ECLI:EU:C:2021:865

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

21 October 2021 (*)

(Reference for a preliminary ruling – Social security for migrant workers – Regulation (EC) No 883/2004 – Article 52(1)(b) – Worker who has been employed in two Member States – Minimum period required by national law for acquisition of entitlement to a retirement pension – Account taken of the contribution period completed under the legislation of another Member State – Aggregation – Calculation of the amount of the retirement benefit to be paid)

In Case C-866/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 19 September 2019, received at the Court on 27 November 2019, in the proceedings

SC

v

Zakład Ubezpieczeń Społecznych I Oddział w Warszawie,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen (Rapporteur), L.S. Rossi and N. Wahl, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Zakład Ubezpieczeń Społecznych I Oddział w Warszawie, by J. Piotrowski and S. Żółkiewski, radcowie prawni,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Czech Government, by M. Smolek, J. Pavliš and J. Vláčil, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and M.M. Tátrai, acting as Agents,

– the European Commission, by D. Martin and M. Brauhoff, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 52(1)(b) 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 (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

2 The request has been made in proceedings between SC and the Zakład Ubezpieczeń Społecznych I Oddział w Warszawie (Social Insurance Institution, Branch No 1 in Warsaw, Poland) ('the pension authority') concerning the determination of the amount of the pro rata retirement pension to be paid to him by that authority.

Legal context

European Union law

3 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), was repealed on 1 May 2010, the date on which Regulation No 883/2004 became applicable.

Regulation No 1408/71

4 Article 1(r) of Regulation No 1408/71 defined the expression 'periods of insurance' as 'periods of contribution or period of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance'.

5 Article 45 of Regulation No 1408/71, entitled 'Consideration of periods of insurance or of residence completed under the legislation to which an employed person or self-employed person was subject, for the acquisition, retention or recovery of the right to benefits', provided in paragraph 1 thereof as follows:

‘Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or as a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.’

6 Article 46 of that regulation, entitled ‘Award of benefits’, provided in paragraphs 1 and 2 thereof as follows:

‘1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

(ii) on the other hand, pursuant to paragraph 2;

…

2. Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and[/]or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. …

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

Regulation No 883/2004

7 Under Article 1(t) of Regulation No 883/2004, the term ‘periods of insurance’ means ‘periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance’.

8 Article 6 of Regulation No 883/2004, entitled ‘Aggregation of periods’, replaced Article 45(1) of Regulation No 1408/71 in the following terms:

‘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,

…

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.’

9 Chapter 5 of Title III of Regulation No 883/2004, entitled ‘Old-age and survivors’ pensions’, includes, inter alia, Article 52 of that regulation, entitled ‘Award of benefits’. Article 52(1), which reproduced, in essence, the provisions of Article 46(2) of Regulation No 1408/71, provides:

‘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.’

Polish law

10 Under point 2 of Article 5(1) of the ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law on retirement and other pensions payable from the Social Security Fund) of 17 December 1998, in the version applicable to the dispute in the main proceedings (Dz. U. 2018, item 1270), in establishing entitlement to a retirement pension and calculating the amount thereof, non-contribution periods are to be taken into account for the purposes of calculating the amount of the retirement pension solely up to a maximum of one third of the proven contribution periods.

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

11 By decision of 24 February 2014, issued by the pension authority, the applicant in the main proceedings was awarded a retirement pension with effect from 5 November 2013.

12 For the purposes of determining entitlement to a retirement pension, the pension authority took account of the various periods of insurance completed by the applicant in the main proceedings. That authority determined, first, the duration corresponding to the contribution periods completed under the legislation of the Republic of Poland and then took into account the non-contribution periods completed under the legislation of that Member State capped at one third of those contribution periods. Finally, and in so far as the insured person did not, solely on the basis of periods of insurance completed under the legislation of the Republic of Poland, have the minimum period of insurance required for the acquisition of entitlement to a retirement pension, the periods of insurance completed under the legislation of another Member State, in this case the Kingdom of the Netherlands, were added to the length of the periods of insurance completed under the legislation of the Republic of Poland.

