OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 14 May 1996 *

1. The preliminary questions on which the Court is to give a ruling in this case have been submitted by the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hessen) to enable it to give a decision in the proceedings brought before it by Siegfried Otte against the Federal Republic of Germany, represented by the Bundesamt für Wirtschaft (Federal Office of Economic Affairs, hereinafter 'the Bundesamt').

2. From the documents before the Court, it appears that Mr Otte, who has possessed Netherlands nationality since 1981, is a migrant worker who was employed for long periods in the German mining sector. He was born on 3 January 1930; he was insured in Germany under the miners' sickness and invalidity insurance scheme from August 1948 to December 1958, and from December 1979 until he was laid off in 1987. From January 1959 to July 1968 he was insured in Germany under the general scheme for employees, and from August 1968 to November 1979 he was insured under the Netherlands general social security scheme.

3. In February 1988, Mr Otte applied for a benefit available, under certain regulations governing the adaptation allowance (Anpassungsgeld), [1] for workers in the mining sector, adopted by the Federal Ministry of the Economy on 13 December 1971, as in force on 16 June 1983.

On 15 January 1988, Mr Otte had started receiving an invalidity pension from the Netherlands general social security scheme, by virtue of the Wet arbeidsongeschiktheid (Netherlands law on incapacity for work, hereinafter 'the WAO'), a fact which Mr Otte did not mention when applying for the German adaptation allowance.

He stated in his application that, as from 1 March 1988, he would receive, under the German Law governing the Mineworkers' Insurance Fund (Reichsknappschaftsgesetz, hereinafter 'RKG'), a pension for reduction of capacity to work as a miner (Bergmannsrente) or, which comes to the same thing, an invalidity pension.

4. By decision of 29 August 1988, the Bundesamt fixed the amount of the adaptation allowance as DM 2 604 per month. In making the calculation, applying *mutatis*

* Original language: Spanish.

1 — Literally, adaptation money.

mutandis the rules for calculation of miners' retirement pensions, the Bundesamt took into account not only his contribution periods in Germany but also his duly proved period of insurance in the Netherlands of 138 months. From that amount, the Bundesamt deducted DM 635 per month corresponding to the miners' invalidity pension granted by Germany, so that the sum payable by it by way of adaptation allowance became DM 1 969.

5. In May 1989, on learning that Mr Otte was in receipt of a Netherlands invalidity pension, the Bundesamt reduced the amount of the adaptation allowance, deducting the amount of the Netherlands pension, and at the same time called on Mr Otte to reimburse the sums unduly paid.

Mr Otte's entitlement to the adaptation allowance expired on 31 January 1990, when he attained the age of 60. On the following day, his German miners' invalidity pension was converted into a retirement pension.

6. He appealed against the Bundesamt's decision deducting the amount of the Netherlands invalidity pension from the German adaptation allowance and against the decision requiring reimbursement of sums unduly paid.

In January 1992, the Verwaltungsgericht dismissed the appeal, considering both decisions to be lawful, in that the Netherlands invalidity pension should be treated, for such purposes, in the same way as the German occupational incapacity pension. Furthermore, if, both for determining entitlement to the adaptation allowance and for calculation of its amount, account is taken for the benefit of the recipient of insurance periods completed abroad, the foreign benefits granted on the basis of the insurance periods taken into account should, in turn, be deducted. Otherwise, there would be a duplication of benefit for the periods completed abroad.

7. Mr Otte appealed against that judgment to the Hessischer Verwaltungsgerichtshof. He contended that the calculation method applied by the respondent was contrary to Article 51 of the EC Treaty, since his benefit was lower than the benefit he wold have received if he had been retired, since in the latter case he would receive at the same time the benefits calculated by reference to the contribution periods in the different Member States, without any reduction at all.

The respondent considers that the lower court correctly decided that the adaptation allowance constitutes a pre-retirement pension [2] which, by contrast with other pen-

2 — Law No 27/84 of 26 July 1984 on rationalization and reindustrialization uses the term 'assistance equivalent to early retirement benefits under the social security system' for benefits which may be available to workers aged 60 or more who, as a consequence of the rationalization, cease work before reaching retirement age with full benefits. The Spanish version of the proposal for a regulation submitted by the Commission to the Council on 12 January 1996 in order to bring benefits of that kind within the scope of Regulation No 1408/71 (OJ 1996 C 62, p. 14), with which I will deal below, refers to them as 'pre-retirement benefits', to distinguish them from the case of 'anticipatory old-age benefits'. Since the first term appears to me to be too long and the second to be open to misinterpretation, since the consolidated version of the General Law on social security (Royal Legislative Decree No 1/94 of 20 June 1994, *Official Gazette of the Spanish State* No 154) refers, in Article 160 et seq., to financial benefits in respect of retirement, I propose to use throughout this Opinion the term 'pre-retirement benefits', a literal translation of the French term used to describe benefits of the kind at issue here.

sions, is not based on contribution periods but is a State subsidy falling outside the substantive scope of the Community social security regulations.

8. In order to give judgment on the appeal, the Hessischer Verwaltungsgerichtshof has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 4(1) and (2), and in particular Article 4(1)(c), of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), to be interpreted as also applying to benefits granted by a Member State in the form of a national subsidy upon application and without legal entitlement (in this case in accordance with the Guidelines on the Granting of Adaptation Allowance to Employees in the Coal-Mining Industry) to older employees in the coal-mining industry laid off as a result of closure or rationalization measures?

(2) If the answer is in the affirmative:

Does Article 4(1)(c) of Regulation (EEC) No 1408/71 require the national subsidy granted by the Member State to be assessed in accordance with Article 46 of Regulation (EEC) No 1408/71, having regard to Article 46(2)(b) in particular?

(3) If the national subsidy granted by the Member State is to be assessed in accordance with Article 46 of Regulation (EEC) No 1408/71:

Does the first sentence of Article 12(2) of Regulation (EEC) No 1408/71 permit a pension, within the meaning of Article 1(t) of Regulation (EEC) No 1408/71, paid by another Member State (in this case the Netherlands WAO pension) to be deducted, or does the second sentence of Article 12(2) of Regulation (EEC) No 1408/71 preclude such deduction?

(4) If a deduction in accordance with the first sentence of Article 12(2) of Regulation (EEC) No 1408/71 is permissible:

Is such deduction limited by Article 7(1)(b) of Regulation (EEC)

No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983?'

The Community provisions

9. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 [3] (hereinafter 'Regulation No 1408/71'), provides, in Article 1:

'For the purpose of this regulation:

...

(t) "benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorization increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

...'

10. The matters covered by the Regulation are laid down in Article 4, pursuant to which:

'1. This regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

3 — OJ 1983 L 230, p. 6.

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

...'

Article 12(2) of Regulation No 1408/71 provides:

'The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with Articles 46, 50 and 51 or Article 60(1)(b).'

11. Pursuant to Article 46

'Award of benefits

1. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefit have been satisfied, without application of the provisions of Article 45 and/or Article 40(3) being necessary, the competent institution of that Member State shall, in accordance with the legislation which it administers, determine the amount of benefit corresponding to the total length of the periods of insurance to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of benefit which would be obtained by applying the rules laid down in paragraph

2(a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where an employed or self-employed person has been subject to the legislation of a Member State and where the conditions for entitlement to benefits are not satisfied unless account is taken of the provisions of Article 45 and/or Article 40(3), the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the periods of insurance or residence 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;

...

3. The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2(a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with the provisions of paragraph 1.'

