JUDGMENT OF THE COURT (Fifth Chamber)
18 April 2002 *

In Case C-290/00,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Johann Franz Duchon

and

Pensionsversicherungsanstalt der Angestellten,

on the interpretation of Articles 48 and 51 EC Treaty (now, after amendment, Articles 39 EC and 42 EC), and on the interpretation and validity of Articles 9a and 94 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed workers, to self-employed workers and to members of their families moving within the Community, as

* Language of the case: German.

amended and updated by Regulation (EC) No 118/97 of the Council of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, and M. Wathelet (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Duchon, by A. Hawel and E. Eypeltauer, Rechtsanwälte,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— Commission of the European Communities, by W. Bogensberger, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2001,

gives the following

Judgment

1 By order of 27 June 2000, received at the Court on 24 July 2000, the Oberster Gerichtshof (Supreme Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 48 and 51 of the EC Treaty (now, after amendment, Articles 39 EC and 42 EC) and 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, 'Regulation No 1408/71').

2 Those questions have been raised in proceedings between Mr Duchon, who was the victim of an industrial accident in 1968, while he was working in Germany, and the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution) concerning his entitlement to an occupational disability pension under Austrian law with effect from 1 January 1998.

Legal framework

Community provisions

3 Regulation No 1408/71 entered into force in the Republic of Austria on 1 January 1994 by virtue of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter 'the EEA Agreement'). As from 1 January 1995, it applied to the Republic of Austria as a Member State of the European Union.

4 Article 9a of Regulation No 1408/71, headed 'Prolongation of the reference period', provides:

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

5 Article 61 of Regulation No 1408/71 contains special provisions in order to take account of the special features of certain national laws on insurance against accidents at work or occupational diseases. Paragraphs 5 and 6 of Article 61 are worded as follows:

'5. Where the legislation of a Member State provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed previously shall be taken into consideration in order to assess the degree of incapacity, to establish a right to any benefit, or to determine the amount of benefit, the competent institution of that Member State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed previously under the legislation of another Member State as if they had occurred or had been confirmed under the legislation which it administers.

6. Where the legislation of a Member State provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed subsequently shall be taken into consideration in order to assess the degree of incapacity, to establish the right to any benefit, or to determine the amount of such benefit, the competent institution of that Member State shall also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed subsequently under the legislation of another Member State, as if they had occurred or had been confirmed under the legislation which it administers, but only where:

(1) no compensation is due in respect of the accident at work or the occupational disease which had occurred or had been confirmed previously under the legislation which it administers;

and

(2) no compensation is due by virtue of the legislation of the other Member State under which the accident at work or the occupational disease occurred or was confirmed subsequently, account having been taken of the provisions of paragraph 5, in respect of that accident at work or that occupational disease.'

6 Under the heading 'Transition provisions for employed persons', Article 94(1) to (3) of Regulation No 1408/71 provides:

'1. No right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.'

National legislation

7 Under Austrian law, employed persons are entitled to an occupational disability pension if, in addition to the specific condition of a reduced capacity for work, they satisfy the general condition of completion of the qualifying period ('Wartezeit') [Paragraph 235(1) Allgemeines Sozialversicherungsgesetz (General Law on Social Security, the 'ASVG')] which corresponds to the number of months during which the claimant has contributed to the pension insurance scheme ('Versicherungszeiten') during a certain period ('the reference period') prior to the date from which the pension entitlement is to run ('Stichtag').

8 Before the age of 50, the qualifying period is 60 months which must be completed during the 120 calendar months (the reference period) preceding the date of the application for the pension, if that falls on the first day of the month, or the first day of the month following the date on which the application was made (Paragraphs 223(2), 236(1)(1)(a) and (2)(1) of the ASVG).

9 Under Paragraph 235(3)(a) of the ASVG, the qualifying period required is waived when the circumstances giving rise to the acquisition of the right to a pension are the result of an accident at work or occupational disease suffered by a person covered by compulsory insurance under the pension insurance scheme under the ASVG or another Austrian federal law, or to a person covered by private insurance under Paragraph 19(a) of the ASVG.

