



Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 11 July 2019¹

Joined Cases C-398/18 and C-428/18

Antonio Bocero Torrico (C-398/18)
Jörg Paul Konrad Fritz Bode (C-428/18)

v

Instituto Nacional de la Seguridad Social,
Tesorería General de la Seguridad Social

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain))

(Reference for a preliminary ruling — Social security of migrant workers — Regulation (EC) No 883/2004 — Article 5 — Early old-age benefit — Requirement that the amount of early old-age benefit to be received be higher than minimum old-age benefit on reaching age of 65 — Method of calculating minimum amount — National legislation taking into account only benefit from the competent Member State — Failure to take into account benefit from another Member State — Requirement of equal treatment of benefits)

I. Introduction

1. These requests for a preliminary ruling, which were lodged at the Registry of the Court on 15 June 2018 (Case C-398/18) and 28 June 2018 (Case C-428/18) respectively, concern the interpretation of EU law, in particular, Article 48 TFEU and, for that matter, Articles 5 and 6 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.²

2. By its question, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) essentially asks whether Article 48 TFEU precludes national legislation which, in order to determine whether a person is eligible for an early age-old benefit, requires, inter alia, that the amount of the benefit received be higher than the minimum old-age benefit that the person concerned would be entitled to receive under such legislation in the light of his or her family situation on reaching the age of 65. In particular, in so doing, the Spanish legislation only takes into account the old-age benefit paid by that Member State without also taking into account equivalent benefits which the person in question might receive from one or more other Member States.

¹ Original language: English.

² OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1.

3. The requests have been made in proceedings between Mr Bocero Torrico, on the one hand, and the Instituto Nacional de la Seguridad Social (National Social Security Agency) ('INSS') and the Tesorería General de la Seguridad Social (General Social Security Treasury) ('TGSS') on the other hand (Case C-398/18), and between Mr Bode, on the one hand, and INSS and TGSS, on the other hand (Case C-428/18).

4. It should be noted that Article 48 TFEU provides that the European Parliament and the Council of the European Union are to adopt 'such measures in the field of social security as are necessary to provide freedom of movement for workers' inter alia by making arrangements to secure for migrant workers the 'aggregation ... of all *periods* taken into account under the laws of the several countries'.³ The current aggregation system of periods may be found in Regulation No 883/2004. In that regard, Article 6 of Regulation No 883/2004 provides for the aggregation of periods of insurance, employment, self-employment or residence and Articles 52 and 58 of that regulation contain rules for the calculation of old-age benefits and minimum old-age benefits where a person has periods of insurance or residence in more than one Member State.

5. While the request for a preliminary ruling specifically refers to Article 48 TFEU, in my view the answer to the question referred may be found in Article 5 of Regulation No 883/2004 which lays down the principle, deriving from the case-law of the Court, of equal treatment of benefits, income and facts.

II. Legal context

A. EU law

6. Recitals 9, 10, 11 and 12 of Regulation No 883/2004 state:

- (9) The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.
- (10) However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.
- (11) The assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable.
- (12) In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.'

³ Emphasis added.

7. Article 3 of Regulation No 883/2004, entitled ‘Matters covered’, provides:

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

...

(d) old-age benefits;

...’

8. Article 5 of the regulation, entitled ‘Equal treatment of benefits, income, facts or events’, provides:

‘Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

- (a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;
- (b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.’

9. Article 6 of Regulation No 883/2004, entitled ‘Aggregation of periods’ provides:

‘Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

- the acquisition, retention, duration or recovery of the right to benefits,
- the coverage by legislation, or
- the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.’

10. Article 52 of that regulation, entitled ‘Award of benefits’, provides in paragraph 1:

‘The competent institution shall calculate the amount of the benefit that would be due:

- (a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);
- (b) by calculating a theoretical amount and subsequently an actual amount (pro rata benefit), as follows:
 - (i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation

it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

- (ii) the competent institution shall then establish the actual amount of the pro rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.’

11. Article 58 of that regulation, entitled ‘Award of a supplement’, provides:

‘1. A recipient of benefits to whom this Chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this Chapter.

2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this Chapter and the amount of the minimum benefit.’

