OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 8 February 2000 *

1. By the question which it has referred to the Court for a preliminary ruling, the Bundessozialgericht (Federal Social Court), Germany, wishes to know whether Community law and, in particular, the provisions enshrining the principle of freedom of movement for workers, preclude the gross amount of the pension granted to a migrant worker under a collective agreement from being subject to sickness insurance contributions both in the State in which it is provided, which does not recognise his entitlement to benefits, and in the Member State in which he resides and to whose social security laws he is subject.

I. The facts in the main proceedings

2. Mr Sehrer, who is the plaintiff in the main proceedings, was born in 1924. Since 1984, when he reached the age of sixty, he has been receiving a retirement pension from the Bundesknappschaft (Federal Insurance Fund for Miners), the defendant social security institution. He lives in Germany and is insured under the Krankenversicherung der Rentner (Pensioners' Sickness Insurance Scheme). He also receives in Germany, from the Landesversicherungsanstalt für das Saarland (Regional Insurance Institution for the Saarland), a supplementary pension under the metalworkers' insurance scheme.

3. In France, the Caisse de retraites complémentaires des ouvriers mineurs (Mineworkers' Supplementary Pension Fund) pays him a retirement pension under a pension scheme established on the basis of a collective agreement.

The gross amount of the French supplementary pension, which, varied during the period at issue — from December 1988 to September 1993 — from FRF 2 384.19 to FRF 2 538.45 per quarter, is subject to a deduction of 2.4% by way of contribution to the sickness insurance scheme. The amount of the contribution varied between FRF 57.22 and FRF 60.92 per quarter during the period in question. This solidarity contribution does not give the plaintiff any entitlement to benefits.

4. When the defendant social security institution learned that Mr Sehrer was receiving the French pension, it demanded payment of the German sickness insurance contributions, which it calculated on the basis of the gross amount of the French pension, without deducting the contributions already

* Original language: Spanish.

paid in France. The sum demanded in respect of arrears of contributions is DEM 1 005.67.

5. The plaintiff's administrative appeal was unsuccessful. The legal action he brought before the Sozialgericht für das Saarland (Social Court of the Saarland) was successful in part. The court annulled that part of the defendant institution's decisions in which it held that the gross amount of the French pension, including the amount deducted by way of contribution to the French sickness insurance scheme, was subject to contributions in Germany. Otherwise it dismissed the action.

6. The Landessozialgericht für das Saarland (Regional Social Court of the Saarland) dismissed the appeal brought by the defendant institution, which then filed an application for 'Revision' (which, in Germany, is an appeal on a point of law) before the Bundessozialgericht.

The matter at issue in those proceedings is whether the part of the supplementary pension deducted by way of contribution to the French sickness insurance scheme should be included in the calculation of the contribution to the pensioners' sickness insurance scheme in Germany, as the defendant institution claims it should, for the periods from December 1988 to September 1993.

II. The question

7. The Bundessozialgericht, the national court hearing the case, is unsure whether the double burden of contributions borne by a migrant worker like Mr Sehrer infringes the principle of equal treatment. If that is the case, the national court wonders whether the infringement is justified on objective grounds.

8. In order to clarify those points, it decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Do Articles 6 and 48 to 51 of the Treaty establishing the European Community and Article 3 of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1] preclude national rules under which the whole of a supplementary French pension paid on the basis of a collective agreement is subject to contributions both to the French sickness insurance scheme and to the German sickness insurance scheme for pensioners?'

1 — OJ, English Special Edition 1971, p. 416.

III. Community law

9. Article 48 of the EC Treaty (now, after amendment, Article 39 EC) provides:

'[...]

2. Such freedom of movement [for workers within the Community] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

10. Under the first and second subparagraphs of Article 1(j) of Regulation No 1408/71, as amended by Regulation (EEC) No 1247/92: [2]

'"legislation" means all the laws, regulations and other provisions and all other present or future implementing measures, of each Member State, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a).

This term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope. '

In certain circumstances, this restriction may be lifted by a declaration by the Member State concerned, which must be notified and published in accordance with the provisions of Article 97 of Regulation No 1408/71.

11. Article 13(2) of Regulation No 1408/71, as amended by Regulation (EEC) No 2195/91 [3] (hereinafter 'Regulation No 2195/91') provides:

'[...]

2 — Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1).

3 — Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ 1991 L 206, p. 2).

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

12. With regard to the contributions payable by pensioners, Article 33 of Regulation No 1408/71, as amended by Regulation (EEC) No 2332/92, [4] provides:

'1. The institution responsible for payment of a pension, and belonging to a Member State whose legislation provides for deductions from pensions in respect of contributions payable by a pensioner to cover benefits in kind, shall be authorised to make such deductions from the pension payable by such institution, calculated in accordance with the legislation concerned, to the extent that the cost of the benefits in kind under Articles 27, 28, 28a, 29, 31 and 32 are to be borne by an institution of the said Member State.

2. Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence, these contributions shall not be payable.'

IV. The procedure before the Court

13. The German Government and the Commission submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice. Since none of the interested parties asked to submit oral observations, the Court decided, pursuant to Article 104(4) of its Rules of Procedure, to dispense with the hearing.

14. The German Government points out that under the social security legislation applicable to Mr Sehrer contributions are

4 — Council Regulation (EEC) No 2332/89 of 18 July 1989 amending Regulation (EEC) No 1408/71 and Regulation No 574/72 (OJ 1989 L 224, p. 1).

levied on the whole of the gross income and no exception is made for cases where pension is paid by an insurance institution in another Member State. Nor does that legislation provide for the situation where the institution deducts part of the pension by way of contributions to the sickness insurance scheme of that State.

The German Government considers that, in principle, Community law does not allow sickness insurance contributions to be levied twice. Consequently, as Mr Sehrer has comprehensive sickness cover in Germany, he should pay sickness insurance contributions only in that State, since the contribution he pays in France confers on him no entitlement or additional advantage whatsoever.

It considers that the deduction, in France, of sickness insurance contributions from the pension of a migrant worker who neither lives in its territory nor is subject to French social security legislation, constitutes an obstacle to freedom of movement, which is prohibited by Article 48 of the Treaty and cannot be justified on the grounds of overriding public interest because it does not confer on the interested party any social advantage or entitlement to benefits.

15. The Commission submits, in the first place, that the obligation imposed by France on a worker who is not subject to its legislation to pay sickness insurance contributions, without conferring any entitlement to benefits in return, is incompatible with the right of free movement for workers within the Community.

The Commission observes, in the alternative, that the results of applying German legislation in the same way to a migrant worker as to a worker who has not exercised his right to freedom of movement may be incompatible with the objective of Article 48 of the EC Treaty, Article 49 of the EC Treaty (now, after amendment, Article 40 EC), Article 50 of the EC Treaty (now Article 41 EC) and Article 51 of the EC Treaty (now, after amendment, Article 42 EC), because there will be laws in two or more Member States applying to the pension rights of migrant workers. Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 5 of the EC Treaty (now Article 10 EC) requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 48 of the Treaty, by ascertaining whether their legislation can be applied literally to migrant workers in exactly the same way as to non-migrant workers, without ultimately causing migrant workers to lose a social security advantage and, consequently, discouraging them from actually exercising their right to freedom of movement.

16. In order to obtain information about the sickness insurance contribution

deducted in France from Mr Sehrer's supplementary pension, the Court put a question to the French Government and requested a written reply. According to the details given in the answer, the sickness insurance contribution, which was introduced by Law No 71-1129 of 28 December 1979, is deducted from all retirement pensions, basic and supplementary, which are financed, in whole or in part, by employers. It is a solidarity contribution which, in itself, does not confer a right to sickness insurance benefits, since that right is acquired when the amount of the pension is calculated, if the recipient satisfies the residence requirement.The amount deducted from supplementary pensions is currently 1%. However, the rate is 3.8% for persons who are covered by the French sickness insurance scheme but do not pay the general social contribution which is levied only on persons who are resident for tax purposes in France.

V. Analysis of the question

17. By the question it has referred for a preliminary ruling, the Bundessozialgericht seeks to ascertain whether Community law and, in particular, the principle of equal treatment in the context of freedom of movement for workers precludes a Member State, when assessing the sickness insurance contributions payable by a migrant worker, from treating as part of his income the gross amount of the pension paid to him in another Member State under an industrial agreement, without taking into consideration that part of the pension has already been deducted by way of sickness insurance contributions in that other State.

18. Before I propose a reply to the question, I shall examine the obligation to pay contributions in France and its repercussions.

A. *The obligation to pay contributions in France.*

19. I think it is clear from the foregoing account of the facts that France levies sickness insurance contributions on a pension provided under a scheme established by a collective agreement, even though the recipient is not subject to French social security legislation and has no entitlement to sickness benefit in France.

20. This is not the first time that doubts have been raised as to whether such

legislation is compatible with the principle of freedom of movement for workers. Nor is France the only Member State which resorts to this practice in order to swell the coffers of its social security fund, although it is, apparently, the one which does so most assiduously. [5]

21. In 1985 the Court held that Belgium had failed to fulfil its obligations [6] because the Belgian law governing the compulsory sickness and invalidity insurance scheme was contrary to Article 33 of Regulation No 1408/71. The infringement lay, specifically, in the fact that from October 1980, the recipients of statutory old-age, retirement, survivors' or similar pensions, or any advantage supplementing those pensions, were required to pay health insurance contributions, even if they did not reside in Belgium and were entitled to sickness benefit in the Member State in which they did reside.

Article 33 of Regulation No 1408/71 authorises the institution responsible for payment of a pension, and belonging to a Member State whose legislation provides for deductions from pensions in respect of cover for the benefits in kind, to make such deductions, calculated in accordance with the legislation concerned, provided that the cost of the benefits is borne by an institution of the said Member State.

22. It is to be inferred from the Court's interpretation of the provision in that judgment, which has been confirmed by subsequent case-law, [7] that, even if there is no direct link between the contribution and the risk insured, deductions from statutory old-age, retirement and survivors' pensions, cannot be made by a Member State where the sickness and maternity benefits received

5 — Indeed, two cases are currently pending before the Court, Case C-34/98 *Commission* v *France*, an application for a declaration that, by applying the social debt repayment contribution (CRDS), the proceeds of which go to the Social Debt Repayment Fund, to the employment income and substitute income of employed and self-employed persons resident in France but working in another Member State who are not subject to French social security legislation the Member State has failed to fulfil its obligations under Article 48 of the EC Treaty and Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 13 of Regulation No 1408/71, and Case C-169/98 *Commission* v *France*, an application for a declaration that by applying the general social contribution (CSG), intended to fund all the branches of the general French social security scheme, to the employment income and substitute income of employed and self-employed persons resident in France but who are not subject to French social security legislation the Member State has failed to fulfil its obligations under the same Community provisions. The hearing in the two cases was held on 4 May 1999. Advocate General La Pergola delivered his Opinion in both cases on 7 September 1999; he considered that, although the CRDS and the CSG are applied objectively to all persons resident in France, the fact that migrant workers are required to finance a social security scheme to which they are not affiliated discriminates against them in relation to the non-migrant workers who are the only ones entitled to received benefits under the scheme. The Advocate General proposed that the Court should grant the two applications by declaring that France had failed to fulfil its obligations.

6 — Judgment in Case 275/83 *Commission* v *Belgium* [1985] ECR 1097.

7 — Judgments in Case C-57/90 *Commission* v *France* [1992] ECR I-75, paragraph 15, and Case C-253/90 *Commission* v *Belgium* [1992] ECR I-531, paragraph 13.

in return are not borne by an institution of that Member State.

23. As a result of the 1985 judgment, the Belgian provisions which the Court had declared to be contrary to Community law ceased to apply to pensions paid under the general scheme to Community nationals living in a Member State other than Belgium, but continued to apply to supplementary retirement pensions. [8]

Something similar used to happen in France, where contributions intended to finance the general social security system were deducted from supplementary and early retirement pensions irrespective of the place where the recipients resided.

24. Accordingly, in 1990 the Commission brought actions against both Belgium and France for failure to fulfil their obligations under Article 13(1) and Article 33 of Regulation No 1408/71. [9]

Although the Commission acknowledged that neither early retirement pension schemes nor supplementary retirement pension schemes fell within the material scope of Regulation No 1408/71, it considered that the fundamental principle established in Article 13(1), that migrant workers are to be subject to the legislation of a single Member State only, was a general principle which predated the Regulation and which could be invoked to prevent a migrant worker being required to pay sickness insurance contributions in two Member States, when he was entitled to benefits in only one of them.

8 — In Case C-347/98 *Commission* v *Belgium*, which is pending before the Court, the Commission seeks a declaration that Belgium has failed to fulfil its obligations under Article 13(2)(f) of Regulation No 1408/71 by deducting personal contributions of 13.07% from the occupational disease pensions the recipients of which are no longer employed or self-employed in Belgium and live in another Member State, to whose legislation they are, therefore, exclusively subject. The Commission maintains that the Belgian authorities do not have the authority to deduct contributions from the occupational disease pensions of people in that situation.

9 — In Case C-68/99 *Commission* v *Germany*, which is also pending before the Court, the Commission is seeking a declaration that by applying Paragraph 23 et seq. of the Künstlersozialversicherungsgesetz (Law on social insurance for artists) to artists and journalists who reside in another EU Member State and normally pursue a self-employed activity both in that other Member State and in the Federal Republic of Germany and who are thus exclusively subject as regards the social security system to the legislation of the Member State in the territory of which they reside, Germany has failed to fulfil its obligations under Articles 51, 52 and/or 59 of the EC Treaty (now, after amendment, Article 49 EC), and under Title II, specifically, the first sentence of Article 14a(1) in conjunction with Article 13(1) and (2)(b), of Regulation No 1408/71. The Commission considers that the contribution levied on publishing companies and press agencies, as a percentage of the remuneration paid for artistic works or the services of artists or journalists, even if the worker is not required to contribute to the social security scheme applicable to artists, is, *de facto*, the employer's contribution which has the effect of a social security contribution both for the company and for the artist or journalist concerned. In so far as the artists or journalists are affiliated to the social security scheme of another Member State, in accordance with Regulation No 1408/71, that effect is not compatible with the wording or objective of the Regulation, which provides that, in order to avoid double social security contributions, an affiliated person will be subject to the legal provisions of a single Member State.

25. In its judgments, [10] the Court, after noting that the recipients of such pensions were employed persons within the meaning of Article 1(a) of Regulation No 1408/71 and that they fell within the class of persons covered by the Regulation, as described in Article 2 thereof, observed that the principle that a single system of legislation should apply only governs the situations referred to in Articles 13(2) and 14 to 17 of the Regulation, which determine the conflict rules which are to apply in each situation. Since the recipients of an early retirement or supplementary pension are not in one of those situations, the principle could not be invoked for their benefit. [11]

26. The Court interpreted Article 33 of Regulation No 1408/71 as meaning that any State which is responsible for payment of a pension under its legislation must therefore be considered responsible for payment of a pension for the purposes of Article 33.

27. However, Article 1(j) provides that the term 'legislation' excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope, in so far as this limitation is not lifted, in certain cases, by a declaration of the Member State concerned.

The Commission acknowledged that the Belgian supplementary retirement pension schemes and the French early and supplementary retirement pension schemes did not constitute legislation within the meaning of Article 1(j), because they had been introduced under agreements concluded by the competent authorities with trade or inter-trade bodies, trade-union organisations or individual undertakings, or under collective agreements concluded between both sides of industry, and had not been the subject of a declaration.

The Court confirmed this assessment [12] and dismissed both applications.

28. In the present case, the Commission submits that the requirement that Mr Sehrer should pay sickness insurance contributions in France, in the circumstances which have been described, infringes the Treaty provisions relating to the free movement of workers, although it does not appear to draw any practical conclusions from its submission.

10 — Cited in footnote 7.

11 — This situation has been modified by the adoption of Council Regulation No 2195/91, which added subparagraph (f) to Article 13(2) of Regulation No 1408/71.

12 — This appraisal appears again in the judgment in Case C-35/97 *Commission* v *France* [1998] ECR I-5325, which concerned supplementary retirement pension schemes introduced under agreements concluded by the competent authorities with trade or inter-trade bodies, trade-union organisations or individual undertakings or under collective agreements concluded by both sides of industry, and rendered compulsory by Article L 731-5 of the Social Security Code.

The German Government shares the Commission's view and also points out that, if the Court were to hold that the levying of such contributions in France is compatible with Community law, that would not affect the German Government's right to levy German sickness insurance contributions on the gross amount of all the income received by the party concerned, irrespective of whether it was paid in Germany or abroad and of the fact that part of it may already have been deducted by way of contributions.

29. I should like to make two observations in this regard. First, I can agree with the Commission that the French rules, as presented in these proceedings, in which France has not even intervened, could be considered to constitute an obstacle to freedom of movement for workers and to be contrary to Article 48 of the EC Treaty. Indeed, the French legislation might deter a worker from moving to France to take up paid employment if, as a result, the pension to which he will be entitled when he retires, even if he is not then living in France, is going to be subject to sickness insurance contributions there, although he will not be entitled to receive benefits.

However, the Court may only consider whether national provisions are compatible with Community law in the context of an action for failure to fulfil obligations, an action which only the Commission or another Member State is entitled to bring. However, the Commission has not initiated proceedings for infringement against France with a view to obtaining a ruling from the Court as to whether the legislation in question is compatible with the principles which govern freedom of movement for workers within the Community. Nor has Germany brought such an action, although it is authorised to do so under Article 170 of the EC Treaty (now Article 227 EC).

Second, the national court, in referring the question for a preliminary ruling, has not asked the Court to examine the French legislation,[13] and has expressly stated, in its order for reference, that the plaintiff can challenge the lawfulness of the French sickness insurance contributions only in proceedings before the French courts.

30. The situation would have been very different if, instead of contesting, in Ger-

13 — In Case 261/81 *Rau* [1982] ECR 3961, the Court considered, at the request of a German court, whether the Belgian legislation constituted a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EC Treaty (now, after amendment, Article 28 EC). In Case C-150/88 *Parfümerie-Fabrik 4711* [1989] ECR 3891, at the request of another German court, it interpreted Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169) in connection with the Italian legislation relating to the packaging, advertising and naming of cosmetic products. A common feature of the two cases was that, in both, the national court had asked the Court of Justice to give a ruling on legislation of another State which had given rise to the non-performance of contract which was the subject-matter of the proceedings.

many, the decision taken by the defendant social security institution to levy a sickness insurance contribution on the total amount of the pension on which he had already paid contributions in France, Mr Sehrer had brought an action before a French court claiming that the obligation to pay contributions in France without receiving any entitlement to benefits constituted an obstacle to the free movement of workers, and if the French court had referred the question for a preliminary ruling. However, the fact that he has not done so does not preclude the admissibility of the question referred by the German court.

31. In *Celestini*,[14] the Court of Justice replied to questions referred by an Italian court, even though the Commission and the German Government considered that they were inadmissible owing, *inter alia*, to the fact that the Italian courts did not have jurisdiction to hear the case and to the artificial nature of the proceedings.

In the main proceedings, one party had brought an action against the other for breach of a contract to supply a consignment of wine to be delivered in Germany. When the wine arrived from Italy, it was subjected to controls by the German authorities, even though it was accompanied by certificates of analysis issued by laboratories authorised in Italy confirming that it conformed with Community legislation. After the wine had been analysed according to traditional methods and then by the method known as 'determination of O_{18}/O_{16} abundance ratio of water in wines', the German authorities impounded it and returned it to Italy, stating that water had been added to it.

Neither of the two parties in the case, both of which contested the legality of the method of determining O_{18}/O_{16} abundance ratio of water in wines, had brought the matter before the German courts, which alone had jurisdiction to rule on the validity of the measure whereby the German authorities declared the imported wine unfit for human consumption. Nevertheless, there was nothing to show that the parties had jointly fabricated a dispute as a device for obtaining a preliminary ruling from the Court.

32. Nor, in the present case, have the parties jointly fabricated a dispute.

33. As regards the relevance of the question referred for a preliminary ruling, the Court has consistently held that it is a matter for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court.

14 — Case C-105/94 [1997] ECR I-2971.

A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action. [15]

In the *Celestini* case, the Italian court had explained that, should it follow from the answers given by the Court that the method of determining O_{18}/O_{16} abundance ratio of water in wines was compatible with Community law, Celestini's action would have to be dismissed. The Court considered that it was not for it to call that assessment in question.

In the case which I am now considering, the Bundessozialgericht states in the order for reference that although Mr Sehrer could have brought proceedings in the French courts, he did not do so, but contested the decision which penalised him to a greater extent because of the level of the contribution. Since the court is seeking the interpretation of Community law and the reply to the question it has referred will enable it to give judgment, the Court of Justice is, in principle, bound to give a ruling. [16]

B. *The reply to the question referred for a preliminary ruling*

34. Both the supplementary retirement pension received by Mr Sehrer in France and the supplementary pension paid to him in Germany under the metalworkers' insurance scheme are provided under industrial agreements, which are excluded from the definition of 'legislation' given in Article 1(j) of Regulation No 1408/71. This means, in practice, that he receives only one retirement pension which falls within the material scope of the Regulation, namely the statutory retirement pension provided by the Bundesknappschaft in Germany, the country in which he resides. [17]

Under Article 13(2)(f) of Regulation 1408/71, [18] he is subject to the social security legislation of the Member state in which he resides, which provides him with sickness insurance and whose social security system may require him to pay contributions to help finance it.

35. Title III, Chapter 1, Section 5 of Regulation No 1408/71 governs the entitle-

15 — See the more recent judgments in Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949 and Case C-7/97 *Bronner* [1998] ECR I-7791.

16 — See, in particular, the judgments in Case C-125/94 *Aprile* [1995] ECR I-2919, paragraphs 16 and 17, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

17 — If it were the French, instead of the German, pension which was a statutory pension, Article 17a of Regulation No 1408/71 could apply to Mr Sehrer and he would be exempt from paying contributions in Germany.

18 — Point (f) was added by Regulation No 2195/91 in order to close a loophole in the system of conflict rules contained in Article 13 of Regulation No 1408/71, which had been revealed by the Court's judgment in Case 302/84 *Ten Holder* [1986] ECR 1821.

ment of pensioners and their families to sickness and maternity benefits. However, Mr Sehrer cannot rely on any of its provisions since they relate to circumstances in which pensions are payable under the legislation of two or more Member States, as in Article 27 and Article 28a, or in which a pension is payable under the legislation of a single Member State, where no right to benefits in kind is enjoyed in the country of residence, as in Article 28.

Nor is Article 33 of the Regulation — which authorises the institution responsible for payment of a pension, and belonging to a Member State whose legislation provides for deductions from pensions in respect of contributions payable by a pensioner to cover benefits in kind, to make such deductions from the pension payable by such institution — applicable to the present case. If it were, it would prevent Germany from levying contributions on the pension received by Mr Sehrer in France, but the provision presupposes that sickness and maternity benefits are provided pursuant to Articles 27, 28 and 28a, and, as I have just said, none of these is relevant to the case.

36. For the reasons I have given, I have to conclude that Mr Sehrer's social security rights are governed exclusively by German legislation. However, this does not mean that the German authorities, when applying their legislation to migrant workers, may disregard the Treaty provisions concerning the free movement of workers within the Community.

37. Mr Sehrer's German nationality does not prevent him invoking Community law before the German authorities, since he has exercised one of the freedoms conferred on him by the Treaty. In its judgments in *Scholz* [19] and *Terhoeve* [20] the Court held that any Community national, irrespective of his place of residence and his nationality who has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of Article 48 of the Treaty.

38. The national court which has referred the question seeks the interpretation of Article 6 of the EC Treaty (now, after amendment Article 12 EC), which prohibits any discrimination on grounds of nationality within the scope of its application, Article 48 of the Treaty, which applies the principle of equal treatment to the freedom of movement for workers in a specific instance, and Article 3 of Regulation No 1408/71, adopted by the Council in accordance with its obligation under Article 51 of the Treaty to provide freedom

19 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9.
20 — Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 27.

of movement for workers, which establishes the same principle.

39. The German legislation at issue, which levies sickness insurance contributions on the whole of the income received by the insured person, does not discriminate directly on grounds of nationality. Nor does it discriminate indirectly by imposing conditions which are more easily satisfied by German nationals or by placing workers who are nationals of other Member States at a greater disadvantage.

40. The Court has consistently held that Article 48 of the Treaty implements a fundamental principle contained in Article 3(c) of the EC Treaty (now, after amendment, Article 3(c) EC), under which, for the purposes set out in Article 2 of the EC Treaty (now, after amendment, Article 2 EC), the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons. [21]

The Court has also held that the Treaty provisions relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [22]

41. Admittedly, as Community law now stands, it is for the legislature of each Member State to establish both the right or obligation to become affiliated to a social security scheme and the conditions of affiliation, [23] and also to specify the income to be taken into account when calculating social security contributions. [24] Indeed, with the exception of Article 14e of Regulation No 1408/71, which lays down certain very specific provisions which do not apply in the present case, the Community law governing freedom of movement for workers does not lay down rules determining the basis on which contributions to national social security schemes are to be levied.

42. However, as I pointed out in my Opinion in *Terhoeve*, [25] the Member States

21 — Judgments in Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16, and Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 15, and the judgment in *Terhoeve*, cited in footnote 20, paragraph 36.

22 — Judgment in *Terhoeve*, cited in footnote 20, paragraph 37. See also, the judgments in Case 143/87 *Stanton* [1988] ECR 3877, paragraph 13, Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraph 13, and *Singh* and *Bosman*, cited in footnotes 21 and 16, paragraphs 16 and 94 respectively.