10 Furthermore, under Paragraph 236(3) of the ASVG, the required reference period may be prolonged by 'neutral months'. Under Paragraph 234(1) of the ASVG:

'The following periods, which are not periods of insurance, shall be regarded as being neutral:

...

2. Periods during which the insured person had an entitlement, awarded by notification, to

...

(b) a disability pension stemming from statutory accident insurance on account of earning capacity reduced by at least 50%;

...'

The main proceedings and the questions referred for a preliminary ruling

11 Mr Duchon, an Austrian national, born on 18 January 1949, was the victim of an industrial accident on 8 September 1968 while he was working as a trainee in Germany. Since that date, he has been in receipt of an industrial accident benefit from the competent German authorities corresponding to a reduced capacity for work of 50%.

12 An initial application by Mr Duchon for an Austrian occupational disability pension with effect from 1 January 1994 was rejected by the Pensionsversicherungsanstalt der Angestellten. On 15 April 1997, his appeal against that decision was also rejected by the Oberster Gerichtshof, on the grounds that he had not completed the qualifying period of 60 months during the reference period of 120 months, that he was not covered by the exceptions laid down in Paragraphs 235(3)(a), 236(3) and 234(1)(2)(b) of the ASVG and that as the events giving rise to entitlement to the disability pension occurred before 1 January 1994, he also could not rely on the Community-law right of freedom of movement for workers.

13 On 22 December 1997, Mr Duchon made a fresh application for an occupational disability pension, but this time with effect from 1 January 1998. By decision of 11 August 1998, that application was also rejected for the same reason as the previous application, namely that the claimant had not completed the qualifying period. On 29 September 1999 the appeal against that decision was dismissed by the Landesgericht (Regional Court), Linz (Austria) on account *inter alia* of the force of *res judicata* attaching to the judgment of the Oberster Gerichtshof of 15 April 1999 which had decided, as between the same parties, the issue concerning the taking into consideration of insurance periods completed in Germany following Mr Duchon's accident in that Member State. According to the Landesgericht, the only issue which could still be examined was whether,

given the insurance periods completed in Austria, the claimant in the main proceedings satisfied, in accordance with the applicable provisions of national law, the requirements relating to the qualifying period. It held that this was not so in the case before it. That judgment was confirmed on appeal by judgment of 11 February 2000 of the Oberlandesgericht (Higher Regional Court), Linz (Austria), and Mr Duchon then brought an appeal on a point of law ('Revision') before the Oberster Gerichtshof.

14 The Oberster Gerichtshof questions the validity of the view according to which Regulation No 1408/71 is not, by virtue of Article 94 thereof, applicable to events which occurred before the accession of the Republic of Austria to the EEA Agreement and then to the European Union.

15 On one hand, if it was established that the incapacity for work in respect of which Mr Duchon claims an Austrian pension was the result of an accident at work in 1968, in Germany, the Oberster Gerichtshof asks whether, for the purposes of the application of Paragraph 235(3)(a) of the ASVG, that accident is a 'contingency' within the meaning of Article 94(3) of Regulation No 1408/71. If that were the case, the regulation would apply to the acquisition of the right to a pension by the claimant in the main proceedings, even though the case concerns a contingency which materialised in the past, albeit that the right itself could only take effect from the date of entry into force of the regulation in the Republic of Austria, in accordance with Article 94(1).

16 On the other hand, should it transpire that the incapacity for work from which the claimant in the main proceedings suffers is not the result of the accident in 1968, the Oberster Gerichtshof asks whether Community law requires that the

periods of payment of the industrial accident benefit under German law be taken into account for the purpose of prolonging the reference period in accordance with Paragraph 236(3) of the ASVG.