B. Spanish law

12. In the version in force on the date of the applicants’ requests, Article 208 of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015), of 30 October 2015⁴ provided:

‘1. A person wishing to take early retirement must satisfy the following criteria:

- (a) He or she must have reached an age which is not more than two years below the age applicable in each case in accordance with Article 205(1)(a), while the reduction coefficients referred to in Article 206 shall not be applicable for these purposes.
- (b) He or she must show a minimum actual contribution period of 35 years,
- (c) After proof has been provided in relation to the general and specific criteria applicable to the type of retirement in question, the amount of the pension to be received must be higher than the amount of the minimum pension which would be due to the person concerned in the light of his family situation on reaching the age of 65. Otherwise, it shall not be possible to take this form of early retirement.

2. Where early retirement as referred to in this article is taken, the pension shall be reduced by the application -- in respect of each quarter or part thereof by which, at the time of the operative event, the worker falls short of the statutory retirement age resulting in each case from the application of Article 205(1)(a) -- of the following coefficients based on the contribution period shown:

...

⁴ Published in BOE No 261 of 31 October 2015, p. 103291, and corrigendum, BOE No 36 of 11 February 2016. P.10898.

For the sole purpose of determining the legal retirement age referred to, that age shall be deemed to be the age which would have been applicable to the worker if that worker had continued to pay contributions during the period between the date of the operative event and attainment of the statutory retirement age resulting in each case from the application of Article 205(1)(a).

For the purposes of calculating the contribution periods, complete periods shall be used, while parts of a period shall not be treated as equivalent to a period.’

13. Article 14(3) of Real Decreto 1170/2015, de 29 de diciembre, sobre revalorización de pensiones del sistema de seguridad social y de otras prestaciones sociales públicas para el ejercicio 2016 (Royal Decree 1170/2015 of 29 December on revaluation of pensions covered by the social security system and other State social benefits for the year 2016)⁵ provides:

‘If, after having applied the provisions of the previous paragraph, the sum of the amounts of the pensions recognised under a bilateral or multilateral social security convention, pursuant to both Spanish and foreign legislation, is lower than the minimum amount of the pension concerned from time to time in force in Spain, the beneficiary, as long as he or she resides on national territory and satisfies the criteria laid down in that connection by the general provisions, shall be guaranteed the difference between the total of the Spanish and foreign pensions awarded and the minimum amount referred to.

Pensions awarded under the Community regulations on social security shall be subject to Article 50 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Article 58 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

...’

III. The dispute in the main proceedings and the question referred for a preliminary ruling

14. Mr Bocero Torrico, who was born on 15 December 1953, is insured under the Spanish social security system. On the 16 December 2016, he applied to the Spanish social security authorities for an early old-age benefit, which the INSS, by decision of 9 November 2016, refused to grant him on the ground that the resulting benefit would not reach the amount of the minimum old-age benefit which would be due to the person concerned in the light of his family situation on reaching the age of 65. Mr Bocero Torrico lodged an administrative complaint which was ultimately rejected by decision of 25 April 2017.⁶

15. Mr Bocero Torrico has a total contribution period of 16 637 days, 9 947 days of which relate to Spain and 6 690 days to Germany. He was awarded an old-age benefit in Germany of EUR 507.35. The early old-age benefit which would be due to him in Spain would be EUR 530.15, resulting from the application of a corrective coefficient of 88% in respect of age to the assessment base of EUR 773.75 and calculated with a proportion of 76.86% in respect of Spain.

⁵ Published in BOE No 312 of 30 December 2015.

⁶ These dates were supplied by the referring court. According to the INSS and the Commission, the date of the decision of refusal was in March 2017.

16. Mr Bode, who was born on 4 June 1952, is insured under the Spanish social security system. On the 31 May 2015, he applied to the Spanish social security authorities for an early old-age benefit, which the INSS, by decision of 26 August 2015, refused to grant him on the ground that the resulting benefit would not reach the amount of the minimum pension which would be due to the person concerned in the light of his family situation when he reached the age of 65.

17. Mr Bode has a total contribution period of 16 725 days, of which he paid contributions in Spain for 2 282 days and in Germany for 14 443. He was awarded a retirement pension in Germany in the actual amount of EUR 1 185.22. The early old-age benefit which would be due to him in Spain would be EUR 206.60, resulting from the application of a corrective coefficient of 87% in respect of age to the assessment base of EUR 1 357.80 per month and calculated with a proportion of 17.49% to be paid by Spain.

