occupation hitherto pursued by the person concerned, that entitlement is to be determined by taking account only of activities subject to compulsory insurance under German legislation.

Although that provision applies regardless of the nationality of the worker concerned, it works, when combined with the provisions of the German legislation, to the disadvantage of migrant workers coming from Member States other than Germany who have been employed successively in those States and in the Federal Republic of Germany because it prevents them from obtaining recognition, for the purposes of entitlement to a pension, of a qualification obtained in another Member State which is higher than that which they have in the Federal Republic of Germany. Since it is not of such a nature as to guarantee the equal treatment required by Article 48 of the Treaty, such a provision has no place in the coordination of national laws provided for in Article 51 of the Treaty in order to promote freedom of movement for workers in the Community.

REPORT FOR THE HEARING
delivered in Case 20/85 *

1. Facts and written procedure

The main action in this case concerns the extent to which one should take into account the occupation hitherto pursued by an insured person when the periods of insurance required for entitlement to a pension have not been completed solely in respect of activities subject to compulsory insurance under German legislation. The problem arose in a case concerning entitlement to a pension for occupational invalidity or incapacity for work.

Mr Roviello, the plaintiff in the main action, is Italian. He never learned a trade. He claims to have worked as a tiler from 1960 to 1974 in Italy, where he was covered by a compulsory insurance scheme and where he subsequently became self-employed. He did the same work in the Federal Republic of Germany from 4 May 1976 to June 1980, with some interruptions, for a period of 48 months in all, and was covered by a compulsory insurance scheme.

His application for a pension for occupational invalidity or incapacity for work was rejected by the competent German institution, the defendant in the main action, on the ground that he could still carry out full shifts of light work involving sitting, walking and standing alternately. His action challenging that decision was unsuccessful both at first instance and on

* Language of the Case: German.

appeal. He thereupon appealed on a point of law to the Bundessozialgericht.

Paragraph 1246 (2) of the Reichsversicherungsordnung (German Social Insurance Code) provides that an insured person is considered to have occupational invalidity if his capacity for work is reduced by at least half. In this context, the activities which one should take into account to assess the working capacity of an insured person include 'all activities corresponding to the insured person's capacity and his abilities which may be required of him, taking into account the length and nature of his training as well as the occupation hitherto pursued and the particular requirements of that occupation'. Paragraph 1246 (3) provides that an insured person is entitled to an occupational invalidity pension if his last occupation was subject to obligatory insurance and he has completed a total period of 60 months' insurance. In this case, the plaintiff had completed only 48 months of insurance in Germany.

Point 15 of Section C of Annex VI to Regulation No 1408/71 (hereinafter 'point 15') was inserted in that regulation by Regulation No 2000/83 of the Council of 2 June 1983 amending Regulation No 1408/71 (Official Journal L 230, p. 1), and reads as follows:

'Where under German legislation account must be taken of the occupation hitherto pursued by the person concerned for the purpose of determining his entitlement to a pension in respect of occupational invalidity or incapacity for work, or a miner's pension in respect of a reduction in his capacity to work as a miner, or a miner's pension in respect of occupational invalidity or incapacity for work, that occupation shall be determined by taking account only of insurable activities under German legislation.'

It appears from the file that the German courts have established in social security cases a system of classification for assignment to another activity. Four categories of worker have been defined: foreman and highly skilled worker, skilled worker, semi-skilled worker and unskilled worker.

In accordance with that scheme, an insured person may be assigned only to a job at the level immediately below his own. An occupational invalidity pension may only be refused, therefore, if the insured person may lawfully be assigned to an activity directly below the occupation he has hitherto pursued.

It appears from the order making the reference that entitlement to an occupational invalidity pension depends on whether it is possible to assign the plaintiff to another activity to which he is suited. Determination of the occupation hitherto pursued is thus important in order to determine whether the plaintiff must be regarded as a skilled or a semi-skilled worker.

According to the order making the reference, the Bundessozialgericht was in doubt as to whether entitlement was based solely on activities insured under German law, activities pursued under a compulsory insurance scheme in other countries not being taken into consideration. In that case, the insurance periods could not be

cumulated, at least in so far as entitlement derived from the occupation hitherto pursued.

By an order of the Fourth Senate of 28 November 1984, the Bundessozialgericht decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) For the purpose of determining entitlement to an occupational invalidity pension, is Point 15 of Section C in Annex VI of Regulation No 1408/71, as amended by Regulation (EEC) No 2000/83 (Official Journal L 230, 22.8.1983, p. 1) and by Regulation (EEC) No 2001/83 (Official Journal L 230, 22.8.1983, p. 6), to be interpreted as meaning that account must be taken of the occupation hitherto pursued by an insured person only where the periods of insurance necessary for the acquisition of entitlement to that pension were completed solely in activities subject to compulsory insurance under German legislation?

(2) If the first question is answered in the affirmative, is Point 15 also applicable to contingencies which materialized before the rule entered into force (1 July 1982)?

(3) If the second question is answered in the negative, does it follow from Point 15 that entitlement to a pension which arises as a result of the materialization of such a contingency but which has not yet been established must be restricted to the period prior to the date on which the rule entered into force (1 July 1982)?'

The order of the Bundessozialgericht was lodged at the Registry of the Court on 24 January 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by the plaintiff, represented by K. Leingärtner and Werner Elsner, Agents, of the Legal Service of the Deutsche Gewerkschaftsbund Kassel; by the defendant, represented by W. Wanders, Manager, of the Landesversicherungsanstalt Schwaben; and by the Commission of the European Communities, represented by Norbert Koch, Legal Adviser, acting as Agent, assisted by Bernd Schulte, of the Max-Planck-Institut für ausländisches und internationales Sozialrecht, Munich.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry. However, it asked the Commission to reply to a question concerning the validity of Point 15 as regards form, an issue to which the Bundessozialgericht referred but on which it did not ask the Court of Justice to rule.

By letter of 28 February 1986, the Commission replied that Regulation No 2000/83 was based primarily on Articles 51 and 235 of the EEC Treaty. The two provisions required a unanimous vote; according to Article 235, the Parliament must be consulted. According to the information at its disposal, the proposal for an amending regulation, approved by the

Parliament on 11 March 1983, contained only Point 14 of Annex VI, Section C. Point 15 was proposed at a later stage — in January 1983 — by the German delegation, sitting in the Social Questions Group of the Council, together with amendments proposed by other delegations for insertion in the text of the regulation. The proposed amendments were approved by the Working Group of the Council on 25 April 1983 and by the Committee of Permanent Representatives on 27 May 1983, and were adopted unanimously on 2 June 1983 by the Council together with the rest of the text of the regulation.

The Commission considers that Point 15 was adopted in compliance with the essential procedural requirements. Article 235 of the EEC Treaty does not require the Parliament to be heard on all points of detail in a proposal for a regulation in their entirety in their definitive form. Such a condition would considerably burden the legislative procedure. When the Council consults the Parliament on a proposal for a regulation and then alters the text, it should not have to consult it again if the modification does not substantially alter the proposed regulation considered as a whole (judgment of 15 July 1970 in Case 41/69 *Chemiefarma* [1970] ECR 661, paragraphs 68 and 69). Point 15 is a technical provision designed to take account of the 'particularities' of the legal situation in the Federal Republic. Such 'particularities' must be taken into consideration by virtue of Article 89 of Regulation No 1408/71. The addition of Point 15 does not substantially alter the original text of the amending regulation.

By a decision of 4 March 1986 the Court decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the Second Chamber.

2. Observations lodged before the Court

The plaintiff states that if Point 15 must be interpreted as meaning that a migrant worker coming from one of the Member States of the Community may only obtain job insurance as a skilled worker if he has paid before the realization of the insurable risk at least 60 months of obligatory contributions in the Federal Republic of Germany, or in the territory covered by the German social security code, the provision in question should be declared void on the ground that it is incompatible with Articles 7 and 51 of the EEC Treaty.

As regards the technical validity of Point 15, the plaintiff asks whether it constitutes a legal provision capable of giving rise to effects which those charged with applying the law are consequently bound to respect. He observes that in the order making the reference, the Bundessozialgericht states that according to the information at its disposal, Point 15 was not adopted following a proposal of the Commission, as required by Article 235 of the EEC Treaty. The plaintiff concludes that a provision may not be validly adopted if the Commission has not made a proposal and if the Parliament has not been consulted.

Even if Point 15 was adopted in the required form, the plaintiff maintains that it must be annulled on substantive grounds. The provision is contrary to Articles 7 and

51 of the EEC Treaty. Its aim is incompatible with those articles. It has the effect of limiting the scope of the national legislation on pensions to such an extent that workers coming from other Member States have in principle no entitlement to an occupational invalidity pension during the first 59 months of their employment in the Federal Republic of Germany, even if the minimum period of 60 months of affiliation may be considered to have been completed, taking into account insurance periods completed in other Member States. Workers coming from other Member States would thus be disadvantaged and discriminated against in comparison with German nationals and foreigners who are citizens of States with which the Federal Republic of Germany has concluded social security agreements. German law does not provide for a preliminary insurance period in order to acquire job insurance and to limit the risk of being required to carry out unskilled work, unrelated to the occupation hitherto pursued.

In order to be regarded as a skilled worker, German law does not require one to have carried out at least 60 months of obligatory contributions in that capacity; on that point the plaintiff refers to the case-law of the Fourth Senate of the Bundessozialgericht, in which the Senate endorsed that view in the case of a German who had been employed as a skilled worker covered by the compulsory insurance scheme only for 35 months and also in the case of a Yugoslav who could only satisfy the condition of at least 60 months of affiliation if his periods of insurance in Yugoslavia were taken into account. The Fifth Senate of the Bundessozialgericht has also held that, for the purposes of Paragraph 1246 (2), the reference to the 'occupation hitherto pursued' by a foreigner does not mean that only an occupation pursued in the Federal Republic of Germany for a period of 60 months may be regarded as skilled work, but only that when the insured last pursued his occupation it was not merely temporarily. In that case, if Point 15 were to apply, workers from other Member States would, as regards the determination of the occupation hitherto pursued, be treated less favourably than foreigners from States with which the Federal Republic of Germany has concluded a social security agreement. In the absence of Point 15, the plaintiff's claim could not be rejected on the ground that he had not yet paid 60 months of obligatory contributions, as a skilled worker, in the Federal Republic of Germany.

The plaintiff proposes that the Court reply to the first question put by the Bundessozialgericht in the following manner:

'Annex VI, Section C, Point 15 of Regulation No 1408/71 of the Council, as amended by Regulation No 2000/83 (Official Journal L 230, 22.8.1983, p. 1) and by Regulation No 2001/83, (Official Journal L 230, 22.8.1983, p. 6) is void because it is incompatible with Articles 7 and 51 of the EEC Treaty. Where entitlement to an occupational invalidity pension under German law is determined exclusively on the basis of the occupation hitherto pursued, it cannot be required that the period of insurance necessary for entitlement (the qualifying period) have been completed solely in activities covered by compulsory insurance under German law.'

The defendant contends that the question whether the risk of invalidity or incapacity for work has materialized in the case of the plaintiff might become irrelevant if it were found that the 60 months of insurance necessary for the award of the pension had not been completed. The 60 months of insurance could be considered to be completed if one cumulated the insurance period completed under the German social security system with those completed under the Italian social security system. According to the defendant, the Bundessozialgericht doubts in this case that it is possible to cumulate the insurance periods on the basis of Article 45 of Regulation No 1408/71.

The defendant considers that Point 15 is not an obstacle to the cumulation of the insurance periods. The activities subject to compulsory insurance under German law are the sole criterion only as regards the determination of the occupation hitherto pursued, and not as regards the examination of the requisite insurance period. If Point 15 were to apply equally to the cumulation of insurance periods, it would be contrary not only to Article 45 of Regulation No 1408/71, but also to Article 51 of the EEC Treaty. The defendant proposes that the Court reply to the first question put by the Bundessozialgericht as follows:

'Annex VI, Section C, Point 15 of Regulation No 1408/71 of the Council, as amended by Regulation No 2000/83 and by Regulation No 2001/83, must be interpreted, for the purposes of determining entitlement to a pension for occupational invalidity, as meaning that the occupation hitherto pursued by an insured person should be taken into account not only when the insurance periods required for entitlement have been completed solely in activities subject to compulsory insurance under German legislation, but also when there is need to take into account activities subject to compulsory insurance in other Member States and the period of insurance necessary for entitlement to a pension is obtained by cumulation.'

