OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 September 1997 *

1. This reference from the Pretura (Magistrate's Court), Rome, concerns the interpretation of Article 46(2)(a) of Regulation No 1408/71 ('the Regulation'). [1]

The Community legislation

2. Article 46 [2] of Regulation No 1408/71 lays down the conditions for the award of old-age and death benefits where a worker has been subject to the legislation of two or more Member States. The system provided for by Article 46 is intended to remedy situations in which the laws of one Member State deny benefits in whole or in part to such a worker because insufficient periods of insurance or residence have been completed. The way in which the system applies — and hence the calculation of the benefit payable — depends on the approach taken by the legislation of the Member State awarding the benefit.

3. If under that legislation a person's entitlement arises without its being necessary to have recourse to periods completed in other Member States (for example, because the periods of insurance or residence completed in the awarding Member State confer entitlement *per se*), the method of calculation set out in Article 46(1) applies. [3]

4. If on the other hand under a Member State's legislation a person's entitlement does not arise unless account is taken of periods of insurance completed in another Member State, Article 46(2) applies. That article provides as follows:

'(a) the competent institution shall calculate the theoretical amount of the benefit to which the persons concerned could lay

* Original language: English.

1 — Council Regulation (EEC) No 1408/71 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. The text of the Regulation as most recently amended by Council Regulation (EC) No 3096/95 of 22 December 1995 may be found in Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71, OJ 1997 L 28, p. 1.

2 — As most recently amended by Council Regulation (EEC) No 1248/92 of 30 April 1992, OJ 1992 L 136, p. 7.

3 — See for a brief explanation of this my Opinion in Case C-199/88 *Cabras* [1990] ECR I-1023, paragraph 11.

claim provided all periods of insurance and/or of residence, which have been completed under the legislations of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.'

5. Thus if a person worked in Member State A for 10 years and in Member State B for 20 years, then even if under the legislation of Member State A he would not be entitled to a pension for an insurance period of 10 years (for example because that State required applicants to have worked there for 15 years), by virtue of Article 46(2) he would be entitled in Member State A to one-third of the benefit he could claim if he had worked there for 30 years. The first step of the procedure thus described (i. e. the calculation of the theoretical amount under Article 46(2)(a)) is known as aggregation and the second step (i. e. the calculation of the *pro rata* benefit under Article 46(2)(b)) as apportionment.

6. Article 50 of Regulation No 1408/71, although not mentioned in the question referred, is invoked by the defendant Istituto Nazionale della Previdenza Sociale (the Italian national social security institute, 'INPS'), the Swedish Government and the Commission. That provision is intended to cover cases where the periods of employment of the worker under the legislation of the States to which he was subject were relatively short with the result that the total amount of the benefits payable by those States does not provide a reasonable standard of living. [4] It provides as follows:

'A recipient of benefits to whom this Chapter applies may not, in the State in whose territory he resides and under whose legislation a benefit is payable to him, be awarded a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods of insurance taken into account for the payment in accordance with the preceding Articles. The competent institution of that State shall, if necessary, pay him throughout the period

4 — Case 64/77 *Torri* v *ONPTS* [1977] ECR 2299, paragraph 5 of the judgment.

of his residence in its territory a supplement equal to the difference between the total of the benefits payable under this Chapter and the amount of the minimum benefit.'

The national legislation

7. Italian law provides for a minimum level of pension. Where the total pension payable (including any pension payable by another Member State) falls below that level, a supplement is payable to bridge the difference.

8. The order for reference provides virtually no information about the minimum pension scheme. It asserts that it is provided for pensioners credited with more than 780 weekly contributions. It refers, without detail, to Article 8 of Law No 153 of 30 April 1969 and Article 7 of Law No 407 of 29 December 1990.

9. The applicants state that the supplement is provided for in Article 9 of Law No 218 of 4 April 1952. That article provides for old-age, disability and survivors' pensions to be increased up to a total amount equal to 45 times the basic pension as elsewhere defined. Article 16, also invoked by the applicants, provides that the supplement is to be financed by a contribution payable by workers compulsorily insured against invalidity, old age and survivorship, by an employers' contribution and by the State.

10. The applicants also refer to Article 8 of Law No 153 of 30 April 1969, Article 6 of Law No 638 of 11 November 1983 and Article 7 of Law No 407 of 29 December 1990. According to the applicants, the 1983 law is concerned solely to avoid any 'overlap' between the pension supplement and other income of the recipient. In its original form, Article 6 of that law excluded from the income so taken into account revenue obtained abroad. However, again according to the applicants, the Law was amended by Law No 407 of 29 December 1990 so as to include for that purpose income accruing abroad to pensioners there resident. As for Article 8 of the 1969 law, the applicants state that it expressly provides for supplementing, to the level of the minimum pension, pensions 'entitlement to which is acquired by virtue of aggregating periods of insurance and contributions in accordance with international agreements or conventions in the field of social security'. Article 8 is quoted as amended by Article 7(1) of Law No 407 of 29 December 1990, although the applicants do not there refer to the latter law.