18. In 2016 the minimum old-age benefit in Spain for persons over the age of 65 with a dependent spouse was EUR 784.90.

19. Mr Bocero Torrico and Mr Bode brought actions before the Juzgado de lo Social (Social Court)⁷ against the INSS and the TGSS seeking a declaration that they were entitled to receive, with effect from 1 January 2017 and 1 July 2015 respectively, an early old-age benefit.

20. The Juzgado de lo Social (Social Court) found in both cases that according to national legislation the amount of early old-age benefit to be received must be higher than the amount of the minimum old-age benefit which would be due to the person concerned in the light of his family situation on reaching the age of 65. It took the view that the amount of the old-age benefit to be received must be the amount corresponding to the Spanish pro rata old-age benefit, since that is the real old-age benefit which the beneficiary will actually receive from Spain as distinct from any other Member State. The judgment therefore accepted the arguments put forward by the INSS based on the purpose of the national legislation, which is to avoid supplementing, up to the statutory minimum, the early old-age benefits of persons who have not yet reached the statutory retirement age, thus keeping them in the employment market.

21. The actions of Mr Bocero Torrico and Mr Bode were thus dismissed by judgments on 6 October 2017 and 15 November 2017 respectively.

22. Mr Bocero Torrico and Mr Bode brought appeals against those judgments on 3 November and 22 November 2017 respectively.

23. The referring court considers that Mr Bocero Torrico and Mr Bode are not a burden on the Spanish social security system as their early old-age benefit will never be supplemented at Spain's expense by means of a supplement to bring them up to the minimum old-age benefit, given that they also receive an old-age benefit from Germany and the sum total of the two real and effective old-age benefits is higher than the minimum Spanish old-age benefit. According to the referring court, Article 14(3) of Royal Decree 1170/2015, which refers to Article 58 of Regulation No 883/2004, only permits payment of the difference between the total benefits due under EU regulations and the minimum old-age benefits in Spain. In other words, if the early old-age benefit were awarded, the two benefits actually received in Spain and Germany would have to be taken into account, which would prevent entitlement to any supplement to bring a benefit up to the minimum amount.

⁷ Of Ourense and A Coruña respectively.

24. The referring court considers that when comparing a worker who has not migrated and who receives from Spain an early old-age benefit in the amount of EUR 1 193.38⁸ and a migrant worker who receives the same amount paid by two or more Member States, the migrant worker is placed at a disadvantage and discriminated against by reason of his movement to other Member States (in this case, Germany), and is prevented from accessing the early old-age benefit to which the non-migrant worker would be entitled. That court thus considers that where Article 208(1)(c) of the General Law on Social Security refers to ‘the amount of the pension to be received’, it ought to be interpreted as meaning the sum total of the actual old-age benefit received from Spain and the actual old-age benefit received from Germany. The referring court also considers that such an approach would be consistent with the aim of the provision, which is to prevent Spain from having to supplement the benefit pension up to the statutory minimum, bearing in mind, as already stated, that, under Spanish and EU legislation, entitlement to a minimum supplement would require taking into account the sum of both benefits.

25. In those circumstances the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 48 TFEU be interpreted as meaning that it precludes national legislation which requires as a condition for access to an early retirement pension that the amount of the pension to be received must be higher than the minimum pension which would be due to the person concerned under that same national legislation, the term “pension to be received” being interpreted as the actual pension from the competent Member State (in this case, Spain) alone, without also taking into account the actual pension which that person may receive through another benefit of the same kind from one or more other Member States?’

IV. Procedure before the Court

26. Written observations were submitted by Mr Bocero Torrico and Mr Bode, by the INSS, the Kingdom of Spain and the Commission, all of whom, presented oral argument at the hearing on 2 May 2019.

V. Observations submitted to the Court

27. Mr Bocero Torrico and Mr Bode claim that national rules which condition access to an early old-age benefit on the amount of the pro rata benefit which the competent institution has to pay in respect of contributions made under its legislation are contrary to Union law. Such rules make access to the benefit conditional on contributions paid in a single Member State thereby rendering ineffective the rules and principles of Union law relating to the free movement and aggregation of periods of insurance, in particular those relating to the aggregation of periods of insurance for the purposes of access to old-age benefits in Articles 45 and 48 TFEU and Articles 6, 50, 51, 52(1)(b) and 58 of Regulation No 883/2004.

28. Mr Bocero Torrico and Mr Bode consider that ‘the amount of the pension to be received’ referred to in Article 208(1)(c) of the General Law on Social Security should be equated to the amount of the theoretical benefit defined in Article 52(1)(b)(i) of Regulation No 883/2004 as this results in the assimilation of a migrant worker to a national worker, in the same situation, who has not migrated. They claim in the alternative that those terms should be interpreted in accordance with Article 5(a) of Regulation No 883/2004 as referring to the sum of the pro rata benefits received by the person

⁸ Provided that they satisfy the other criteria laid down in the Spanish legislation. The referring court indicated that those other criteria are not in issue in the main proceedings. This figure was provided by the referring court in both Case C-398/18 and Case C-428/18.

concerned from two or more Member States for all periods of insurance taken into account for the purposes of access to and calculation of the early old-age benefit in Spain. They note however that this approach gives rise to two disadvantages. Firstly, it conditions access to early old-age benefit in Spain to the amount resulting from the settlement of entitlement to benefit in two or more Member States in accordance Article 52(1)(b)(ii) of Regulation No 883/2004, irrespective of the amount of benefit the person concerned would have been entitled to in Spain if all periods of insurance had been completed under Spanish legislation and secondly, it conditions access to early old-age benefit in one Member State on access to and receipt of an early old-age benefit in another State without taking into account the fact that early retirement is not provided for in the legislation of all Member States and is not regulated in the same way in those States which provide for the possibility of early old-age benefit.

29. The INSS claims that, in accordance with the new administrative position 3/2018 of 13 February 2018, the condition imposed by Article 208(1)(c) of the General Law on Social Security is satisfied provided, firstly, that the theoretical amount of the benefit⁹ is higher than the minimum Spanish old-age benefit and, secondly, that the sum of the amount of the Spanish benefit and that of one or more States is higher than the minimum Spanish old-age benefit. According to the INSS if the theoretical amount of the benefit is superior to the minimum Spanish old-age benefit then the payment of a supplement under Article 14(2) of Royal Decree 1170/2015 in order to ensure an amount equal to the minimum old-age benefit is not payable. Moreover, where the sum of the amount of the Spanish benefit and that of one or more States is superior to the minimum Spanish old-age benefit then a supplement under Article 14(3) is not payable. The INSS therefore considers that in order to answer the question of the referring court, the theoretical benefit calculated by aggregating periods in accordance with Article 5, 6, 51 and 52 of Regulation No 883/2004 should be taken into account.

30. The Kingdom of Spain considers that Regulation No 883/2004 does not require Member States to supplement the pro rata benefit payable by a Member State corresponding to an early old-age benefit in order to attain the minimum pension payable in that Member State at 65 years as this would result in discrimination in favour of workers who have not been insured for the whole period in Spain. It highlights the fact that Mr Bocero Torrico's and Mr Bode's contributions in Germany were taken into account by the INSS pursuant to Article 52 of Regulation No 883/2004 in order to calculate the amount of their early old-age benefit. However, the addition of the amount of their German benefits in order to satisfy the condition imposed by Article 208(1)(c) of the General Law on Social Security) is not provided for by Regulation No 883/2004 and would result in a distortion of Spanish social security law.

31. The Kingdom of Spain also confirms that the two conditions required by the new administrative position 3/2018 are applicable to Mr Bocero Torrico's and Mr Bode's requests for an early old-age benefit.

32. The Commission considers that Mr Bocero Torrico's and Mr Bode's requests for an early old-age benefit must be examined in the light of the principle of equal treatment of benefits, income, facts or events laid down in Article 5(a) of Regulation No 883/2004, as interpreted in the light of Articles 45 and 48 TFEU. Thus the reference by Spanish legislation to 'the amount of the pension to be received' must be interpreted as referring to the sum of the Spanish and the German benefits in question which are equivalent benefits for the purpose of that provision.

⁹ See Article 52 of Regulation No 883/2004 on how to calculate theoretical amount.

VI. Analysis

33. For the purpose of providing a useful answer to the national court, it should be noted, first, that Regulation No 883/2004 does not set up a common scheme of social security, but rather allows different national social security schemes to exist, its sole objective being to ensure the coordination of those schemes. Thus, according to settled case-law, Member States retain the power to organise their own social security schemes. Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, in particular, the conditions for entitlement to benefits. In exercising those powers, Member States must nonetheless comply with EU law and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States.¹⁰ Persons who exercise that free movement right cannot suffer any legislative disadvantage by reason of the fact that they have exercised that right.

34. A Member State is, in principle, free to provide for a right to a minimum old-age pension¹¹ and to impose conditions in order for a person to benefit from an early old-age benefit provided that such conditions do not constitute an impediment to the free movement of workers for the purposes of Article 45 TFEU. I therefore consider that, in principle, a Member State is free, as in the case at hand, to condition the grant of an early old-age benefit on a person reaching a certain age, having a certain number of years of contributions and being entitled to a benefit which is higher than the amount of the minimum old-age benefit in that Member State.¹²

35. Indeed, it would appear that the three conditions imposed by Article 208(1) of the General Law on Social Security are not in themselves challenged in the main proceedings before the referring court. The challenge rather concerns the manner in which the third condition imposed by Article 208(1)¹³ of that national legislation applies¹⁴ in respect of persons such as Mr Bocero Torrico and Mr Bode who have exercised their right to free movement.

36. There is a clear divergence in opinion in the observations submitted to the Court as to whether Article 5 and/or Article 6 of Regulation No 883/2004 are applicable to the circumstances in question in the main proceedings.

37. It is settled case-law¹⁵ that the *acquisition* of entitlement to an old-age benefit comes within the scope of Article 6 of Regulation No 883/2004.¹⁶ By contrast, the rules concerning the *calculation* of the amount of the benefit are laid down in Article 52 et seq. of that regulation.¹⁷

10 See by analogy, judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946, paragraphs 38 to 40 and the case-law cited).

11 Judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946, paragraph 47).

12 Mr Bocero Torrico and Mr Bode indicated that this condition was imposed by Spanish legislation in order to ensure the viability of the public old-age benefit system.

13 Article 208(1)(c) of the General Law on Social Security.

14 Thus Mr Bocero Torrico and Mr Bode do not challenge the right of the Kingdom of Spain to impose requirements in respect of the minimum amount of benefit a person would receive in order to be eligible for an early old-age benefit.

15 Judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114, paragraph 22 and the case-law cited).

16 See also Article 45(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (11), P.416) as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

17 See also Article 46 et seq. of Regulation No 1408/71.

38. Article 6 of Regulation No 883/2004 implements the principle of aggregation of insurance, residence, employment or self-employment *periods* as laid down in Article 48 TFEU¹⁸ by providing inter alia that where the legislation of a Member State makes the acquisition of the right to benefits subject to the completion of periods of insurance, employment, self-employment or residence the competent institution of that Member State is to take account of such periods completed under the legislation of any other Member State as if they had been completed under the legislation which it administers. In other words, the *periods* completed in various Member States must be aggregated.¹⁹

39. As regards old-age benefits, Article 52(1)(b)(i) of Regulation No 883/2004 provides that the competent institution is to calculate the theoretical amount of the benefit to which the person concerned is entitled as if all the periods of insurance and/or residence which that person completed in various Member States had been completed in the Member State of the competent institution. The competent institution is then required, pursuant to Article 52(1)(b)(ii) of the regulation, to determine the actual amount of the benefit on the basis of the theoretical amount, in accordance with the ratio of the duration of the periods of insurance and/or residence completed in the Member State of the competent institution to the total duration of the periods of insurance and/or residence completed in the various Member States — in other words, the pro rata method of calculation.²⁰

40. It is important to note that the calculation of the theoretical amount and subsequently the actual amounts (pro rata benefit) of Mr Bocero Torrico's and Mr Bode's old-age benefits in Spain and Germany have not been called into question in the main proceedings.

41. The INSS, the Kingdom of Spain and indeed Mr Bocero Torrico and Mr Bode consider that the theoretical amount of a benefit calculated in accordance with Article 52(1)(b)(i) of Regulation No 883/2004 should be used in order to assess whether the condition regarding the amount of minimum benefit imposed by Article 208(1)(c) of the General Law on Social Security is fulfilled.

42. For my part, I disagree.

43. In my view, the theoretical amount of a benefit calculated in accordance with Article 52(1)(b)(i) of Regulation No 883/2004 is an intermediary step in calculating the actual pro rata benefit to be awarded and cannot be used in order to assess whether entitlement to an (early) old-age benefit has in fact been acquired.²¹ In addition, as I indicated at points 37 and 38 of this Opinion, there is a clear distinction in Regulation No 883/2004 between the rules relating to the acquisition of entitlement to an old-age benefit and those concerning the calculation of the benefit.²²

44. Moreover, while the acquisition of entitlement to an old-age benefit comes within the scope of Article 6 of Regulation No 883/2004, that provision clearly refers to the aggregation of *periods* of insurance, employment, self-employment or residence and not to other conditions giving rise to such an entitlement.²³ Given that Article 208(1)(c) of the General Law on Social Security subjects

18 This is one of the basic principles governing European Union coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the FEU Treaty, to freedom of movement does not have the effect of depriving workers of social security advantages to which they would have been entitled if they had spent their entire working life in only one Member State. Such a consequence might discourage European Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114), paragraph 30).

19 Judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946, paragraph 41).

20 Judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946, paragraph 42).

21 The theoretical amount is thus of no independent relevance per se.

22 The limited scope of the rules for calculating benefits laid down in Article 46(2) of Regulation No 1408/71 (now Article 52(1)(b) of Regulation No 883/2004) was stressed by the Court in judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946). Indeed, the Court stated that that provision could not be used for the purpose of calculating a minimum old-age benefit as that must be done in accordance with Article 50 of Regulation No 1408/71 (now Article 58 of Regulation No 883/2004).

23 It is therefore relevant for the purposes of Article 208(1)(b) of the General Law on Social Security and the calculation of the 35 year minimum contribution period. In the main proceedings, Mr Bocero Torrico's and Mr Bode's periods of contribution in Spain and Germany must be aggregated for the purposes of satisfying that condition.

entitlement to an early old-age pension, inter alia, to the condition that the amount of the benefit received be higher than the minimum old-age benefit that the person concerned would be entitled to receive in Spain in the light of his or her family situation on reaching the age of 65, I consider that Article 5 of Regulation No 883/2004 is the relevant provision which should be applied.²⁴ Indeed, recital 10 of Regulation No 883/2004 provides that the principle of assimilation or equal treatment of benefits, income, facts or events in another Member State pursuant to Article 5 of that regulation *should not interfere* with the principle laid down in Article 6 of aggregating certain periods, such as periods of insurance, occurring in another Member State as if they were completed under the legislation of the competent Member State.²⁵

45. In my view, the requirement contained in Article 208(1)(c) of the General Law on Social Security in order to obtain an early old-age pension ensures that the ‘receipt’ of a particular amount²⁶ of old-age benefit ‘has legal effects’ and therefore that requirement must comply with the principle of equal treatment laid down in Article 5 of Regulation No 883/2004 in order not to penalise workers who exercise their right to freedom of movement.²⁷ I accordingly consider that old-age benefits in Spain must be added to comparable or equivalent benefits received in one or more other Member States in order to satisfy the condition in Article 208(1)(c) of the General Law on Social Security.

46. It would appear from the file before the Court, subject to verification by the referring court, that the early old-age benefit provided for by Article 208(1) of the General Law on Social Security²⁸ and Mr Bocero Torrico’s and Mr Bode’s old-age benefits²⁹ in Germany are comparable or equivalent benefits for the purposes of Article 5(a) Regulation No 883/2004.³⁰

47. At the hearing on 2 May 2019, the INSS and the Kingdom of Spain stated that the objective of the national provisions in question was twofold, firstly, to ensure that claimants entitled to the early old-age benefit provided for by Article 208(1) of the General Law on Social Security do not become a burden on the Spanish social security system and, secondly, to encourage labour market activity and to deter such claimants from seeking early retirement.

24 Regulation No 1408/71 did not contain an equivalent provision to Article 5 of Regulation No 883/2004. In my view, Article 5 of Regulation No 883/2004 simply amounts to a clarification of the principle of equal treatment laid down in Article 4 of that regulation. The purpose of Article 5 of Regulation No 883/2004 is to ensure that exercise of the right to freedom of movement does not have the effect of depriving workers of social security advantages to which they would have been entitled if they had spent their entire working life in only one Member State. It is clear from recital 9 of Regulation No 883/2004 that the assimilation or equal treatment of benefits, income, facts or events in another Member State pursuant to Article 5 of that regulation is an explicit codification of the principle of equal treatment of benefits, income, facts or events established in a number of judgments of the Court. The first judgment of the Court based on Article 5 of Regulation No 883/2004 is judgment of 21 January 2016, *Vorarlberger Gebietskrankenkasse and Knauer* (C-453/14, EU:C:2016:37).

25 Recitals 10 to 12 of Regulation No 883/2004 clarify that certain limitations are placed on that principle of assimilation or equal treatment laid down in Article 5 of that regulation.

26 At paragraph 68 of its judgment of 28 April 2004, *Öztürk* (C-373/02, EU:C:2004:232), the Court found that the principle of equal treatment laid down in Article 3(1) of Decision No 3/80 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60), must be interpreted as precluding the application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon fulfilment of the requirement that the person concerned has received, within a certain period prior to his application for the pension, unemployment insurance benefits from that Member State alone. In my view, no meaningful legal difference can be drawn for the purposes of Article 5(a) of Regulation No 883/2004 between the requirement of being in receipt of a particular benefit and the requirement of being in receipt of a particular amount on that benefit. See also judgment of 7 March 1991, *Masgio* (C-10/90, EU:C:1991:107), which deals with the principle of equal treatment and the legal effects of the amount of a benefit. At paragraph 25 of that judgment the Court found that ‘a migrant worker who is receiving an old-age pension under the legislation of one Member State and accident insurance benefits paid by an insurance institution of another Member State may not be put in a worse position, for the purposes of calculating the portion of the benefit to be suspended pursuant to the national legislation of the first State, than a worker who has not exercised his right of free movement and is receiving both benefits under the legislation of a single Member State.’

27 See by analogy, judgments of 7 June 1988, *Roviello* (20/85, EU:C:1988:283, paragraph 18) and of 18 December 2014, *Larcher* (C-523/13, EU:C:2014:2458, paragraph 46).

28 See Articles 1(x) and Article 3(d) of Regulation No 883/2004. Article 1(x) of Regulation No 883/2004 provides that ‘early old-age benefit’ means a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit’.

29 See Articles 1(x) and Article 3(d) of Regulation No 883/2004.

30 See, by analogy, judgment of 21 January 2016, *Vorarlberger Gebietskrankenkasse and Knauer* (C-453/14, EU:C:2016:37, paragraph 35).

48. In accordance with the explicit terms of Article 208(1)(c) of the General Law on Social Security, it would appear that the national provisions in question are specifically designed to ensure that claimants seeking old-age benefits must be entitled to the amount of the minimum pension applicable and are thus not entitled to certain additional top-up benefits or supplements, thereby ensuring that they do not become a further burden on the Spanish social security system. It must be emphasised that it is by no means this objective per se that is being called into question in the present proceedings but rather the fact that the national legislation is applied in a discriminatory manner to the detriment of workers who have exercised their fundamental right to free movement. Moreover, I would note that the referring court itself³¹ has indicated that, following the addition of both their Spanish and German old-age benefits, neither Mr Bocero Torrico nor Mr Bode would be entitled to a supplement.³² In these circumstances, neither claimant will thus be a burden on the Spanish social security system.

49. While the objective of discouraging or deterring claimants from seeking early retirement may be laudable in order to increase national productivity and to reduce the burden on the social security system — particularly in the light of an ageing population and increased life expectancy — it cannot be achieved in a manner which discriminates against those who have exercised their fundamental right to free movement. In this respect, I regret to say that in the present cases it is difficult to avoid the impression that the Spanish authorities exercised their statutory powers in a manner which manifestly discriminated against the present claimants who exercised their free movement rights and in respect of which there is — or, at least, should be — little excuse.

50. I therefore consider that Article 5(a) of Regulation No 883/2004 must be interpreted as precluding national legislation which requires as a condition for access to an early old-age benefit that the amount of the benefit to be received must be higher than the minimum benefit which would be due to the person concerned under that same national legislation *without* also taking into account the actual benefit which that person may receive through another benefit of the same kind from one or more other Member States.

VII. Conclusion

51. In the light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) as follows:

Article 5(a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems must be interpreted as precluding national legislation which requires as a condition for access to an early old-age benefit that the amount of the benefit to be received must be higher than the minimum benefit which would be due to the person concerned under that same national legislation *without* also taking into account the actual benefit which that person may receive through another benefit of the same kind from one or more other Member States.

³¹ See point 23 of this opinion.

³² See judgment of 7 December 2017, *Zaniewicz-Dybeck* (C-189/16, EU:C:2017:946, paragraph 59), which states that ‘for the purpose of calculating whether a person is entitled to a minimum benefit such as the guaranteed pension at issue in the main proceedings, [Article 58 of Regulation No 883/2004] specifically provides that the actual amount of retirement pensions received by the person concerned from another Member State is to be taken into account’.