ECLI:EU:C:2018:189

JUDGMENT OF THE COURT (Tenth Chamber)

15 March 2018 (*)

(Reference for a preliminary ruling — Social security for migrant workers — Regulation (EEC) No 1408/71 — Articles 12 and 46a to 46c — Benefits of the same kind — Definition — Rule against overlapping — Definition — Conditions — National rule providing for a supplement to the total permanent incapacity pension for workers of at least 55 years of age — Suspension of the supplement in the event of employment or receipt of a retirement pension)

In Case C-431/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castilla y León, Spain), made by decision of 11 May 2016, received at the Court on 2 August 2016, in the proceedings

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS)

v

José Blanco Marqués,

THE COURT (Tenth Chamber),

composed of E. Levits, President of the Chamber, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2017,

after considering the observations submitted on behalf of:

– the Instituto Nacional de la Seguridad Social (INSS) and the Tesorería General de la Seguridad Social (TGSS), by A. Trillo García and M. Baró Pazos, letrados,

– the Spanish Government, by V. Ester Casas, acting as Agent,

– the European Commission, by L. Lozano Palacios and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4, 12 and 46a to 46c of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1), ('Regulation No 1408/71') and of Articles 3, 10, 53, 54 and 55 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).

2 The request has been made in proceedings between, on the one hand, the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain; 'the INSS') and the Tesorería General de la Seguridad Social (TGSS) (Social Security General Fund, Spain; 'the TGSS') and, on the other hand, José Blanco Marqués concerning the decision of the INSS to suspend the payment of the supplement to his total permanent incapacity pension because he is in receipt of a Swiss retirement pension.

Legal context

EU law

3 According to the twenty-first recital of Regulation No 1408/71, it is necessary, in order 'to protect migrant workers and their survivors against an excessively stringent application of the national provisions concerning reduction, suspension or withdrawal, ... to include provisions laying down strict rules for the application of these provisions'.

4 Article 1(j) of that regulation defines 'legislation' as designating, in respect of each Member State, 'statutes, regulations, and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security …'.

5 Article 4 of that regulation, entitled 'Matters covered', provides, in paragraph 1:

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

(a) sickness and maternity benefits;

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

(c) old-age benefits;

(d) survivors’ benefits;

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

(f) death grants;

(g) unemployment benefits;

(h) family benefits.’

6 Article 12 of that regulation, entitled ‘Prevention of overlapping of benefits’, provides:

‘1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Articles 41, 43(2) and (3), 46, 50 and 51 or Article 60(1)(b).

2. Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.

3. The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefits in the case of a person in receipt of invalidity benefits or anticipatory old-age benefits pursuing a professional or trade activity may be invoked against such person even though he is pursuing his activity in the territory of another Member State.

…’

7 Article 46 of Regulation No 1408/71 provides:

‘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;

…’

8 Article 46a of that regulation, entitled ‘General provisions relating to reduction, suspension or withdrawal applicable to benefits in respect of invalidity, old age or survivors under the legislations of the Member States’, provides:

‘1. For the purposes of the Chapter, overlapping of benefits of the same kind shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. For the purposes of this Chapter, overlapping of benefits of different kinds means all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.

3. The following rules shall be applicable for the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

(a) account shall be taken of the benefits acquired under the legislation of another Member State or of other income acquired in another Member State only where the legislation of the first Member State provides for the taking into account of benefits or income acquired abroad;

(b) account shall be taken of the amount of benefits to be granted by another Member State before deductions of taxes, social security contributions and other individual levies or deductions;

(c) no account shall be taken of the amount of benefits acquired under the legislation of another Member State which are awarded on the basis of voluntary insurance or continued optional insurance;

(d) where provisions on reduction, suspension or withdrawal are applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of a similar or different kind payable under the legislation of other Member States or other income acquired within the territory of other Member States, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation or the income acquired within the territory of other Member States.’

9 According to Article 46b of that regulation, entitled ‘Special provisions applicable in the case of overlapping of benefits of the same kind under the legislation of two or more Member States’:

‘1. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall not be applicable to a benefit calculated in accordance with Article 46(2).

2. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall apply to a benefit calculated in accordance with Article 46(1)(a)(i) only if the benefit concerned is:

(a) either a benefit, which is referred to in Annex IV, part D, the amount of which does not depend on the length of the periods of insurance [or] of residence completed,

or

…

The benefits referred to in (a) and (b) and agreements are mentioned in Annex IV, part D.'

10 Regulation No 1408/71 was repealed and replaced by Regulation No 883/2004 with effect from 1 May 2010. However, under Article 90(1) of the latter regulation, Regulation No 1408/71 has remained in force and continues to have legal effect for the purposes of 'the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)] and the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons [signed in Luxembourg on 21 June 1999 and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002, on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1) ("the EC-Switzerland Agreement")], and other agreements which contain a reference to Regulation (EEC) No 1408/71, for as long as those agreements have not been modified in the light of this Regulation'.

11 Article 8 of the EC-Switzerland Agreement provides:

'The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:

(a) securing equality of treatment;

(b) determining the legislation applicable;

(c) aggregation, for the purpose of acquiring and retaining the right to benefits, and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned;

(d) paying benefits to persons residing in the territory of the Contracting Parties;

(e) fostering mutual administrative assistance and cooperation between authorities and institutions.'

12 Article 20 of the EC-Switzerland Agreement provides:

'Unless otherwise provided for under Annex II, bilateral social security agreements between Switzerland and the Member States of the European Community shall be suspended on the entry into force of this Agreement, in so far as the latter covers the same subject matter.'

13 Article 1 of Annex II to the EC-Swiss Agreement, which concerns the coordination of social security schemes, provides:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term “Member State(s)” contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.’

14 Section A of Annex II to that agreement refers to, inter alia, Regulation No 1408/71.

15 Annex II to the EC-Switzerland Agreement was updated by Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 (OJ 2012 L 103, p. 51).

16 Annex II, as thus amended, which entered into force on 1 April 2012, refers to Regulation No 883/2004 but also to Regulation No 1408/71 ‘when referred to in Regulation [No 883/2004] or when cases are concerned which occurred in the past’.

Spanish law

17 Articles 136 and 137 of the Ley General de la Seguridad Social (General Law on Social Security), in its consolidated version approved by Real Decreto Legislativo 1/1994 (Royal Legislative Decree 1/1994) of 20 June 1994 (BOE No 154 of 29 June 1994, p. 20658), as applicable to the case in the main proceedings (‘the LGSS’), provide, for the purposes of social protection in the event of total permanent incapacity to perform a normal occupation, for lifelong pensions intended to protect from a situation of need those workers who, as a result of an illness or accident, whether or not work-related, lose the capacity to perform their normal occupation but are still able to perform other occupations.

18 Under Article 139(2) of the LGSS:

‘The financial benefit for total permanent incapacity shall consist of a lifelong pension which, in exceptional circumstances, may be replaced by a lump-sum payment when the beneficiary is under 60 years of age.

Persons declared to have total permanent incapacity to perform their normal occupation will receive the pension provided for in the previous paragraph, increased by a percentage determined by regulation when, owing to their age, lack of general or specialised training and the welfare and employment conditions of the place of residence, it may be presumed that they will find it difficult to obtain employment in an activity other than their previous normal occupation.

…’

19 Under Article 6(1) to (3) of Decreto 1646/1972 para la aplicación de la ley 24/1972, de 21 de junio, en materia de prestaciones del Régimen General de la Seguridad Social (Decree 1646/1972 on the Implementation of Law 24/1972 of 21 June 1972 concerning General Social Security System benefits), of 23 June 1972 (‘Decree 1646/1972’), the pension for total permanent incapacity to perform the normal occupation is increased by a supplement of 20% of the regulatory base used to determine the amount of the benefit (‘the 20% supplement’) when the worker is at least 55 years of age.

20 However, given that that supplement is based on the presumption that it is particularly difficult, for people of at least 55 years of age, to find employment in an occupation other than that in which they used to be engaged and in respect of which they have been recognised as having total

permanent incapacity, that supplement is, under Article 6(4) of Decree 1646/1972, 'suspended during the period in which the worker is in employment'.

21 By contrast, the receipt of a total permanent incapacity pension as such is compatible with pursuing another occupation.