13 Once the duration of the insurance period had been determined and in accordance with Article 52(1)(b) of Regulation No 883/2004, the pension authority calculated in the same way the theoretical amount of the benefit, by adding together national contribution periods and national non-contribution periods capped at one third of the former periods before adding the periods of insurance completed under the legislation of another Member State. The actual amount of the benefit was calculated on the basis of the ratio of the duration of the periods of insurance completed under the legislation of the Republic of Poland, contributory and non-contributory, the latter capped at one third of the national contribution periods, in relation to the total duration of the periods of insurance completed under both the legislation of the Republic of Poland and the legislation of another Member State.

14 The applicant in the main proceedings brought an action against the decision of the pension authority of 24 February 2014, requesting in particular that non-contribution periods completed under the legislation of the Republic of Poland be taken into account to a greater extent in the calculation of the amount of the retirement pension, arguing that the pension authority had erred in not having taken into consideration the reasoning of the Court in the judgment of 3 March 2011, *Tomaszewska* (C-440/09, EU:C:2011:114; 'the judgment in *Tomaszewska*'), according to which, in determining the periods necessary for acquiring entitlement to a retirement pension, for the purposes of determining the limit which non-contribution periods may not exceed, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States, must be taken into consideration.

15 Taking the view that the calculation method applied by the pension authority was correct, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) dismissed that action by judgment of 19 November 2015.

16 Following the appeal brought by the applicant in the main proceedings, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland), by judgment of 9 August 2017, reversed that judgment and the decision of the pension authority of 24 February 2014. That court stated that the interpretation adopted in the judgment in *Tomaszewska* concerning the application of Article 45 of Regulation No 1408/71 is valid not only for the purposes of determining the duration necessary for acquiring entitlement to a retirement pension, but also for the purposes of calculating the amount of benefit due.

17 The pension authority brought an appeal on a point of law against that judgment before the Sąd Najwyższy (Supreme Court, Poland). In support of its appeal, that body submits, first, that the judgment in *Tomaszewska* concerned the interpretation of Article 45(1) of Regulation No 1408/71, corresponding to Article 6 of Regulation No 883/2004, and not Article 46(2) of Regulation No 1408/71, which corresponds to Article 52(1) of Regulation No 883/2004, at issue in the main

proceedings. Secondly, it argues that that judgment is applicable only in factual situations similar to those in the case which gave rise to that judgment. Thirdly, application of the interpretation of Article 45 of Regulation No 1408/71, as adopted in the judgment in *Tomaszewska*, in the case in the main proceedings would have the consequence that the non-contribution periods completed under the legislation of the Republic of Poland would be taken into account to a greater extent than as provided for under Polish law, leading to an increase in the proportion of the Polish social security system's contribution to the benefits payable to the insured person. Fourthly, it is apparent from paragraph 2 of Decision No H6 of the Administrative Commission for the Coordination of Social Security Systems, of 16 December 2010, concerning the application of certain principles regarding the aggregation of periods under Article 6 of Regulation No 883/2004 (OJ 2011 C 45, p. 5), that the periods of insurance communicated by other Member States are to be aggregated by the Member State to which they are addressed without questioning their quality, so therefore the Polish social security authority cannot be required to take into account national insurance periods to a greater extent than as provided for under national law.

18 According to the referring court, Article 52(1)(b) of Regulation No 883/2004 may be interpreted in three different ways.

19 The first possible interpretation is that followed by the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw), which relies on the interpretation of Article 45(1) of Regulation No 1408/71, as set out in the judgment in *Tomaszewska*, according to which the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution insurance periods may not exceed in relation to contribution periods, all periods of insurance completed, including those completed in other Member States. That legal fiction applies not only to the acquisition of entitlement to a benefit, but also to the calculation of the amount, both theoretical and actual, of that benefit.

