r) of Regulation No 1408/71 is now Article 1(t) of Regulation No 883/2004.

[66] Ibid., paragraph 33.

[67] Ibid., paragraph 34.

[68] Ibid., paragraphs 38 and 39. In reaching that conclusion, the court relied on the judgment of 18 February 1992, *Di Prinzio* (C-5/91, EU:C:1992:76, paragraph 54). The only other rulings referred to by the Court, in ruling on the substance, were judgment of 26 June 1980, *Menzies* (793/79, EU:C:1980:172), and the judgment referred to in footnote 69 below.

[69] Ibid., points 40 to 41, referring to judgment of 15 October 1991, *Faux* (C-302/90, EU:C:1991:385).

66. First, *Barreira Pérez* would seem to be unusual in that the distinction between aggregation, now appearing in Article 52(1)(b)(i) of Regulation No 883/2004, and apportionment, as now reflected in Article 52(1)(b)(ii) of that regulation, was not central to the Court's reasoning. As already explained, this distinction was established in the Court's foundational case-law on the calculation of social security benefits under Regulation No 1408/71, the predecessor to Regulation No 883/2004.[70] *Barreira Pérez* rather turned on the fact that the relevant contributions were completed before, and not after, materialisation of the risk. *Barreira Pérez* is therefore to be interpreted narrowly, and in the light of the fact that Regulation No 883/2004 is a measure of coordination and not harmonisation. As pointed out in the written observations of the pension authority, under EU law, as it presently stands, there is no principle of unified supranational social security solidarity.

67. Secondly, and perhaps most importantly *Barreira Pérez* concerned a straightforward situation in which Spanish law, Spain being the Member State in issue in that case, added notional contributions by reference to the age of the person seeking a Spanish pension. The ministerial order providing for notional contributions therefore fell within the scope of the words 'under the legislation which it administers' in Article 46(2)(b) of Regulation No 1408/71 (now 'under the legislation it applies' in Article 52(1)(b)(ii) of Regulation No 883/2004). There was no issue in *Barreira Pérez* of an insured person seeking to interpret Spanish law to include periods of insurance undertaken outside of Spain for the purposes of the calculation to take place under Article 52(1)(b)(ii).

68. However, the non-contributory periods in issue in the main proceedings, are not caught by the words 'under the legislation it applies' in Article 52(1)(b)(ii) because the Polish legislation allows only for non-contribution periods up to the level of contribution periods completed in Poland. It is important to reiterate that, as explained by Advocate General Jacobs in *Stinco Panfilo*,[71] the apportionment phase is designed to distribute, fairly, responsibility among the Member States on the basis of length of contributions, so that the payment reflects the period the insured person spent working in the competent Member State. This balance would indeed be distorted, on the facts arising in the main proceedings, if the somewhat artificial extension of Polish non-contribution periods, which was necessary in calculation of the theoretical amount in order to overcome any disadvantage to the insured person exercising free movement rights in the Netherlands, were extended to the phase of apportionment and calculation of the actual amount pro rata under Article 52(1)(b)(ii) of Regulation No 883/2004. It is to be recalled that most contribution periods were completed in the Netherlands (see point 13 above), so that the distortion in the main proceedings would be significant if they were included at the apportionment stage in determining the amount of non-contribution periods to be counted.

69. Thirdly, replacing the indexing of the maximum level of non-contribution periods from contribution periods in Poland, with contribution periods in Poland and the Netherlands, for the calculation to take place under Article 52(1)(b)(i) of Regulation No 883/2004, but not with respect to Article 52(1)(b)(ii) thereof, makes perfect sense when the widely diverging purposes of these two provisions is recalled. The phrase 'under the legislation which it applies' under Article 52(1)(b)(i) falls to be interpreted in the light of the objective of calculation of the theoretical amount; namely, insured persons must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement.[72]

[70] Points 52 to 60 above.

[71] See point 54 above.

[72] Point 34 above. As the Court reiterated recently in its ruling of 28 June 2018, *Crespo Rey* (C-2/17, EU:C:2018:511, paragraphs 70 to 72), if Member State law cannot be interpreted in conformity with Regulation No 883/2004, it is to be disapplied.

70. However, as already explained, the purpose of Article 52(1)(b)(ii) of Regulation No 883/2004 is to secure a fair apportionment of responsibility among the Member States, based on length of contribution in each relevant Member State. In the light of this purpose, the words 'under the legislation which it applies' demands a literal interpretation. In other words, the context of 'under the legislation which it applies' in the two provisions, is different.[73] The literal interpretation of those words excludes host state contribution periods in the calculation to take place under Article 52(b)(ii) of Regulation No 883/2004 with respect to the one-third cap for non-contribution periods under Polish law, when account is taken of its context and purpose.

71. The argument of the Czech Government to the effect that EU law precludes a different duration of insurance periods being taken into account for calculation of the theoretical amount of a pension as opposed to the actual amount cannot be accepted. I also disagree with the Commission when it argues that the legal fiction reflected in the calculation of the theoretical amount is equally present in the pro rata calculation of the total number of pertinent periods of insurance in all Member States concerned. Contrary to the Commission's arguments, the ruling in *Menzies*[74] is not confined to the specific circumstances of that case.[75]

72. Finally, and for the sake of completeness, even if the calculation prescribed here restricted the insured person's free movement rights under Article 45 TFEU,[76] it would be justified by the principle of social solidarity, entailing the objective of connection with Polish society, and would not seem to go beyond what was necessary to achieve this end, as argued in the written observations of the pension authority.[77]

73. Therefore, the calculation that is reproduced at points 15 and 16 above, and which was undertaken by the pension authority, does not reflect the requirements of Article 52(1)(b)(i) and (ii) of Regulation No 883/2004 in the following respect.

74. The theoretical amount is not to be calculated by reference to national contribution periods (104) + national non-contribution periods (34) + foreign contribution periods (269), but by reference to the calculation that maximises the theoretical amount (in accordance with the Court's case-law), namely national contribution periods (104) + foreign contribution periods (269) + national non-contribution periods (124, representing one third of these two figures combined). This formulation adds up to 497 months of national contributions and is indeed the formulation reflected in the referring court's option (b).

[73] See my Opinion in *Pinckernelle* (C-535/15, EU:C:2016:996, point 40).

[74] Judgment of 26 June 1980, *Menzies* (793/79, EU:C:1980:172).

[75] See, for example, judgments of 18 February 1992, *Di Prinzio* (C-5/91, EU:C:1992:76); of 24 September 1998, *Stinco and Panfilo* (C-132/96, EU:C:1998:427); of 17 December 1998, *Lustig* (C-244/97, EU:C:1998:619); of 19 July 2012, *Reichel-Albert* (C-522/10, EU:C:2012:475); of 21 February 2013, *Dumont de Chassart* (C-619/11, EU:C:2013:92); of 21 February 2013, *Salgado González* (C-282/11, EU:C:2013:86) C.f. judgment of 21 July 2005, *Koschitzki* (C-30/04, EU:C:2005:492).

[76] See in this regard the judgment of 7 March 2013, *van den Booren* (C-127/11, EU:C:2013:140, paragraphs 38 to 46). Compliance with secondary provisions of EU law such as Regulations No 1408/71 and No 883/2004 does not rule out the existence of obstacles to free movement, as precluded by Article 45 TFEU. See, with respect, to Article 21 TFEU, the judgment of 19 July 2012, *Reichel-Albert* (C-522/10, EU:C:2012:475, paragraph 38): 'it is important to bear in mind that, although Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe European Union law and, in particular, the provisions of the Treaty on freedom of movement for citizens as guaranteed by Article 21 TFEU (see, to that effect, [judgments of 23 November 2000, *Elsen* (C-135/99, EU:C:2000:647 paragraph 33), and of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraph 43]).'

[77] Judgment of 26 October 2006, *Tas-Hagen and Tas* (C-192/05, EU:C:2006:676, paragraphs 34 and 35). See more recently Opinion of Advocate General Kokott in *Staatssecretaris van Economische Zaken and Staatssecretaris van Financiën* (C-133/13, EU:C:2014:2255, point 38).

75. The actual amount was, however, correctly calculated by the pension authority, as set out in point 16 above. The actual amount of the benefit was calculated on a pro rata basis from 138 months of Polish periods of insurance (104 months of Polish contribution periods plus 34 months of non-contribution periods capped at one third of national contribution periods on a total of 407 months of insurance in Poland and the Netherlands).

IV. Conclusion

76. I therefore propose the following answer to the question referred by the Sąd Najwyższy (Supreme Court, Poland):

Article 52(1)(b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems should be interpreted as meaning that, in the circumstances of the main proceedings, the competent institution is to take into account, when calculating pension benefits, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislation of other Member States only for the purpose of determining the theoretical amount under Article 52(1)(b)(i) of Regulation No 883/2004, and not for the purpose of establishing the actual amount of the benefit under Article 52(1)(b)(ii) of Regulation No 883/2004.