11. The INPS refers to Article 8 of Law No 153 of 30 April 1969 and Article 6 of Law

No 638 of 11 November 1983. It states that the latter adds a further requirement for entitlement to the pension supplement, namely that the revenue of the putative recipient should not exceed twice the annual amount of the minimum pension. It was stated at the hearing on behalf of the INPS that no legislation other than those two provisions was relevant to the pension supplement.

The facts and the main proceedings

12. It appears from the somewhat skeletal order for reference that Mr Stinco and Mr Panfilo each applied to the INPS for an old-age pension. Each applicant was also entitled as from the same date to an old-age pension from another Member State (France and the United Kingdom respectively). It was stated at the hearing that Mr Stinco had worked for 392 weeks in Italy and 1 105 weeks in France. The Court has been given no details of Mr Panfilo's working history.

13. The INPS awarded *pro rata* pensions in accordance with Article 46(2) calculated by reference to the notional pensions which the applicants would have received if they had worked in Italy throughout their working life. It appears that the amount of the notional pension taken for the calculation was such that, had the applicants in fact been entitled to domestic pensions of that amount, the pension would have been topped up by the Italian statutory pension supplement so as to reach the statutory minimum pension level. The amount of the notional pension is described by the applicants as derisory, and was stated at the hearing to lead to a *pro rata* payment of LIT 2 100 (possibly per month, although that has not been specified) in the case of Mr Stinco and even less in the case of Mr Panfilo. If the notional pension is supplemented to the level of the minimum pension, however, the *pro rata* payment in the case of Mr Stinco would be LIT 502 490 (presumably per annum).

14. The order for reference states that the pension actually received by the applicants was not supplemented to meet the statutory minimum because the total pension received in each case, i. e. after taking into consideration the pension received from France or the United Kingdom, was above the level triggering payment of the supplement under Italian law. However, even if the total pension were below that level it must be doubted whether the applicants would be entitled to require Italy to supplement their total pensions to that level since it was stated at the hearing that they were resident in France or the United Kingdom and, as will be seen below, it appears that the Italian pension supplement is a non-exportable benefit.

15. The applicants each claimed that the notional pension used as a starting point for the calculation of their *pro rata* pensions should have included the supplement and

should therefore have been equal to the statutory minimum. They brought separate proceedings seeking a declaration and order to that effect; those proceedings were joined.

16. The Pretura referred to the Court the question whether, in order to determine the amount of an Italian *pro rata* pension, the INPS must base its calculations on the 'notional' or theoretical pension alone or on the 'notional' or theoretical pension supplemented where relevant to meet the statutory minimum.

17. Written observations were submitted by the applicants, the INPS, the Swedish Government and the Commission. The applicants, the INPS, the Spanish and Austrian Governments and the Commission were represented at the hearing.

Is the supplement within Article 46?

18. The question whether the supplement is within the scheme of Article 46 is not raised as such in any of the observations. However, the INPS contends that the supplement is not part of the pension, presumably with a view to concluding that it is therefore not within Article 46. The Pretura and the applicants assert that it is not an independent benefit but is simply one of the elements constituting the pension. The Commission refers to a recent decision of the Italian Corte di Cassazione, [5] asserting that in that case, as reportedly in several previous cases, it was stated that the supplement, although subject to specific and distinct conditions, remained none the less an inseparable element of the pension. The Commission's interpretation of that judgment was disputed at the hearing by counsel to the INPS. However, for the reasons given below I do not consider that it is necessary for the Court to be apprised of the precise scope of the Italian judgment in order to be able to reply to the question referred.

19. Even if the supplement were conceptually separable from the basic pension payable, that in itself would not in my view be sufficient to take it outside the scope of Article 46. Supplementary allowances are specifically mentioned by the Regulation as being within the meaning of 'benefits and pensions'. [6] The Court has on several occasions held that supplementary allowances similar in structure to the Italian pension supplement fall within the scope of Regulation No 1408/71, notwithstanding that such allowances frequently have characteristics of both social security (obviously and expressly within the scope of Regulation No 1408/71 by Arti-

5 — Sez. Lavoro, judgment of 9 January 1996, No 95 *INPS* v *Alberici* [1996] *Il Foro Italiano* I-874.