12. For its part, Article 7 of Regulation (EEC) No 574/72 of the Council of

21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation (EEC) No 2001/83 [4] (hereinafter 'Regulation No 574/72'), provides, with regard to Article 12 of Regulation No 1408/71:

'General rules for the implementation of provisions dealing with the prevention of overlapping of benefits — Application of those provisions to benefits in respect of invalidity, old age and death (pensions)

1. Where a person entitled to a benefit due under the legislation of one Member State is also entitled to benefits under the legislation of one or more of the other Member States, the following rules shall apply:

(a) if the application of Article 12(2) or (3) of the Regulation entails the reduction or the concurrent suspension of those benefits, none of them may be reduced or suspended by an amount greater than the amount obtained by dividing the sum which is subject to reduction or suspension under the legislation under which the benefit is due by the number of benefits subject to reduction or suspension to which the person concerned is entitled;

(b) as regards benefits in respect of invalidity, old age or death (pensions) awarded under Article 46(2) of the Regulation by the institution of a Member State, that institution shall take into account any benefits of a different kind and any income or remuneration likely to entail the reduction or suspension of the benefit due from that institution, not for the calculation of the theoretical amount referred to in Article 46(2)(a) of the Regulation but exclusively for the reduction or suspension of the amount referred to in Article 46(2)(b) of the Regulation. However, only a fraction of the total amount of such benefit, income or remuneration shall be taken into account, and that fraction shall be determined in proportion to the duration of the insurance periods completed, in accordance with Article 46(2)(b) of the Regulation;

(c) as regards benefits in respect of invalidity, old age or death (pensions) awarded under the first subparagraph of Article 46(1) of the Regulation by the institution of a Member State, that institution shall, where the provisions of Article 46(3) of the Regulation apply, take into account any benefits of a different kind and any income or remuneration likely to entail the reduction or suspension of the benefit due from that institution, not for the calculation of the amount referred to in Article 46(1) of the Regulation, but exclusively for the reduction or suspension of the amount resulting from the application of Article 46(3) of the Regulation. However, only a fraction of the amount of those benefits, income or

4 — OJ 1983 L 230, p. 86.

remuneration shall be taken into account; such fraction shall be obtained by applying to that amount a coefficient equal to the ratio between the amount of benefit resulting from the application of Article 46(3) of the Regulation and the amount resulting from the application of the first subparagraph of article 46(1) of the Regulation.

2. For the purposes of Article 12(2), (3) and (4) of the Regulation, the competent institutions concerned shall, on request, exchange all requisite information.'

The national provisions

13. The provisions governing the adaptation allowance appear in guidelines adopted by the Federal Ministry of the Economy on the granting of the adaptation allowance to employees in the coal mining industry of 13 December 1971 [5] and 22 September 1988. [6]

Paragraphs 3 and 4 of the 1971 guidelines, as in force from 1983, provide as follows:

'Paragraph 3

An adaptation allowance may be granted only if the worker

1. has been laid off by the employer between 30 June 1971 and 1 January 1990 following closure or a rationalization measure, for reasons not attributable to him,

2. would, if he had retained the post which he held in the undertaking until that time, have fulfilled, within a period not exceeding five years — reckoned from the day on which he was laid off — the conditions for entitlement to:

(a) the miners' retirement pension (Paragraph 48(1) of the Reichknappschaftsgesetz (RKG) [Law governing the Mineworkers' Insurance Fund]),

5 — *Bundesanzeiger* No 233 of 15 December 1971, p. 1; in the version published in *Bundesanzeiger* No 113 of 23 June 1983.

6 — *Bundesanzeiger* No 182 of 28 September 1988, p. 4325.

(b) the miners' retirement pension following a period of unemployment (Paragraph 48(2) of the RKG),

(c) the miners' retirement pension for miners who have completed a specified length of service (Paragraph 48(1), point 2, of the RKG),

(d) the miners' retirement pension under Paragraph 48(3) or (5) of the RKG

or

(e) the compensatory benefit for miners (Paragraph 98a of the RKG),

3. in the cases covered by 2(a), (b) and (d), has completed, when he is laid off, an insurance period of at least 180 calendar months, and

4. has worked in a German coal mine without interruption during the two years before he is laid off, unless that period was interrupted for reasons not attributable to him.

The undertaking's social redeployment scheme under which the worker is laid off must have been drawn up in concert with the Federal Minister of the Economy ...

Paragraph 4

1. The amount of the adaptation allowance shall be calculated by application by analogy of the rules governing

(1) the compensatory benefit for miners in the cases provided for by paragraph 3, point 2(e), and

(2) the miners' retirement pension in the other cases provided for in paragraph 3, point 2,

taking account of the rights acquired by the worker for the purposes of the miners'

retirement pension, on termination of employment. In the cases provided for under (a), (b) and (d) of paragraph 3, point 2, for calculation of the adaptation allowance account shall also be taken of the rights acquired for the purposes of the retirement pension under the general scheme for employees ...

2. If the laid-off worker receives a pension or temporary allowance under a miners' insurance scheme, a sickness benefit following termination of employment, an invalidity benefit or analogous benefits paid by social security institutions of other States, the amount of such benefit shall be taken into account in calculating the amount of the adaptation allowance. The same shall apply to the family benefits provided for by the Bundeskindergeldgesetz available to the laid-off worker, unless the adaptation allowance does not include a family supplement for the same child.

3. ...

4. Save as otherwise provided, the rules governing the miners' retirement pension shall apply by analogy ...'.

In 1988, new rules adopted by the Federal Ministry of the Economy on the granting of an adaptation allowance for workers in the mining industry came into force, repealing the earlier guidelines. Paragraphs 3 and 4 of the new guidelines provide as follows:

'3. Conditions for award of the allowance

3.1 An adaptation allowance may be granted only if the worker:

3.1.1 was laid off before 1 January 1995 for reasons not attributable to him;

3.1.2 would, if he had retained the post which he held in the undertaking until that time, have fulfilled, within a period not exceeding five years reckoned from the day on which he was laid off, the conditions for entitlement to:

(a) the miners' retirement pension (paragraph 48, point 1, of the RKG),

(b) the miners' retirement pension following a period of unemployment (paragraph 48, point 2, of the RKG),

3.1.3 in the cases covered by 3.1.2(a), (b) and (d), proves that, when he is laid off, he has paid contributions for at least 180 months and, in the case under (e), at least 60 months, and

(c) the miners' retirement pension for miners who have completed a specified length of service (paragraph 48(1), point 2, of the RKG),

3.1.4 has worked without interruption in German mining undertakings or mining brown coal during the two years immediately before he is laid off ...

(d) the miners' retirement pension under paragraph 48(3) of the RKG,

3.2 The worker may only receive the adaptation allowance if the undertaking mining brown coal takes on a worker previously engaged in the mining of hard coal (Steinkohle) or one from a special mining undertaking.

(e) the miners' retirement pension provided for in paragraph 48(5) of the RKG,

3.3 The social redeployment plan of the undertaking laying off the worker must have been approved by the Federal Ministry of the Economy ...

or

4. Nature, extent and amount of the benefit

(f) the compensatory benefit for miners (paragraph 98a of the RKG);

4.1 The adaptation allowance

4.1.1 Pursuant to the rules governing

(a) the compensatory benefit for miners in the cases covered by 3.1.2(f), or

(b) the miners' retirement pension in the other cases covered by 3.1.2,

the amount of the adaptation allowance shall be calculated taking into account the rights acquired by the worker for the purposes of the miners' retirement pension when he is laid off. In the cases covered by 3.1.2(a), (b), (d) and (e), account shall also be taken, for calculation of the adaptation allowance, of the rights acquired for the purposes of the retirement pension for employees ...

4.1.2 If the laid-off worker receives from a social security institution of another State a benefit under the mining scheme ..., a sickness benefit or benefit for permanent incapacity for work after cessation of employment, an invalidity pension or other benefits of that kind, the amount thereof shall be taken into account in calculating the amount of the adaptation allowance. The same shall apply to family benefits provided for by the Bundeskindergeldgesetz to which the laid-off worker is entitled, unless the amount of the adaptation allowance does not include a family supplement for the same child;

4.1.3 The adaptation allowance ... shall be granted for a maximum period of five years ...

4.1.4 Save as otherwise provided, the provisions governing the miners' retirement pension shall apply by analogy.

4.2 Sickness insurance contributions

4.2.1 During the period in which the worker receives the adaptation allowance, the German authorities shall assume responsibility, out of public funds, for continuing voluntary sickness insurance contributions for the worker, without his thereby becoming entitled to receive benefits for temporary incapacity for work in that event ... However, such contributions shall cease to be the responsibility of those authorities in any period during which the worker is in paid

employment or is self-employed to a significant extent ...'.

14. In these proceedings, observations have been submitted by the appellant in the main proceedings, the German State as respondent, and the Commission.

The first question

15. It seems to me that, by this question, the national court wishes to know whether a benefit such as that received by the appellant from the time he was laid off by a German undertaking in the coal mining sector to the time at which he attained the retirement age for miners must be regarded as a social security benefit within the meaning of Regulation No 1408/71, in other words whether that benefit falls within its substantive scope.