22 Under Article 143(4) of the LGSS, when the beneficiary of a permanent incapacity pension reaches the age of 65, that pension becomes a retirement pension. The conditions of application of that benefit, however, remain unaffected by the change in its title.

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

23 Mr Blanco Marqués, born on 3 February 1943, is the beneficiary of a Spanish pension for total permanent incapacity to perform the occupation of qualified mine electrician, due to a non-occupational disease, this status having been recognised by court order of 3 June 1998 with effect from 13 January 1998. In order to establish entitlement to that pension and to determine its amount, only contributions made to the Spain social security scheme were taken into account. As the person concerned was, at the date on which that court order took effect, over 55 years of age, he was granted the 20% supplement in accordance with Article 6(1) to (3) of Decree 1646/1972.

24 When he reached the age of 65, Mr Blanco Marqués obtained a retirement pension from the Swiss social security scheme, with effect from 1 March 2008. That retirement pension was granted to him taking exclusively into account the contributions which he had made to the Swiss compulsory pension scheme.

25 By decision of 24 February 2015, the INSS withdrew, with effect from 1 February 2015, the 20% supplement that Mr Blanco Marqués had been receiving, on the ground that that supplement was incompatible with the receipt of a retirement pension, and requested him to reimburse the amount of EUR 17 340.95, corresponding to the amounts paid in respect of that supplement between 1 February 2011 and 31 January 2015, the recovery of which was not time-barred.

26 Mr Blanco Marqués challenged that decision before the Juzgado de lo Social No 1 de Ponferrada (Social Court No 1, Ponferrada, Spain). By judgment of 28 September 2015, that court annulled that decision. It held that the 20% supplement was not incompatible with the receipt of a Swiss retirement pension, since, pursuant to Article 46a(3)(a) of Regulation No 1408/71 or to Article 53(3)(a) of Regulation No 883/2004, there can be incompatibility only when national legislation provides, for the purpose thereof, that benefits and income acquired abroad should be taken into account. There is, it found, no such rule in Spanish law.

27 The INSS appealed against that judgment to the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castilla y León, Spain), arguing that, according to the case-law of the Tribunal Supremo (Supreme Court, Spain), the 20% supplement is suspended not only in the situation expressly provided for in Article 6(4) of Decree 1646/1972, that is to say, where the beneficiary is in employment, but also where that beneficiary is in receipt of a retirement pension in another Member State or in Switzerland, as such a retirement pension constitutes a substitute for employment income.

28 In those circumstances the Tribunal Superior de Justicia de Castilla y León (High Court of Justice of Castilla y León) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a rule of national law, such that contained in Article 6(4) of [Decree 1646/1972], which establishes that the 20% supplement to the regulatory base for pensioners who have a total permanent incapacity to perform their normal occupation and who are over 55 years old “shall be suspended during the period in which the worker obtains employment”, to be regarded as a rule to prevent overlapping within the meaning of Article 12 [and] Article 46a [to] 46c of Regulation [No 1408/71] and Articles 5 [and] 53 [to] 55 of Regulation [No 883/2004], in view of the fact that the [Tribunal Supremo (Supreme Court)] has held that the incompatibility established in that rule of national law applies not only to employment but also to receipt of a retirement pension?

(2) If the answer to the previous question is in the affirmative, are Article 46a(3)(a) of Regulation [No 1408/71] and Article 53(3)(a) of Regulation [No 883/2004] to be interpreted as meaning that a rule to prevent the overlapping of the benefit at issue and a pension from another European Union State or Switzerland may be applied only if there is a rule of national law of the rank of statute that expressly provides that social security old-age, invalidity or survivors’ benefits, such as that at issue here, are incompatible with benefits or income acquired abroad by the beneficiary? Or may the rule to prevent overlapping be applied to pensions from another European Union State or Switzerland, in accordance with Article 12 of Regulation [No 1408/71] and Article 5 of Regulation [No 883/2004], even when there is no express legal provision, but when the national case-law has adopted an interpretation which supposes that the benefit at issue is incompatible with a retirement pension under Spanish law?