6 — See Article 1(t).

cle 4(1)) and social assistance (excluded from the scope of Regulation No 1408/71 by Article 4(4)): see for example *Frilli* [7] (Belgian guaranteed income paid to the elderly with inadequate resources); *Biason* [8] (the Fonds National de Solidarité allowance, a French supplementary allowance paid to recipients of old-age or invalidity benefits with inadequate resources); *Piscitello* [9] (the Italian 'pensione sociale', a social aid pension paid to the elderly whose income is below a specified amount); and *Giletti* [10] (the Fonds National de Solidarité allowance). Moreover, such a benefit was considered by the Court specifically from the angle of Article 46 in *Levatino*. [11]

20. That case concerned Belgian guaranteed income benefit, a non-contributory benefit intended to guarantee a minimum income to elderly persons without adequate resources. The benefit, which was means-tested and did not depend on the completion of particular periods of insurance, was paid as a supplement raising actual income (of both applicant and spouse) to a specified level. The applicant was in receipt of the benefit to supplement her Belgian and Italian pensions, the total of which was below the minimum. The Court ruled that a benefit such as the guaranteed income was an old-age benefit within the meaning of the Regulation so that the beneficiary's rights must be determined in accordance with, in particular, Articles 46 and 51. [12] I had stated in my Opinion that:

'a benefit such as the guaranteed income benefit falls within the scope of Chapter 3 of Title III of the regulation and, in particular, Article 46. In my view, the opposite solution would run counter not only to the letter but also to the objectives of Article 46. The case-law of the Court makes it clear that the purpose of the regulation is to promote as much as possible the free movement of workers ... If it were accepted that non-contributory benefits of the mixed type such as the guaranteed income benefit were beyond the scope of Article 46, the protection which Chapter 3 of Title III of the regulation is intended to grant to migrant workers would be substantially reduced. It would also be open to Member States to by-pass the provisions of that Chapter by making use of non-contributory benefits.' [13]

21. *Prima facie*, therefore, it seems that, on the authority of *Levatino*, the supplement falls within Article 46. The version of Regulation No 1408/71 at issue in *Levatino* has, however, since been amended by Regulation No 1247/92; [14] the amendments made by

7 — Case 1/72 *Frilli* v *Belgium* [1972] ECR 457. For a comprehensive analysis of the distinction between social security and social assistance, see the Opinion of Advocate General Mayras.

8 — Case 24/74 *Caisse Régionale d'Assurance Maladie* v *Biason* [1974] ECR 999.

9 — Case 139/82 *Piscitello* v *INPS* [1983] ECR 1427.

10 — Joined Cases 379/85 to 381/85 and 93/86 *CRAM Rhône-Alpes* v *Giletti* [1987] ECR 955.

11 — Case C-65/92 *ONP* v *Levatino* [1993] ECR I-2005.

12 — Paragraph 21 and operative part of the judgment.

13 — Paragraph 15. See also paragraphs 13, 14 and 16.

14 — Council Regulation (EEC) No 1247/92 of 30 April 1992, OJ 1992 L 136, p. 1.

Regulation No 1247/92 have been invoked by both the INPS and the Austrian Government in support of their argument that the theoretical amount for the purposes of Article 46(2)(a) should not include the supplement.

22. It is clear from the preamble to Regulation No 1247/92 that the amendments made by that regulation were largely inspired by the case-law of the Court of Justice to the effect that certain benefits may fall simultaneously within the categories of both social security and social assistance. [15] The regulation has a long history, going back to *Biason*, [16] a decision of the Court in 1974 to the effect that Article 10 of Regulation 1408/71, which lays down the general principle that Member States may not make the grant of certain benefits (including old-age and invalidity benefits) conditional on the beneficiary's residence in the awarding State, required a Member State to export benefits within the scope of the Regulation where the beneficiary moved to another Member State. The benefit in question in *Biason* was a supplementary allowance from the French Fonds National de Solidarité supplementing an invalidity pension acquired under an insurance scheme; it was a benefit of the type previously accepted by the Court as being a hybrid benefit subject to the Regulation.

23. Despite the Court's clear ruling, France, the Member State of payment, refused to pay the allowance to recipients of such pensions who resided in other Member States, and the Commission in 1980 commenced infringement proceedings. That prompted the French delegation to the Council to submit a proposal suggesting legislation to restrict payment of such hybrid benefits to residents in the territory of the Member State concerned. The French initiative led the Commission to suspend the infringement proceedings and ultimately resulted in a Commission proposal to amend Regulation No 1408/71. [17] Progress with the proposal was subsequently delayed, in part by France's continuing refusal to accept that, notwithstanding the clear case-law of the Court, the Fonds National de Solidarité allowance was social security for the purposes of the Regulation; the Commission accordingly recommenced proceedings in 1988, and obtained a ruling from the Court that France had failed to fulfil its obligations under Article 10 of Regulation No 1408/71. [18]

24. The proposal was eventually adopted as Regulation No 1247/92, which makes in effect four changes to Regulation No 1408/71.

15 — Second and third recitals in the preamble. See for examples the cases cited in notes 7 to 10. For further cases see the Opinion of Advocate General Da Cruz Vilaça in *Giletti*, cited in note 10, paragraphs 21 to 31, and the summary of the written observations of the United Kingdom in the Report for the Hearing in *Pisciello*, cited in note 9, pp. 1432 to 1434.