16. The Hessischer Verwaltungsgerichtshof suggests two possibilities:

— either the adaptation allowance is excluded from the scope of Regulation No 1408/71, in which case it is merely a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [7] (hereinafter 'Regulation No 1612/68'). If that is the case, the appellant would not be the subject of discrimination by virtue of the deduction made, since the benefit he receives under the WAO may be regarded as equivalent to a German invalidity benefit, which, in accordance with domestic legislation, must be taken into account in calculating the amount of the adaptation allowance;

— or else the adaptation allowance must be regarded as falling within the scope of Regulation No 1408/71, in which case it must be calculated having regard to Articles 12 and 46 thereof.

The national court favours the second hypothesis, in view of the essential features of the adaptation allowance. It observes, first, that that benefit, which is limited in time, is intended to ensure a given level of income for older workers who have been laid off as a result of closure or rationalization of a mining undertaking, pending attainment of the age at which they are entitled to receive a compensatory allowance from the miners' insurance fund or an invalidity or retirement pension under the same scheme.

7 — OJ, English Special Edition 1968 (II), p. 475.

Moreover, the periods for which the adaptation allowance is received are treated as periods of unemployment for the purposes of acquiring pension rights.

Secondly, the amount of the benefit is calculated, in accordance with the rules governing the miners' retirement pension, on the basis of the periods of contributions both to that scheme and to the general scheme, until termination of employment. In the national court's view, that adaptation allowance, which is similar to a pre-retirement benefit, could be equated with the old-age benefits referred to in Article 4(1)(c) of Regulation No 1408/71, since the essential conditions for grant of the benefit are based on periods of membership of a social security scheme intended to cover a particular risk, and the fact that the benefit is granted out of public funds on the basis of regulations rather than legal provisions does not represent an obstacle in that regard. Even where, it adds, the decision to grant an adaptation allowance is discretionary, workers in mining undertakings who fulfil the conditions for that benefit enjoy, by virtue of the German Basic Law, the right to equal treatment, within the budgetary resources of the federal authorities and of each of the *Länder* concerned.

The national court concludes by pointing out that the adaptation allowance could also be regarded as a non-contributory social security benefit, in accordance with Article 4(2) of Regulation No 1408/71. In that case, it would be a kind of pre-retirement pension covering the periods for which a worker over a particular age would otherwise be regarded as unemployed. Since the requirements for its grant and the method of calculating it are based on the RKG, it would be classifiable as a retirement pension rather than an unemployment benefit within the meaning of Article 4(1)(g) of Regulation No 1408/71.

17. The appellant in the main proceedings considers that the adaptation allowance serves the purpose of guaranteeing older workers deprived of their usual job as a consequence of closure or rationalization of a mining undertaking a certain level of income pending acquisition of the right to a retirement pension. In fact, it is a bridging benefit, limited in time, the amount of which is calculated by applying the same provisions as for the retirement pension and taking into account for that purpose the insurance periods completed in another Member State. It is also a benefit financed out of public funds, the grant of which is within the discretion of the authorities, but to which all mining workers who fulfil specified requirements are entitled, within the budgetary resources of the federal authorities and of each of the *Länder* concerned.

He concludes, with respect to the first question, that the adaptation allowance forms part of a non-contributory social security scheme for the purposes of Article 4(2) of Regulation No 1408/71, linked to one of the risks exhaustively listed in Article 4(1) — specifically sub-subparagraph (g) — which refers to unemployment benefits, and proposes that the Court of Justice answer the question from the national court to the effect that parts Article 4(1) and (2) of Regulation No 1408/71 must be interpreted as including the benefits granted in Germany in the form of subsidies, in accordance with the regulations governing the award of the adaptation allowance to older workers in coal mines who are laid off as a result of closure or rationalization measures.

18. The German Government on the other hand is of the opinion that the adaptation allowance in question is not a social security benefit covered by Article 4(1) of Regulation No 1408/71. It puts various reasons forward for that view:

First, Regulation No 1408/71 only applies to legislation governing the branches of social security exhaustively listed in Article 4(1), so that any not included on that list is excluded from its substantive scope, however much it confers on the recipients a legally defined position conferring entitlement to the award of a benefit.

Secondly, when notifying, in accordance with Article 5 of Regulation No 1408/71, the legislation and schemes covered by Article 4(1), [8] Germany did not mention the regulations governing award of the adaptation allowance for coal miners.

Thirdly, it states that both the conditions for its grant and the method for calculating it provide grounds for the view that it is a pre-retirement benefit, the purpose of which is to cover the period of time until the worker is entitled to a retirement pension, adding that, according to the case-law of the Court of Justice, benefits of that kind are excluded from the scope of Regulation No 1408/71. Moreover, the adaptation allowance, of which the duration is limited in time and the *raison d'être* is closely linked with the present economic situation, cannot simply be treated as if it were a retirement pension within the meaning of the regulation. Whilst eligibility for a retirement pension depends

8 — Updating the declarations of the Member States provided for in Article 5 of Regulation No 1408/71 (OJ 1980 C 139, p. 1).

solely on the circumstances of the recipient, namely attainment of a particular age, completion of the minimum contribution period and the fact of having retired, the grant of an adaptation allowance is essentially dependent on a condition outside the control of the recipient, namely his being laid off as a result of closure or rationalization measures. Moreover, the allowance in question cannot be regarded as a retirement pension since the periods in which it is received are taken into account for the purposes of entitlement to such a pension and determination of its amount.

Fourthly, the adaptation allowance cannot be treated as if it were unemployment benefit. Receipt of unemployment benefit carries with it the obligation for the worker to register with the appropriate employment centre and be available to accept any work which is offered and is suitable to his circumstances, whereas the recipient of the adaptation allowance is exempted from that requirement.

Finally, the German Government adds that if Regulation No 1408/71 were applied to the adaptation allowance, its amount would be calculated irrespective of whether or not the recipient was entitled to pensions in other Member States. In the present case, since Mr Otte has already become entitled to a Netherlands invalidity pension, that calculation would have positive repercussions, since the total figure would be higher. However, if it is borne in mind that most workers, when awarded an adaptation allowance, do not meet all the prescribed conditions for entitlement at the same time to a pension in another Member State, that is clearly an exceptional result. In accordance with the practice followed by the German administration, workers receive a benefit whose amount is increased as a result of the contribution periods in other Member States being taken into account for that purpose. If Regulation No 1408/71 were applied, they would only receive part of the possible allowance, which would be calculated either by taking account only of the contribution period in Germany or else by applying pro rata rules, resulting in failure to achieve the aim pursued, which is to provide workers laid off following closure or rationalization measures with sufficient financial resources until they become entitled to a retirement pension.

19. Before opening the oral procedure, the Court invited the German Government to explain a number of details concerning the benefit, namely: the way in which it is calculated, the financial involvement of the undertaking in determining its amount and the content of the redeployment plan agreed between the undertakings and the German authorities.

In its reply, the German Government stated that Mr Otte's allowance was calculated, initially, in accordance with the guidelines adopted in 1971, as in force in 1983. When it was subsequently recalculated, the new rules adopted in 1988 were applied. Regarding the calculation method, it stated that the allowance was determined by applying the rules

governing retirement and invalidity insurance for miners and is paid like a pension, but that the amount is not charged to that insurance, being instead funded out of taxes. Account is taken of contribution periods in other Member States both in verifying whether the recipient meets the requirements for its grant and for determining the amount of the benefit and, if the recipient has also acquired entitlement to other benefits in Germany or in another Member State, the amount thereof is deducted from the German adaptation allowance, in order to ensure that there is no duplication of benefits for the same insurance period.

It explained that undertakings have no financial involvement whatsoever either in determining or in calculating the amount of the adaptation allowance but merely pay, where appropriate, a severance allowance.

It confirmed that the adaptation allowance serves a structural and employment-policy objective, since it is linked to a condition outside the control of the beneficiary, namely his cessation of employment as a result of closure or rationalization measures and that, in the case of workers in a company producing brown coal, that company is also required to recruit, in exchange, workers from mines producing hard coal or special mining companies.

Having suggested that the first preliminary question be answered in the negative, the German Government considers that it is unnecessary to answer the other three.