(3) If the answer to the previous question supports application of the Spanish rule preventing overlapping (as given a broad interpretation by case-law) to the case at issue, even failing any express law concerning benefits or income acquired abroad, is the 20% supplement, which, under Spanish Social Security legislation, is received by workers who are recognised as having total permanent incapacity to perform their normal occupation and are over 55 years old, as has been described, to be considered the same as or different from a retirement pension under the Swiss social security system? Does the definition of the various branches of social security in Article 4(1) of Regulation [No 1408/71] and Article 3(1) of Regulation [No 883/2004] have Community scope or must the definition given by the national legislation be followed for every specific benefit? If the definition has Community scope, is the 20% supplement to the regulatory base of the total permanent incapacity benefit, which is the subject matter of these proceedings, to be regarded as an invalidity benefit or an unemployment benefit, in light of the fact that it supplements the pension for total permanent incapacity to perform the normal occupation owing to the difficulty people more than 55 years old have in finding other employment, so that payment of that supplement is suspended if the beneficiary does work?

(4) If the two benefits are considered to be of the same kind and considering that contribution periods in another State have not been taken into account for the determining of either the amount of the Spanish incapacity pension or its supplement, is the 20% supplement to the regulatory base of the Spanish total permanent incapacity pension to be regarded as a benefit to which the rules to prevent overlapping are applicable, inasmuch as its amount does not depend on the length of periods of insurance or residence, within the meaning of Article 46b[(2)(a)] of Regulation [No 1408/71] and Article 54(2)(a) of Regulation [No 883/2004]? May the rule to prevent overlapping be applied even though that benefit is not listed in Part D of Annex IV to Regulation [No 1408/71] or in Annex IX to Regulation [No 883/2004]?

(5) If the answer to the previous question is in the affirmative, is the rule in Article 46a(3)(d) of Regulation [No 1408/71] and Article 53(3)(d) of Regulation [No 883/2004], according to which the Spanish social security benefit could be reduced only “within the limit of the amount of the benefits payable under the legislation” of another State, in this case Switzerland?

(6) If the two benefits are considered to be of different kinds and given that Switzerland appears to apply no rule to prevent overlapping, under Article 46c of Regulation [No 1408/71] and Article 55 of Regulation [No 883/2004], may the whole reduction be applied to the 20% supplement to the Spanish total permanent incapacity pension or must the reduction be made on a split or pro-rata basis? In either case, must the limit referred to in Article 46a(3)(d) of Regulation [No 1408/71] and Article 53(3)(d) of Regulation [No 883/2004], according to which the Spanish social security benefit may be reduced only "within the limit of the amount of the benefits payable under the legislation" of another State, in this case Switzerland, be applied?'

Consideration of the questions referred

Preliminary observations

29 Given that the referring court refers in its questions to both Regulation No 1408/71 and Regulation No 883/2004, it is appropriate to determine at the outset which of those regulations is applicable *ratione temporis* to the circumstances of the main proceedings.

30 In that regard, it is apparent from the case-file made available to the Court that the decision granting the Spanish total permanent incapacity pension and the decision granting the Swiss retirement pension were adopted in 1998 and 2008 respectively. As those two decisions, which give rise to the pensions in question, were adopted before Regulation No 883/2004 entered into force, Regulation No 1408/71 alone is relevant to the case in the main proceedings.

The first question

31 By its first question, the referring court asks, in essence, whether the Spanish rule in Article 6(4) of Decree 1646/1972, as interpreted by the Tribunal Supremo (Supreme Court), pursuant to which the 20% supplement is suspended during the period in which the worker is in employment or receives a retirement pension, constitutes a provision on reduction of benefit for the purposes of Article 12 of Regulation No 1408/71.

32 As a preliminary point, it should be noted that a provision of national law that provides for a total permanent incapacity pension, such as the 20% supplement, comes within the scope of Regulation No 1408/71.

33 Article 4(1)(b) of Regulation No 1408/71 applies to 'invalidity benefits, including those intended for the maintenance or improvement of earning capacity'.

34 In addition, according to Article 1(t) of that regulation, the terms 'benefits' and 'pensions' are to be given the broadest possible interpretation as meaning all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances.