20 The second interpretation is that the judgment in *Tomaszewska* has a bearing only in part on the interpretation of Article 52 of Regulation No 883/2004, in that solely paragraph 1(b)(i) of that article expressly provides that the theoretical amount is to be calculated using a legal fiction according to which the insured person has completed all periods of insurance, including those completed in other Member States, within the Member State in which the benefit is claimed. By contrast, the calculation of the actual amount referred to in paragraph 1(b)(ii) of that article is made without that fiction being systematically applied.

21 The third interpretation would mean that the judgment in *Tomaszewska* applies only to the acquisition of entitlement to a retirement pension and not to the calculation of the amount of that pension.

22 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should Article 52(1)(b) of Regulation [No 883/2004] be interpreted as meaning that the competent institution:

(a) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States both for the purpose of determining the theoretical amount (point (i)) and the actual amount (point (ii)) of the benefit; or

(b) takes into account, in accordance with national law, non-contribution periods not exceeding one third of the aggregated contribution periods completed under national law and under the legislations of the other Member States only for the purpose of determining the theoretical amount (point (i)) but not for the purpose of establishing the actual amount (point (ii)) of the benefit; or

(c) does not take into account, either for the purpose of determining the theoretical amount (point (i)) or the actual amount (point (ii)) of the benefit, periods of insurance in another Member State when calculating the limit on non-contribution periods under national law?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 52(1)(b) of Regulation No 883/2004 must be interpreted as meaning that the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, the various periods of insurance, including those completed under the legislation of other Member States, when calculating the theoretical amount of the benefit referred to in point (i) of that provision and the actual amount of the benefit referred to in point (ii) of that provision.

24 As a preliminary point, it must be observed that even though Regulation No 1408/71 was replaced, with effect from 1 May 2010, by Regulation No 883/2004, the provisions of Articles 45 and 46 of Regulation No 1408/71 were reproduced, in essence, in Articles 6 and 52 of Regulation No 883/2004 respectively. Consequently, as the Advocate General observed in point 28 of his Opinion, the case-law of the Court relating to those provisions of Regulation No 1408/71 retains all its relevance for the interpretation of the provisions at issue of Regulation No 883/2004.

25 It must be borne in mind that the provisions both of Regulation No 1408/71 and of Regulation No 883/2004 do not set up a common scheme of social security, but have the sole objective of ensuring coordination between the various national schemes which continue to exist. Thus, according to settled case-law, Member States retain the power to organise their own social security schemes (see, to that effect, inter alia, judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 35, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 38).

26 Since Regulations No 1408/71 and No 883/2004 do not determine the conditions governing the constitution of periods of employment or insurance, those conditions, as is apparent both from Article 1(r) of Regulation No 1408/71 and from Article 1(t) of Regulation No 883/2004 are defined exclusively by the legislation of the Member State under which the periods in question are completed (see, to that effect, judgment of 20 January 2005, *Salgado Alonso*, C-306/03, EU:C:2005:44, paragraph 30).

27 However, although it is for the legislation of each Member State to determine, inter alia, the conditions for entitlement to benefits, the Member States must nevertheless comply with EU law and, in particular, the provisions of the FEU Treaty giving every citizen of the European Union the right to move and reside within the territory of the Member States (see, to that effect, inter alia, judgments of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraphs 36 and 37, and of 23 January 2020, *Bundesagentur für Arbeit*, C-29/19, EU:C:2020:36, paragraph 41 and the case-law cited).

28 In order to guarantee that compliance, Article 45 of Regulation No 1408/71, as reproduced, essentially, in Article 6 of Regulation No 883/2004, provides that where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance, the competent institution of that Member State is to take account of the periods of insurance completed under the legislation of any other Member State as if they had been completed under the legislation which it applies. In other words, the periods of insurance completed under the legislation of various Member States must be aggregated (judgment of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 41).

29 Thus, Article 45 of Regulation No 1408/71, like Article 6 of Regulation No 883/2004 implements the principle of aggregation of insurance, residence or employment periods as laid down in Article 48 TFEU. 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 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 (see, to that effect, the judgment in *Tomaszewska*, paragraph 30 and the case-law cited).

