OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 6 June 1991 *

Mr President,
Members of the Court,

1. In the present case the Sozialgericht Stuttgart seeks a ruling from the Court on the compatibility with Community law of the German legislation on the grant of an occupational invalidity pension or a pension for incapacity to work and on the validity of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community. [1]

2. I shall summarize the facts of the case. Mrs Paraschi, a Greek national, exercised an activity from 1965 to 1969 which was subject to the social security scheme in Germany and paid a total of 102 monthly pension contributions. In July 1979 she returned to her country of origin where, because of a deterioration in her health, she was unable to resume employment or, because of the short time for which she had paid Greek pension contributions, to receive an invalidity pension

Two applications for a German invalidity pension, made in 1978 and 1980, were rejected by the competent institution on the ground that Mrs Paraschi's incapacity for work was not sufficiently reduced for the purposes of the German legislation.

A third application, submitted in 1985, was also rejected despite the finding that the applicant was, at least temporarily, prevented, for reasons of health, from resuming her employment. On that occasion, the refusal was based on legislation introduced in 1984, applying stricter conditions to the grant of invalidity pensions whereby pensions for reduced working capacity could be granted only (a) where the insured had been engaged in an activity that was subject to compulsory insurance, and (b) had paid at least 36 monthly contributions during the 60-month period (the reference period) before the invalidity occurred.

3. It is therefore necessary to make it clear, for the purposes of the present case, that in calculating the reference period, the legislation in question provides that no account is to be taken of certain special periods, of which an exhaustive list is given, which are added to and prolong the 60-month period. Such special periods include periods of interruption, particularly through illness or unemployment, which have given rise to the payment of benefits or even, under certain conditions, where they have not done so;

* Original language: Italian.

1 — Consolidated version: Official Journal 1983 L 230, p. 8.

and periods of incapacity for work, provided that they are not already required to be taken into account as periods of interruption.

There is also a transitional system under which the conditions for the grant of an invalidity pension in force until 31 December 1983 continue to apply where voluntary contributions were paid in the period 1 January to 31 December 1984.

4. The Sozialgericht Stuttgart, from which Mrs Paraschi subsequently sought recognition of her entitlement to a German invalidity pension, entertained doubts as to the validity of that system in the light of the relevant provisions of Community law and decided to seek a ruling from the Court of Justice as to the compatibility of Regulation No 1408/71 and the abovementioned provisions amending the Law on social security insurance with Articles 48(2) and 51 of the EEC Treaty.

5. However, having regard in particular to the facts of the case and the arguments set out in the order for reference, that question, which was drafted in general terms, should be reformulated.

It is apparent that the national court seeks essentially to determine whether Community law, and in particular Articles 48(2) and 51 of the Treaty and Regulation No 1408/71, preclude the application of legislation such as that which I have just outlined and whether or not Regulation No 1408/71 is valid in relation to the abovementioned principles laid down in the EEC Treaty.

6. In order to answer the first of those questions, further details are called for. There are two aspects of the German provisions which are relevant to the present case: first, the actual requirement of a reference period during which contributions must be paid and, secondly, the possible discriminatory effects of the conditions under which that period may be prolonged.

7. With respect to the first point, it must be observed that the Court has consistently held that Article 51 of the EEC Treaty and Regulation No 1408/71 provide only for the aggregation of insurance periods completed in different Member States and do not regulate the conditions under which those insurance periods are constituted, the conditions governing the right or obligation to become a member of a social security scheme being a matter to be determined by the legislation of each Member State — provided, of course, that there is no resultant discrimination between the nationals of the host State and those of other Member States. [2]

It follows that, in principle, Community law does not detract from the right of the national legislature to impose stricter conditions concerning the grant of an invalidity pension, provided that the conditions imposed do not entail any manifest or disguised discrimination between Community citizens.

The precondition imposed by the German legislature for the grant of a pension for incapacity to work, namely that the worker must have been covered by compulsory insurance for a reference period before the

2 — Judgments in Case 29/88 *Schmitt* v *Bundesversicherungsanstalt für Angestellte* [1989] ECR 581; Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraph 12; and Case 266/78 *Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, paragraph 5.

invalidity occurred, is in itself an objective condition which applies without distinction to national workers and those of other Member States and it does not therefore appear open to criticism from the point of view of Community law.

8. As regards the national court's reference to possible infringements of the right to property and of vested rights as a result of the application of that legislation to existing situations and to rights which have already been acquired, it must be emphasized that any resultant harm derives merely from the application of national legislation and must therefore be considered solely in relation to domestic constitutional principles.

9. A more delicate and complex issue, however, is appraisal of the possibility under German legislation of prolonging the reference period.

In that connection it must first be pointed out that initially the practice followed by the German authorities was to take account, for the purposes of prolonging the reference period, only of the periods in which benefits were paid under the domestic legislation.

In order to bring that practice to an end, the Community legislature amended Regulation No 1408/71 by inserting, with retroactive effect, Article 9a,[3] according to which:

'Where, under the legislation of a Member State, recognition of entitlement to a benefit is conditional upon completion of a minimum period of insurance during a specific period preceding the contingency insured against (reference period) and where the abovementioned legislation provides that the periods during which the benefits have been granted under the legislation of that Member State or periods devoted to the upbringing of children in the territory of that Member State shall give rise to prolongation of the reference period, periods during which the invalidity pensions or old-age pensions or sickness benefits, unemployment benefits or benefits for accidents at work (except for pensions) have been awarded under the legislation of another Member State and periods devoted to the upbringing of children in the territory of another Member State shall likewise give rise to prolongation of the aforesaid reference period.'

10. However, that provision did not resolve all the problems or remove the possibility of discrimination stemming from the abovementioned German legislation and practice.

In practice certain situations may arise, as, apparently, has occurred in Mrs Paraschi's case, in which, because of the different ways in which the social security schemes are organized in the various Member States, particular events or circumstances which, in the Member State where the competent institution is established, give rise to entitlement to benefits, do not give rise to entitlement to similar benefits in the country from which the migrant worker originates, with the result that the worker may find that his expectation of a pension for reduced capacity to work is frustrated merely because he has left the country in which his entitlement was acquired, despite the fact that he has duly paid the legally prescribed contributions.

3 — Council Regulation No 2332/89 of 18 June 1989 (Official Journal 1989 L 224, p. 1).

11. Whilst it is true that the Court has held that Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States and thus leaves in being differences between the social security systems of the Member States and hence in the rights of the people working there, [4] and also that Articles 7 and 48 of the Treaty, by prohibiting every Member State from applying its law differently on the ground of nationality, are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between their laws, the fact remains that under Community law the laws of the Member States must be applied to all persons subject to them in accordance with objective criteria and without regard to their nationality. [5]

Accordingly, the Court has made it clear that there would be discrimination if the conditions for the acquisition or retention of the right to social security benefits were defined in such a way that they could in fact be fulfilled only by nationals of the Member State concerned or if the conditions for loss or suspension of the right were defined in such a way that they would in fact be more easily satisfied by nationals of other Member States than by those of the State of the competent institution. [6]

Furthermore, as has been consistently held, the principle of equal treatment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by virtue of other distinguishing criteria, in fact achieve the same result. [7]

12. In the light of the case-law to which I have referred, serious doubts can but arise concerning a practice whereby no account is taken, for the purposes of prolonging the reference period, of events and circumstances arising in another Member State which correspond to events and circumstances which, under the laws of the Member State in which the competent institution is located, give rise to entitlement to a prolongation of that period where, because of the different ways in which the social security systems are organized, that situation would not have given rise to the payment of benefits in the country of residence.

In such a case, the migrant worker would find that he had to bear not the inevitable adverse consequences of existing differences between the laws of the various Member States but rather the specific effects of national legislation which, in providing for the possibility of prolonging the reference period, lays down a condition of such a kind that fulfilment of it might be more difficult for a national of a Member State other than that in which the competent institution is established.

13. In fact, although in principle such legislation applies without distinction, it is liable to have a much greater adverse effect on migrant workers who, for various reasons, tend to return to their countries of origin in

4 — Case 227/89 *Rönfeldt* [1991] ECR I-323, paragraph 12; Case 313/86 *Lenoir* v *Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, paragraph 13; and Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de Savoie* [1986] ECR 1, paragraph 20.

5 — Judgment in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, paragraph 18.

6 — *Kenny*, supra, paragraph 17.

7 — Judgments in *Pinna*, supra, paragraph 23; Case 237/78 *Toia* v *Caisse Régionale d'Assurance de Maladie de Lille* [1979] ECR 2645, paragraph 12; and Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11.

the event of illness or unemployment, with the result that they become subject to a different social security system.

Such legislation, by exacerbating the adverse effects of the diversity of the social security systems, thus *de facto* has the effect, in numerous cases, of imposing the burden of residence on migrant workers and significantly impedes implementation of the principle of freedom of movement for workers.

14. It should be noted, incidentally, that the introduction by the German legislature of transitional rules under which, in certain circumstances, it was possible to secure extended application of the previous system, does not change the main problem, quite apart from the difficulties encountered by migrant workers returning to their own countries in obtaining information about that system.

15. If therefore, as has been observed, Articles 48(2) and 51 prohibit the application of legislation like that at issue, in so far as it makes no provision for prolonging the reference period by reference to events and circumstances occurring in another Member State, which correspond to events and circumstances and which, under the legal order in question, permit such a prolongation, it remains to be established whether the failure to include in Regulation No 1408/71 a provision which prevents such discrimination may be such as to render that regulation, and more particularly Article 9a thereof, invalid.

In that regard, it must be pointed out that, as is apparent from the foregoing reasoning and from the observations submitted by the Commission, Article 9a is not really a provision for the coordination of the various social security systems but rather a declaratory provision expounding the obligation of non-discrimination laid down by the Treaty.

Nevertheless, the fact cannot be overlooked that, in specifically setting out that obligation, the Community legislature unlawfully reduced its scope and that the application of the provision in question by the national administrations and courts allows discrimination that is incompatible with Community law to persist.

Accordingly, Article 9a should be declared invalid in so far as it does not require account to be taken, for the purpose of prolonging the reference period, of events and circumstances arising in another Member State.

16. As to the effects of a ruling of invalidity, as just proposed, two considerations must be borne in mind: in the first place, in the particular circumstances of the present case, the discrimination is due more to what the law does not say than to what is does and, in the second place, the right of individuals to obtain a prolongation of the

reference period, because of events and circumstances arising in another Member State, derives directly from the Treaty and would exist even in the absence of a specific legislative provision.

It follows that, pending new rules, the competent national authorities are required to extend, in the way that I have suggested, the scope of the obligation imposed by Article 9a. [8]

17. In the light of the foregoing considerations, I suggest that the Court give the following answers to the question submitted to it by the Sozialgericht Stuttgart:

1. Community law does not affect the right of the national legislature to make recognition of entitlement to a benefit conditional upon completion of a minimum period of insurance within a reference period prior to the materialization of the contingency insured against.

2. If the legislation of a Member State makes recognition of entitlement to a benefit conditional upon completion of a minimum period of insurance within a reference period which precedes the materialization of the contingency insured against and provides that the supervening events or circumstances are to prolong that reference period, Articles 48(2) and 51 of the EEC Treaty preclude the application of such legislation in such a way that no account is taken, for the purpose of calculating the reference period, of corresponding events and circumstances in another Member State.

3. Article 9a of Regulation No 1408/71 is invalid to the extent to which it does not provide that, for the purpose of prolonging the reference period which precedes the materialization of the contingency insured against, account is to be taken of events and circumstances arising in another Member State.

4. Pending the adoption of new rules, the competent national authorities are required, in the manner indicated above, to extend the scope of the obligation imposed by Article 9a of Regulation No 1408/71.

8 — For a similar solution, see the judgment in Case 300/86 *Van Landschoot* v *Mera NV* [1988] ECR 3443, paragraphs 22 to 24.