35 As regards the definition of 'a provision on reduction of benefit' for the purposes of Article 12(2) of Regulation No 1408/71, it is apparent from settled case-law of the Court that a national rule must be regarded as a provision on reduction of benefit if the calculation which it requires to be made has the effect of reducing the amount of the pension which the person concerned may claim by reason of the fact that he receives a benefit from another Member State (see, to that effect, judgments of 7 March 2002, *Insalaca*, C-107/00, EU:C:2002:147, paragraph 16 and the case-law cited, and of 7 March 2013, *van den Booren*, C-127/11, EU:C:2013:140, paragraph 28).

36 In the present case, it is apparent from the order for reference that, under Article 6(4) of Decree 1646/1972, as interpreted by the case-law of the Tribunal Supremo (Supreme Court), the 20% supplement is suspended not only when the beneficiary receives an employment income, but also when he receives a retirement pension, as that pension is regarded as a substitute income for employment income. In addition, according to that same case-law, there is no need to distinguish between national retirement pensions and pensions received in another Member State or in Switzerland, with the result that both kinds of pensions must be taken into account in the same way for the purpose of the application of that provision.

37 It follows that the national rule at issue in the main proceedings must be regarded as covering the benefits received by the beneficiary in another Member State or in Switzerland, given that the Swiss Confederation, for the purposes of the application of Regulation No 1408/71, is to be equated with a Member State of the European Union (judgment of 18 November 2010, *Xhymshiti*, C-247/09, EU:C:2010:698, paragraph 31).

38 In addition, it is not disputed that the effect of the application of that national rule is to reduce the total amount of the benefits that the person concerned may claim.

39 The Court has already ruled that a national rule which provides that the supplement to a worker's retirement pension is to be reduced by the amount of a retirement pension which the person concerned may claim under the scheme of another Member State constitutes a provision for reduction of benefit for the purposes of Article 12(2) of Regulation No 1408/71 (judgment of 22 October 1998, *Conti*, C-143/97, EU:C:1998:501, paragraph 30).

40 In that regard, so far as concerns the argument of the INSS and the TGSS that the national rule at issue in the main proceedings falls outside the scope of Regulation No 1408/71 on account of the fact that it merely sets out a simple incompatibility rule, the Court has explained that national provisions for reduction of benefits cannot be rendered exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules for calculating the amount payable or rules of evidence (see, to that effect, judgments of 22 October 1998, *Conti*, C-143/97, EU:C:1998:501, paragraph 24, and of 18 November 1999, *Van Coile*, C-442/97, EU:C:1999:560, paragraph 27).

41 In the light of the foregoing, the answer to the first question is that a national rule, such as that at issue in the main proceedings, pursuant to which the 20% supplement to a total permanent incapacity pension is suspended during the period in which the beneficiary of that pension receives a retirement pension in another Member State or in Switzerland, constitutes a provision on reduction of benefit for the purposes of Article 12(2) of Regulation No 1408/71.

The second question

42 By its second question, the referring court asks, in essence, whether Article 46a(3)(a) of Regulation No 1408/71 must be interpreted as meaning that the concept of 'legislation of the first Member State' in that article is to be interpreted strictly, or whether it also includes the interpretation of that concept by a higher national court.

43 Under that provision, 'account shall be taken of the benefits acquired under the legislation of another Member State or of other income acquired in another Member State only where the legislation of the first Member State provides for the taking into account of benefits or income acquired abroad'.

44 In addition, 'legislation' is defined in Article 1(j) of Regulation No 1408/71 as designating, in respect of each Member State, statutes, regulations, and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security.

45 As evidenced by paragraph 27 of the present judgment, although Article 6 of Decree 1646/1972 merely provides that the 20% supplement is to be suspended where the beneficiary of the total permanent incapacity pension is in employment, national case-law has interpreted that provision as meaning that the suspension for which it provides also extends to the case in which the beneficiary receives a retirement pension, whether that pension is paid by the national social security system or by that of another Member State or Switzerland.

46 With regard to the question whether the interpretation of a legal provision by a supreme court must be regarded as legislation within the meaning of Article 1(j) of Regulation No 1408/71, it should be borne in mind that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (judgment of 8 June 1994, *Commission* v *United Kingdom*, C-382/92, EU:C:1994:233, paragraph 36).

47 Although isolated or insignificant judicial decisions cannot be taken into account, that is not the case with regard to an interpretation in the case-law confirmed by a national supreme court (see, to that effect, judgment of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 32).

48 In those circumstances, the answer to the second question is that Article 46a(3)(a) of Regulation No 1408/71 must be interpreted as meaning that the concept of 'legislation of the first Member State' in that article is to be interpreted as including the interpretation of a provision of national law made by a supreme national court.

The third question

49 By its third question, the referring court asks, in essence, whether the 20% supplement granted to a worker drawing a total permanent incapacity pension under Spanish law and the retirement pension acquired by that same worker in Switzerland must be regarded as being of the same kind or of a different kind within the meaning of Regulation No 1408/71.

50 With a view to answering that question, it should be borne in mind that, according to settled case-law of the Court, social security benefits must be regarded as being of the same kind when their purpose and object, as well as the basis on which they are calculated and the conditions for granting them, are identical. By contrast, characteristics which are purely formal need not be considered relevant criteria for the classification of the benefits (see, to that effect, judgments of 5 July 1983, *Valentini*, 171/82, EU:C:1983:189, paragraph 13; of 11 August 1995, *Schmidt*, C-98/94, EU:C:1995:273, paragraphs 24 and 31; and of 18 July 2006, *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 25).

51 In the present case, as regards the purpose and object of the 20% supplement, it is apparent from the order for reference that that supplement is intended to protect a specific category of particularly vulnerable persons, that is to say, workers aged between 55 and 65 who have been recognised as having total permanent incapacity and for whom it is difficult to find employment in an occupation other than that in which they were previously engaged.

52 In order to achieve that objective, those workers are granted a supplement to the total permanent incapacity pension, the amount of which is set as a percentage of the regulatory base used to determine the amount of that incapacity pension.

53 It follows from the foregoing that the 20% supplement and the total permanent incapacity pension to which it is automatically ancillary are comparable to old-age benefits, inasmuch as they are intended to guarantee a means of subsistence to workers declared as having total permanent incapacity to carry out their normal occupation and who, having reached a certain age, would in addition find it difficult to find employment in an activity other than their normal occupation.

54 It is, moreover, to that effect that the total permanent incapacity pension and the 20% supplement are different from an unemployment benefit, which is intended to cover the risk associated with the loss of revenue suffered by a worker following the loss of his employment although he is still able to work (see, to that effect, judgment of 18 July 2006, *De Cuyper*, C-406/04, EU:C:2006:491, paragraph 27).

55 In contrast to an unemployment benefit, the purpose of which is to enable the person concerned to remain on the labour market during the period of unemployment, the total permanent incapacity pension and the 20% supplement are intended to supply the beneficiary with the financial means for him to provide for himself during the period between the declaration of total permanent incapacity and retirement age.

56 Thus, where the beneficiary of a total permanent incapacity pension succeeds in re-entering the labour market in different employment to that previously engaged in, he retains the right to the total permanent incapacity pension as such and the payment of the 20% supplement alone is suspended on account of his engaging in a new occupation, which enables him to offset in part the loss of professional income.

57 Consequently, the suspension of the 20% supplement is intended solely to adapt the conditions for granting the total permanent incapacity pension to the beneficiary's situation and cannot therefore mean that that benefit is of a different kind to that established in paragraph 53 of the present judgment.

58 That finding is supported by the fact that, once a beneficiary reaches retirement age, Spanish legislation notionally equates the permanent incapacity pension with a retirement pension.

59 In that regard, it should be pointed out that the Court has already ruled that, in the case where a worker is in receipt of invalidity benefits converted into an old-age pension by virtue of the legislation of a Member State and invalidity benefits not yet converted into an old-age pension under the legislation of another Member State, the old-age pension and the invalidity benefits are to be regarded as being of the same kind (judgments of 2 July 1981, *Celestre and Others*, 116/80, 117/80 and 119/80 to 121/80, EU:C:1981:159, paragraph 11 and the case-law cited, and of 18 April 1989, *Di Felice*, 128/88, EU:C:1989:153, paragraph 13).

60 It follows that a 20% supplement granted to a worker receiving a total permanent incapacity pension under Spanish law and the retirement pension acquired by that same worker in Switzerland must be regarded as being of the same kind, and this holds true both for the period between the declaration of total permanent incapacity made between the age of 55 and retirement age and for the period after retirement age has been reached.

61 The answer to the third question is therefore that a supplement to a total permanent incapacity pension granted to a worker under the law of a Member State, such as that at issue in the main proceedings, and a retirement pension acquired by that same worker in Switzerland must be regarded as being of the same kind within the meaning of Regulation No 1408/71.

The fourth and fifth questions

62 By its fourth and fifth questions, the referring court asks, in essence, in the event that the two benefits in question must be regarded as being of the same kind, which specific provisions of Regulation No 1408/71 as regards overlapping of benefits of the same kind are to be applied.

63 In that regard, it must be pointed out that, according to Article 12(2) of Regulation No 1408/71, provisions to prevent overlapping laid down in the legislation of a Member State may, unless that regulation provides otherwise, be relied on against persons who receive a benefit from that Member State if they can claim other social security benefits, even when those benefits are acquired under the legislation of another Member State (judgments of 7 March 2002, *Insalaca*, C-107/00, EU:C:2002:147, paragraph 22, and of 7 March 2013, *van den Booren*, C-127/11, EU:C:2013:140, paragraph 29).

64 As regards the specific provisions applicable to invalidity, old-age or survivors' benefits, Article 46b(2)(a) of Regulation No 1408/71 provides that the provisions to prevent overlapping set out in national legislation are applicable to a benefit calculated in accordance with Article 46(1)(a)(i) of that regulation only when two cumulative conditions are met, that is to say, when, first, the amount of the benefit does not depend on the length of the periods of insurance or of residence completed and, secondly, the benefit is referred to in Annex IV, part D, to that regulation.

65 In the present case, it is apparent from the case-file made available to the Court that the benefits at issue in the main proceedings meet the requirement in Article 46(1)(a)(i) of Regulation No 1408/71, as the two pensions have been calculated by the respective national institutions on the basis solely of the provisions of the legislation that they administer, without there having been any need to apply an aggregation or pro rata calculation.

66 As for the two cumulative conditions, although the parties that submitted observations disagree on whether the amount of the 20% supplement depends on the period of insurance covered, with the result that it is for the referring court to determine that matter, it is nonetheless common ground that a benefit of that kind is not expressly referred to in Annex IV, part D, to Regulation No 1408/71.

67 In the light of the foregoing, the answer to the fourth and fifth questions is that Article 46b(2)(a) of Regulation No 1408/71 must be interpreted as meaning that a national rule to prevent overlapping, such as that in Article 6 of Decree 1646/1972, is not applicable to a benefit calculated in accordance with Article 46(1)(a)(i) of that regulation when that benefit is not referred to in Annex IV, part D, to that regulation.

The sixth question

68 In view of the answer to the two previous questions, there is no need to answer the sixth question.

Costs

69 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 (Tenth Chamber) hereby rules:

1. **A national rule, such as that at issue in the main proceedings, pursuant to which the supplement to a total permanent incapacity pension is suspended during the period in which the beneficiary of that pension receives a retirement pension in another Member State or in Switzerland, constitutes a provision on reduction of benefit for the purposes of Article 12(2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EEC) No 592/2008 of the European Parliament and of the Council of 17 June 2008.**

2. **Article 46a(3)(a) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 592/2008, must be interpreted as meaning that the concept of 'legislation of the first Member State' in that article is to be interpreted as including the interpretation of a provision of national law made by a supreme national court.**

3. **A supplement to a total permanent incapacity pension granted to a worker under the law of a Member State, such as that at issue in the main proceedings, and a retirement pension acquired by that same worker in Switzerland must be regarded as being of the same kind within the meaning of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 592/2008.**

4. **Article 46b(2)(a) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 592/2008, must be interpreted as meaning that a national rule to prevent overlapping, such as that in Article 6 of Decreto 1646/1972 para la aplicación de la ley 24/1972, de 21 de junio, en materia de prestaciones del Régimen General de la Seguridad Social (Decree 1646/1972 on the Implementation of Law 24/1972 of 21 June 1972 concerning general social security system benefits), of 23 June 1972, is not applicable to a benefit calculated in accordance with Article 46(1)(a)(i) of that regulation when that benefit is not referred to in Annex IV, part D, to that regulation.**

[Signatures]

* Language of the case: Spanish.