OPINION OF ADVOCATE GENERAL LÉGER

delivered on 6 June 2002 [1]

1. With the aim of helping to establish freedom of movement for workers, Council Regulation No 1408/71 [2] provides that, where a national of a Member State cannot establish a period of affiliation or of employment sufficient to entitle him to a retirement pension in that State, periods of insurance or of employment completed by the person concerned in various Member States shall be aggregated.

2. In those circumstances, the retirement pension payable by the Member State is to be calculated in accordance with the ratio of periods of insurance or employment completed by the person concerned in that State. This is referred to as a '*pro rata* benefit'.

3. In this case, the Court has been asked to interpret the concept of 'periods of insurance', as provided for in Article 1(r) and (s) and Article 46(2) of the Regulation, for the purposes of calculating a *pro rata* benefit. This involves determining the extent to which a period of notional contribution which, according to the national legislation, has been added to periods of actual contribution solely in order to fix the amount of retirement pension, must be taken into account in calculating this *pro rata* benefit.

I — Legal background

The provisions of national law

4. According to the applicable Spanish legislation, the right to an old-age pension is conditional upon having contributed for at least 15 years, two of which must fall within the fifteen years immediately preceding the date on which entitlement to a pension arises. [3]

1 — Original language: French.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1399/1999 of 29 April 1999 (OJ 1999 L 164, p. 1) (or 'the Regulation').

3 — Article 161(1)(b) of the Ley General de Seguridad Social (General Law on Social Security), revised version approved by Real Decreto Ley (Royal Decree-Law) No 1/1994 of 20 June 1994 (BOE No 154 of 29 June 1994).

5. The amount of the retirement pension depends on the contributions paid by the person concerned and on the length of the person's periods of insurance. Thus, the amount of benefit is determined by applying the following percentages to the relevant basis of assessment:

— 50% for the first 15 years;

— 3% for each additional year in which contributions are paid, between the 16th and 25th year inclusive, and

— 2% for each additional year in which contributions are paid, commencing with the 26th year, provided that the total applied to the reference basis of assessment does not exceed 100%. [4]

6. Each worker's years of contribution are to be determined on the basis of periods of contribution to the general social security scheme from 1 January 1967, increased, where necessary, by periods of contribution to previous old-age and disability insurance or workers' mutual schemes, which have been abolished. [5]

7. Paragraph 3 of the Second Transitional Provision of the Ministerial Order provides that the periods of contribution to such previous schemes are to be calculated according to the following rules:

'(a) These contributions shall be calculated on the basis of contributions actually paid during the period falling between 1 January 1960 and 31 December 1966 to one or both of the abovementioned schemes, but contributions which overlap shall be taken into account only once;

(b) where appropriate, the number of years and fractions of years attributed to the worker by reference to his age on 1 January 1967 shall be added to the number of days of contributions referred to in subparagraph (a) above, in accordance with the scale set out below...

4 — Ibid., paragraph 163.

5 — Article 9(4) of the Orden Ministerial (Ministerial Order) of 18 January 1967 on the provisions for application and implementation of old-age benefit (BOE No 22 of 26 January 1967), or 'the Ministerial Order'.

(c) the number of days of contribution for the period referred to in subparagraph (a), increased, where appropriate, by the days corresponding to the fraction of years resulting from the application of the scale set out in subparagraph (b) above and by the days in respect of which contributions have been paid the general social security scheme from 1 January 1967, shall be divided by 365 in order to determine the number of years of contribution, by reference to which the percentage of the pension is determined, and the fraction of the year, if there is one, shall be deemed to be a full year of contribution, regardless of the number of days it comprises.'

8. The years and fractions of years, expressed in days, attributed to the worker in accordance with the abovementioned scale, by reference to his age on 1 January 1967, are between 30 years and 318 days, for a worker aged 65 years, and 250 days, for a worker aged 21 years.

9. They are not taken into account for the purpose of building up the 15-year minimum qualifying period for entitlement to an old-age pension.