16 — Cited in note 8.

17 — OJ 1985 C 240, p. 6; COM(85) 396 final.

18 — Case C-236/88 *Commission* v *France* [1990] ECR I-3163. For the history of Regulation No 1247/92, see the Report for the Hearing in *Commission* v *France*, p. 3166; the summary of the written observations of the Commission in *Pisciello*, cited in note 9, p. 1434; and the explanatory memorandum to the Commission's proposal, cited in note 17.

25. First, it extends the definition of 'member of the family' in Article 1(f) to bring Regulation No 1408/71 into line with the Court's case-law on the entitlement of children to certain hybrid benefits. [19]

26. Secondly, it inserts Article 4(2a) [20] in Regulation No 1408/71, to make it clear that certain hybrid benefits are within the scope of the Regulation:

'2 a.This Regulation shall also apply to special non-contributory benefits which are provided under a legislation or schemes other than those referred to in paragraph 1 [social security] or excluded by virtue of paragraph 4 [social assistance], where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1 (a) to (h), or

(b) solely as specific protection for the disabled.'

Article 4(1)(c) refers to old-age benefits.

27. Thirdly, it inserts Article 10a [21] and Annex IIa [22] in Regulation No 1408/71, to make it clear that Member States may specify that certain of the benefits described in Article 4(2a) are payable exclusively to residents. Article 10a(1) provides:

'Notwithstanding the provisions of Article 10 and Title III, [23] persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. ...'

19 — See the first recital in the preamble to and Article 1(1) of Regulation No 1247/92.

20 — Inserted by Article 1(2) of Regulation No 1247/92.

21 — Inserted by Article 1(4) of Regulation No 1247/92.

22 — Inserted by Article 1(6) of Regulation No 1247/92.

23 — Title III contains special provisions relating to the various categories of benefits including Articles 44 to 51 on pensions.

The remainder of Article 10a ((2) to (4)) contains rules for the aggregation of periods completed in another Member State and provisions facilitating the receipt of this type of benefit which are not relevant to this case.

Annex IIa includes under the heading 'H. ITALY':

'(e) Benefits supplementing the minimum pension (Laws No 218 of 4 April 1952, No 638 of 11 November 1983 and No 407 of 29 December 1990)'.

Other benefits listed in Annex IIa are the Belgian guaranteed income benefit at issue in *Frilli* and *Levatino*, the French supplementary allowance from the National Solidarity Fund at issue in *Biason* and *Giletti* and the Italian social pension at issue in *Piscitello*.

28. Finally, Regulation No 1247/92 inserts Article 4(2b), [24] to make it clear that certain other non-contributory benefits are outside the scope of the Regulation altogether; Member States may specify such benefits, [25] which are to be listed in a new Section III of Annex II [26] to Regulation No 1408/71:

'This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.'

29. It is thus clear that Regulation No 1247/92 was designed, first, expressly to include special non-contributory benefits amongst the benefits covered by Regulation No 1408/71 and hence ensure that migrant workers no longer have to bring proceedings each time the status of a hybrid benefit is disputed and, secondly, to restrict the grant of those benefits acquired under the legislation of one Member State exclusively to persons residing within the territory of that State. [27]

24 — Inserted by Article 1(2) of Regulation No 1247/92.

25 — Article 5 of Regulation No 1408/71 as replaced by Regulation No 1247/92: see Article 1(3) of the latter.

26 — Inserted by Article 1(5) of Regulation No 1247/92.

27 — See the Court's description of the Commission's Proposal in *Commission* v *France*, cited in note 18, paragraph 6 of the judgment, in very similar terms.

30. The applicants argue, in my view correctly, that Regulation No 1247/92 did not modify the calculations imposed by Article 46.

31. The INPS invokes Regulation No 1247/92, although its arguments are somewhat unclear. It appears to conclude that, since the supplement is, by virtue of Regulation No 1247/92, not exportable, it cannot be considered in the determination of the theoretical amount of the benefit for the purposes of Article 46(2)(a). That the INPS considers that Regulation No 1247/92 has that effect is also borne out by the statement made on behalf of the applicants at the hearing that before the entry into force of that regulation the INPS had included the supplement in the theoretical amount and had changed its practice only after Regulation 1247/92 came into force. (It may also be inferred from the observations of the Italian Government in *Valentini* [28] that that Government was previously of the view that a supplement such as the pension supplement at issue in this case fell within the scope of Article 46.)

32. The argument advanced by the INPS however confuses payment of the supplement with the distinct — and germane — question whether it should be taken into account in the determination of the theoretical amount. It is true that Regulation No 1247/92 makes it clear that the supplement is to be granted as such exclusively to residents in Italy, and hence that, since they are not resident in Italy, the applicants would not be entitled to claim the supplement to raise their total pensions to the minimum amount specified by the Italian legislation. That issue does not, however, arise in this case: it is plain that the applicants are not seeking *payment* of the benefit as a supplement to top up their pensions but are simply claiming that it should be taken into account in determining the theoretical amount of the Italian pension for the purposes of Article 46(2)(a).