17 It also questions whether Article 9(a) of Regulation No 1408/71 is compatible with Article 48(2) and 51 of the Treaty, in so far as it involves an exception to assimilation in relation to industrial accident benefits. In this respect, it refers to the judgment in *Paraschi* (C-349/87 [1991] ECR I-4501). It observes that if Mr Duchon had always worked in Austria and if the industrial accident had happened there, the reference period would have been prolonged, in accordance with national law, by a period equal to that during which benefit would have been paid to him. The fact that the period during which a benefit was paid in Germany is not taken into consideration makes the position of migrant workers less favourable than that of settled workers. That discrimination is not objectively justified.

18 In those circumstances the Oberster Gerichsthof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the situation of an employed person who, as a national of a country which is now a Member State, was employed prior to the accession of that Member State in another Member State and sustained an accident there, fall within the scope 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 (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 1249/92 of 30 April 1992, where the person concerned applies for an occupational disability pension after the accession of the Member State and the accident at work can have the effect of establishing entitlement to an occupational disability pension?

If the first question is to be answered in the affirmative:

2. Are Articles 48(2) and 51 of the EC Treaty (now Articles 39(2) and 42 EC) and Regulation (EEC) No 1408/71 to be interpreted as precluding national rules which, for the qualifying period for a benefit stemming from the insurance contingency of reduced capacity for work not to apply, require not only that the insurance contingency is the result of an accident at work, but also that the insurance contingency materialised in respect of a person insured compulsorily with a pension insurance institution under the (Austrian) Allgemeines Sozialversicherungsgesetz (General Law on Social Security) (ASVG) or another (Austrian) federal law or in respect of a person insured privately under Paragraph 19a of the (Austrian) Allgemeines Sozialversicherungsgesetz (ASVG) and therefore do not cover accidents at work sustained during employment in other Member States?

3. Are Articles 48(2) and 51 of the EC Treaty (now Articles 39(2) and 42 EC) to be interpreted as precluding Article 9a of Regulation (EEC) No 1408/71 and national rules which exclude in general any prolongation of the reference period in respect of the period during which a pension is received or limits such prolongation to cases of entitlement to a pension stemming from the statutory accident insurance of the Member State concerned?'

The questions referred to the Court

The first question

19 By its first question, the Oberster Gerichtshof is asking, essentially, whether a person who is a national of a Member State, who, before the accession of that

State to the European Union, was employed in another Member State where he suffered an industrial accident at work and who, after the accession of his home State, applies to the authorities of that State for an occupational disability pension following that accident, falls within the scope of Regulation No 1408/71.

20 Mr Duchon, the Austrian Government and the Commission contend that that question should be answered in the affirmative.

21 In that regard, it should be borne in mind that it is settled case-law that the principle of legal certainty precludes a regulation from being applied retroactively, regardless of whether such application might produce favourable or unfavourable effects for the person concerned, unless a sufficiently clear indication can be found, either in the terms of the regulation or its stated objectives, which allows the conclusion to be drawn that the regulation was not merely providing for the future (Case 234/83 *Gesamthochschule Duisburg* [1985] ECR 327, paragraph 20, and Case C-28/00 *Kauer* [2002] ECR I-1343, paragraph 20). Although the new law is thus valid for only for the future, it also applies, according to a generally recognised principle, in the absence of a provision to the contrary, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, Case 96/77 *Bauche and Delquignies* [1978] ECR 383, paragraph 48; Case 125/77 *Koninklijke Scholten-Honig and De Bijenkorf* [1978] ECR 1991, paragraph 37; Case 40/79 *P.* v *Commission* [1981] ECR 361, paragraph 12; Case 270/84 *Licata* v *Economic and Social Committee* [1986] ECR 2305, paragraph 31; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 49 and 50; and *Kauer*, cited above, paragraph 20).

22 By providing that no right is to be acquired in respect of a period prior to the date of its application in the territory of the Member State concerned, Article 94(1) of Regulation No 1408/71 is in full accord with the principle of legal certainty mentioned earlier.

23 Equally, in order to enable Regulation No 1408/71 to apply to the future effects of situations arising under the period of validity of the old law, Article 94(2) imposes the obligation to take into consideration, for the purposes of determining rights to benefit, all periods of insurance, employment or residence completed under the legislation of any Member State 'before 1 October 1972 or before the date of its application in the territory of that Member State'. It follows, therefore, from that provision that a Member State is not entitled to refuse to take into account periods of insurance completed in the territory of another Member State, for the purposes of establishment of a retirement pension, for the sole reason that they were completed before the entry into force of the regulation in its regard (Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 16, and *Kauer*, paragraph 22).

24 On the other hand, Article 94(3) of Regulation No 1408/71 also provides for account to be taken of any contingency, to which the right in question relates, even though it materialised 'prior to 1 October 1972 or to the date of [the regulation's] application in the territory of the Member State concerned'.

25 There is no doubt that an accident at work which occurred on the territory of a Member State before the entry into force of Regulation No 1408/71 in another Member State under whose legislation benefits for incapacity for work as a result of that accident are claimed, constitutes a 'contingency' within the meaning of Article 94(3) of that regulation.

26 Accordingly, the answer to the first question must be that the situation of a person who is a national of a Member State, who, before the accession of that State to the European Union, was employed in another Member State where he was the victim of an accident at work and who, after the accession of his home State, applies to the authorities in that State for a pension for incapacity to work as a result of that accident falls within the scope of application of Regulation No 1408/71.

The second question

27 By its second question, the Oberster Gerichtshof is asking, essentially, whether Article 48(2) and 51 of the Treaty and Regulation No 1408/71 must be interpreted as precluding a national provision, such as Paragraph 235(3)(a) of the ASVG, which provides an exception to the requirement of a qualifying period as a condition for entitlement to an occupational disability pension where the disability is the result of an accident at work — which occurred, in the case in point, before the date of entry into force of that regulation in the Member State concerned — only in the event that at the time of the accident the victim was compulsorily or privately insured under the legislation of that State, to the exclusion of the legislation of all other Member States.

28 In that respect, it is appropriate, as a first step, to review the legality of a provision such as Paragraph 235(3)(a) of the ASVG in the light of Community law as it would apply if the accident at work had occurred after the accession to the European Union of the Republic of Austria.

29 It is clear, as the Austrian Government and the Commission argue, that such a provision, although it applies without taking account of the nationality of the workers concerned, is liable to operate to the detriment, in social security matters, of persons who have exercised their right to the freedom of movement guaranteed by the Treaty, since the possibility of satisfying the requirement of affiliation under the ASVG is in their case smaller than it is in the case of workers who have remained in Austria.

30 Moreover, the Austrian Government contends that the duty of the national court to interpret Paragraph 235(3)(a) of the ASVG in such a way that affiliation by virtue of an occupational activity pursued in another Member State is treated in the same manner as affiliation by virtue of such an activity pursued on national territory.

31 On the latter point, it must be remembered that it is for the national court to apply Community law in full and to protect the rights that it confers on individuals, if necessary by not applying a provision where its application, in the circumstances of the case before it, would lead to a result contrary to Community law (Case C-262/97 *Englebrecht* [2000] ECR I-7321, paragraph 40).

32 Second, where, as in the case in the main proceedings, the national legislation applies to the acquisition of the right to a pension for incapacity for work resulting from an accident at work which occurred before the date of entry into force of Regulation No 1408/71 in the Member State where the pension is claimed, it must be pointed out, first, that the determination of a pension entitlement acquired after the accession of the Republic of Austria to the European Union, even as the result of a contingency which materialised before that date, must be effected by the Austrian authorities in accordance with the provisions of the Treaty on freedom of movement for workers (see, to that effect, *Kauer*, cited above, paragraph 45).

33 On the other hand, as regards, more specifically, the taking into account of the contingency in question in the main proceedings, that is to say, the accident at work which occurred in 1968 in Germany, it is necessary to apply the transitional provision contained in Article 94(3) of Regulation No 1408/71, which, by its nature, is intended to cover situations arising at a time when the Treaty was not yet applicable in the Member State in point. The specific purpose of that provision, as already noted in paragraphs 23 and 24 above, is to enable

Regulation No 1408/71 to apply to the future effects of situations which came into being at a time when, by definition, freedom of movement for persons was not yet guaranteed in the relations between the Member State in point and the Member State in whose territory the specific situations which may be required to be taken into account arose.