20. The Commission considers, first, whether the guidelines for grant of the adaptation allowance can be regarded as 'legislation' for the purposes of Regulation No 1408/71. It observes that, according to the case-law of the Court of Justice, the definition in Article 1(j) of that regulation is extremely broad, extending to all kinds of laws, regulations and other provisions relating to the branches and schemes of social security covered by Article 4(1) and (2), [9] only provisions of agreements being excluded. Since the German provisions were adopted by the federal administration, they are of an administrative nature and must be regarded as 'legislation' for the purposes of Regulation No 1408/71.

9 — Case 87/76 *Bozzone* [1977] ECR 687, paragraphs 9 to 11.

It then considers whether the benefit in question constitutes social assistance, by virtue of the fact that it is awarded on a discretionary basis by the administration, this being one of the criteria which, according to the case-law of the Court of Justice, characterize a benefit of that kind. [10] However, in the case of the adaptation allowance, the awarding authority does not enjoy unfettered discretion, since every worker who meets the requirements is entitled to receive it, provided that the budgetary resources for the time being so allow. Moreover, both a refusal and the calculation of the amount are open to appeal.

The grant of an allowance according to the personal needs of the beneficiary is another decisive criterion for defining a social assistance benefit. However, it is not a precondition for award of the adaptation allowance that the personal needs of the person concerned be considered individually. The Commission therefore concludes that the adaptation allowance must not be regarded as a social assistance benefit.

Thirdly, it states that the fact that the adaptation allowance is classified as a 'subsidy' under German law is not decisive in determining whether or not it falls within the scope of Regulation No 1408/71 since, as is apparent from the case-law of the Court, the decisive factor is the objective served by the benefit. [11]

Finally, the Commission states that the benefit in question could be regarded as a pre-retirement pension and considers the possibility of the application to it of Regulation No 1408/71, despite the fact that it is as yet not covered by it as such. [12] It points out that, until such time as a provision has been adopted governing pre-retirement benefits, in accordance with the case-law of the Court Regulation No 1408/71 may be applied to them if they relate to any of the risks expressly listed in Article 4(1). [13] In that regard, it states that there are two possibilities: to regard the adaptation allowance as

10 — Case 79/76 *Fossi* [1977] ECR 667.

11 — Case 122/84 *Scrivner* [1985] ECR 1027.

12 — On 18 June 1980 the Commission submitted a proposal for a regulation to the Council, amending Regulation No 1408/71 for the benefit of unemployed workers which, had it been approved, would have governed pre-retirement benefits in the context of unemployment benefits, enabling recipients who move to another Member State to retain the right to them (OJ 1980 C 169, p. 22). On 12 January 1996, the Commission submitted a further proposal to the Council to amend Regulation No 1408/71 for the benefit of the recipients of a pre-retirement benefit which, if approved, would treat benefits of that kind as an independent category added to the list in Article 4(1); it would eliminate in favour of beneficiaries the residence requirements which may be applied to such benefits, enabling them to continue to qualify for them when moving to another Member State and to be covered by the rules governing aggregation of insurance or employment periods and calculation of unemployment benefits (OJ 1996 C 62, p. 14).

13 — Case 104/76 *Jansen* [1977] ECR 829, paragraphs 7 and 8, and *Scrivner*, cited in footnote 11 above.

similar to a retirement pension or to equate it with an unemployment benefit:

— there are, of course, reasons for considering that the adaptation allowance is very similar to an unemployment benefit: it is granted to a worker for loss of employment, it is received for a limited period, the period for which it is received is taken into account for the acquisition of entitlement to a retirement pension, and the fact that the beneficiary is not obliged to make himself available to the employment services is not decisive for the purposes of determining whether or not it is to be regarded as a benefit of that nature, since long-term unemployed may also receive allowances, without having to be available on the labour market;

— it considers, however, that the decisive criterion for determining to which risk the benefit in question might be linked is the way in which it is calculated. In the case of the adaptation allowance, the national legislation governing calculation of the retirement pension applies by analogy and account is taken not of the income for the last period worked, as would be the case for an unemployment benefit, but of the contribution periods for a retirement pension, including periods in another Member State.

The Commission reaches the conclusion that the adaptation allowance is sufficiently linked with one of the risks referred to in Article 4(1) of Regulation No 1408/71 and that there are grounds for considering that it is a benefit closer to a retirement pension than to an unemployment benefit. Accordingly, it suggests that the Court say in reply to the first question that Article 4(1) and (2) and, more specifically, Article 4(1)(c) must be interpreted as applying also to benefits which a Member State grants in the form of a national non-compulsory subsidy at the request of workers who have attained a specified age and have been laid off by a company in the mining sector as a result of closure or rationalization measures.

21. The issue is in fact whether or not Regulation No 1408/71 must be applied to an adaptation allowance of the kind in question. The consequences for the beneficiaries will differ considerably, as both the national court and the German Government indicate, and as I shall have occasion to demonstrate below.

22. The German Government states in its observations that, when it made the declaration provided for in Article 5 of Regulation No 1408/71, it did not mention the guidelines governing the adaptation allowance. The said Article 5 provides that the Member States are to indicate, by means of a declaration to be notified to the President of the

Council and published in the *Official Journal of the European Communities*, the scope of the regulation, specifying the national legislation and schemes referred to in Article 4(1) and (2).

However, that statement is not relevant to deciding whether or not the adaptation allowance must be regarded as a social security benefit for the purposes of the Community legislation. As the Court of Justice has held on many occasions, the fact that a Member State has not mentioned a law in that declaration does not *ipso facto* remove that law from the scope of Regulation No 1408/71. [14]

23. This Court has had to decide, fairly frequently, whether a specific, but not easily classifiable, benefit granted by one of the Member States should be regarded as a social security benefit within the meaning of the regulation. As a result, there is well-known case-law on the point.

24. In the first place, there are specific types of regime which, for various reasons, are excluded from the scope of Regulation No 1408/71. They are, pursuant to Article 4(4), social and medical systems, benefit schemes for victims of war or its consequences and special schemes for civil servants and persons treated as such.

It is clear that the adaptation allowance received by Mr Otte was not medical assistance, that he did not receive it under a scheme for victims of war and that he is not a member of a civil service scheme. It remains to be seen whether it constituted social assistance.

25. The Court of Justice has clarified the requirements for a benefit to be classifiable as social assistance. Thus, in its judgment in Case 39/74, [15] it considered that, although by virtue of some of its features, the specific legislation of a Member State concerning the grant of benefits to handicapped people is akin to social assistance, especially when need is the essential criterion in its implementation and there are no conditions as to periods of employment, membership or contributions, it is nevertheless within the sphere of social security to the extent to which, departing from the consideration of each case on its merits — a characteristic

14 — Case C-327/92 *Rheinhold & Mahla* [1995] ECR I-1223, paragraph 18.

15 — Case 39/74 *Costa* [1974] ECR 1251, paragraphs 7 and 11. To the same effect, Case 1/72 *Frilli* [1972] ECR 457, paragraph 14, and Case 24/74 *Biason* [1974] ECR 999, paragraphs 9 and 10.

feature of assistance — it confers upon beneficiaries a legally defined position. The discretion of the authorities in granting a particular benefit is another criterion to be applied in deciding whether a benefit falls within the sphere of social security or that of social assistance. [16] The Court held on that occasion that the benefits in question were not within the sphere of social security, *inter alia* because they were granted on a discretionary basis as far as nationals residing abroad were concerned.

In view of the fact that the legislation governing award of the adaptation allowance requires a minimum contribution period and takes no account of the needs of the beneficiary and that the condition regarding availability of budgetary resources cannot be assimilated to a discretion on the part of the administration, it is clear that the benefit in question does not constitute social assistance.

26. However, that does not mean that it must therefore be regarded as coming within the concept of social security for the purposes of Regulation No 1408/71. As the Court has held in a number of decisions, the distinction between benefits which are excluded from the scope of the regulation and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant, and not on whether the national legislation describes the benefit as a social security benefit or not. In order to fall within the field of social security covered by Regulation No 1408/71, legislation must in any event satisfy, in particular, the condition of covering one of the risks expressly specified in Article 4(1). It follows that that list is exhaustive and therefore a branch of social security not mentioned in it does not fall within that category for the purposes of Regulation No 1408/71, even if it confers upon individuals a legally defined position entitling them to a benefit. [17]

27. From a simple reading of Article 4(1), it is apparent that adaptation allowances are not listed as such. Consequently, it will be necessary to see whether, on examination of its characteristics, and, in particular, its purpose and the requirements for its grant, that benefit may possibly be sufficiently closely linked with one of the risks contained in that list, which, in this case, are limited to two: retirement benefits and unemployment benefits, referred to in Article 4(1)(c) and(g) respectively.

