OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 12 December 1990 *

Mr President,
Members of the Court,

1. The Sozialgericht Stuttgart has submitted a question for a preliminary ruling which will, in essence, necessitate consideration by the Court of whether the loss of social security advantages owing to the replacement of bilateral conventions concluded between Member States by Regulation (EEC) No 1408/71 of the Council [1] is consistent with Articles 48 and 51 of the EEC Treaty.

2. Some particulars regarding the dispute before the national court are in order. Mr Rönfeldt, a German national born in 1924 and now residing in German territory, paid German old-age insurance contributions from 1941 to 1957 and then worked in Denmark until 1971, during which time he paid contributions to the Danish social security scheme, before returning to Germany, where he became subject to compulsory insurance.

3. According to the documents before the Court, the German-Danish social insurance Convention of 14 August 1953 provided that, *for the purpose of the calculation* of the retirement pension provided in Germany, German nationals who had worked in Denmark were entitled to have periods of up to 15 years completed in Denmark taken into account.

4. Article 45 of Regulation No 1408/71 requires the competent institutions of the Member States to take account of all the periods of work completed in those States when determining whether pension rights have been acquired. Article 46 provides that the pension to be paid by each Member State is to be calculated pro rata according to the actual length of the period of work subject to its legislation.

5. It should also be pointed out that Article 6 of Regulation No 1408/71 provides that, as regards persons and matters which it covers, it replaces any social security convention binding two or more Member States.

6. In the dispute before the national court the German social security institution, although apparently not questioning the need to take account of the periods completed by Mr Rönfeldt in Denmark for the purpose of determining whether pension rights have been acquired, refuses to include those periods when determining the amount of the pension payable in Germany. The pension paid to the claimant must therefore be calculated pro rata according to the periods in respect of which he paid contributions in Germany.

7. However, there are different retirement ages in Denmark and in Germany. In

* Original language: French.

1 — Regulation 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 (codified version contained in Annex I to Council Regulation No 2001/83; OJ 1983 L 230, p. 8).

Denmark the retirement age is 67 years, whereas in Germany it is 65 years, with the option of early retirement at 63. Thus, according to the approach of the competent German authority, Mr Rönfeldt is entitled to a German pension corresponding pro rata to the period during which he has worked in Germany. He will not receive a retirement pension from the Danish social security institutions until he has reached the age of 67.

8. It is in essence with that consequence that Mr Rönfeldt has taken issue in the proceedings before the Sozialgericht Stuttgart. In its question to the Court, the Sozialgericht expresses doubt as to the compatibility of the relevant national legislation and Regulation No 1408/71 with Articles 48 and 51. In order to establish the precise points on which that court seeks a ruling, however, reference should be made to the grounds set out in its order. A reading of the order discloses two distinct subjects of concern. First, the Sozialgericht asks the Court to interpret Article 94 of Regulation No 1408/71 in order to establish whether pre-existing pension rights, acquired before the accession of a Member State to the Community, are governed by the provisions of the Member State of employment or those of the State of origin, regard being had to the fact that the Member States have fixed different age limits for retirement. The national court then goes on to express doubts as to the validity, in the light of the principles of protection of property rights and ensuring freedom of movement, of provisions laying down different age limits for entitlement to benefits under the statutory pension insurance scheme.

9. The question with regard to the interpretation of Article 94 of Regulation No 1408/71 is whether the person concerned falls within its scope. In my opinion the answer is not in doubt. Article 94(2) expressly provides as follows: 'All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State, shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.' It is thus clear from Article 94 that periods of insurance completed under Danish legislation before the date on which the regulation became applicable in the territory of the Kingdom of Denmark must be taken into consideration for the determination of rights in the Federal Republic of Germany.

10. Article 45 of the regulation lays down the detailed rules as to how insurance periods are to be taken into account by the competent institution, which must treat periods of contribution completed under Danish legislation as if they had been completed in Germany *for the purpose of the acquisition of pension rights.* As far as the *amount of the pension* is concerned, on the other hand, Article 46 provides that it is to be calculated by each competent institution according to the length of the periods of insurance or residence completed under the legislation which it administers.

11. In the specific circumstances of this case, the German social security institution is obliged to add the Danish insurance periods when determining the acquisition of pension rights in Germany, but is not required to take account of them when calculating the amount of the pension, since the amount — in Germany — is entirely dependent on the periods completed under German legislation.