33. The distinction between the grant of benefits listed in Annex IIa, restricted to residents, and the receipt by a non-resident of a *pro rata* benefit calculated by reference to a theoretical amount which includes the benefit, may seem slight, even specious. The distinction is however in my view correctly drawn. An example may make its operation clearer. Suppose that a worker with short periods of contributions in Italy and France retired. His pension entitlement was calculated pursuant to Article 46, the Italian pension supplement being taken into account for the purposes of the theoretical amount. He would receive *pro rata* benefits reflecting the periods worked in the two Member States concerned. If the total of those benefits actually received was less than the minimum pension laid down by Italian legislation, the worker could, provided that he was resident in Italy, in addition claim the Italian supplement to increase the total to the minimum. If however he chose to move to another Member

28 — Case 171/82 *Valentini* v *ASSEDIC* [1983] ECR 2157, at p. 2165.

State, he would continue to receive the *pro rata* benefits, but, by virtue of Article 10a, would not be entitled to continue receiving the supplement. He may, of course, be entitled to an analogous supplement in his new State of residence, if its legislation provides for such a benefit; if so, he may rely on Article 50 of Regulation No 1408/71.

34. The Austrian Government submitted at the hearing that, since the Italian pension supplement is listed in Annex IIa to Regulation No 1408/71, then neither Article 46(2)(a) nor Article 50 applies.

35. It is to my mind clear on a number of grounds that the effect of Article 10a is not to exclude from the scope of Regulation No 1408/71 as a whole the benefits listed in Annex IIa. As a general point, it must be borne in mind that Article 10a, as a derogation from legislation intended to improve the situation of migrant workers, calls for a strict interpretation.

36. First, it is clear from Article 4(2a), referred to in Article 10a, that the Regulation applies in principle to benefits such as the Italian pension supplement.

37. Secondly, the opening words of Article 10a, 'Notwithstanding the provisions of ... Title III', show that the Regulation as a whole applies, and in particular that Title III (which includes Article 46) applies except in so far as it is overridden by Article 10a, namely as to the validity of a residence requirement in the case of specified benefits.

38. Thirdly, if the effect of Article 10a were to exclude from the scope of Regulation No 1408/71 the benefits listed in Annex IIa, Article 4(2b) and Section III of Annex II would be redundant.

39. It may also be noted that Advocate General Tesauro in *Krid* [29] gave short shrift to the argument apparently advanced by the United Kingdom to the effect that the amendments made by Regulation No 1247/92 'made it even clearer that special non-contributory benefits fall outside the scope of social security'. [30] He stated his view that it was not 'possible to entertain any doubts with regard to the fact that a national benefit such as that at issue in the main proceedings [the French Fonds National de Solidarité supplement] ... falls within the field of social security' as defined by the Regulation. [31] The Court

29 — Case C-103/94 *Krid* v *CNAVTS* [1995] ECR I-719.

30 — See paragraphs 9 to 11 of the Opinion.

31 — Paragraph 11.

echoed that view, ruling that, 'since Regulation No 1247/92 came into force, benefits such as the supplementary allowance from the FNS have been expressly included within the matters covered by Regulation No 1408/71'. [32]

40. It is thus clear to my mind that, notwithstanding Article 10a, Regulation No 1408/71 as a whole applies to the benefits listed in Annex IIa. It is moreover clear to me that Article 46 specifically continues to apply to those benefits.

41. First, if the intention had been to take non-contributory benefits generally outside the scope of Article 46, that provision would surely have been amended so as to make that clear; as will be shown below, that was not done, even though the relevant provisions of Article 46 were amended at the same time.

42. Secondly, there is nothing in the wording of Article 10a to suggest that it has the effect contended for by the INPS and the Austrian Government: the provision simply provides for the benefits to which it applies to be paid exclusively in the State of residence. The Austrian Government submitted at the hearing that the reference to Title III in the opening words of Article 10a demonstrated that Title III did not apply to benefits listed in Annex IIa. That argument is to my mind not correct. Title III is headed 'Special provisions relating to the various categories of benefits' and comprises 60 articles grouped in eight chapters dealing with sickness and maternity, invalidity, old-age and death (pensions), accidents at work and occupational diseases, death grants, unemployment benefits, family benefits, and benefits for dependent children of pensioners and for orphans. Many of those provisions seek to confer entitlement to cash benefits on non-residents. Clearly to the extent that such benefits are listed in Annex IIa, any such entitlement is now overridden by Article 10a. There is no reason, however, to consider that Article 10a excludes the application of the remaining provisions of Title III, which do not concern the entitlement of non-residents, to the benefits listed in Annex IIa.

43. Thirdly, the history of Article 10a, recounted above, shows that the intention was to resolve the difficulties perceived to flow from cases such as *Biason* [33] and *Piscitello*, [34] where the Court ruled that non-contributory cash benefits continued to be payable even though the recipient transferred his residence from the Member State of payment to another Member State, rather than issues such as that raised in *Levatino*, which concerned the determination and adjustment of old-age benefits

32 — Paragraph 36 of the judgment.

33 — Cited in note 8.

34 — Cited in note 9.

which included a benefit in the nature of a supplement to a minimum income level. The purpose of Article 10a is purely to validate a stipulation that a benefit is payable solely in the national territory, which stipulation would otherwise be unlawful by virtue of Article 10 as previously interpreted by the Court.

44. There is accordingly nothing to suggest that the effect of the amendments made to Regulation No 1408/71 by Regulation No 1247/92 is to exclude benefits such as the Italian pension supplement from Article 46.

45. To conclude this section, therefore, I consider that it was established in *Levatino* that a benefit such as the Italian pension supplement is subject to Article 46 and that that proposition has not been altered by the amendments to Regulation No 1408/71 made by Regulation No 1247/92.

The theoretical amount

46. Once it is accepted that Article 46 applies to the supplement, in my view it must follow from the wording of Article 46(2)(a), and in particular from the final sentence, [35] that the theoretical amount of the pension to be calculated should include the supplement. That to my mind is the plain meaning of 'the theoretical amount of benefit to which the person concerned could lay claim provided all periods of insurance ... have been completed in the State in question'. If, in this case, the applicants had completed in Italy the total number of weeks worked, it appears that they would have been able to lay claim to derisory pensions supplemented in each case to the level of the minimum pension.

47. The INPS submits that, where the amount of the minimum benefit is, as here, independent of periods of insurance, that benefit must not be taken into account in calculating the theoretical pension but is relevant only for the purposes of Article 50. That argument is in my view untenable in the light of the wording of Article 46(2)(a), the final sentence of which specifically provides that 'if the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount'. That provision clearly envisages that the amount of a benefit which is independent of the duration of the periods completed is not thereby excluded from the theoretical amount, but on the contrary is the theoretical

35 — See paragraph 47 below.

amount; that view moreover appears to have been taken by the Court in *Levatino*. [36] It may be noted that Article 46 was amended by Regulation No 1248/92, [37] adopted on the same day as Regulation No 1247/92, but the final sentence in Article 46(2)(a) was not deleted. That is most unlikely, moreover, to have been an oversight, since the final sentence was in fact recast in smoother language to the same effect, [38] thus strongly suggesting that it was intended to have continuing scope.

48. That argument of the INPS moreover disregards the decision in *Levatino*, in which the benefit was similarly independent of periods of insurance but was none the less held to fall within the scope of Article 46. It may be noted that in that case the Office National de Pensions, the Belgian national authority, put forward the argument that the method of calculation of the guaranteed income benefit was incompatible with the system of aggregation and apportionment provided for in, *inter alia*, Article 46. That argument was rejected. [39]

49. The INPS asserts that including the supplement in the theoretical amount of the pension would mean that the amount of the pension awarded after apportionment would be inversely proportional to the length of the beneficiary's working life. It illustrates that argument with an example: on the assumption that the beneficiary worked for a short given period in Italy (five years in its example), then the longer the total working life of the beneficiary (and hence *ex hypothesi* the longer his working life elsewhere), the smaller the fraction represented by the Italian element of his total pension. Since that is the whole purpose of the aggregation and apportionment exercise, that proposition is hardly surprising.

50. The INPS also presents as an unacceptable consequence of the applicants' view the fact that the total pension payable after aggregation and apportionment may in some circumstances exceed the national minimum; again, that is hardly surprising given that it is surely the purpose of a minimum to be exceeded in most cases.

51. Should it not be thought clear from the wording of Article 46(2)(a) that the theoretical amount of the pension should include the supplement, there is a further argument to that effect drawn from decisions of the Court. There is some case-law on what is meant by 'the theoretical amount of the benefit', although no direct authority on the specific question raised in this case.

36 — Cited in note 11; see paragraph 26 of the judgment.

37 — Cited in note 2.

38 — The previous version read: 'If, under that legislation, the amount of the benefit does not depend on the length of the periods completed then that amount shall be taken as the theoretical amount referred to in this subparagraph': see the consolidated version of Regulation No 1408/71 contained in Annex I to Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6.

39 — Paragraphs 23 to 27 of the judgment; see also paragraphs 13 and 14 of my Opinion.

52. *Menzies* [40] concerned the proper basis for calculating an occupational invalidity pension in Germany under Article 46(2). German legislation provided for a supplementary insurance period to be credited to insured persons who had suffered occupational invalidity before reaching 55 years of age. Mr Menzies had 24 months of insurance contributions in Germany and 248 months in the United Kingdom. The supplementary period, which in his case amounted to 199 months, was taken into account by the competent institution when calculating the theoretical amount under Article 46(2)(a) but not when calculating the actual amount under Article 46(2)(b). The theoretical benefit was therefore the amount of invalidity pension to which Mr Menzies would have been entitled in Germany if he had paid contributions for a total of 471 months, namely 24 +248 +199. The German *pro rata* benefit was calculated as 8.82% of the theoretical amount, namely 24: (24 +248). The applicant claimed that the supplementary period should have been taken into account in calculating the actual amount, which would have resulted in a *pro rata* benefit of 47.34%, namely (24 +199): (24 +248 +199).

53. In rejecting that argument, the Court made the following points about the calculation of the theoretical amount:

'As regards the theoretical amount, the express effect of Article 46(2)(a) is that it must be calculated as if the insured person had carried out his occupational activity exclusively in the Member State in question. It follows that if, in order to evaluate the benefit awarded in the event of premature invalidity or death of the insured person, the legislation of that State provides that the benefit must be calculated in relation to not only periods of insurance completed by the insured person but also in relation to a supplementary period ..., that supplementary period must also be taken into account in the calculation of the theoretical amount referred to in subparagraph (a).' [41]

54. In *Di Prinzio* [42] the Court commented that:

'with regard to the question of the taking into account of notional periods in calculating the theoretical amount of the benefit, it is apparent from the wording of Article 46(2)(a) that the competent institution is to apply its own legislation in its entirety and therefore, if the latter provides that the benefits must be calculated not only by reference to actual periods or periods treated as such, but also to a number of additional notional years, that additional period must also be taken into consid-

40 — Case 793/79 *Menzies* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2085.

41 — Paragraph 10 of the judgment.

42 — Case C-5/91 [1992] ECR I-897.

eration in calculating the theoretical amount of the benefit'. [43]

55. It can be concluded from *Menzies* and *Di Prinzio* that, if a Member State sought to achieve the aim of a minimum pension by the attribution of notional periods of insurance to correct an applicant's short insurance history, such periods would clearly be required to be included in determining the theoretical amount. It would seem anomalous if, where another Member State seeks to achieve the same aim by way of a pension supplement, that supplement should not be so included.

56. In *Besem*, [44] the Court laid down a more general rule. That case concerned the calculation of Netherlands invalidity benefit. Under the relevant national legislation, the amount of the benefit was not dependent on the length of the completed periods of insurance but was based on the degree of incapacity for work and on the amount which the applicant could have earned if he had not been unfit for work. Where, however, entitlement to the benefit arose solely as a result of the Community regulation, that hypothetical wage was to be reduced in proportion to uninsured periods. Mr Besem had been uninsured for five years in an otherwise insured period of 44 years before being declared unfit for work. The Netherlands authority calculated his invalidity benefit under Article 46(2) on the basis of the wage thus reduced. That reduction was challenged.

57. In ruling that the reduction was unlawful, the Court stated that the situation before it was:

'governed by a comprehensive set of Community rules which contain all that is necessary to enable the theoretical amount to be determined by considering those rules in conjunction with the national provisions laying down the amount of benefit which would be received by a worker entitled to such benefit under the national legislation alone.

It is not compatible with those rules for a Member State to adopt for the purpose of determining the amount of benefit in such circumstances provisions designed to alter the way in which the theoretical amount is calculated so as to make that amount less than that which would result from the general provisions in force under the national legislation.' [45]

58. It may be concluded from the principles laid down by the Court in those cases that

43 — Paragraph 45 of the judgment.

44 — Case 274/81 *Besem* v *Nieuwe Algemene Bedrijfsvereniging* [1982] ECR 2995.

45 — Paragraphs 12 and 13 of the judgment.

the calculation referred to in Article 46(2)(a) is to be based on the total notional pension which would be due to the applicant if he had worked throughout his working life in the Member State in question. It would be inconsistent with those principles that a pension supplement should not be included in that calculation.

59. I would mention as a final point the various notes and minutes of meetings of the Administrative Commission on Social Security for Migrant Workers which have been referred to by the INPS in support of its submissions. The Administrative Commission was originally set up under Regulation No 3, [46] the precursor of Regulation No 1408/71, and is currently regulated by Articles 80 and 81 of Regulation No 1408/71. Its duties *inter alia* include dealing with 'all administrative questions and questions of interpretation arising from' Regulation No 1408/71, 'without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by this Regulation or by the Treaty'. [47] The Court however established at an early stage that the equivalent provision of Regulation No 3 [48] did not affect the powers of the competent courts or tribunals to assess the validity and content of the Regulation, in respect of which the decisions of the Administrative Commission have only the status of an opinion. No other interpretation, the Court continued, would be in accordance with the Treaty, in particular Article 177 which established a procedure to ensure the uniform judicial interpretation of the rules of Community law. [49] Accordingly, the notes referred to by the INPS cannot be regarded as binding.

Article 50 of Regulation No 1408/71

60. The INPS refers to the distinction between 'theoretical amount' in Article 46(2)(a) and 'minimum benefit' in Article 50: the former is simply the basis for the calculation on which the Community system of aggregation and apportionment is based while the latter represents a guaranteed minimum income independent of the periods of insurance completed by the worker. The INPS concludes that, in the context of the Community legislation, Article 50 is the sole provision intended to guarantee a minimum income to pensioners. That may well be correct: it does not, however, appear to be directly relevant to the issue before the Court, which as indicated above is not concerned with guaranteeing a minimum income to the applicants.

61. The INPS invokes *Torri* [50] and *Browning*, [51] although it is not clear what principle

46 — Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, JO 1958, p. 561.

47 — Article 81(a).

48 — Article 43.

49 — Case 19/67 *Sociale Verzekeringsbank* v *Van der Vecht* [1967] ECR 345, at p. 355.

50 — Cited in note 4.

51 — Case 22/81 [1981] ECR 3357.

it is seeking to derive from those decisions. In *Torri*, the Court ruled that Article 50 could not apply where a Member State had not specifically legislated for a minimum pension. In *Browning*, that proposition was further refined: the Court ruled that what was meant in Article 50 was a minimum resulting from a specific guarantee laid down under national legislation and not the minimum benefits which may result from the normal operation of pension rules based on insurance periods and contributions. It may be that the INPS is seeking to rely on *Torri* as authority for its contention that the theoretical amount of the benefit is not the same as the minimum pension: in that case, the applicant had unsuccessfully argued that, in default of a statutory minimum pension in a given Member State, Article 50 required that a minimum be payable equal to the theoretical amount calculated in accordance with Article 46(2)(a). However, it is clearly fallacious to conclude from the premiss that the theoretical amount cannot, in the absence of any statutory minimum, be a minimum pension for the purposes of Article 50 that therefore the theoretical amount must, for the purposes of Article 46(2)(a), exclude a statutory supplement designed to bring a pension up to such a minimum.

62. The Commission refers to the historical genesis of Article 50. In the Explanatory Memorandum to its proposal [52] for a revised Regulation No 3, [53] which was ultimately adopted as Regulation No 1408/71, it is stated in relation to Article 40, which became Article 50 of Regulation No 1408/71:

'Lorsque la carrière du travailleur a été assez courte et que le droit aux prestations d'invalidité, de vieillesse ou de survie, n'a pu s'ouvrir, au titre des législations des Etats auxquelles il a été soumis, qu'en tenant compte de toutes ses périodes d'assurance, il arrive fréquemment que le montant total des prestations dues par ces Etats n'atteigne pas le niveau du minimum prévu par la législation d'un ou de plusieurs d'entre eux, *bien que le montant théorique dont il s'agit à l'article 35* [which became Article 46] *ait déjà été porté au niveau de ce minimum.*' [54]

The provision was intended to be applicable in the three Member States which, at the time, provided for minimum benefits of the specified types, namely France, Italy and Luxembourg. The Commission notes that the minimum benefits laid down by the French and Luxembourg legislation were for fixed amounts. It concludes that the theoretical amount in Article 46(2)(a) was clearly intended to be raised to the level of any applicable statutory minimum, whether or not the amount of that minimum is independent of periods of insurance.

52 — JO 1966 194, p. 3333; COM(66) 8 of 6 January 1966.

53 — Cited in note 46.

54 — P. 52; emphasis added.

63. I do not consider that the Commission's explanations of its proposed legislation would be conclusive, or even of significant probative value, in the absence of other factors: as Advocate General Warner pointed out in his Opinion in *Torri*, [55] there is no warrant for assuming that the members of the Council shared in all respects the Commission's intentions as to the meaning of any given provision. Where, however, as here, those explanations accord with the view of, in this case, Article 46(2)(a) derived from its wording, its context and its interpretation by the Court, I consider that they furnish useful additional evidence.

Conclusion

64. I accordingly consider that the question referred by the Pretura, Rome, should be answered as follows:

Where (i) the legislation of a Member State confers entitlement to a supplement to increase to a specified minimum the amount of an old-age pension within the meaning of Chapter 3 of Title III of Council Regulation (EEC) No 1408/71 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 and (ii) the amount of the pension to which a person could have laid claim if he had completed in that Member State all periods of insurance and/or residence under the legislation of the Member States to which he was subject would be less than the specified minimum so that the person would be entitled to that supplement, the theoretical amount referred to in Article 46(2)(a) of the Regulation is the amount of the pension as supplemented to that specified minimum notwithstanding the fact that the supplement is listed in Annex IIa to the Regulation.

55 — At p. 2309.