28. From the documents before the Court, it

16 — *Fossi*, cited in footnote 10 above, paragraph 7.

17 — Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 11 and 12, and *Scrivner*, cited in footnote 11 above, paragraphs 18 and 19.

appears that the features of the adaptation allowance are as follows:

— it is a benefit available to workers in a specific mining sector,

— who have reached a certain age but who are not yet entitled to a retirement pension, and

— have been laid off as a result of a plan for redeployment of the workforce of an undertaking, which must have been approved by the Federal Ministry of the Economy;

— it is a benefit granted for a limited period, available between cessation of employment and attainment of retirement age, subject to a maximum of five years;

— it is a 'bridging' benefit intended to ensure a certain level of income for laid-off workers until they become entitled to a retirement pension;

— the periods when the benefit is received are taken into account for the purposes of acquisition of the right to a retirement pension and determination, in due course, of its amount;

— the amount of the benefit is determined by applying the rules governing invalidity and retirement insurance for miners, by reference to the rights accrued upon cessation of employment,

— account is taken of contribution periods for pensions under the general scheme for employees, and of contribution periods under social security schemes in other Member States, both to verify whether the requirements for its award are met and to establish its amount,

— the amount of any other pensions received in Germany or in other Member States is deducted from it in order to ensure that there is no duplication of benefits for the same insurance period;

— it is paid out of public funds, not from retirement pension insurance;

— its award is a matter of discretion for the authorities — however, that discretion is limited to the budgetary resources of the federal administration and of each *Land* concerned;

— the beneficiary has no obligation to register with an employment centre or be available on the labour market;

— its receipt is compatible with pursuit of activity as an employee or self-employed person, subject to a specified income ceiling;

— if the laid-off worker was employed by a company mining brown coal, he is only entitled to the adaptation allowance if the undertaking takes on another worker in his place, from the mining sector;

— its award is subject to a residence condition: if the beneficiary moves abroad, he forfeits the right to the allowance, and

— the right to the allowance lapses on death of the beneficiary, without any rights accruing to his survivors.

29. Once the features of this benefit are examined, it is not difficult to identify its purpose and the requirements for its grant. As regards the former, the benefit is granted to coal miners laid off as a result of closure or rationalization measures until such time as they attain the age entitling them to a retirement pension, that period being taken into account for the purposes of acquisition of pension rights and determination, in due course, of the amount thereof. It thus pursues the purpose of providing them with a certain level of income during a period in which it would probably be difficult for them to obtain it in any other way; it also allows them to continue acquiring pension rights, which will increase the amount of the pension when they retire, and therefore removes them, from both the financial and statistical points of view, from the sphere of unemployment insurance.

Moreover, in the case of a worker laid off by a company mining brown coal, where the undertaking is under an obligation linked with the grant of the benefit, consisting in the recruitment of another worker from the mining sector, the benefit also serves a purpose linked with employment policy, since it encourages the release of posts occupied by workers who are already close to retirement

age, for the benefit of unemployed younger people previously employed in other mining undertakings.

30. The requirements for its grant consist, basically, in cessation of employment for reasons outside the worker's control, the possibility of the worker's becoming entitled to a retirement pension within a maximum period of five years from the date of his being laid off, his fulfilment of a minimum qualifying period which is normally 180 months, the fact of having worked in a coal mine in Germany for at least the two years prior to being laid off and the approval by the Federal Ministry of the Economy of the workforce redeployment plan giving rise to his cessation of employment.

31. The amount of the adaptation allowance is determined by reference to the pension rights acquired by the worker under the miners' scheme when he is laid off. In most cases, account is also taken of periods during which the workers contributed to the general scheme for employees and of contribution periods under social security schemes of other Member States, subject to the fact that, if the worker receives a benefit on the basis of those periods, the amount thereof is deducted from the amount of the adaptation allowance to ensure that one and the same contribution period does not give rise to duplication of benefits.

32. In view of the features of that benefit and, in particular, the purpose which it serves and the requirements for its grant, as well as the method by which it is calculated, I believe that it is what might be described as a pre-retirement benefit. Benefits of that kind which, there is no doubt, are still not covered by Regulation No 1408/71, since they came into being after it entered into force, and which are difficult to classify, have been emerging in the Member States in very different forms, in connection with the economic crisis at the end of the 1970s, sometimes being linked with industrial retraining policies or simply representing employment promotion measures adopted by each Member State, giving rise in practice to a complex problem of interpretation.

33. It is clear that they are not yet covered by Regulation No 1408/71 because the Commission has in the past submitted two proposals to the Council for that purpose, the first in 1980 [18] and the second in 1996, [19] so far with little success, and the fact is that they are difficult to classify since, depending on the structure of the social security system in each Member State and the employment policy objectives pursued, they may take forms which are more closely allied to unemployment benefits or retirement benefits, as the case may be.

18 — Cited in footnote 12 above.
19 — Ibid.

A clear indication of that difficulty is the fact that, on both occasions, the Commission proposed to the Council that the recipients of a pre-retirement benefit should not be included in Chapter 3 of the Regulation, which contains the provisions on calculation of insurance periods and payment of retirement pensions, but rather in Chapter 6 which, for the moment, is concerned only with unemployment benefits — under the later proposal, a new Chapter 6a would be inserted, dealing with pre-retirement benefits. However, in this case, the Commission maintains that Regulation No 1408/71 is applicable to the adaptation allowance received by Mr Otte since it is linked with a retirement pension.

34. At first sight the Commission's position appears paradoxical, but I believe that this can be fairly easily accounted for. In my view, in its proposal for a regulation, the Commission is opting to deal with pre-retirement benefits in the same way as unemployment benefits, because in that way there would be aggregation of insurance and employment periods and calculation of benefit in accordance with Articles 67 and 68 of Regulation No 1408/71. If, on the other hand, it assimilated them to retirement pensions, the worker's rights would have to be determined by application of the provisions of Chapter 3 of that Regulation.

The latter course of action would, as the German Government explains in its observations, mean that the calculation of Mr Otte's adaptation allowance and of pre-retirement benefits in general would have to be based on Article 46 of the Regulation, with the result that workers in that situation would receive a benefit the amount of which would be determined either by reference solely to the contribution periods in the Member State granting the pre-retirement benefit, pursuant to Article 46(1)(a), or by application of the pro rata rules contained in Article 46(2)(a) and (b).

It must be borne in mind that the fact that the worker is entitled to receive a pre-retirement benefit in a Member State does not mean that he simultaneously meets the requirements imposed by all the legislations under which he has completed insurance periods in order to be entitled to receive a benefit. For example, for entitlement to a retirement pension, the social security legislation of most Member States requires the worker to have attained the age of 65. If he does not fulfil those requirements simultaneously in all the Member States, Article 49 of Regulation No 1408/71 would be applied.

That was precisely the position which arose in Case C-146/93, [20] in which the Court of Justice considered a preliminary question submitted by the Social Chamber of the French Court of Cassation. The question arose in proceedings brought by Mr McLachlan concerning his entitlement to a

20 — Case C-146/93 *McLachlan* [1994] ECR I-3229.

retirement pension. The applicant, who had been laid off at the age of 61 for economic reasons, had paid contributions for 53 quarters in the United Kingdom and 120 quarters in France and was unable to obtain a pension in the United Kingdom before reaching 65. He applied for and obtained a retirement pension in France. Under French legislation, account was taken of the quarterly periods for which he had paid contributions in the United Kingdom in order to decide whether he met the conditions for entitlement to the retirement pension, but the pension was paid on the basis of the periods completed in France, namely 120 quarterly periods.