The provisions of Community law

10. According to Article 1(r) of the Regulation, the term 'periods of insurance' means, for the purposes of application of the Regulation, 'periods of contribution or periods of 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'.

11. Article 1(s) of the Regulation refers in the same terms to national legislation in relation to defining 'periods of employment' and 'periods of self-employment'.

12. Where a person's entitlement to an old-age pension arises in a Member State only by having recourse to aggregation of periods of insurance completed in two or more Member States, Article 46(2) of the Regulation provides that:

'(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 [6] 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.'

II — Facts and procedure

13. Mr Barreira Pérez, a Spanish national born on 10 October 1934, has worked in Germany and in Spain. In October 1999, at the age of 65 years, he made a claim for a retirement pension.

14. He made contributions in respect of 4 051 days in Germany, sufficient to entitle him to a retirement pension from the competent German institution. He also contributed for 5 344 days in Spain, which is less than the minimum qualifying period of 15 years, fixed by the legislation of that State. [7]

15. The Instituto Nacional de la Seguridad Social (National Social Security Institute — or 'the I.N.S.S.'), the body responsible for management of the Spanish social security system, therefore aggregated the periods of insurance completed by Mr Barreira Pérez in Spain and in Germany. In order to determine the pension payable to him in Spain, the I.N.S.S. calculated the theoretical amount of benefit under Article 46(2)(a) of the Regulation. To the 9 395 actual days of contribution days completed in Spain and in Germany, [8] it added 3 005 days of notional contribution credited to Mr Barreira Pérez in accordance with the scale referred to in paragraph 3(b) of the Second Transitional Provision of the Ministerial Order.

16. However, the I.N.S.S. did not take those 3 005 days into account in calculating the *pro rata* benefit. This means that it did not add them to the 5 344 days of contribution completed in Spain, referred to in the numerator, nor to the 9 395 days of contribution in the two Member States,

6 — According to Article 4(1) of the Regulation, 'the risk' refers to the event covered by the social security benefit concerned. Here, therefore, it means the old age of the person concerned.

7 — See paragraph 3 of this Opinion.

8 — 4 051 days in Germany and 5 344 days in Spain.

which form the denominator of the coefficient by which the theoretical amount must be multiplied in order to determine the *pro rata* benefit.

17. Consequently, the coefficient applied by the I.N.S.S. to the theoretical amount was 0.5685, instead of 0.6733.

18. Mr Barreira Pérez brought an action against the I.N.S.S.'s decision to fix his retirement pension in Spain on that basis.

III — The questions referred for a preliminary ruling

19. The Juzgado de lo Social (Social Court), Orense (Spain), has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 1(r) and (s) [of Council Regulation No 1408/71] be interpreted as meaning that periods of notional, equivalent contribution, which may be taken into account under the legislation of a Member State for the purpose of determining the number of years of contribution by reference to which the amount of old-age pension is determined under domestic legislation, are also to be considered from a legal viewpoint as "periods of insurance"?

(2) If the answer to the first question is in the affirmative, is the proper construction of Article 46(2)(b) [of that regulation] that "the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which [the competent institution of a Member State] administers" also includes those periods of notional contribution corresponding to periods before the materialisation of the risk which, under the legislation of the Member State concerned, are to be taken into account as periods of contribution for the purpose of determining the amount of old-age pension?'

IV — The answer to the questions

20. In its questions, the referring court asks whether the 3 005 days attributed to Mr Barreira Pérez, pursuant to paragraph 3(b)

of the Second Transitional Provision of the Ministerial Order, must be taken into account in calculating the *pro rata* benefit.

21. The national court is therefore seeking to determine whether those 3 005 days are to be regarded as a period of insurance, for the purposes of Article 1(r) and (s) of the Regulation, and, if so, whether they constitute a period of insurance completed before the materialisation of the risk, for the purposes of Article 46(2)(b) of the Regulation.

On the first question

22. As regards the defining of the concept of 'periods of insurance' in Article 1(r) and (s) of the Regulation, it is apparent from the wording of these provisions that they refer expressly to national legislation.