30 Consequently, where national legislation lays down, for the purpose of determining the minimum insurance period required for acquisition of the right to a retirement pension, a limit which non-contribution periods cannot exceed in relation to contribution periods, the competent institution of the Member State concerned must take into consideration, for the purposes of determining contribution periods, all periods of insurance completed in the course of the migrant worker's career, including those acquired under the legislation of other Member States (see, to that effect, the judgment in *Tomaszewska*, paragraphs 37 and 39).

31 In that regard, it should be pointed out that that principle of aggregation applies in all situations where acquisition of the right to a retirement pension requires periods completed under the legislation of other Member States to be taken into account and its application cannot, therefore, be confined solely to the situation, at the origin of the judgment in *Tomaszewska*, where the threshold is not reached on the basis of an initial calculation which would simply add to the contribution and non-contribution periods determined in accordance with the provisions of national law, the contribution periods completed under the legislation of another Member State, without taking them into account in the calculation of that limit.

32 However, the dispute in the main proceedings does not concern the acquisition of a right to a pension, the rules of which are laid down in Article 45(1) of Regulation No 1408/71, which was succeeded by Article 6 of Regulation No 883/2004, but the calculation of the amount of a retirement pension.

33 In that regard, point (a) of the first paragraph of Article 48 TFEU requires, to provide freedom of movement for workers, that the European Parliament and the Council of the European Union adopt the measures necessary to aggregate all periods of insurance completed under the laws of the several countries not only for the purpose of acquiring and retaining the right to benefit, but also for the purpose of calculating the amount of benefit.

34 It is apparent from the wording of Article 52(1)(b) of Regulation No 883/2004, which reproduces, in essence, the calculation rules laid down, inter alia, in Article 46 of Regulation No 1408/71 (see, to that effect, the judgment in *Tomaszewska*, paragraph 22 and the case-law cited),

that the amount of the retirement pension is calculated in two stages, first by calculating a theoretical amount and subsequently an actual amount.

35 As regards the first stage, referred to in Article 52(1)(b)(i) of that regulation, the competent institution is required to calculate the theoretical amount of the benefit which the insured person could claim if all the periods of insurance and/or of residence completed under the legislation of other Member States had been completed under the legislation which it applies (see, as regards Article 46(2)(a) of Regulation No 1408/71, judgments of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 9, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 42).

36 In accordance with that provision, the theoretical amount of the benefit must therefore be calculated as if the insured person had worked exclusively in the Member State concerned (see, to that effect, judgments of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 10; of 21 July 2005, *Koschitzki*, C-30/04, EU:C:2005:492, paragraph 27; and of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 41).

37 As the Advocate General observed in point 53 of his Opinion, that means, in the present case, that the contribution periods completed under the legislation of the Republic of Poland and under that of the Kingdom of the Netherlands must be taken into account for the purposes of determining the one-third limit which, under the legislation of the Republic of Poland, non-contribution periods may not exceed in relation to contribution periods, in order to calculate the theoretical amount of the benefit. In other words, for the purposes of calculating the theoretical amount of the benefit, the periods of insurance completed under the legislation of the various Member States are aggregated.

38 That interpretation of Article 52(1)(b)(i) of Regulation No 883/2004 is consistent with the purpose of that provision in so far as the calculation to be made pursuant to that provision, like that to be made pursuant to Article 46(2)(a) of Regulation No 1408/71, is intended to give a worker the maximum theoretical amount which he or she could claim if all his or her periods of insurance had been completed under the legislation of the Member State in question (judgments of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 11, and of 21 July 2005, *Koschitzki*, C-30/04, EU:C:2005:492, paragraph 28).

