be taken into acount in the calculation of the theoretical amount referred to in Article 46 (2) (a) but not in the calculation of the actual amount referred to in Article 46 (2) (b) of Regulation No 1408/71.

Kutscher Mertens de Wilmars Mackenzie Stuart

Delivered in open court in Luxembourg on 26 June 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 28 MAY 1980 [1]

Mr President,
Members of the Court,

The parties to the action from which this reference for a preliminary ruling arises are in dispute over the amount of an occupational invalidity pension which has to be calculated in accordance with Article 46 (2) of Regulation 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 (Official Journal, English Special Edition 1971 (II), p. 416).

The plaintiff in the main action, born on 15 July 1937, is a national of the United Kingdom living in the Federal Republic of Germany. In December 1975 he became incapacitated for work within the meaning of Article 23 of the German Angestelltenversicherungsgesetz [Clerical Staff Insurance Law], hereinafter referred to as "the AVG", of 23 February 1957 (Bundesgesetzblatt I, p. 88 as last amended on 12 December 1977, Bundesgesetzblatt I, p. 2557). Up to that date he had paid 24 monthly contributions to the German pension insurance fund so that he did not fulfil the waiting time of 60 months required by Article 23 (3) of the AVG. The plaintiff could however show that he had 248 months of insurance in the United Kingdom which have to be taken into account under Article 45 of Regulation No 1408/71 for the acquisition of the right to benefits.

At his request the Bundesversicherungsanstalt für Angestellte, the defendant in the main action, granted him from January 1976 a pension for occupational invalidity which it calculated in accordance with Article 46 (2) of Regulation No 1408/71. The relevant provisions, as amended by the Act of Accession, are worded as follows:

1 — Translated from the German.

"(2) ...

(a) The institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or periods of residence completed under the legislation of the Member States to which the worker has been subject had been completed in the State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount ...;

(b) The institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph, and in the ratio which the length of the periods of insurance or residence completed before the risk materializes under the legislation administered by that institution bears to the total length of the periods of insurance and residence completed under the legislations of all the Member States concerned before the risk materialized."

In calculating the theoretical amount of the benefit in accordance with subparagraph (a) besides taking into account the 24 German and 248 United Kingdom months of insurance the Bundesversicherungsanstalt für Angestellte further took into account a supplementary period of 199 months. The basis for this was Article 37 of the AVG, according to which in regard to insured persons who have suffered invalidity before reaching the age of 55, in calculating the years of insurance to be taken into account the period running from the calendar month in which the risk materialized to the calendar month in which the insured person attained the age of 55 years must be added to completed periods of insurance and interrupted periods. This calculation resulted in a theoretical annual pension amounting to DM 11 270.66.

However, in the calculation of the amount actually payable the Bundesversicherungsanstalt für Angestellte took into account only the 24 months of contribution as German periods of insurance and disregarded the supplementary period. The time-apportioned ratio was consequently 24 : 24 + 248 which meant that according to that method of calculation the amount actually payable was 8.8% of the theoretical amount, or DM 82.90 a month.

The plaintiff, on the other hand, thinks that the supplementary period must also be taken into account in the calculation of the German periods of insurance. The time-aportioned ratio must consequently be: 24 + 199 : 272 + 199. That means a rate of 47% of the theoretical amount.

After his objection, his action before the Sozialgericht [Social Court] Frankfurt and his appeal to the Hessisches Landessozialgericht [Higher Social Court, Hessen] had failed, the plaintiff lodged an appeal on a point of law before the Bundessozialgericht, the 11th Senate of which stayed the proceedings by an order of 19 September 1979 and referred the following question to the Court of Justice for a preliminary ruling:

"Must the expressions 'periods of insurance ... completed' and 'periods of insurance ... completed ... before the risk materializes' contained in Article 46 (2) (a) and (b) of Regulation (EEC) No 1408/71 of the Council of the European Communities be interpreted as also including those periods treated as such within the meaning of Article 1 (r) of the regulation which can only start to run

when the risk materializes but which must, in order to obtain an appropriate pension, be added to the periods of insurance completed when the risk materializes, such as the German supplementary period within the meaning of Article 37 of the AVG?"

My views on this are as follows:

The parties are in dispute over the meaning of the words "periods of insurance or residence completed before the risk materializes under the legislation administered by that institution" used in Article 46 (2) (b).

The plaintiff takes the view that, in the light of the definition of "periods of insurance" given in Article 1 (r) of the said regulation, the periods of insurance which must be completed before the risk materializes are intended to include the supplementary periods within the meaning of Article 37 of the AVG which are specific to the national law of the Federal Republic of Germany. This interpretation of the provision in question is also confirmed by its meaning and purpose. The legal concept of a supplementary period pursuant to Article 37 of the AVG aims to give relatively more favourable treatment to insured persons who prematurely become incapacitated for work or incapable of earning. In order to provide such persons with a pension sufficient to subsist on they are treated as if contributions had been paid up to the time of their attaining the age of 55. But the sole purpose of Article 46 of Regulation No 1408/71 is to apportion sensibly and practicably the burden of pensions between the various national pension insurance institutions and not to hinder the social policy aims behind Article 37 of the AVG.

On the other hand the defendant adopts the view that the supplementary period under Article 37 of the AVG may be taken into account only in the calculation of the theoretical amount. This view is confirmed by Decision No 95 of 24 January 1974 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (Official Journal C 99 of 23 August 1974, p. 5). It is in keeping not only with the wording of this provision but also with a teleological approach to the provision. Thus the supplementary period within the meaning of Article 37 of the AVG is not an actually completed period of insurance but only a factor determining the amount of the pension in accordance with the scheme and based on considerations of social policy alone, the intention being to ensure that premature invalids receive a minimum pension without having paid the appropriate contributions.

Although the supplementary period is not a completed period, it is not justifiable when calculating the theoretical amount in accordance with Article 46 (2) (a) of the regulation in question to leave out of account the portion of contributions attributable to it since, as the second sentence of that provision shows in particular, the aim of the regulation is to allow as many of the factors as possible which determine the amount of the national pension to count in the determination of the theoretical amount. Under Article 46 (2) (b) the theoretical amount calculated in this way is however to be paid *pro rata* only. The amount to be paid by the institution of a Member State has to be determined by the period of insurance actually completed up to the time at which the risk materializes. To that extent the provision is an expression of the "mere co-ordination" of the schemes accomplished at that time in the Community. Failure to take this view of the law would lead to different treatment in the Member States which treat the

same situation, such as premature invalidity, differently under their pension insurance schemes.

In conclusion the Commission takes the view that the legal nature of the supplementary period mentioned in Article 37 of the AVG is ultimately a question of interpretation for national German law and not for Community law. If the German legislature regards the supplementary period as a period of insurance that supplementary period must be treated as completed up to the time at which the risk materializes, and it must therefore be regarded as a period completed before the risk materializes. Having weighed up all the arguments the Commission is nevertheless inclined to regard the supplementary period as an internal method of calculation binding only on the German insurance institution. This interpretation, it claims, is not contrary to Decision No 95 of the Administrative Commission the wording of which would moreover seem to indicate that basically the Administrative Commission also regards such notional periods as factors in calculation and not as periods of insurance. Even if the supplementary period is seen as no nore than a factor in calculation, then that factor must be taken into account in full in the calculation of the theoretical amount, on the basis of which the German institution must proceed, with the result that the German institution has to pay 9% on the basis of 471 insurance months.

I too am of the opinion that the question of the legal nature of the supplementary period can only be determined under national law and therefore only by the national courts. The same applies to the further question whether, if the supplementary period is a period of insurance or a period treated as such, the supplementary period is considered to be completed before or after the risk materializes. This follows clearly from Article 1 (r) of Regulation No 1408/71 which in regard to the application of that regulation defines the term "periods of insurance" very broadly and by reference to national law as follows:

"Periods of contribution or periods of employment as defined or recognized 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 insurance."

It follows from that that in regard to the apportionment of the burden of pensions between the institutions concerned the Community legislature responsible for that apportionment refers to the national law. The German court has therefore to decide whether the supplementary period has to be regarded as a period equivalent to the periods of insurance.

It must be borne in mind here that the supplementary period is indisputably included in the calculation of the theoretical amount of the benefit under Article 46 (2) (a) of Regulation No 1408/71 which provides that "all the periods of insurance or periods of residence completed under the legislation of the Member States" are to be taken into account. By the second sentence of that provision, if the amount of the benefit does not depend in national law on the length of the periods completed then that amount shall be taken as the theoretical amount.

Another factor to be borne in mind is that, contrary to the view of the defendant in the main action, by its very wording Article 46 (2) (b) does not indicate periods actually completed

before the risk materializes. For this reason substitute periods and interrupted periods for which no contributions have been paid are also to be taken into account in the apportionment.

Finally, Decision No 95 of the Administrative Commission does not militate against taking into account the supplementary period in the calculation of the actual amount under Article 46 (2) (b); [in German] the decision reads:

"Der zuständige Träger eines Mitgliedstaats, nach dessen Rechtsvorschriften die Höhe der Leistungen unter Berücksichtigung fiktiver Zeiten nach Eintritt des Versicherungsfalls festgestellt wird, ... diese Zeiten nur bei der Berechnung des theoretischen Betrages nach Artikel 46 Absatz 2 Buchstabe a) der Verordnung (EWG) Nr. 1408/71 [berücksichtigt], nicht aber bei der Berechnung des tatsächlichen Betrages nach Artikel 46 Absatz 2 Buchstabe b) dieser Verordnung".

The rather unclear wording of the German text of the decision could justify the assumption that periods presumed to have been completed, which are determined after the occurrence of the event insured against, are only to be taken into account for the calculation of the theoretical amount under subparagraph (a). The clearer wording of the versions in other Community languages shows plainly however that only such periods as are *notionally* regarded as running *after* the occurrence of the event insured against, are not to be taken into account for the calculation of the actual amount under subparagraph (b). For example the French text reads:

"L'institution compétente d'un État membre dont la législation prévoit que le montant des prestations est établi en tenant compte de périodes fictives postérieures à la réalisation du risque ..."

The English version runs:

"The competent institution of a Member State whose legislation provides that the amount of benefits must be determined by taking into account periods presumed to have been completed after the occurrence of the event insured against [shall take these periods into consideration solely for calculating the theoretical amount referred to in Article 46 (2) (a) of Regulation No 1408/71, and not for calculating the actual amount referred to in Article 46 (2) (b) of that regulation]".

Moreover, the arguments of the Bundessozialgericht themselves show that it would be wrong in German law to regard a period as notional because it has not yet elapsed.

I therefore come to the conclusion that Article 46 (2) (a) and (b) of Regulation No 1408/71 are to be interpreted as meaning that, if the supplementary period mentioned in Article 37 of the AVG is to be regarded as a completed period of insurance in German law, it must also be taken into account for the calculation of the theoretical amount under subparagraph (a) as well as in the determination of the actual amount under subparagraph (b). I cannot discern any binding requirements in Community law which make it imperative to regard the supplementary period, not as a period of insurance within the meaning of the said provision, but as a factor in calculation only. Furthermore, I can see no reason for treating the German supplementary period as an atypic phenomenon of a national legal system which could justify shifting the burden onto the German insurance institution alone. Contrary to the view of the Commission, clear support for this opinion cannot be derived from Decision No 95 of the Administrative Commission either. Finally, in my opinion the judgment of the Court in Case 50/75 *(Caisse de Pension des Employés Privés* v *Helga Massonet,* judgment of 25 November 1975 [1975] ECR 1473), which concerned, amongst other things, the question of the overlapping of periods of insurance prohibited by Article 27 (1) of Regulation No 3 of the Council of 25 September 1958 on social security for migrant workers (Journal

Officiel No 30 of 16 December, p. 561), cannot be adduced as evidence that in the apportionment of the burden of the pensions between the various insurance institutions the supplementary period mentioned in Article 37 of the AVG is to be regarded as no more than a method of calculation.

I therefore suggest that the question from the Bundessozialgericht be answered as follows:

The terms "periods of insurance completed" and "periods of insurance completed before the risk materializes" in Article 46 (2) (a) and (b) of Regulation No 1408/71 of the Council are to be interpreted to the effect that they can also include periods treated as such within the meaning of Article 1 (r) of the regulation which under national legislation are to be added to the completed periods of insurance when the risk materializes.