34 In those circumstances, the fact that Mr Duchon worked in Germany before the entry into force of the EEA Agreement or before the accession of the Republic of Austria to the European Union cannot, as such, preclude application of Article 94(3) of Regulation No 1408/71.

35 However, the application of the condition laid down in Paragraph 235(3)(a) of the ASVG to an accident at work which occurred before the date of entry into force of Regulation No 1408/71 in the Member State where the grant of an occupational disability pension is claimed is likely to render the benefit of Article 94(3) illusory where the national legislation itself does not provide that affiliation under the legislation of another Member State is to be taken into account, there being no Community rule requiring this in respect of the period prior to the date mentioned above.

36 As a result, the answer to the second question must be that Article 94(3) of Regulation No 1408/71, read in conjunction with Article 48(2) of the Treaty, must be interpreted as precluding a national provision such as Paragraph 235(3)(a) of the ASVG, which provides an exception to the requirement of a qualifying period as a condition for the acquisition of the right to an occupational disability pension where that disability is the result of an accident at work — which occurred, in the case in point, before the date of entry into force of the regulation in the Member State concerned — only in the event that the victim had been insured compulsorily or privately at the time of the accident under the legislation of that State, to the exclusion of the legislation of all other Member States.

The third question

37 By its third question, the Oberster Gerichtshof is asking, essentially, whether Article 48(2) and 51 of the Treaty must be interpreted as precluding a provision such as Paragraph 234(1)(b) of the ASVG, read in conjunction with Paragraph 236(3) of the same law, which takes into consideration, for the purposes of prolongation of the reference period during which the qualifying period must have been completed in order for the right to a pension to be acquired, only those periods during which the insured received a disability benefit under a national accident insurance scheme, without providing for the possibility of prolonging the reference period where such a benefit has been paid under the legislation of another Member State. The national court also questions the compatibility of Article 9a of Regulation No 1408/71 with Articles 48(2) and 51 of the Treaty in so far as it expressly excludes taking into account, for the purposes of prolongation of the reference period under the legislation of a Member State, the periods during which industrial accident benefits have been paid under the legislation of another Member State.

38 In that regard, as the Austrian Government and the Commission point out, it already follows from the Court's case-law that even if, formally, legislation of the type in question in the main proceedings applies without distinction as to nationality to all Community workers, who may accordingly, under the conditions which it lays down, benefit from the prolongation of the reference period, such legislation, in so far as it makes no provision for the possibility of prolongation of the reference period where events or circumstances, such as the payment of accident benefits, corresponding to those which enable the period to be prolonged occur in another Member State, is liable to have a much greater adverse effect on migrant workers, since they above all, particularly in the case of invalidity, tend to return to their countries of origin (see, to that effect, Case C-349/87 *Paraschi*, cited above, paragraph 24).

39 That being so, Article 48(2) and 51 of the Treaty preclude national legislation which permits, in certain circumstances, the reference period to be prolonged, but does not provide for the possibility of a prolongation where events or circumstances corresponding to those which would enable it to be granted occur in another Member State (*Paraschi*, paragraph 27).

40 For the same reasons as those given at paragraph 38 of the present judgment, Article 9a of Regulation No 1408/71 must be declared invalid in so far as it expressly excludes the possibility of taking into account, for the purposes of prolongation of the reference period under the legislation of a Member State, periods during which industrial accident benefits have been paid under the legislation of another Member State.

41 The Austrian Government argues however that Article 48(2) and 51 of the Treaty are not relevant for the purposes of the decision in the main proceedings. In so far as the industrial accident in question occurred before the entry in force of the EEA Agreement in Austria, the provisions of the Treaty are inapplicable *ratione temporis* to those proceedings.

42 It adds that the transitional provisions of Article 94 of Regulation No 1408/71 do not include any assimilation rule comparable to that contained in Article 9a, guaranteeing the prolongation of the reference period.

43 In that respect, it must be pointed out that the case in the main proceedings does not concern the acquisition of a pension entitlement in respect of a period prior to the entry into force of the EEA Agreement in the Republic of Austria, but concerns the acquisition of such entitlement with effect from 1 January 1998.

44 As the Court has already held in its judgment in Case C-195/98 *Österreichischer Gewerkschaftbund* [2000] ECR I-10497, paragraph 55, the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241 p. 21, and OJ 1995 L 1, p. 1) contains no transitional provisions concerning the application of Article 48 of the Treaty. The provisions of that article must be considered to be immediately applicable and binding as regards the Republic of Austria as from the date of its accession to the European Union, that is to say 1 January 1995. Since that date, they may be relied on by migrant workers from any Member State and be applied to the present and future effects of situations arising before the accession of the Republic of Austria to the European Union.

45 That general finding cannot be called into question by the fact that Article 94 of Regulation No 1408/71 has not expressly provided for the possibility of taking into account, for the purposes of the acquisition of a right to a benefit under the legislation of a Member State, the periods which were completed in another Member State before the entry into force of that regulation in the first of those States and during which certain benefits, such as, in the present case, industrial accident benefits, were paid to the person insured.

46 Having regard to the foregoing, the third question must be answered as follows:

— Articles 48(2) and 51 of the EC Treaty must be interpreted as meaning that they preclude a provision such as Paragraph 234(1)(2)(b) of the ASVG, read

in conjunction with Paragraph 236(3) of that law, which takes into account, for the purposes of the prolongation of the reference period during which the qualifying period for acquisition of the right to a pension must have been completed, only those periods during which the insured person received a disability pension under a national accident insurance scheme, without providing for the possibility of a prolongation of that period where a benefit of such a kind was paid under the legislation of another Member State.

— Article 9a of Regulation No 1408/71, which is incompatible with Articles 48(2) and 51 of the EC Treaty in so far as it excludes the possibility of taking into account, for the purposes of the prolongation of the reference period under the legislation of a Member State, the periods during which industrial accident benefits were paid under the legislation of another Member State, is invalid.

Costs

47 The costs incurred by the Austrian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties are concerned, in the nature of a step to proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 27 June 2000, hereby rules:

1. The situation of a person who is a national of a Member State, who, before the accession of that State to the European Union, was employed in another Member State where he was the victim of an accident at work, and who, after the accession of his home State, applies to the authorities in that State for a pension for incapacity for work as a result of that accident falls within the scope of application 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.

2. Article 94(3) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, read in conjunction with Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC), must be interpreted as precluding a national provision such as Paragraph 235(3)(a) of the Allgemeines Sozialversicherungsgesetz, which provides an exception to the requirement of a qualifying period as a condition for the acquisition of the right to an occupational disability pension where that disability is the result of an accident at work — which occurred, in the case in point, before the date of entry into force of that regulation in the Member State concerned —

only in the event that the victim had been insured compulsorily or privately at the time of the accident under the legislation of that State, to the exclusion of the legislation of all other Member States.

3. Articles 48(2) and 51 of the EC Treaty (now, after amendment, Articles 39(2) EC and 42 EC) must be interpreted as meaning that they preclude a provision such as Paragraph 234(1)(2)(b) of the Allgemeines Sozialversicherungsgesetz, read in conjunction with Paragraph 236(3) of that law, which takes into account, for the purposes of prolongation of the reference period during which the qualifying period for the acquisition of the right to a pension must have been completed, only those periods during which the insured person received a disability pension under a national accident insurance scheme, without providing for the possibility of a prolongation of that period where a benefit of such a kind was paid under the legislation of another Member State.

4. Article 9a of Regulation No 1408/71, as amended and updated by Regulation No 118/97, a provision which is incompatible with Articles 48(2) and 51 of the EC Treaty in so far as it excludes the possibility of taking into account, for the purposes of the prolongation of the reference period under the legislation of a Member State, the periods during which industrial accident benefits were paid under the legislation of another Member State, is invalid.

Jann von Bahr Wathelet

Delivered in open court in Luxembourg on 18 April 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber