JUDGMENT OF THE COURT (Fifth Chamber)
12 September 1996 *

In Case C-251/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (Spain) for a preliminary ruling in the proceedings pending before that court between

Eduardo Lafuente Nieto

and

Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)

on the interpretation and validity of Article 47(1) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and as adapted by Annex I, Part VIII, of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 170), and on the interpretation of Article 46(2) of that regulation,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Lafuente Nieto, by Abelardo Vázquez Conde, Roque Méndez Robleda and Benjamín Mayo Martínez, of the Orense Bar,

— the Spanish Government, by Alberto J. Navarro González, Director General for Community Legal and Institutional Coordination, and by Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,

— the Council of the European Union, by Sophia Kyriakopoulou and Ignacio Díez Parra, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by Maria Patakia and Blanca Rodríguez Galindo, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Lafuente Nieto, represented by Abelardo Vázquez Conde, Roque Méndez Robleda and Benjamín Mayo Martínez; of the Spanish Government, represented by Miguel Bravo-Ferrer Delgado; of the Council, represented by Sophia Kyriakopoulou and Ignacio Díez Parra; and of the Commission, represented by Maria Patakia and I. Martínez del Peral, of its Legal Service, at the hearing on 2 May 1996,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1996,

gives the following

Judgment

1 By order of 31 May 1994, received at the Court on 13 September 1994, the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Basque Autonomous Community) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation and validity of Article 47(1) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) and as adapted by Annex I, Part VIII, of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 170), and on the interpretation of Article 46(2) of that regulation.

2 The questions were raised in a dispute between the Instituto Nacional de la Seguridad Social (National Social Security Institute; 'the INSS') and the Tesorería General de la Seguridad Social (General Social Security Revenue Authority; 'the TGSS'), Spanish social security agencies, and Mr Lafuente Nieto concerning the calculation of his invalidity pension.

3 Mr Lafuente Nieto, a worker of Spanish nationality who worked in Spain before 1969, and then in Germany until 1990, became wholly and permanently incapacitated for work in July 1990. The competent German institution granted him an invalidity pension, the amount of which, for reasons unknown to the national court, was calculated without taking account of contribution periods completed in Spain. The competent Spanish institution, the INSS, granted him an invalidity pension on account of total and permanent incapacity for work caused by illness other than occupational disease.

4 The order for reference shows that, under Spanish legislation, the pension entitlement of an industrial wage-earner aged 48 years and 3 months when he becomes totally and permanently incapacitated for work, like Mr Lafuente Nieto, as a result of non-occupational illness, does not vary in amount according to contribution periods or employment history. However, under Article 2(2)(b) of Law No 26/1985 of 31 July 1985, entitlement is conditional upon, first, his having paid contributions for a period equal to at least a quarter of the time which has elapsed since he attained the age of 20 years, and, secondly, one-fifth of the prescribed minimum periods of contribution having been completed within the 10 years which preceded the onset of the invalidity.

5 When those conditions are met, the amount of the pension is calculated by reference to the average of the worker's contribution bases over the 84 months immediately preceding the date on which his invalidity commenced. If, however, there were times during that period when the worker was under no obligation to pay contributions, the calculation is made as if he had then paid contributions on the minimum basis. In addition, the contribution bases for the first 60 months of the period (both real and notional) are indexed by reference to the movement of the official consumer price index during each of those months until the end of the period to be updated (Article 3(1) and (4) of the Law of 31 July 1985).

6 The amount of Mr Lafuente Nieto's pension, fixed at PTA 9 226 per month (payable 14 times a year), was determined by an apportionment comparing his insurance periods in Spain with those recorded for him in both Member States in which he had worked, whilst applying the rule that contributions were deemed to have been paid on the minimum basis, as provided for in cases where the worker was under no obligation to pay contributions. The INSS took the view that, during the period of 84 months to be taken into account in calculating the reference basis (that is, from July 1983 to June 1990), Mr Lafuente Nieto, who was then working in Germany, was under no obligation to pay contributions for the purposes of the Spanish legislation.

7 Mr Lafuente Nieto has challenged that amount and claimed that the figure should be PTA 56 485, calculated by a method which differs from that used by the INSS in two respects. First, the reference basis for calculating his pension takes account of the bases used to calculate the contributions paid in Germany over the period immediately preceding the onset of his invalidity, in so far as they do not exceed the maximum contribution bases applicable in Spain at that time, and applying the minimum basis for those months in which he did not pay contributions in Germany. Secondly, the apportionment is made by comparing the Spanish contribution period not with the whole of the contribution periods in Spain and Germany, but with the minimum contribution period necessary under Spanish legislation for entitlement to a pension.

8 The Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco, before which the matter came on appeal, referred the following questions to the Court for a preliminary ruling:

'(1) In the circumstances of fact which it covers, must Article 47(1)(e) of Regulation (EEC) No 1408/71 (as it stood in July 1990) be interpreted as including a statutory provision such as that in Article 3 of Law No 26/1985 of 31 July 1985, referred to in paragraph B of the second recital of facts of this judgment, or does such a provision fall within the scope of Article 47(1)(b) of the regulation?

(2) If the answer to Question 1 is that that statutory provision falls within the factual circumstances envisaged in Article 47(1)(e) of Regulation (EEC) No 1408/71:

(a) must it be regarded as introducing a specific Community law rule, in addition to the relevant Spanish rule, on the method of determining the average contribution basis, consisting in calculating it by reference to the arithmetical mean of the minimum and maximum contribution bases applicable in Spain?

(b) or must it be understood as not containing a specific rule on the method of determining the average contribution basis, so that the latter will have to be calculated in accordance with Spanish domestic law, although, for that purpose, no contributions made to the competent institution of another Member State, in accordance with the legislation of the latter, may be taken into account?

(c) or must it be interpreted as not containing a specific rule on the method of determining the average contribution basis, that basis having to be calculated in accordance with Spanish domestic law, but in such a way that, for those purposes, account is taken of the contributions paid to the competent institution of another Member State in accordance with the latter's legislation, to the extent that such contributions would also have been payable in Spain under Spanish legislation if the event giving rise to them in the other State were deemed to have occurred in Spain?

(3) If the correct interpretation of Article 47(1)(e) of Regulation (EEC) No 1408/71 is one of the two first alternatives indicated in Question 2, is that provision contrary to the requirements of Article 51 of the EEC Treaty concerning the freedom of movement for workers provided for in Article 48 thereof, and is it therefore invalid?

(4) If the answer to Question 1 is that the provisions of Article 3 of Law No 26/1985 of 31 July 1985 fall within the factual circumstances envisaged by Article 47(1)(b) of Regulation (EEC) No 1408/71:

(a) must the rule contained in that provision be interpreted as meaning that, in calculating the basis for the permanent invalidity or old-age pension, account may not be taken of any contribution paid to the competent institution of the other Member State in accordance with the legislation of that State?

(b) or must it be interpreted, for the purposes of that calculation, as allowing account to be taken of contributions paid to the competent institution in the other Member State, under its legislation, to the extent to which those contributions would likewise have been payable in Spain, under Spanish legislation, if the event giving rise to them in the other State were deemed to have occurred in Spain?

(5) If the correct interpretation of Article 47(1)(b) of Regulation (EEC) No 1408/71 is the first of the two alternatives set out in Question 4, is that provision contrary to the requirements of Article 51 of the EEC Treaty concerning the freedom of movement for workers provided for in Article 48 thereof, and is it therefore invalid?

(6) Regardless of the answers to the questions above, must the factual circumstances envisaged by Article 46(2)(c) of Regulation (EEC) No 1408/71, as it stood in July 1990, be interpreted as covering pensions in respect of permanent invalidity caused by non-occupational illness provided for under the Spanish general social security scheme, and must it therefore be concluded that the maximum period referred to in that provision is, in such cases, the minimum contribution period necessary to obtain entitlement to it?'

The legislative background to the dispute

9 Before replying to the questions, it will be useful to recall the provisions of the regulation at issue in the main action, as they stood at the date which the national court found to be relevant, namely July 1990.

10 As the documents before the Court show, the legislations of the two Member States in which the person concerned is to draw invalidity benefits are not of the

same type. The Spanish legislation is mentioned in Annex IV to the regulation as one of those referred to in Article 37(1), according to which the amount of invalidity benefits is independent of the duration of periods of insurance. The German legislation, on the other hand, is not among their number.

11 Article 40(1) of the regulation provides that for invalidity in the case of workers who have been successively subject to both types of legislation the provisions of the chapter of the regulation on old-age and death benefits, that is, Articles 44 to 51, are to apply by analogy.

12 Under Article 45(1), where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance or residence, account must be taken, to the extent necessary, of periods of insurance or residence completed under the legislation of any other Member State.

13 Article 46 sets out rules on the award of benefits. Article 46(1), which applies where the conditions for entitlement to benefit have been satisfied without it being necessary to apply Article 45, provides that a comparison is to be made between the amount of benefit calculated under the applicable legislation and the amount calculated by applying the rules under Article 46(2)(a) and (b), and that the higher of those two amounts is to be taken into consideration.

14 Article 46(2), which applies where the conditions for entitlement to benefits under the legislation of a Member State are not satisfied unless account is taken of the provisions of Article 45, contains the following rules:

'(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the insurance periods completed under the

legislation of the Member States to which the employed or self-employed person has been subject had been completed in the Member State in question and under the legislation administered by it on the date the benefit is awarded. If, under that legislation, the amount of the benefit does not depend on the length of the periods completed, then that amount shall be taken as the theoretical amount referred to in this subparagraph;

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

(c) if the total length of the periods of insurance and residence completed before the risk materializes under the legislations of all the Member States concerned is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers.'

15 Finally, Article 47 lays down additional provisions for the calculation of benefits. Article 47(1) deals specifically with the calculation of the theoretical amount referred to in Article 46(2)(a), and includes the two following provisions:

'...

(b) where, under the legislation of a Member State, benefits are calculated on the basis of the amount of earnings, contributions or increases, the competent institution of that State shall determine the earnings, contributions and increases to be taken into account in respect of the periods of insurance or

residence completed under the legislation of other Member States on the basis of the average earnings, contributions or increases recorded in respect of the periods of insurance completed under the legislation which it administers;

...

(e) where, under the legislation of a Member State benefits are calculated on the basis of average contributions, the competent institution shall determine that average exclusively by reference to those periods of insurance completed under the legislation of the said State.'

Question 1

16 In this question, the national court asks under which of the two rules contained in the above provisions of Article 47(1) of the regulation the system for calculating invalidity benefits laid down by the Spanish legislation falls.

17 Mr Lafuente Nieto considers that, since in reality that system establishes a direct relationship between the amount of benefits and wages or salaries, contributions or increases, it falls under the first rule, referred to in (b) above.

18 By contrast, the Spanish Government considers that it falls under the second rule, referred to in (e), since it makes the calculation of benefits dependent upon a 'basis for contributions' which does not correspond to the actual wages or salary.

19 The Commission maintains that none of the provisions of Article 47(1) applies to a system, such as the one in question, whereby the amount of benefit does not depend on the length of the insurance periods.

20 The first rule applies where the legislation of the Member State concerned provides that benefits are to be calculated on the basis of the amount of wages or salaries, contributions or increases, and periods of insurance or residence in another Member State are taken into account.

21 That does not cover a system such as that described by the national court, whereby the amount of benefits does not depend on the length of the insurance periods and, in calculating that amount, account is taken of the average of the contribution bases corresponding to the worker's wages or salary over a certain number of years preceding the onset of the invalidity, or, in respect of periods during which the person concerned was not obliged to pay contributions, to a minimum wage or salary. Under such a system, calculation of the benefits is not based on the actual amount of earnings, contributions or increases during the whole of the insurance or residence periods completed.

22 The second rule, contained in Article 47(1)(e) of the regulation, which was added at the time of the accession of the Kingdom of Spain and the Portuguese Republic to the Community, applies where the legislation of the Member State concerned provides that benefits are to be calculated on the basis of average contributions, determined exclusively by reference to periods of insurance completed under the legislation of that State.

23 The national court and the Spanish Government take the view that the circumstances in which that rule was inserted into the regulation indicate that it was intended precisely to cover a system of calculating invalidity benefits such as that laid down by the Spanish legislation, which effectively provides that, unless specified otherwise, benefits are to be calculated on the basis of average contributions.

24 The Commission considers nevertheless that the interpretation given by the Court in Case 181/83 *Weber* v *Nieuwe Algemene Bedrijfsvereniging* [1984] ECR 4007, where it held Article 47(1) inapplicable in certain circumstances without distinguishing between the various hypotheses to which that paragraph referred at that time, should be extended to the hypothesis envisaged in subparagraph (e). In its opinion, the rules in that subparagraph cannot apply in this case since, as the Court ruled in Case C-406/93 *Reichling* v *INAMI* [1994] ECR I-4061, Article 46(2)(a) requires that account be taken, for the purposes of calculating the theoretical amount of benefit, of the remuneration received by the worker at the time when he became incapacitated in a Member State other than that under whose legislation the theoretical amount is calculated.

25 That argument cannot be accepted.

26 In the first place, the fact that the solution adopted by the Court in *Weber* concerns all the hypotheses contained in Article 47(1) at that time does not imply that that solution must be generalized and extended to all provisions added to that paragraph subsequently. It should also be noticed, as the Advocate General points out at paragraph 25 of his Opinion, that that judgment concerned an invalidity benefits scheme which, although analogous in some respects to the scheme at issue in the main proceedings, is distinct from it in others.

27 Moreover, the interpretation given by the Court in *Reichling* concerns Article 46(2)(a) of the regulation and not Article 47(1), which contains additional provisions. Whilst the former provision may be useful in interpreting the latter and, in some cases, in assessing its validity, those issues being the subject-matter of other questions referred by the national court, that does not mean that subparagraph (e) cannot cover a scheme such as that at issue in the main proceedings.

28 Finally, it should be noted that Council Regulation (EEC) No 1248/92 of 30 April 1992 (OJ 1992 L 136, p. 7), which came into force after the date which the national court held to be relevant, laid down new provisions intended, as is demonstrated by the 32nd recital in its preamble and the additions made to Annex VI, Part D, paragraph 4 of Regulation No 1408/71, to specify the detailed rules for the application of Article 47 of the regulation to Spain and Portugal, in particular as regards the calculation of the Spanish theoretical benefit. Those new provisions confirm that Article 47(1), which refers precisely to the calculation of the theoretical amount of the benefit, contains rules which concern the Spanish legislation. Contrary to the Commission's affirmations in reply to a question put by the Court, those rules are, moreover, applicable not only to old-age and death benefit schemes but also, by analogy pursuant to Article 40(1) of the regulation, to invalidity benefit schemes where the worker concerned has, as in this case, been subject successively to legislations of different types.

29 The answer to Question 1 must therefore be that Article 47(1)(e) of the regulation, as it stood in July 1990, covers a system for calculating invalidity benefits on an average basis for contributions, as laid down by the Spanish legislation.

Questions 2 and 3

30 In these two questions, the national court asks what interpretation is to be given to the above rule in Article 47(1)(e) of the regulation and, if necessary, whether that rule complies with the principles laid down in Article 51 of the Treaty. In particular, the court asks whether compliance with those principles does not imply that, in calculating the average contribution basis under the legislation concerned, account must be taken of contributions paid under the legislation of another Member State, within the limit of the contributions which would have had to be paid under the first legislation, if the person concerned had at all times been subject to the latter at the time when the invalidity arose.

31 Mr Lafuente Nieto argues that the latter interpretation is the only one permissible, if Article 47(1)(e) applies to his situation.

32 The Spanish Government maintains, on the other hand, that it is evident from that very provision that the average basis for contributions must be determined exclusively by reference to the periods of insurance completed under Spanish legislation.

33 Like all the provisions of Article 47(1) as they stood at the relevant date, the rule in subparagraph (e) is an additional provision for the calculation of the theoretical amount referred to in Article 46(2)(a). The rule must therefore be interpreted in the light of that provision and, as the Court held in relation to Article 46(2)(a) in *Reichling*, in the light of the objective laid down by Article 51 of the Treaty, which implies in particular that migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement.

34 The interpretation of the rule at issue does not raise any serious difficulty when the legislation which applies is that of the Member State in which the invalidity occurred and the insurance periods used to determine the average basis for contributions were actually completed in that State. That is the case, for example, where the invalidity occurs in Spain, and the worker is entitled to benefits under Spanish legislation only if account is taken of periods completed under legislation of a different type and he has contributed in Spain during the period used to calculate the average basis for contributions.

35 But that does not apply to the situation at issue in the main proceedings, where, in the first place, the invalidity arose in a Member State whose legislation is of a different type from that under which benefits are sought and, moreover, the worker concerned did not pay contributions under the latter legislation during the period used to determine the average basis for contributions. In such a situation, Spanish

legislation does not simply provide that the calculation of benefits rests on an average basis for contributions, within the meaning of the rule at issue. It provides that, in the absence of an obligation to pay contributions during all or part of the reference period, a minimum basis is wholly or partially substituted for the average basis, which may work to the disadvantage of migrant workers.

36 It is not disputed that if Mr Lafuente Nieto had always worked in Spain and completed all his insurance periods there he would not have been regarded as a worker who was not under an obligation to pay contributions during the period immediately preceding the onset of the invalidity. He would therefore have been entitled to a higher invalidity pension than the one which was granted to him.

37 The rule contained in Article 47(1)(e) of the regulation, which envisages a calculation using an average basis for contributions such as that provided for, in principle, by Spanish legislation, is not intended to authorize, and cannot in any event have the effect of authorizing, by way of exception and in certain situations limited to workers who have exercised their right to free movement, a different method of calculation based on a minimum basis for contributions.

38 In this case, Mr Lafuente Nieto was not obliged, during the period used under Spanish legislation for calculating the average basis for contributions, to pay contributions in Spain, but he was under that obligation in another Member State. That finding should have been taken into account by the competent Spanish institution, applying Article 47(1)(e) interpreted in the light of the objective referred to in paragraph 33 above, because a migrant worker must not suffer a reduction in the amount of the benefit he would have received had he not been migrant (*Reichling*, paragraph 26).

39 Nevertheless, such a finding does not mean that, contrary to the provisions of Article 47(1)(e), whereby that average basis is to be determined by reference only to insurance periods completed under the legislation concerned, the calculation of

the average basis for contributions must rest on the amount of contributions paid in the other Member State. It merely implies that, in such a situation, that basis must be the same for the person concerned as if he had remained under the obligation to pay contributions under the legislation concerned.

40 In circumstances such as those at issue in the main proceedings, therefore, although account is to be taken only of contributions paid under the legislation concerned, that amount must be updated and revalorized so as to correspond with what the person concerned would have paid had he continued to work under the same conditions in the Member State in question.

41 That interpretation is confirmed by the new provisions which Regulation No 1248/92 introduced into Annex VI, heading D, paragraph 4 of Regulation No 1408/71, whereby 'the calculation of the theoretical Spanish benefit shall be carried out on the basis of the actual contributions of the insured person during the years immediately preceding payment of the last contribution to the Spanish social security' and 'the amount of the pension obtained shall be increased by the amount of the increases and revalorizations calculated for each year after and up to the year preceding the materialization of the risk for pensions of the same kind'.

42 Those new provisions, which came into force after the date which the national court held to be relevant, would not normally be directly applicable to this case, subject only to the possibility which the new Article 95a of the regulation confers upon the persons concerned to request revision of their rights to take account of those rules. But, as the Advocate General points out in paragraph 53 of his Opinion, the provisions in question, which do no more than set out the detailed rules for determining the average basis for contributions with sole reference to insurance periods completed under Spanish legislation, whilst leaving the content of Article 47(1)(e) unaltered, are intended only to ensure the compatibility thereof with the principles set out in Article 51 of the Treaty.

43 The answer to Questions 2 and 3 must therefore be that Article 47(1)(e) of the regulation, as it stood in July 1990, and interpreted in accordance with the objective laid down by Article 51 of the Treaty, implies that, in a situation such as that at issue in the main proceedings, calculation of the average basis for contributions rests solely on the amount of contributions paid under the legislation concerned, and the theoretical amount of the benefit thus obtained is to be duly revalorized and increased as if the person concerned had continued to work under the same conditions in the Member State in question.

Questions 4 and 5

44 Having regard to the answer to Question 1, there is no need to answer Questions 4 and 5.

Question 6

45 In this final question, the national court asks whether Article 46(2)(c) of the regulation, in the version then in force, applies to an invalidity pension scheme such as that provided for by the Spanish legislation and whether, therefore, the maximum period required for receipt of full benefit which the competent institution must, in accordance with that provision, take into consideration instead of the total length of the insurance periods, corresponds to the minimum period of contributions necessary to acquire entitlement to a pension.

46 Mr Lafuente Nieto proposes an affirmative response, maintaining that, in accordance with Article 45(1) of the regulation, aggregation of insurance periods must never exceed what is necessary and that the application of Article 46(2)(c) to that

effect has been recognized in several judgments of the Court (see, in particular, Joined Cases C-90/91 and C-91/91 *Office National des Pensions* v *Di Crescenzo and Casagrande* [1992] ECR I-3851).

47 The Spanish Government and the Commission argue, on the contrary, that the provision in question does not apply to a scheme such as that laid down by Spanish legislation, whereby the amount of benefit is independent of insurance periods.

48 The latter argument must be accepted.

49 In the first place, it should be remembered that the rule in Article 45(1), on which Mr Lafuente Nieto seeks to rely, concerns the acquisition, retention or recovery of the right to benefits and not the calculation of the amount of benefits, the rules for which are set out in Article 46 et seq.

50 In addition, the case-law cited by Mr Lafuente Nieto does not apply to situations where, as in this case, aggregation of insurance periods in accordance with Article 45 is necessary for entitlement to benefits. It applies where entitlement to benefits is acquired without there being any need to apply that article, and where it is necessary, under Article 46(1), to make a comparison between benefits due under national law and those which would be due under Community law (see, in particular, the judgment in *Di Crescenzo and Casagrande*, cited above, paragraphs 15 to 17).

51 Finally, the wording of Article 46(2)(c) itself shows, in the version in force at the date which the national court found to be relevant, that that rule applies where the total duration of the insurance periods completed in all the Member States concerned is greater than the maximum duration required by the legislation of one of those States in order to enjoy full benefit. That latter definition can envisage only legislations whereunder benefits are, in principle, calculated by reference to the duration of the periods completed.

52 The rule at issue was introduced to deal with the problems which may arise in calculating retirement pensions by reference to the duration of insurance periods, when there is a maximum duration beyond which the amount of the pension cannot be further increased. Originally appearing in Article 46(2)(c) of the regulation, the rule was moved to Article 47(1)(a) by Regulation No 1248/92, and supplemented by the qualification that 'the provision shall not apply to benefits the amount of which does not depend on the length of insurance'.

53 As is demonstrated by the fact that no explanation is given on that subject in the recitals in the preamble to Regulation No 1248/92, the displacement of the text and that qualification cannot be regarded as having introduced a new provision into the rules, but must be regarded merely as clarification, corroborating the interpretation given above (see, by analogy, *Reichling*, paragraph 29).

54 The answer to Question 6 must therefore be that Article 46(2)(c) of the regulation, as it stood in July 1990, does not cover the calculation of invalidity benefits under a scheme such as that provided for by Spanish legislation, whereby the amount of benefit does not depend on the length of the insurance periods.

Costs

55 The costs incurred by the Spanish Government, the Council of the European Union and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco by order of 31 May 1994, hereby rules:

1. **Article 47(1)(e) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and as adapted by Annex I, Part VIII of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, covers a system for calculating invalidity benefits on an average basis for contributions, as laid down by the Spanish legislation.**

2. **Article 47(1)(e) of Regulation No 1408/71, interpreted in accordance with the objective laid down by Article 51 of the EEC (now the EC) Treaty,**

implies that, in a situation such as that at issue in the main proceedings, calculation of the average basis for contributions rests solely on the amount of contributions paid under the legislation concerned, and the theoretical amount of the benefit thus obtained is to be duly revalorized and increased as if the person concerned had continued to work under the same conditions in the Member State in question.

3. **Article 46(2)(c) of Regulation No 1408/71 does not cover the calculation of invalidity benefits under a scheme such as that provided for by Spanish legislation, whereby the amount of benefit does not depend on the length of the insurance periods.**

Edward Puissochet Jann

Sevón Wathelet

Delivered in open court in Luxembourg on 12 September 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber