



## Reports of Cases

### JUDGMENT OF THE COURT (First Chamber)

18 December 2014\*

(Reference for a preliminary ruling — Social security for migrant workers — Article 45 TFEU — Article 3(1) of Regulation (EEC) No 1408/71 — Old-age benefits — Principle of non-discrimination — Worker who, prior to retirement, has participated, in a Member State, in a part-time work scheme for older employees — Consideration for entitlement to an old-age pension in another Member State)

In Case C-523/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundessozialgericht (Germany), made by decision of 13 June 2013, received at the Court on 3 October 2013, in the proceedings

**Walter Larcher**

v

**Deutsche Rentenversicherung Bayern Süd,**

THE COURT (First Chamber),

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

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Larcher, by R. Buschmann,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by D. Martin and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 October 2014,

gives the following

\* Language of the case: German.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU and Article 3(1) of 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), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71').
- 2 The request has been made in proceedings between Mr Larcher and the Deutsche Rentenversicherung Bayern Süd concerning the award of an old-age pension following participation in a pre-retirement part-time work scheme for older employees ('Altersrente nach Altersteilzeitarbeit').

### Legal context

#### *EU law*

- 3 Article 2(1) of Regulation No 1408/71 provides:

'This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

- 4 Article 3(1) of Regulation No 1408/71 is worded as follows:

'Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

- 5 In accordance with Article 4(1) of that regulation, Regulation No 1408/71 applies to all legislation concerning the branches of social security relating, inter alia, to old-age benefits and unemployment benefits.

- 6 Article 45(1) of Regulation No 1408/71 provides:

'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 a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.'

### *National legislation*

#### German law

7 The provisions of German law which are relevant to the facts material to the main proceedings are those laid down in the Social Code (Sozialgesetzbuch), as amended by the Law of 21 July 2004 (BGBl. 2004 I, p. 1791) ('the SGB'), and in the Law on part-time work for older employees (Altersteilzeitgesetz), as amended by the Law of 23 April 2004 (BGBl. 2004 I, p. 602) ('the AltTZG').

8 Paragraph 237(1) of the SGB provides:

'Insured persons shall be entitled to a retirement pension where

1. they were born before 1 January 1952,
2. they reach the age of 60 years;
3. either
  - (a) they are unemployed at the beginning of retirement and, upon reaching the age of 58 years and 6 months, have been unemployed for a total of 52 weeks or receive an allowance for former workers from the mining industry

or

- (b) they have reduced their working time in order to [participate in a] scheme of part-time work for older employees within the meaning of Paragraphs 2 and 3(1)(1) of the AltTZG for at least 24 calendar months,
4. over the final ten years prior to the beginning of retirement, they have made eight years of compulsory contributions for an insured employment or activity, that ten-year period being extended to take account of additional periods, periods for consideration and periods for the drawing of a pension under the recipient's own insurance, which are not also compulsory contribution periods by virtue of any insured employment or activity, and
5. they have respected the grace period of 15 years.'

9 The first sentence of Paragraph 2(1) and (2) of the AltTZG provides:

'(1) Benefits shall be granted for workers who

1. have reached the age of 55,
2. after 14 February 1996, on the basis of an agreement with their employer which must at least cover the period up to the date on which an old-age pension can be claimed, have reduced their working time to half the weekly time worked up until then, and are employed while affiliated with the compulsory unemployment insurance within the meaning of Book III of the SGB (part-time work for older employees) and
3. over the final five years prior to the part-time work for older employees, were for at least 1 080 calendar days in employment subject to compulsory unemployment insurance within the meaning of Book III of the SGB. ...

(2) If the agreement on part-time work for older employees provides for different weekly working periods or a different allocation of weekly working time, the condition under paragraph 1(2) shall also be satisfied where:

1. the weekly time worked on average over a period of up to three years, or, in the case of rules set out in a collective agreement, or in a works agreement, if a collective agreement provides for that possibility, or in rules for churches and public religious institutions, over a period of up to six years, does not exceed half the weekly time worked up until then, and where the worker is employed while affiliated with the compulsory unemployment insurance within the meaning of Book III of the SGB and
2. the pay under the scheme of part-time work for older employees, together with the increase provided for under Paragraph 3(1)(1)(a) [of the AltTZG], continues to be paid.'

10 Paragraph 3(1) of the AltTZG provides:

'The right to benefits under Paragraph 4 presupposes that:

1. the employer, on the basis of a collective agreement, ...
  - (a) has increased the pay by at least 20% during the period of part-time work for older employees, and that new pay is at least 70% of the previous pay within the meaning of Paragraph 6(1) [of the AltTZG] less the statutory deductions normally applicable to workers (minimum net amount) and
  - b) has paid, in respect of the worker, contributions to the statutory pension insurance scheme at least up to the amount that applies to the difference between 90% of previous pay within the meaning of Paragraph 6(1) [of the AltTZG] and the pay due under the scheme of part-time work for older employees, with that previous pay being taken into account only up to the limit used to calculate contributions, and that
2. the employer, upon the departure of the worker engaged in part-time work for older employees
  - (a) employs, in the employment position which became available or was freed in that context by a transfer, a worker registered as unemployed at the employment office or a worker who has completed his apprenticeship as part of employment subject to compulsory unemployment insurance within the meaning of Book III of the SGB; for employers who do not employ in general more than 50 workers, there is an irrebuttable presumption that the worker is employed in the employment position which became available or was freed in that context by a transfer, or
  - (b) employs an apprentice in work subject to compulsory unemployment insurance within the meaning of Book III of the SGB, where the employer does not employ in general more than 50 workers

...'

11 Paragraph 4 of the AltTZG provides for the payment of a public subsidy by the national employment agency to the employer in respect of the financial burdens resulting from a worker participating in the scheme of part-time work for older employees. However, acquisition of the right to an old-age pension following part-time work for older employees, provided for in Paragraph 237(1)(3)(b) of the SGB, is not conditional upon the employment office paying that subsidy to the employer in question or providing any financial aid. Payment of the subsidy was conditional on the employment position freed being newly filled by a worker registered as unemployed with the employment office or a worker who has

completed his training and on the employer having provided a pay increase to the worker participating in the scheme of part-time work for older employees. The payment of that increase is not dependent on whether the employment position freed by virtue of a worker's participation in the scheme of part-time work for older employees has been in fact newly filled.

#### Austrian law

- 12 According to the Bundessozialgericht (Federal Social Court; or 'the referring court'), the provisions of Austrian law governing part-time work for older employees at the material time are set out in the Law of 1977 on Unemployment Insurance (Arbeitslosenversicherungsgesetz 1977), as amended by the Law of 30 December 2003 (BGBl I, 128/2003) ('the AIVG'). Accordingly, under Paragraph 27(2)(1) of the AIVG, older workers are eligible to participate in the scheme of part-time work for older employees, which is open to men older than 55 years who, over the preceding 25 years, have been employed for at least 15 years while subject to compulsory unemployment insurance.
- 13 Under Paragraph 27(2)(2) of the AIVG, the scheme of part-time work for older employees is to form the subject-matter of a contractual agreement which must provide for a reduction in working time of between 40% and 60% of normal working time. Under Paragraph 27(5) of the AIVG, working hours may, but need not, be evenly distributed during the period of part-time work for older employees.
- 14 The employer pays the worker in part-time work for older employees wage compensation in an amount at least equal to 50% of the difference between the average pay in the year prior to the reduction of normal working time and the pay corresponding to the reduced working time. That compensation means that, for example, in the case of a 50% reduction in working time, the worker receives from his employer 75% of his previous pay.
- 15 Under Paragraph 27(2)(3)(a) and (b) of the AIVG, the contributions for social security which the employer of that employee must pay are those applicable before the reduction in normal working time. Under Paragraph 27(1) and (4) of the AIVG, the allowance for part-time work for older employees paid by the Labour Market Office must compensate for 50% of the additional costs to the employer. The amount of that compensation may reach 100%, where a previously unemployed person is hired or where an additional apprentice is trained.

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

- 16 Mr Larcher, who was born on 19 May 1946, is an Austrian citizen who resides in Austria. For more than 29 years, he was employed in Germany as a worker subject to compulsory social security. On 1 December 2000, he began working in Austria in full-time employment subject to compulsory social security. From 1 March 2004, he received, under an agreement establishing a pre-retirement scheme of part-time work for older employees, a reduction in his normal weekly working time, from 38.5 hours to 15.4 hours. Those 15.4 hours corresponded to 40% of the normal weekly time previously worked by Mr Larcher. The hours were spread over 4 days per week. On 30 September 2006, Mr Larcher stopped working under those pre-retirement arrangements. From 4 October 2006, he was engaged in only minor employment for the purposes of social security law.
- 17 During the period covered by the part-time work scheme for older employees, Mr Larcher's employer paid him wage compensation amounting to half the difference between the gross monthly salary paid in respect of the reduced time worked and the gross monthly salary paid in respect of the time worked before that reduction, and continued to make contributions to the Austrian pension insurance scheme calculated on the basis of the social contributions base applicable before the reduction in normal working time. The Austrian Labour Market Office granted the employer an allowance for part-time work for older employees to offset in part the costs arising as a result of Mr Larcher's participation in the scheme.



- 18 Since 1 October 2006, Mr Larcher has been in receipt of an Austrian retirement pension known as ‘early old-age pension by virtue of long insured periods’ in the amount of EUR 370.25. In addition, he has received since 1 June 2009 a German retirement pension known as ‘old-age pension for the long-term insured’ in the amount of EUR 696.81. Those pensions are not the subject of the dispute in the main proceedings.
- 19 In February 2006, Mr Larcher applied to the Deutsche Rentenversicherung Bayern Süd for a retirement pension following participation in a part-time work scheme for older employees. His application was refused on the grounds that Mr Larcher had not participated in such a scheme under the provisions of German law. Upon the dismissal of his administrative appeal, Mr Larcher brought the matter before the German courts. His actions were dismissed both at first instance and on appeal.
- 20 In particular, the Bayrisches Landessozialgericht (Higher Social Court of Bavaria, Germany), hearing the appeal, relied on the argument that such a pension was not due because, contrary to the provision made under the AltTZG, Mr Larcher — in the context of the part-time work scheme for older employees in which he had participated in Austria — had reduced his working time, not to 50% of the weekly time worked previously, but to 40% of that time.
- 21 Nor, according to the Bayrisches Landessozialgericht, would the application of EU law enable a ruling to be made that was favourable to Mr Larcher. The part-time work scheme for older employees in which he had participated in Austria could not be taken into account under Article 45(1) of Regulation No 1408/71, since it is not the calculation of insurance periods that is at issue in the circumstances, but the taking into account of the part-time work for older employees as a prerequisite for the right to a pension. There is no indirect discrimination for the purposes of Article 3(1) of Regulation No 1408/71, such as that at issue in the case giving rise to the judgment in *Öztürk* (C-373/02, EU:C:2004:232). Under Austrian law, Mr Larcher could have reduced his working time to between 40% and 60% while engaging in part-time work for older employees. He could therefore have chosen to reduce that time to only 50% of normal working time, thereby satisfying the conditions laid down by German law. Consequently, there is no obstacle to the exercise of freedom of movement for workers.
- 22 In support of his appeal on a point of law before the Bundessozialgericht, Mr Larcher argues that the Bayrisches Landessozialgericht infringed Paragraph 237(1)(3)(b) of the SGB by construing it in a manner inconsistent with EU law. According to an interpretation consistent with EU law, that provision requires only that participation in a part-time work scheme for older employees have taken place in accordance with the legislation of the Member State concerned. According to Mr Larcher, the interpretation adopted by the Bayrisches Landessozialgericht is contrary to the prohibition of discrimination on grounds of nationality and to the principle of the freedom of movement for workers. In the light of the case-law of the Court of Justice, specifically the judgment in *Öztürk* (EU:C:2004:232), there is unjustified indirect discrimination. In the proceedings before the Bundessozialgericht, Article 5(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) falls to be applied. In consequence, part-time work for older employees under German law should be assimilated to part-time work for older employees under Austrian law.
- 23 The referring court notes that, as yet, the Court has not ruled on the taking into account, as a condition for entitlement to an old-age pension, of part-time work for older employees through participation in a scheme in Member States other than that in which the pension is applied for and that the questions raised in the main proceedings cannot be answered solely on the basis of existing case-law. Moreover, contrary to the assertions made by Mr Larcher, the case before the referring court cannot be decided solely on the basis of the judgment in *Öztürk* (EU:C:2004:232).
- 24 According to the referring court, experience shows that, in reality, most workers, until their retirement, have only worked in one Member State and thus satisfy the conditions for entitlement to a national old age pension following part-time work for older employees more easily than a worker such as

Mr Larcher, who has been employed in different Member States. Where a worker accepts employment in another Member State, he is likely to be penalised as soon as he attempts to assert his pension rights, because of the differences between the laws applicable to him, as compared with retired persons whose working life is linked to a single Member State. The content of the provisions governing part-time work schemes for older employees may vary from one Member State to another and it is unlikely that the conditions for the application of a given scheme correspond exactly to the conditions applied in another Member State for entitlement to an old-age pension.