The national court wished to know whether, under Regulation No 1408/71, insurance periods completed in another Member State have to be taken into account in order to determine the rate of the retirement pension but are disregarded in calculating the amount thereof. In its reply, the Court of Justice stated that, in view of the fact that when the applicant applied for his pension he had not reached the United Kingdom statutory retirement age, he was subject to Article 49(1)(a) of Regulation No 1408/71, which refers, for calculation of the benefit, to the national legislation whose requirements are fulfilled. That article, the Court stated in its judgment, precludes the taking into account by that legislation of periods completed under the legislation of another Member State as regards calculation of the amount of the pension, in conformity with the system under Regulation No 1408/71, which allowed different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights.

35. I believe that that, essentially, is the reason for which the Commission proposes on the one hand that the Council place pre-retirement benefits in the same category as unemployment benefits and, on the other, that the Court take the view that the German adaptation allowance is linked with a retirement pension within the meaning of Article 4(1)(c) of Regulation No 1408/71. Mr Otte, who meets at the same time the requirements for entitlement to an invalidity benefit from another Member State, would benefit as a result, since the total sum received by him would be greater.

Now, I agree with the German Government that this is a rather exceptional situation, which should not serve as a basis for interpreting a regulation that is of general application. And I should add that, in any event, it is not the task of the Court of Justice to interpret Community law in relation to the result produced in each specific case, but rather to adopt an interpretation which is useful to the judicial authorities of the Member States when applying that law.

36. It is beyond dispute that the adaptation allowance under review here shares common features with, first, a retirement pension or early retirement pension, such as, for example, the fact that the right to receive it and its amount are determined by application of the same rules as those governing the retirement pension and that, like them, its purpose is to ensure certain income for those who cease

working and are not obliged to seek other employment. Secondly, it is similar to an unemployment benefit, since entitlement to it arises only where the worker has been laid off and, whilst he receives it, the beneficiary continues to accumulate retirement pension rights.

37. However, the features of that benefit, in particular its purpose and the requirements for its grant, which are set out in detail in paragraphs 28 to 31 of this Opinion, in my view preclude its inclusion, as Community law stands, within the substantive scope of Regulation No 1408/71.

I do not believe that it is sufficiently linked, within the meaning of the case-law of this Court, with retirement pensions of the kind referred to in Article 4(1)(c) of Regulation No 1408/71 since it is a benefit to which a worker is entitled only if he has not yet reached retirement age, to which he may be entitled only if he has been laid off, which is granted for a limited period of time, the period concerned being taken into account for the purposes of building up retirement pension rights, and which lapses on the death of the beneficiary, without any rights accruing to his survivors.

38. In that respect, considerable guidance is to be found in the judgment of the Court in Case 171/82 [21] giving a preliminary ruling to the Tribunal de Grande Instance of Lyon. The issue was whether a French benefit, paid under a 'guaranteed income retirement scheme', for workers over 60 who voluntarily ceased work was to be regarded as a benefit of the same nature as a retirement pension for the purposes of applying Article 12(2) of Regulation No 1408/71.

The Court of Justice considered that the retirement benefits referred to in Article 4(1)(c) and Article 46 of Regulation No 1408/71 are characterized essentially by the fact that their purpose is to ensure means of subsistence for those persons who, on reaching a certain age, cease working and are under no obligation to make themselves available to the employment services. Moreover, the system of aggregation and apportionment of the benefits provided for in Article 46 is based on the assumption that the benefits are normally financed and acquired on the basis of the beneficiary's own contributions and calculated by reference to the length of time during which he has been affiliated to the insurance scheme.

Although benefits like those granted under the 'guaranteed income retirement scheme' to workers over 60 who ceased working voluntarily display certain similarities with retirement pensions, as regards their object and purpose, in that they are principally intended to provide means of subsistence for people who have reached a specified age,

21 — Case 171/82 *Valentini* [1983] ECR 2157.

they nevertheless differ from them by reason of the basis on which they are calculated and the conditions for granting them, having regard to the system of aggregation and apportionment on which Regulation No 1408/71 is based. They also differ from them in that they pursue an objective linked with employment policy, by helping to release work posts occupied by workers nearing retirement age for the benefit of younger people without jobs.

Accordingly, the Court inferred that those benefits could not be regarded as being of the same nature as the retirement benefits provided for by Article 46 of Regulation No 1408/71.

I would add that, if they cannot even be regarded as being of the same nature, it would be even more difficult to maintain that the benefit under review here, whose features are similar to those of the French benefit, should be regarded as falling within the scope of Regulation No 1408/71 by reason of the fact that it is linked with a retirement pension.

39. The adaptation allowance at issue in this dispute likewise does not, in my opinion, display a sufficient link with unemployment benefits of the kind referred to in Article 4(1)(g) of Regulation No 1408/71, since the beneficiary is not required to register with the employment service or to hold himself available on the labour market, receipt of it is compatible with pursuit of an activity as a self-employed person or as an employee, subject to certain limits, the worker must meet an age condition for entitlement to it, and its amount is determined in accordance with the rules governing the retirement pension by taking account of periods completed under the social security systems of other Member States and deducting the amount of other pensions to which entitlement arose from the contribution periods taken into account.

In its judgment in Case C-66/92, [22] the Court held that a particular benefit or grant paid in the Netherlands, without the authorities enjoying any discretion as regards the neediness of the beneficiary, to workers of a specified age who are unemployed or subject to partial invalidity, after expiry of entitlement to unemployment benefit and until the beneficiary attains retirement age, was to be regarded as an unemployment benefit for the purposes of Regulation No 1408/71. But one of the essential requirements for its grant was the requirement that the beneficiary be available to take up work. As seen earlier, the beneficiary of an adaptation allowance is

22 — Case C-66/92 *Acciardi* [1993] ECR I-4567.

under no obligation to register with the employment services or to hold himself available on the labour market.

40. In any event, as the Court held in *Valentini*, [23] pre-retirement schemes were established mainly as part of the employment policy adopted by the Member States. They help to release posts held by workers who are near to the age of retirement for the benefit of younger unemployed persons. I believe it is quite clear that the adaptation allowance also pursues a clear employment policy objective, in view of the fact that the worker's dismissal must occur as part of a workforce redeployment plan approved by the Federal Ministry of the Economy and the laid-off worker will only be entitled to receive the benefit if the undertaking recruits in his place an unemployed worker from the mining sector.

41. It is, therefore, a pre-retirement benefit which for the moment does not fall within the scope of Regulation No 1408/71. The Court has not yet directly ruled on this point since, although in Cases C-57/90 [24] and C-253/90 [25] it considered the matter of pre-retirement pensions and supplementary retirement pensions, there is a fundamental difference between those cases and the present one. In those two cases, the benefits were provided for in agreements signed by the competent authorities with professional bodies or in collective agreements signed by the social partners, which had not been the subject of a declaration made by the Member State concerned listing the schemes of that kind to which Regulation No 1408/71 applied. The Court held that those national schemes could not be regarded as 'legislation' within the meaning of Article 1(j) of the Regulation and that the benefits which they granted did not therefore come within the scope of the Regulation. The situation is different in the case of the adaptation allowance, which was created by means of regulations adopted by the Federal Ministry of the Economy.

42. From all those considerations, I infer that the adaptation allowance at issue here does not come within the substantive scope of Regulation No 1408/71 and that, therefore, it is unnecessary to answer the other questions submitted by the national court, which were to be answered only if the Court answered the first question in the affirmative.

43. However, in order to provide the national court with all the information on the interpretation of Community law which it needs for determination of the dispute

23 — Cited in footnote 21 above.

24 — Case C-57/90 *Commission* v *France* [1992] ECR I-75.

25 — Case C-253/90 *Commission* v *Belgium* [1992] ECR I-531.

before it, I propose that the Court of Justice consider, as it did in Case 94/84, [26] the correctness or otherwise of the first hypothesis put forward by the referring court, according to which, if the adaptation allowance falls outside the scope of Regulation No 1408/71, it is merely a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

44. Article 7(2) of Regulation No 1612/68 provides that a national of a Member State is to enjoy, in the territory of the other Member States, 'the same social and tax advantages as national workers'.

The Court of Justice has defined the concept of social advantages for the purpose of that provision. It has held that '"social advantages" should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'. [27]

45. In view of that definition, it is necessary to decide whether the adaptation allowance must be regarded as a social advantage for the purposes of that provision.

Over the years, the Court has held that the following are to be regarded as social advantages, for the purposes of Article 7(2) of Regulation No 1612/68, for which reason they should be granted to workers from other Member States or members of their families under the same conditions as to nationals: interest-free childbirth loans granted by a public legal entity to low-income families to stimulate the birth rate; [28] a social benefit guaranteeing minimum income to older people; [29] a social benefit generally guaranteeing minimum means of subsistence for those who have inadequate income and are unable to increase it; [30] cash benefits granted to young people seeking work; [31] the possibility for a migrant worker to obtain permission for the person living with him and to whom he is not married, and who does not possess the nationality of the host country, to set up home with him; [32] a grant for maintenance and training, intended for university studies leading to a

26 — Case 94/84 *Deak* [1985] ECR 1873, paragraph 18.

27 — Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 18.

28 — Case 65/81 *Reina* [1982] ECR 33.

29 — Case 261/83 *Castelli* [1984] ECR 3199 and Case 157/84 *Frascogna* [1985] ECR 1739.

30 — *Scrivner* and *Hoeckx*, cited in footnotes 11 and 17 above respectively.

31 — *Deak*, cited in footnote 26.

32 — Case 59/85 *Reed* [1986] ECR 1283.

professional qualification; [33] birth and maternity cash benefits; [34] and invalidity allowances. [35]

46. I believe that, as occurred in the examples cited, the adaptation allowance meets the conditions to be regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, since it is granted to national workers by virtue of their objective status as workers and extension of it to nationals of other Member States appears appropriate to facilitate their mobility within the Community. That benefit must therefore be granted to workers from other Member States under the same conditions as to national workers.

47. In view of the foregoing reasoning, I propose that the Hessischer Verwaltungsgerichtshof be informed that it is appropriate to interpret Article 4(1) and (2) — and in particular Article 4(1)(c) — of Regulation No 1408/71 as not covering benefits of a Member State which, by way of a voluntary national subsidy (in this case under the ministerial guidelines governing the adaptation allowance for workers in the mining sector), are granted at the request of older workers in the mining sector who have been laid off as a result of closure or rationalization measures, but that those benefits nevertheless constitute a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

48. In view of the answer that I propose be given to the first question, it is unnecessary to answer the other three. I shall nevertheless examine them below, in case the Court should consider that the adaptation allowance falls within the scope of Regulation No 1408/71.

The second and third questions

49. By those questions, which I think should be considered together, the national court, which is acting on the assumption that the adaptation allowance will be regarded by the Court of Justice as a benefit not only included within the scope of Regulation No 1408/71 but also assimilated to a retirement pension, wishes to know whether it should be calculated by application of Article 46 of the Regulation, having regard in particular to paragraph 2(b) thereof, and, if so, whether the first sentence of Article 12(2) of Regulation No 1408/71 allows deduction of the pension paid by another Member State, in this case the invalidity pension paid by the

33 — Case 39/86 *Lair* [1988] ECR 3161.

34 — Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817.

35 — *Schmid*, cited in footnote 27 above.

Netherlands, or whether the second sentence of Article 12(2) of Regulation No 1408/71 excludes such a deduction.

50. In its observations, the appellant describes the adaptation allowance as an unemployment benefit. He therefore considers that Article 46 of the Regulation, forming as it does part of Chapter 3 concerning retirement pensions, cannot be applied directly, but can be applied indirectly in so far as the domestic legislation provides that the adaptation allowance is to be calculated in accordance with the provisions on pensions and Regulation No 1408/71, as a supranational measure, forms part of those provisions.

51. He also considers that the amount of the benefit available under German law cannot be limited by application of Article 12(2) of Regulation No 1408/71, which prohibits overlapping benefits. It would be contrary to the purpose of Articles 48 and 51 of the Treaty to limit that overlapping if the result would be a decrease in the rights acquired by the person concerned under national legislation. He adds that, although certain limitations may be imposed on migrant workers in exchange for the advantages which they obtain from the Community provisions, those provisions must not lead to elimination or reduction of the social security advantages acquired under the domestic law of one of the Member States.

He suggests that the Court of Justice say in reply to the national court that the benefit granted by a Member State, under its domestic law alone, cannot be limited by Article 12(2) of Regulation No 1408/71, where the legislation of that State provides that an unemployment benefit within the meaning of Article 4(1)(g) of that Regulation is to be calculated in the same way as pensions, which means that, indirectly, they must be calculated in accordance with Article 46 of that Regulation and that, pursuant to Article 51 of the Treaty, Article 12(2) of Regulation No 1408/71 must be interpreted as meaning that the competent authorities of a Member State may not suspend, reduce or eliminate an unemployment benefit which they have granted, being one of those provided for in Article 4(1)(g) of that Regulation, on the ground that, applying the same Regulation, the authorities of another Member State are paying the person concerned an invalidity pension.

52. The Commission submits that, if the adaptation allowance is regarded as a retirement pension, it must necessarily be calculated in accordance with Article 46 of Regulation No 1408/71 and that the applicability of one or other of the paragraphs thereof depends in each case on whether the person concerned meets the requirements for entitlement to the benefit solely under national law or whether it is necessary to have recourse to Article 45 of that Regulation and take into account, in order to make up the qualifying period, the insurance periods completed in another Member State.

It adds that Mr Otte has proved contributions in Germany for more than the 180 months necessary to secure entitlement to the benefit in question, so that it will not be necessary to aggregate the contribution periods in Germany and the Netherlands in order to complete the qualifying period. In such circumstances, the competent institution must calculate the benefit in accordance with Article 46(1) and (2) of the Regulation.

It proposes that the answer to be given to the national court is that, in circumstances like those of this case, where, under domestic law, the requirements for entitlement to a retirement pension within the meaning of Article 4(1)(c) of Regulation No 1408/71 are already fulfilled, that pension must be calculated in accordance with Article 46 of the Regulation.

53. The Commission goes on to say that, in accordance with the case-law of the Court of Justice, a national provision prohibiting overlapping can be applied to an acquired right under national legislation alone only if the anti-overlapping provision at the same time provides for the deduction of foreign benefits. Since the person concerned meets the prescribed requirements, without its being necessary to take account of periods completed abroad, his entitlement arises under national law and the external anti-overlapping provisions contained in the legislation governing award of the German adaptation allowance could therefore, in principle, be applied.

It adds, however, that the second sentence of Article 12(2) does not allow application of the national anti-overlapping provision where benefits of the same nature are involved. In the present case, the Commission has suggested that the German adaptation allowance should be regarded as a retirement pension and that the benefit received by Mr Otte from the Netherlands social security system was an invalidity benefit. As is well known, the Court has long since taken the view that, for such purposes, a retirement pension and an invalidity benefit are to be regarded as benefits of the same nature.

In those circumstances, the Commission suggests that the Court state in reply to the national court that Article 46 and the second sentence of Article 12(2) of Regulation No 1408/71 apply to a retirement pension like the German adaptation allowance. That means that, as regards calculation of the adaptation allowance in accordance with Article 46 of the Regulation, no account should be taken, as provided by the second sentence of Article 12(2) of the Regulation, of a foreign retirement pension like the Netherlands invalidity pension.

54. According to settled case-law of the Court of Justice, when a worker receives a

pension pursuant to national legislation alone, the provisions of Regulation No 1408/71 do not prevent that legislation from being applied to him in its entirety, including the national rules against overlapping benefits. [36] However, according to the same case-law, if application of the national legislation proves less favourable to the worker than the conditions laid down by Article 46 of Regulation No 1408/71, the latter provisions must be applied.

It is for the national court or the competent institution to compare the benefits which would be paid under national legislation alone, including anti-overlapping provisions, and those payable under Article 46 of the Regulation, including the anti-overlapping rule in paragraph 3 thereof, and to allow the migrant worker to receive whichever benefit is greater.

55. For calculation of the benefits payable under Article 46, the national court or competent institution will have, inter alia, to bear in mind that, according to Article 12(2) of Regulation No 1408/71, provisions for reduction, suspension or withdrawal of benefit in the legislation of a Member State, where a benefit overlaps with other social security benefits arising in that Member State or under the legislation of another Member State, are not applicable where the person concerned receives benefits of the same kind in respect of invalidity, old age, death or occupational disease. [37]

56. The Court of Justice has held that social security benefits must be regarded as being of the same kind when their purpose and object, together with the basis on which they are calculated and the conditions for granting them, are identical, irrespective of characteristics peculiar to the various national laws. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits. [38]

57. There is thus copious case-law of this Court as to what should be regarded as benefits of the same kind. For example, there is no doubt that an early retirement pension and an invalidity pension [39] must, like an invalidity pension converted into a retirement pension and an unconverted invalidity pension, [40] and a survivor's pension and a retirement pension, [41] be regarded as benefits

36 — Case 238/81 *Van der Bunt-Craig* [1983] ECR 1385, paragraph 15; Case C-108/89 *Pian* [1990] ECR I-1599, paragraph 8; Case C-5/91 *Di Prinzio* [1992] ECR I-897, paragraph 16, and Joined Cases C-90/91 and C-91/91 *Di Crescenzo and Casagrande* [1992] ECR I-3851, paragraph 15.