39 Furthermore, as the Advocate General noted in point 56 of his Opinion, maximising the relevant factors for the calculation of the theoretical amount is consistent with the settled case-law according to which Article 46(2) of Regulation No 1408/71, which was succeeded by Article 52(1) of Regulation No 883/2004, must be interpreted in the light of the objective laid down in Article 48 TFEU. That objective is to contribute, in particular by the aggregation of periods of insurance, residence or employment, to the establishment of freedom of movement for workers, entailing that migrant workers must neither lose rights to social security benefits nor suffer a reduction in the amount thereof as a result of the fact that they have exercised their right to freedom of movement (see, to that effect, judgments of 9 August 1994, *Reichling*, C-406/93, EU:C:1994:320, paragraphs 21 and 24; of 17 December 1998, *Lustig*, C-244/97, EU:C:1998:619, paragraphs 30 and 31; and of 21 February 2013, *Salgado González*, C-282/11, EU:C:2013:86, paragraph 43).

40 By contrast, under the second stage, referred to in Article 52(1)(b)(ii) of Regulation No 883/2004, the competent institution is 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 of residence completed under the legislation it applies, to the total duration of the periods of insurance and/or of residence completed under the legislations of all the Member States concerned (see, as regards Article 46(2)(b) of Regulation No 1408/71, judgments of 26 June 1980, *Menzies*,

793/79, EU:C:1980:172, paragraph 9, and of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 42).

41 Article 52(1)(b)(ii) of Regulation No 883/2004 is thus intended solely to apportion the respective burdens of benefits between the institutions of the Member States concerned in the ratio of the duration of the periods of insurance completed under the legislation of each of those Member States. That application, at the stage of calculating the actual amount, of the principle of apportionment and not of the aggregation principle is justified in the light of the absence of a common system of social security, implying that, while not penalising workers exercising their right to freedom of movement, it is necessary to safeguard the financial integrity of the social security schemes of the Member States. The taking into account, in the calculation of the apportionment, of a period which does not correspond to any period of insurance or even of actual residence in the Member State in question would be likely to upset, unilaterally and artificially, the balance of the burden of the benefits existing between Member States in a way which is incompatible with the scheme established by that article (see, to that effect, concerning Article 46(2)(b) of Regulation No 1408/71, judgment of 26 June 1980, *Menzies*, 793/79, EU:C:1980:172, paragraph 11).

42 As the Advocate General also observed, in essence, in points 55 and 58 of his Opinion, according to the principle of apportionment, each competent institution is required to pay only that part of the benefit relating to the relevant periods completed under the legislation it applies. Thus, the actual amount of the benefit to be paid represents the proportion of the theoretical amount corresponding to the total periods of insurance or residence actually completed under the legislation of the Member State in question.

43 Consequently, the actual amount of the benefit must be calculated by taking into account all periods of actual contribution or periods treated as such by the legislation which the competent institution applies (see, to that effect, judgment of 3 October 2002, *Barreira Pérez*, C-347/00, EU:C:2002:560, paragraph 39), excluding periods of insurance completed outside the Member State concerned.

44 In the present case, the calculation of the actual amount of the benefit must therefore be made in accordance with Polish legislation, taking into account the contribution periods completed under the legislation of the Republic of Poland and the non-contribution periods completed under the legislation of that Member State not exceeding one third of those contribution periods, as required by that legislation but excluding insurance periods completed in another Member State.

45 In the light of all the foregoing considerations, the answer to the question referred is that Article 52(1)(b) of Regulation No 883/2004 must be interpreted as meaning that, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the national legislation, the competent institution of the Member State concerned must take into consideration, when calculating the theoretical amount of the benefit referred to in point (i) of that provision, all the periods of insurance, including those periods of insurance completed under the legislation of other Member States, whereas the calculation of the actual amount of the benefit referred to in point (ii) of that provision is made having regard solely to the periods of insurance completed under the legislation of the Member State concerned.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 52(1)(b) 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 meaning that, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the national legislation, the competent institution of the Member State concerned must take into consideration, when calculating the theoretical amount of the benefit referred to in point (i) of that provision, all the periods of insurance, including those periods of insurance completed under the legislation of other Member States, whereas the calculation of the actual amount of the benefit referred to in point (ii) of that provision is made having regard solely to the periods of insurance completed under the legislation of the Member State concerned.

[Signatures]

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* Language of the case: Polish.