- 25 Articles 45 TFEU to 48 TFEU and Regulation No 1408/71 must, however, prevent migrant workers who have exercised their right to freedom of movement and have been employed in several Member States from being penalised without any objective reason, as compared with workers who have spent their entire working life in a single Member State. According to the referring court, such a restriction on the exercise of freedom of movement may be discernible in the case before it, given that Mr Larcher, whose working life came to an end in his country of origin, participated in a part-time work scheme for older employees on the basis of the laws applicable in that Member State, but, following his participation in that scheme, is being refused entitlement to an old-age pension in another Member State, in which he spent most of his working life.
- 26 According to the referring court, consideration of whether there is a justification for such a difference in treatment leads to a second question. That question, which concerns method, relates to the factors to be taken into account for the purposes of comparing two national pre-retirement schemes. Accordingly, the particular point that that court is moved to address in the case before it is whether the Austrian part-time work scheme for older employees is comparable in terms of its function and structure to the scheme applicable in Germany.
- 27 In those circumstances, the Bundessozialgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Does the principle of [equal treatment] laid down in Article 39(2) EC (now Article 45(2) TFEU) and Article 3(1) of Regulation [No 1408/71] preclude a provision [of the national law of a Member State] under which a pre-condition for entitlement to an old-age pension following part-time work for older employees is that the part-time work for older employees must have been pursued under the legislation of that Member State, and not of another Member State?
- (2) If so, what requirements does the principle of equal treatment laid down in Article 39(2) EC ... and Article 3(1) of Regulation No 1408/71 impose on the assimilation of part-time work for older employees completed under the legislation of the other Member State as a pre-condition for entitlement to a national old-age pension?
- (a) Is a comparative examination of the conditions for part-time work for older employees needed?
- (b) If so, is it sufficient that the part-time work for older employees in both Member States is essentially the same in content, in terms of its function and structure?
- (c) Or must the conditions for part-time work for older employees in both Member States be identical in content?’

## Consideration of the questions referred

### Question 1

- 28 In order to answer the first question, it should be noted that, as regards freedom of movement for workers, the principle of non-discrimination laid down in Article 45 TFEU was implemented, in relation to social security for migrant workers, by Article 3(1) of Regulation No 1408/71.
- 29 Since it is not disputed that benefits such as those at issue in the main proceedings fall within the scope of Regulation No 1408/71, the questions referred must be considered in the light of that regulation and, more specifically, in the light of Article 3(1) thereof.
- 30 As the Court has consistently held, the object of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 45 TFEU, equal treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from national legislation of the Member States (see, *inter alia*, judgments in *Mora Romero*, C-131/96, EU:C:1997:317, paragraph 29; *Borawitz*, C-124/99, EU:C:2000:485, paragraph 23; and *Celozzi*, C-332/05, EU:C:2007:35, paragraph 22).
- 31 It is also settled case-law that the principle of equal treatment, as laid down in Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (judgment in *Celozzi*, EU:C:2007:35, paragraph 32).
- 32 The Court has accordingly ruled that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, judgments in *O'Flynn*, C-237/94, EU:C:1996:206, paragraph 20; *Meints*, C-57/96, EU:C:1997:564, paragraph 45; *Borawitz*, EU:C:2000:485, paragraph 27; and *Celozzi*, EU:C:2007:35, paragraph 26).
- 33 It is not necessary, in that respect, to establish that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect (see, to that effect, judgments in *O'Flynn*, EU:C:1996:206, paragraph 21; *Öztürk*, EU:C:2004:232, paragraph 57; and *Celozzi*, EU:C:2007:35, paragraph 27).
- 34 In the present case, it is common ground that the national legislation at issue in the main proceedings applies without regard to the nationality of the workers concerned or their place of residence and does not contain any clause relating to a compulsory stay in the national territory. Accordingly, that legislation does not, by itself, establish any overt difference in treatment between national workers and workers from another Member State.
- 35 It should be noted that, as the Advocate General pointed out in paragraphs 40 to 43 of his Opinion, in so far as the legislation at issue requires a worker who intends to apply for an old age pension following participation in a part-time work scheme for older employees to have participated in such a scheme exclusively under German law, it is liable to disadvantage workers who have exercised their right to freedom of movement.



- 36 First, that legislation places a migrant worker like Mr Larcher, who, having spent most of his working life in one Member State, is employed in another Member State in which he participates in a part-time work scheme for older employees, in a less favourable position, on that account, as compared with a worker who has spent his entire working life in one Member State and participates there in a pre-retirement scheme of that nature.
- 37 Second, as the Advocate General observed in point 45 of his Opinion, such legislation is likely to deter employers established in a Member State other than the Federal Republic of Germany from hiring, under their national part-time work scheme for older employees, a person who has spent much of his working life in Germany, if the rules governing the national scheme are different from those governing the German part-time work scheme for older employees.
- 38 In those circumstances, it is still necessary to determine whether such national legislation may nevertheless be justified. In that regard, according to the Court's settled case-law, national measures of the kind at issue in the main proceedings may be allowed only if they pursue a legitimate objective in the public interest, they are appropriate to ensuring the attainment of that objective, and they do not go beyond what is necessary to attain the objective pursued (see, inter alia, judgment in *van den Booren*, C-127/11, EU:C:2013:140, paragraph 45).
- 39 As the referring court pointed out, the legislation at issue is intended, first, to ensure that the transition to retirement, for employees who request this, is as smooth as possible and, second, to encourage the recruitment of apprentices or people who are unemployed.
- 40 While it is true, as the Advocate General observed in point 48 of his Opinion, that those two objectives, which are inextricably linked in this case, can be regarded as legitimate objectives of social policy (see, to that effect, judgments in *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 64, and *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraphs 50 and 51), it is still necessary to determine whether the national measures at issue in the main proceedings are appropriate to ensuring the attainment of those objectives and do not go beyond what is necessary to do so.
- 41 Although the measures are indisputably necessary to ensure the attainment of the objectives pursued, it is nevertheless appropriate to hold that, since they require the participation in a part-time work scheme for older employees to have taken place exclusively in accordance with German law and preclude entitlement to an old-age pension following participation in such a scheme in the case of workers who engaged in part-time work for older employees under a scheme governed by the provisions in force in another Member State, they go beyond what is necessary to attain those objectives.
- 42 As the German Government itself concedes in its written observations, the outright exclusion from consideration, for the purposes of assessing entitlement to the German national retirement pension, of participation in a part-time work scheme for older employees in another Member State reflects failure to have regard to the fact that such a scheme in that other Member State may pursue identical or similar objectives to those of German law, in accordance with rules which are also identical or similar to those under German law, and that, accordingly, the application of that scheme is likely to attain, in the same way, the legitimate objective or objectives in question.
- 43 It follows that Article 3(1) of Regulation No 1408/71 precludes national legislation such as that at issue in the main proceedings if it is construed and applied in the manner described by the referring court, in the wording of Question 1, in particular.

- 44 However, it should be recalled that, when applying domestic law, national courts are required to interpret that law, in so far as is possible, in a manner consistent with EU law in order to ensure, for matters within their jurisdiction, the full effectiveness of EU law when they determine the disputes before them (see, to that effect, inter alia, judgment in *C-397/01 to C-403/01 Pfeiffer and Others*, EU:C:2004:584, paragraphs 113 and 114).
- 45 Accordingly, if — as the referring court maintains — it is possible to construe the provisions of national law at issue in the main proceedings as not precluding payment of the old-age pension following participation in a part-time work scheme for older employees where participation in such a scheme took place under the law of another Member State, the principle that national law must be interpreted in conformity with EU law requires national administrative and judicial authorities to adopt that interpretation.
- 46 In the light of all those considerations, the answer to Question 1 is that the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71 precludes legislation of a Member State under which entitlement to an old-age pension following participation in a part-time work scheme for older employees is conditional on that scheme having taken place under the laws of that Member State.

#### *Question 2*

- 47 By its second question, the referring court asks, in essence, whether the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71 must be interpreted as meaning that, for the purposes of the recognition in a Member State of participation in a part-time work scheme for older employees which took place in accordance with the legislation of another Member State, it is necessary to undertake a comparative examination of the conditions for the application of the part-time work schemes for older employees under the legislation of those two Member States; and, if so, how similar those schemes must be.
- 48 In order to answer that question, it should be borne in mind that the system put in place by Regulation No 1408/71 is merely a system of coordination, concerning, inter alia, the determination of the legislation applicable to employed and self-employed persons who make use, in various circumstances, of their right to freedom of movement and that it is inherent in such a system that the conditions to which entitlement to a retirement pension is subject differ depending on the Member State (see, to that effect, judgment in *Tomaszewska*, C-440/09, EU:C:2011:114, paragraphs 25 and 26).
- 49 However, when laying down those conditions, Member States must ensure the equal treatment of all workers occupied on their territory as effectively as possible and not penalise workers who exercise their right to freedom of movement (see, to that effect, judgments in *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 19; *Nikula*, C-50/05, EU:C:2006:493, paragraph 20; and *Derouin*, C-103/06, EU:C:2008:185, paragraph 20).
- 50 Although, as is clear from paragraphs 41 to 43 above, Article 3(1) of Regulation No 1408/71 precludes a Member State from systematically refusing to take into account, for the purposes of the granting of a retirement pension in its territory, participation in a part-time work scheme for older employees which took place under the laws of another Member State, that provision does not require the former Member State to recognise automatically participation in such a scheme as equivalent to participation in a part-time work scheme for older employees under its own national legislation.
- 51 Any interpretation of that provision as compelling Member States to treat such schemes automatically as equivalent would in effect deprive them of their competence in the field of social protection.

- 52 It follows that the national authorities must undertake a comparative examination of the two part-time work schemes for older employees in question.
- 53 In so far as the primary purpose of that examination by the authorities of a Member State is to assess whether the conditions for the application of a part-time work scheme for older employees under the legislation of another Member State achieve the legitimate objectives pursued in the former Member State by such a scheme, those authorities cannot require those conditions to be identical.
- 54 First, it is not inconceivable that the same objective can be achieved by various means and that, in consequence, the conditions for the application of a part-time work scheme for older employees differ as between those measures.
- 55 Second, if those conditions were required to be identical, the examination in question would *de facto* be deprived of all practical effect, since it seems unlikely that the legislative provisions of two Member States would be identical in all respects.
- 56 It should be noted that that interpretation of Article 3(1) of Regulation No 1408/71 is the only one consistent with the principle that Member States retain competence to determine the conditions for granting social security benefits, while at the same time ensuring equality of treatment for all workers occupied on the territory of a Member State by not penalising workers who are exercising or have exercised their right to freedom of movement.
- 57 As regards, more specifically, the assessment of the similarity of the different conditions, laid down in two separate Member States, for the application of their respective part-time work schemes for older employees, that assessment must be carried out on a case-by-case basis and minor differences with no significant impact on the achievement of the objectives cannot properly be relied upon as grounds for refusing to recognise that participation in such a scheme under the laws of another Member State is equivalent to participation in the national scheme.
- 58 It should be noted that, in the dispute before the referring court, it is common ground that the two pre-retirement schemes at issue have the same objectives, namely, to ensure a smooth transition to retirement for workers and to encourage recruitment of apprentices or people who are unemployed, and that the conditions for the application of those schemes are very similar, since the reduction in working time provided for under the German scheme is 50% and that provided for under the Austrian scheme is from 40% to 60%. A difference of 10% in the hours worked is not significant enough to compromise attainment of the social policy objectives pursued by the AltTZG.
- 59 In the light of all the foregoing considerations, the answer to Question 2 is that the principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71 must be interpreted as meaning that, for the purposes of the recognition in a Member State of participation in a part-time work scheme for older employees which took place in accordance with the legislation of another Member State, it is necessary to undertake a comparative examination of the conditions for the application of such schemes under the legislation of those two Member States, in order to determine on a case-by-case basis whether the differences identified are liable to compromise attainment of the social policy objectives pursued by the legislation at issue in the former Member State.

### **Costs**

- 60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

- 1. The principle of equal treatment laid down in Article 3(1) of 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, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, precludes legislation of a Member State under which entitlement to an old-age pension following participation in a part-time work scheme for older employees is conditional on that scheme having taken place exclusively under the laws of that Member State.**
- 2. The principle of equal treatment laid down in Article 3(1) of Regulation No 1408/71, as amended and updated by Regulation (EC) No 118/97, as amended by Regulation No 1992/2006, must be interpreted as meaning that, for the purposes of the recognition in a Member State of participation in a part-time work scheme for older employees which took place in accordance with the legislation of another Member State, it is necessary to undertake a comparative examination of the conditions for the application of such schemes under the legislation of those two Member States, in order to determine on a case-by-case basis whether the differences identified are liable to compromise attainment of the social policy objectives pursued by the legislation at issue in the former Member State.**

[Signatures]