23. As the Court has often held, the object of the Regulation, in pursuance of Article 42 EC, is the aggregation, for the purpose of 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 various countries. It does not, however, determine the conditions on which those periods are to be constituted. [9]

24. The Court has held on several occasions that, in order to determine whether a given period is to be regarded as a period of insurance, reference must be made to the conditions laid down by national law, provided however that Articles 39 EC to 42 EC are observed. [10]

25. As the Commission has rightly asserted, it is for the national court to interpret its own legislation, in compliance with the provisions of the EC Treaty relating to freedom of movement for persons.

26. Within the framework of cooperation established by Article 234 EC, the Community judicature may nevertheless provide the national court with useful guidance on

9 — Case 388/87 *Warmerdam-Steggerda* [1989] ECR 1203, paragraph 10, and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

10 — Case 126/77 *Frangiamore* v *Office National de l'Emploi* [1978] ECR 725; Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* v *Office national des pensions* [1993] ECR I-6497, paragraphs 19 and 20; and Case C-28/00 *Kauer* v *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I-1343, paragraph 26.

the interpretation of Community law in order to enable it to interpret its national law and determine the outcome of the main proceedings.

27. It must be borne in mind, firstly, that in accordance with settled case-law, 'a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position, and provided that it concerns one of the risks expressly listed in Article 4(1) of the Regulation'. [11]

28. It will fall to the national court to ascertain whether each of these conditions is satisfied.

29. In the light of the facts that the national court has made known to the Court, we may reasonably consider that the period at issue satisfies those conditions, with the result that it falls within the ambit of the Regulation.

30. Firstly, the period at issue was attributed credited to Mr Barreira Pérez because he satisfied the conditions laid down by Spanish legislation, that is to say, he had contributed to one of the insurance schemes referred to by that legislation. The period was determined on the basis of the applicant's age 1 January 1967 by means of a scale laid down for that purpose, without any regard to his personal needs. [12]

31. Secondly, the period at issue was added to the actual periods of contribution in calculating the amount of Mr Barreira Pérez's old-age pension, which is one of the benefits covered by Article 4(1) of the Regulation.

32. Next, it is undisputed that the I.N.S.S. took this period into account in full in calculating the theoretical amount of the pension, as laid down in Article 46(2)(a) of the Regulation. [13] The merits of taking it into account in this way are not disputed by the Spanish Government.

33. It ought to be borne in mind that, under Article 46(2)(a) of the Regulation, the

11 — Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 29 and the case-law cited. Article 4(1) of the Regulation provides that the latter is to apply to all legislation concerning the branches of social security covering the benefits which it lists, among which are old-age benefits.

12 — See paragraphs 4 to 8 of this Opinion and the order for reference, pp. 2 to 3.

13 — See the order for reference, p. 4.

theoretical amount of the benefit is to be calculated as if all periods of insurance and of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, had been completed in the State in question, and under the legislation which the competent institution administers on the date of the award of the benefit.

34. Article 46 of the Regulation does not include any definition of the concept of periods of insurance. The Court has already held that, in order to apply this Article, reference must be made to the definition in Article 1(r) of the Regulation. [14] It follows that the periods of insurance taken into account in calculating the theoretical amount are the periods of contribution or periods of 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. [15]

35. In that regard, it seems to me important to point out that neither the Spanish Government nor the I.N.S.S., at the hearing, was able to explain, in answer to the Court's questions on this point, on what basis this period had been taken into account in this calculation without being treated by Spanish legislation as a period of insurance.

36. The Spanish Government and the I.N.S.S. have asserted, primarily, that this period is not based on contributions paid and was not taken into account for the acquisition of rights to an old-age pension. According to them, accepting that this period could be regarded as a period of insurance would undermine the balance between contributions collected and benefits paid. The risk of this would be aggravated by the fact that workers who had contributed to the schemes of other Member States between 1960 and 1966 could also be entitled to credits for this additional period on the basis of age and thus could obtain an increase in the pension which they may claim in Spain, without any quid pro quo.

37. However, this line of argument cannot challenge the actual wording of Article 1(r) and Article 46(2)(a) of the Regulation.

38. Similarly, this line of argument seems to me to be contradicted by the fact that the period at issue was attributed to Mr Barreira Pérez because he had contributed to one of the insurance schemes which was abolished when the national system was set

14 — *Lepore and Scamuffa*, paragraphs 17 to 19.

15 — See paragraph 10 of this Opinion.

up. The origin of that period is, therefore, membership of and contributions paid to a social security scheme. Furthermore, it is apparent from the Spanish Government's own explanations that attributing to workers who have been members of one of these schemes a fixed period, determined according to their age, was a measure intended to preserve their rights acquired under those schemes in the light of the new conditions on length of contribution and benefit rates laid down by the new system. [16]

39. Finally, the line of argument used by the Spanish Government and the I.N.S.S. in so far as it concerns the detrimental financial consequences of an affirmative answer to the questions raised by the referring court, confirms, in my opinion, that the period at issue is in fact treated as a period of insurance under the national legislation since, if it were not, the I.N.S.S. would have been sure to discount it when calculating the theoretical amount.

40. In the light of the facts set out above, I therefore propose that the Court should reply in the affirmative to the first question referred for a preliminary ruling since, pursuant to the national legislation, the period at issue was taken into account in calculating the theoretical amount of the old-age benefit, provided for by Article 46(2)(a) of the Regulation.

16 — In particular, the increase to 35 years of the length of contribution required for receipt of a full-rate retirement pension. See the Spanish Government's observations, p. 7 of the French version.

On the second question

41. This concerns determination of the extent to which the period of insurance at issue may be regarded as having been completed before the materialisation of the risk, within the meaning of Article 46(2)(b) of the Regulation.

42. I consider the answer to this question to be contained in the Court's judgment in *Di Prinzio*. [17] Like the Commission and the applicant, I think the approach followed in that judgment may be applied in the present case.

43. In that judgment, the Court was faced with a law which provided that a mine worker who had worked for 30 years had the right to a full pension and that, while he had not accumulated 30 years in that occupation but at least 25, he was entitled to a number of additional years of notional work equal to the difference between 30 years and the actual number of years worked.

44. Invited to give a ruling on the conditions in which Article 46(2) of the Regulation was to be applied, the Court took the view, firstly, that it is apparent

17 — Case C-5/91 *Di Prinzio* v *Office National des Pensions* [1992] ECR I-897.

from the wording of Article 46(2)(a) that the competent institution is to apply its own State's legislation in its entirety. The Court deduced from this that, if this legislation provides that the old-age benefit must be calculated not only by reference to actual periods or periods treated as such, but also to a number of additional years of notional work, these additional years must also be taken into account in calculating the theoretical amount of benefit. [18]

45. Secondly, the Court took the view that, where the notional periods recognised by the applicable national legislation predate the materialisation of the risk, as in the present case, those periods must be included in the calculation of the *pro rata* benefit. [19]

46. The Court based that statement on the words 'periods of insurance completed before the materialisation of the risk' in Article 46(2)(b) of the Regulation. [20]

47. The Court inferred from Decision No 95 of the Administrative Commission of the European Communities on Social Security of Migrant Workers of 24 January 1974 [21] and from *Menzies* [22] that the notional periods taken into consideration solely in order to compute the theoretical amount but not to determine the *pro rata* benefit are notional periods *after the materialisation of the risk*.

48. It thus follows from the Court's judgment in *Di Prinzio* that the notional periods which, under the national legislation applicable, must be added to actual periods of contribution in order to fix the theoretical amount of old-age pension and which predate the materialisation of the risk, must be taken into account in calculating this *pro rata* benefit.

49. In the present case, it is undisputed that, under the national legislation, the period at issue was taken into account in calculating the theoretical amount of the benefit. [23]

50. Next, I consider, contrary to the opinion expressed by the Spanish Government and by the I.N.S.S., that this period at

18 — Ibid., paragraph 45.

19 — Ibid., paragraphs 54 and 56.

20 — Idem.

21 — Decision concerning the interpretation of Article 46(2) of Regulation No 1408/71 on the calculation of *pro rata* pensions (OJ C 99, p. 5).

22 — Case 793/79 *Menzies* [1980] ECR 2085.

23 — See paragraph 32 of this Opinion.

issue must be regarded as having been completed before the materialisation of the risk, within the meaning of Article 46(2)(b) of the Regulation.

51. It is apparent from the Second Transitional Provision of the Ministerial Order [24] and from the order for reference [25] that the period at issue was attributed to Mr Barreira Pérez because he had contributed to previous Spanish insurance schemes. It is common ground that the period was calculated with reference to his age on 1 January 1967, according to the scale laid down for that purpose. That period therefore forms part of the rights to which Mr Barreira Pérez is entitled on account of having contributed to these schemes. It was indeed completed before the risk covered by the benefit materialised, in the calculation of which the period was taken into account, that is to say, the old age of the person concerned.

52. In this regard, contrary to what the Spanish Government and the I.N.S.S. maintain, the period at issue differs from the one at issue in *Menzies*.

53. That case involved a supplementary period which was intended to help evaluate the benefits granted in the case of premature invalidity or death of an insured person who had suffered occupational invalidity before reaching the age of 55. It was equal to the period between the month in which the risk materialised and the last month of the year in which the insured person reached the age of 55. [26]

54. That supplementary period therefore came after the risk had materialised, that is to say, after the accident at work suffered by the person who then claimed invalidity pension, and because of which he was entitled to that pension.

55. The Court logically deduced from that, therefore, that this supplementary period, which did not correspond to any period of insurance or of actual residence in the Member State in question *completed before the risk materialised*, had to be taken into account in calculating the theoretical amount but not in calculating the *pro rata* benefit. [27]

56. In the present proceedings, the facts giving rise to the period at issue, namely, first, contribution to one of the previous insurance schemes and, second, the age of

24 — See paragraph 6 of this Opinion.

25 — Page 4 of the French translation.

26 — See the Court's judgment in *Menzies*, paragraph 4.

27 — Ibid., paragraph 11 and the operative part of the judgment.

the person concerned on 1 January 1967, obviously date from before he reached the age required to make a claim for a retirement pension.

57. Next, the fact that the period at issue was attributed to Mr Barreira Pérez only when those rights were determined is not inconsistent with this analysis. The period at issue does not differ, in that respect, from the actual contribution periods completed by the person concerned and taken into account by the I.N.S.S. in calculating the *pro rata* benefit. Furthermore, the same was also true of the notional period taken into account in the *Di Prinzio* case.

58. As regards the fact that it is not possible to situate the period at issue chronologically between 1 January 1960 and 31 December 1966, so that this period and completed periods of insurance might overlap, during the same interval of time, under the legislation of another Member State, I consider that these correspond to the situation specified in Article 15(e) of Council Regulation (EEC) No 574/72.[28] Under this provision, if the time in which certain periods of insurance or residence were completed under the legislation of a Member State cannot be determined accurately, such periods are to be presumed not to overlap with periods of insurance or residence completed under the legislation of another Member State and are, where advantageous, to be taken into account.

59. The present case therefore involves a notional period treated by the applicable national legislation as a period of insurance, and this must be regarded as having been completed before the materialisation of the risk.

60. In accordance with the view upheld by the Court in the *Di Prinzio* case, this notional period satisfies the conditions required for it to be taken into account in calculating the *pro rata* benefit.

61. Contrary to what the Spanish Government and the I.N.S.S. maintain, this conclusion does not have the effect of conferring a dual advantage on the applicant.

28 — Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Council Regulation (EC) No 118/97, as amended by Council Regulation (EC) No 1399/1999.

62. Taking it into account in this way simply constitutes strict application of Article 46(2)(b) of the Regulation, which is precisely intended to fix the actual amount of the benefit payable by the respective institutions of each Member State in accordance with the proportion of rights that the worker has acquired in each of those States.

63. Conversely, the approach advocated by the Spanish Government and the I.N.S.S. penalises Mr Barreira Pérez for exercising his right to freedom of movement.

64. If Mr Barreira Pérez had remained working in Spain and had completed all his periods of insurance there, his old-age pension would have been calculated taking into account the whole of the notional period at issue.

65. We have seen that, under the Spanish legislation, the retirement pension is calculated by applying percentages to the relevant basis of assessment according to the number of years of contribution and that this number is determined by adding to the actual years of contribution the number credited to the worker pursuant to paragraph 3(b) of the Second Transitional Provision. [29]

66. Discounting the contested notional period from the calculation of the *pro rata* benefit clearly has the effect of reducing, simply because he has exercised his right to freedom of movement, the advantages that Mr Barreira Pérez would have derived from this notional period.

67. The Regulation has the objective of ensuring that migrant workers do not lose their rights to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty. [30]

68. The Court has repeatedly held that the aim of Articles 39 to 42 of the Treaty would not be attained if, as a consequence of the exercise of this right, Community workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State. Such a consequence could deter these workers from exercising their right to freedom of

29 — See paragraphs 4 to 9 of this Opinion.

30 — See also Case C-406/93 *Reichling* v *Institut National d'Assurance Maladie-Invalidité* [1994] ECR I-4061, paragraph 24.

movement and would therefore constitute an obstacle to that freedom. [31]

69. The Court has deduced from this that the abovementioned articles constitute a barrier to a Community worker's forfeiting, because he has exercised his right to freedom of movement, all or part of the advantage of a provision of his national social security legislation. Thus, the Court has taken the view that it is incompatible with Community law for a migrant worker to be precluded from relying, for the calculation of his old-age pension, on national legislation treating periods of invalidity as periods of active employment on the sole ground that, when he became incapable of work, he was employed, not in the Member State in question, but in another Member State. [32]

70. The approach upheld by the I.N.S.S., which, so far as the applicant is concerned, results in the coefficient used to calculate the *pro rata* benefit's being fixed at 0.5685 instead of 0.6733, is actually such as to dissuade a worker from exercising his right to freedom of movement.

71. I deduce from all these factors that the second question referred for a preliminary ruling must be answered in the affirmative.

31 — See, in particular, *Paraschi*, paragraph 22, and Case C-302/90 *Caisse auxiliaire d'assurance maladie-invalidité and Institut national d'assurance maladie-invalidité* v *Faux* [1991] ECR I-4875, paragraphs 27 and 28, and the case-law cited.

32 — *Lepore and Scamuffa*, paragraph 24.

V — On the limitation of the effects of the judgment to be delivered

72. As a subsidiary plea, the Spanish Government has asked the Court to rule, if it has replied in the affirmative to the questions referred for a preliminary ruling, that the judgment will not have any retroactive effect.

73. The Spanish Government has asserted that affirmative answers run the risk of causing a serious economic imbalance for the national social security scheme. It has added that persons who contributed between 1960 and 1966 in a Member State will be able to obtain a significant increase in the pension to which they are entitled in Spain.

74. It ought to be borne in mind that the Court's interpretation of a rule of Community law, in the exercise of the jurisdiction conferred on it by Article 234 EC, clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dis-

pute relating to the application of that rule before the competent courts are satisfied. [33]

75. According to settled case-law, it is therefore only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon a provision which it has interpreted with a view to calling in question legal relationships established in good faith. [34]

76. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. [35] Furthermore, the limitation may be allowed only in the actual judgment ruling upon the interpretation sought. [36]

77. In the present case, it appears undeniable that, if the Court should answer the two questions referred for a preliminary ruling in the affirmative, the judgment to be delivered will have negative financial repercussions for the Spanish social security system, even though, as the documents in this case now stand, it is not possible to assess their extent and duration. However, it seems to me that the two other conditions set out above are not fulfilled.

78. The condition relating to the good faith of those concerned requires that they should have been reasonably mistaken as to the applicability [37] or the scope [38] of the Community provision being interpreted. It is necessary that the ambiguity of Community law should have given rise to a significant legal uncertainty. [39]

79. Article 46 of the Regulation does not present any particular ambiguity. In any event, the provisions of Article 46(2)(b) of the Regulation, since their interpretation in the *Di Prinzio* case, no longer involve any ambiguity, at least as regards the conditions in which the notional contribution periods must be taken into account in calculating the *pro rata* benefit. In that connection, the Spanish Government and the I.N.S.S. have not invoked any circumstances other than the probability of financial repercussions for the social security body concerned.

33 — Case C-262/96 *Sürül* v *Bundesanstalt für Arbeit* [1999] ECR I-2685, paragraph 107.

34 — In Case 43/75 *Defrenne* v *Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, the Court accepted, for the first time, that it could limit the temporal effects of its preliminary rulings, on the basis of important considerations of legal certainty affecting all the interests involved, both public and private. See, for a recent application, Case C-372/98 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte J.H. Cooke & Sons* [2000] ECR I-8683, paragraph 42.

35 — See the Court's judgment in *Cooke*, paragraph 42.

36 — Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625, paragraph 30, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 142.

37 — Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 43.

38 — Case 61/79 *Amministrazione delle finanze dello Stato* v *Denkavit italiana* [1980] ECR 1205, paragraphs 19 to 21.

39 — Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 48.

80. Next, it is to be borne in mind that, where the case involves, as the present case does, a social security system the funding of which depends on a Member State, the Court has consistently held that the financial consequences which might ensue for a State from a preliminary ruling have never in themselves justified limiting the temporal effects of that judgment. The Court has taken the view that to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which individuals have under Community law. [40]

81. Finally, I consider that the limitation requested runs foul of the fact that there is no such measure in the Court's judgment in *Di Prinzio*.

82. As I have stated above, limitation of the temporal effects may be allowed only in the actual judgment ruling upon the interpretation sought. The Court has taken the view that, when a judgment interpreting a provision of Community law has not limited its temporal effects, such a restriction cannot be made in a later judgment. [41]

83. In the present proceedings, the referring court has submitted two questions to the Court, which concern the interpretation of, respectively, Article 1(r) and (s) and Article 46 of the Regulation. We have seen that the provisions of Article 1(r) and (s) of the Regulation, which refer expressly to national legislation, are covered by long-standing, settled case-law. [42]

84. As far as Article 46(2)(b) of the Regulation is concerned, the Court's judgment in *Di Prinzio* does not provide for any limitation on the temporal effects of its interpretation of this provision, under which the *pro rata* benefit must be calculated taking into account all notional periods before the risk materialised, added to the actual years of employment or years treated as such by the legislation applied by the competent institution.

85. I think that the circumstances in this case do not justify any derogation from the principle that interpreting judgments have retrospective effect.

40 — Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 52, and Case C-104/98 *Buchner and Others* v *Sozialversicherungsanstalt der Bauern* [2000] ECR I-3625, paragraph 41 and the case-law cited.

41 — Case 309/85 *Barra* v *Belgian State and City of Liège* [1988] ECR 355, paragraph 14.

42 — See paragraph 24 of this Opinion.

VI — Conclusion

86. In light of the preceding considerations, I propose that the Court should give the following answers to the questions referred for a preliminary ruling by the Juzgado de lo Social (Social Court), Orense:

'(1) The provisions of Article 1(r) and (s) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1399/1999 of 29 April 1999, must be interpreted as meaning that periods of notional, equivalent contribution, which may be taken into account under the legislation of a Member State for the purpose of determining the number of years of contribution by reference to which the amount of old-age pension is determined under domestic legislation, are also to be considered from a legal viewpoint as "periods of insurance", where, pursuant to the national legislation, these periods were taken into account in calculating the theoretical amount of the old-age benefit, provided for by Article 46(2)(a) of the Regulation.

(2) The provisions of Article 46(2)(b) of the Regulation must be interpreted as meaning that "the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation" which the competent institution of a Member State administers also includes those periods of notional contribution corresponding to periods before the materialisation of the risk which, under the legislation of the Member State concerned, are to be taken into account as periods of contribution for the purpose of determining the amount of old-age pension.'