37 — *Pian*, cited in footnote 36 above, paragraphs 10 and 11.
38 — Case 37/86 *Coenen* [1987] ECR 3589, paragraph 10.
39 — *Pian*, cited in footnote 36 above.
40 — *Di Prinzio*, cited in footnote 36 above.
41 — *Coenen*, cited in footnote 38 above.

of the same kind for the purposes of Article 12(2) of Regulation No 1408/71.

However, it must be borne in mind that, in *Valentini*, [42] the Court considered that a French benefit granted under a 'guaranteed retirement income scheme' to workers over 60 who left work voluntarily and a retirement pension should not be regarded as benefits of the same kind for the purpose of applying Article 12(2) of Regulation No 1408/71.

58. There is no doubt that, if this Court assimilates the adaptation allowance to a retirement pension, in the light of the case-law cited it must be regarded as being of the same nature as the Netherlands invalidity benefit.

Pursuant to Article 46 of Regulation No 1408/71, the amount of the benefits must be calculated in three stages:

— first, for calculation of the independent benefit, the competent institution determines, under its own legislation, the amount of the benefit corresponding to the total duration of the insurance or residence periods to be taken into account under that legislation alone. Pursuant to Article 12(2), national conditions concerning reduction, suspension or withdrawal are inapplicable;

— secondly, when making the pro rata calculation of the benefit the competent institution must proceed as follows:

— first, it will determine the theoretical amount of the benefit, being that which the worker could claim if all the insurance periods covered by him in different Member States had been completed in the Member State concerned and in accordance with the legislation applied by the institution on the date of award of the benefit. In determining that theoretical amount, the competent institution must disregard all national provisions for the reduction, suspension or suppression of benefits;

— it will then calculate the actual amount of the benefit, on the basis of the theoretical amount and in the ratio which the length of the insurance periods completed before the materialization of the risk under the legislation administered by that

42 — Cited in footnote 21 above.

institution bears to the total length of the insurance periods completed before materialization of the risk under the legislations of all the Member States concerned;

— thirdly, it must compare the autonomous benefit and the apportioned part of the benefit, in order to determine which is higher.

Finally, it will apply the Community anti-overlapping provision. The competent institution must verify whether the sum of all the autonomous and apportioned benefits available to the worker exceeds the limit laid down in Article 46(3), namely the highest theoretical amount. [43]

59. In view of all those considerations, I propose that the Court, if it considers that those two questions should be answered, state in reply to the national court that the amount of the adaptation allowance must be calculated in accordance with Article 46 of Regulation No 1408/71 and that, once that calculation is made, it must compare the amount of the benefit which would be available under national legislation alone, including anti-overlapping rules, and the amount of the benefit which would be available under Community law applied in its entirety, including anti-overlapping provisions, bearing in mind that, in accordance with the case-law, Article 46 of the Regulation may be applied only if it enables the migrant worker to receive a benefit at least as high as that which would be payable under the applicable national legislation alone.

An adaptation allowance like the one at issue in these proceedings, if it is to be assimilated to a retirement pension granted by a Member State, and an invalidity pension arising under the legislation of another Member State are benefits of the same kind for the purposes of Article 12(2) of Regulation No 1408/71.

The fourth question

60. As far as the fourth preliminary question is concerned, neither the appellant in the main proceedings nor the Commission considers it necessary to give an answer, in view of the solution which they propose for the second and third questions.

In case the Court considers that the anti-overlapping provision in the first sentence of Article 12(2) of Regulation No 1408/71 applies even to the calculation made

43 — *Di Crescenzo and Casagrande*, cited in footnote 36, paragraphs 19 to 34.

in accordance with Article 46, the Commission adds that it would also be necessary to apply Article 7 of Regulation No 574/72 and that, when the comparative calculation provided for by Article 46(1) and (2) was made, account would have to be taken not only of Article 7(1)(b) but also of Article 7(1)(c).

61. In examining the first preliminary question I stated that a benefit can only be regarded as a social security benefit for the purposes of Regulation No 1408/71 if it falls within one of the cases expressly referred to in Article 4(1) or, if that is not the case, if it is linked with one of them. The adaptation allowance at issue in these proceedings is not, of course, expressly provided for in that list of cases covered. However, there are two possible ways of seeking to link the benefit in question with one of those cases, namely, regarding it as assimilated to a retirement pension or regarding it as assimilated to an unemployment benefit.

62. The national court, in the first three questions, appears to rely on the assumption that the adaptation allowance can be assimilated to a retirement pension. However, I consider that the last of its questions can only be answered if it is considered that that benefit is to be assimilated to an unemployment benefit. If it considers to be applicable the first sentence of Article 12(2 of the Regulation, which allows the application of national anti-overlapping rules, it seems to accept the possibility of the person concerned not receiving invalidity, old-age, death or occupational-illness benefits of the same nature. In the present case, it being established that the Netherlands benefit is an invalidity benefit, if the benefit which he receives in Germany is not of the same kind, then it can only be a benefit assimilated to an unemployment benefit.

Accordingly, its award will be governed not by the provisions of Article 46 of Regulation No 1408/71 and, consequently, neither Article 7(1)(b) nor Article 7(1)(c) of Regulation No 574/72 will apply, since both refer to invalidity, retirement or death benefits awarded in accordance with Article 46, but rather by Article 7(1)(a) of Regulation No 574/72, according to which,

'1. Where a person entitled to a benefit due under the legislation of one Member State is also entitled to benefits under the legislation of one or more other Member States, the following rules shall apply:

(a) if the application of Article 12(2) or (3) of the Regulation entails the reduction or the concurrent suspension of those benefits, none of them may be reduced or suspended by an amount greater than the amount obtained by dividing the sum which is subject to reduction or suspension under the legislation under which the benefit is due by the number of benefits subject to reduction or suspension to which the person concerned is entitled;

...'

Conclusion

In view of the foregoing considerations, I suggest that the Court give the following answer to the Hessische Verwaltungsgerichtshof:

(1) Article 4(1) and (2), and more particularly Article 4(1)(c), of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as not covering benefits of a Member State which, by way of national voluntary subsidy (available in this case under ministerial guidelines governing the adaptation allowance for workers in the mining sector), are granted at the request of older workers in the mining sector laid off in connection with closure or rationalization measures.

Those benefits nevertheless constitute a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

If the Court does not agree, it should answer the other questions as follows:

(2) The amount of the adaptation allowance, which is regarded as assimilated to a retirement pension, must be calculated in accordance with Article 46 of Regulation No 1408/71.

Once that calculation has been made, the national judicial authority or competent institution must compare the amount of the benefit payable under national legislation alone, including anti-overlapping rules, and the amount of the benefit available under Community law in its entirety, including anti-overlapping provisions. Article 46 of Regulation No 1408/71 may be applied only if it enables the migrant worker to receive a benefit at least as high as that payable under national legislation alone.

An adaptation allowance like the one at issue in these proceedings, if it is to be assimilated to a retirement pension granted by a Member State, and an invalidity pension arising under the legislation of another Member State constitute benefits of the same kind for the purposes of Article 12(2) of Regulation No 1408/71.

(3) The first sentence of Article 12(2) of Regulation No 1408/71 will be applicable if the adaptation allowance and the Netherlands invalidity benefit at issue in these proceedings are to be regarded as benefits of different kinds, the former being assimilated to an unemployment benefit.

In such a case, its award will be governed not by the provisions of Article 46 of Regulation No 1408/71 and, consequently, neither Article 7(1)(b) nor Article 7(1)(c) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Council Regulation (EEC) No 2001/83, will be applicable, but rather by Article 7(1)(a) of Regulation No 574/72.