23 — Judgments in Case 368/87 *Hartmann Troiani* [1989] ECR 1333, paragraph 21, Case C-245/88 *Daalmeijer* [1991] ECR I-555, paragraph 15, and Case C-297/92 *Baglieri* [1993] ECR I-5211, paragraph 13.

24 — Judgment in *Terhoeve*, cited in footnote 20, paragraph 51.

25 — Opinion in *Terhoeve*, cited in footnote 20, particularly points 67 to 69.

must, in exercising their power to determine the factors which form the basis for assessing the contributions to their social security schemes, not only comply with the principle of equal treatment by making sure that the rules do not discriminate between their own nationals and those of other Member States, but also ensure that national social security legislation does not create an obstacle to the effective exercise of the fundamental freedom guaranteed by Article 48 of the Treaty, and that workers who exercise their right to freedom of movement do not find themselves at a disadvantage, in respect of their social security entitlement, by comparison with those who do not.

43. According to the case-law of the Court, provisions which preclude or deter a national of a Member State from leaving his country in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. [26]

44. The social security provisions of the contested German legislation, which apply in the same way to migrant and non-migrant workers, may be detrimental only to the migrant workers. Indeed, it would be very unlikely, in practice, for the same kind of social security contributions to be levied twice on the income of a non-migrant worker subject to German legislation. On the other hand, a worker who has exercised his right to freedom of movement and has acquired one or more pensions in other Member States, may, if these are retirement pensions which do not fall within the scope of Regulation No 1408/71, be required to pay sickness insurance contributions on the gross income from which sickness insurance contributions have already been deducted in another Member State.

I infer from this that the prospect of having to pay social security contributions twice, to cover the same risk, on the gross amount of one of the retirement pensions which he has acquired during his working life may deter a worker from exercising his right to freedom of movement.

45. For the reasons I have given, I think that national legislation such as the legislation at issue in the main proceedings constitutes an obstacle to the free movement of workers, contrary to Article 48 of the Treaty, because, when it establishes the basis on which sickness insurance contributions are levied, it does not take into account the fact that part of the pension which the party concerned receives in another Member State, provided under a

26 — Judgment in Case C-10/90 *Masgio* [1991] ECR I-1119, paragraphs 18 and 19, and *Bosman*, cited in footnote 16, paragraph 96.

scheme established on the basis of a collective agreement, has already been deducted by way of sickness insurance contributions in that State.

46. The German court which referred the question said in the order for reference that it would also like to know whether, if the Court considers the double burden of contributions imposed on migrant workers to be contrary to the principle of equal treatment, that burden may be justified on objective grounds. However, it has not included this query in the question referred to the Court nor has it mentioned any grounds of justification in its order.

In the circumstances, I think that, in the interests of brevity, the national court should be referred to the copious case-law of the Court, cited in my Opinion in *Terhoeve*, relating to the grounds of justification for indirect discrimination and obstacles to the free movement of persons. [27]

C. *Final considerations*

47. Although the Court may not rule on the matter in the preliminary ruling proceedings, I do not wish to finish without drawing attention to what I consider to be the particularly negative effects on the free movement of persons of national legislations such as the French legislation, which the Court has not previously censured. On the basis of legislations having the same or similar characteristics national social security contributions are deducted from the income received in the relevant State by migrant or frontier workers who are still working or, like Mr Sehrer, are retired, and are resident in another Member State and subject to its social security legislation.

The fact that those deductions are made by way of social security contributions by a State which does not provide the person concerned with any social benefits in return, rather than by way of direct taxes, which is what they actually are although they are intended for a specific purpose, has two consequences, which are equally disadvantageous to a migrant or frontier worker, whether working or retired: the first is that he will also have to pay contributions in another Member State if he is to be entitled to receive social security benefits, and the second is that he may not rely on the double taxation agreements concluded between Member States to prevent the income on which contributions have already been levied in one Member State from being subject to taxation again in the State in which he resides.

27 — Cited in footnote 25, in particular points 54 to 64.

VI. Conclusion

48. In the light of the foregoing considerations, I propose that the Court gives the following answer to the question referred by the Bundessozialgericht:

Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes a Member State, when calculating the sickness insurance contributions payable by a retired migrant worker subject to its legislation, from taking into account the gross amount of a pension provided in another Member State on the basis of a collective agreement, without regard to the fact that part of that pension has already been deducted by way of sickness insurance contributions in the latter State.