12. Turning to the disparity between Danish and German legislation as regards the retirement age, I would point out that the Court has consistently held that Regulation No 1408/71 'does not set up a common scheme of social security but allows different national schemes to exist and its sole objective is to coordinate those national schemes' [2] and that 'Article 51 leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 of the Treaty'. [3] It is quite clear from those principles that any disparities in the fixing of the retirement age are in no way contrary to the provisions of the EEC Treaty regarding social security for workers, which seek not to harmonize but to coordinate the laws of the Member States.

13. However, the enquiries of the Sozialgericht might raise by implication the question of the validity of Regulation No 1408/71, inasmuch as that regulation, by replacing the international conventions between the Member States with its own provisions, is arguably liable to jeopardize property rights and freedom of movement, since Mr Rönfeldt's position may be seen in fact to be less favourable under its operation than it would have been under the German-Danish convention.

14. As a preliminary point I should observe that this Court has held the application of Article 6 of Regulation No 1408/71, which provides that the regulation is to replace the existing social security conventions between the Member States, to be mandatory, even where the result would be a less advantageous position for the worker concerned. [4] There seems therefore to be no further doubt as to its scope.

15. Is such a result compatible with the principle of freedom of movement and with the observance of property rights, to which the Sozialgericht has referred?

16. In my view the allusion to the observance of property rights may be dealt with quite briefly. The position of a person contemplating the future contingency of old age cannot on any account be equated with that of a person holding a proprietary right. There might be uncertainty as to the legal status of a person *already entitled to a retirement pension* whose rights were affected by changes of the kind brought about by Regulation No 1408/71. However, it is sufficient to note that the provisions at issue have no such effect in this case.

17. The allegation that the right of freedom of movement has been impaired needs to be discussed at greater length. The loss of the benefits derived by a worker from international conventions between Member States is an undeniable consequence of Article 6 of Regulation No 1408/71. In this situation one might choose to be guided by the principles defined by the Court in its *Petroni* [5] judgment, where it held the regulation to be

2 — Judgment of 5 July 1988 in Case 21/87 *Borowitz* v *Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, at paragraph 23; see also judgments of 12 July 1979 in Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, 12 June 1980 in Case 733/79 *Caisse de compensation* v *Laterza* [1980] ECR 1915, and 9 July 1980 in Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205.

3 — Judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1, at paragraph 20.

4 — Judgment of 7 June 1973 in Case 82/72 *Walder* v *Sociale Verzekeringsbank* [1973] ECR 599.

5 — Judgment of 21 October 1975 in Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149.

invalid in so far as its provisions deprived workers of the social security advantages which would be conferred on them unconditionally by the legislation of a single Member State.

18. Attractive as it seems at first sight, the parallel cannot, in my view, be accepted in this case. In the first place, the Court held in the *Walder* judgment[6] that the replacement of existing international conventions by Regulation No 1408/71 was mandatory even where it would entail less advantageous consequences for the worker, and it did so without suggesting in any way that it considered such a consequence to affect the validity of the regulation in that respect. In the second place, and more importantly, there is a fundamental difference between a case in which the application of the regulation leads to a less favourable position than the worker would have enjoyed by virtue of national law alone and a case in which its application brings about a less favourable position than that resulting from an international convention.

19. In the first case, workers availing themselves of their right to freedom of movement are penalized by comparison with the position they would have enjoyed had it been governed by their national legislation alone. There, 'the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement',[7] the workers were to find themselves in a less favourable position than if they had not availed themselves of that right.

20. In the second case, on the other hand, the inapplicability of the international convention can in no way be said to penalize the worker who has exercised his right to freedom of movement by comparison with the situation he would have enjoyed had he remained subject to national law alone. That is to say, his rights will not be less than they would have been had they been determined under national legislation alone. As the Commission has rightly pointed out, no entitlement to receive benefits acquired by the applicant under national legislation has been withdrawn from him.

21. Accordingly, I propose that the Court should rule as follows:

(1) Every period of insurance completed under the laws of the Kingdom of Denmark before the date on which Regulation (EEC) No 1408/71 of the Council became applicable in the territory of that Member State is to be taken into account for the purpose of determining the rights acquired under the provisions of that regulation;

(2) Consideration of Article 6 of Regulation No 1408/71 has disclosed no factor of such a kind as to affect its validity.'

6 — Case 32/72, cited above

7 — Case 24/75, cited above