The defendant maintains that 'the occupation hitherto pursued' referred to in Point 15 is determinative only as regards whether there exists in the plaintiff's case occupational invalidity or general incapacity for work within the meaning of the German pension scheme. It is clear, in the present case, that one should take into account as the occupation hitherto pursued only the occupation pursued by the plaintiff in Germany. The only point at issue is to determine at what level he pursued that occupation and whether, taking into account his remaining capacity, he may still be required to work or whether he may benefit from job insurance in order to prevent him from being disadvantaged on the social level. That question may be decided only on the basis of German law. Community law contains no provision which is different to or complementary to national law.

The defendant states that in 1978 a Senate of the Bundessozialgericht held that one should take into account, for the determination of the occupation hitherto pursued, activities carried out abroad. In order to comply with that and yet avoid the difficulties entailed in assessing activities carried out abroad on the basis of the criteria

applicable in Germany, the German pension institutions asked the German Federal Minister of Labour to clarify matters, which led to the insertion of Point 15 in Regulation No 1408/71. Point 15 is merely a clarification and has modified neither German nor Community law. As a consequence, the cumulation of insurance periods for the acquisition of entitlement to an invalidity pension or a pension for incapacity for work is admissible and mandatory, regardless of whether the risk of general incapacity for work or occupational invalidity occurred before or after the adoption of Point 15. The law applicable by virtue of Regulation No 1408/71 is in each case the same. Therefore, according to the defendant, it is not necessary to reply to the other questions put by the national court.

The Commission states, after making certain observations on the relevant parts of the German social security system, that according to Article 45 (1) of Regulation No 1408/71, the competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional on the completion of periods of insurance or residence must take into account, to the extent necessary, periods of insurance or residence completed under the legislation of any Member State as if they were periods completed under the legislation which it administers. In accordance with that provision, when applying the criterion of the 'occupation or activity subject to compulsory insurance' for the purposes of Paragraph 1246 (2a) the competent German institution should take into account the periods of employment subject to compulsory insurance completed in another Member State; the same must apply as regards the periods of insurance required for completion of the 'qualifying period' referred to in Paragraph 1246 (3).

In that context, the question arises whether, for the determination of entitlement to an occupational invalidity pension within the meaning of Paragraph 1246, it is possible, in view of the special nature of that category of pension, to consider separately the 'activities subject to compulsory insurance by virtue of German law' and the periods of insurance completed in other Member States which must be taken into account by virtue of Community law (Article 45 of Regulation No 1408/71), purely for the purposes of national law. That approach could be based on the decisive criterion for the existence of job insurance, that is, the 'occupation hitherto pursued', a criterion which would then justify a corresponding 'national' restriction.

The Court of Justice has already examined the question whether, apart from the completion of insurance periods and qualifying periods which must be taken into account irrespective of the Member State in which they were completed, there were other conditions to which this Community restriction did not apply. In its judgment of 9 July 1975 in Case 20/75 *D'Amico* [1975] ECR 891, the Court recalled the principle set out in Article 51 of the EEC Treaty according to which migrant workers must be permitted 'to acquire the right to benefit for all periods of employment or periods treated as such which have been completed by him in various Member States, without discrimination' compared with 'other workers by reason of the exercise of his right to freedom of movement'. The

Commission maintains that the Court nevertheless admitted in that decision an exception to the principle, permitting national legislation to make the right to an early retirement pension subject, apart from the condition of reaching a certain age-limit and the completion of a certain period of affiliation, to a supplementary independent condition, that is that the insured person be unemployed for a certain time. The Court held that in such a case, Community law did not require the fact that the insured person was registered as unemployed in another Member State to be taken into account. That interpretation was justified because unemployment benefits, unlike other benefits, are closely linked to the Member State in which the risk — unemployment — occurs.

On the other hand, the criterion of 'the occupation hitherto pursued' applied with regard to the German occupational invalidity pension concerns a sector of social security where there does not exist a similar basis to justify that geographical link. Thus, the fact that German law confers, by granting job insurance, an advantage not necessarily reciprocated in other Member States of the Community does not justify its restriction to 'the occupation hitherto pursued' in the Federal Republic of Germany. It places migrant workers at a disadvantage compared to workers employed only in the Federal Republic of Germany in so far as, although they have pursued an activity which is covered by job insurance in that country, they may be refused the legal consequences which result therefrom at the social security level for the sole reason that they have not completed the period of insurance necessary for entitlement to a pension exclusively in employment subject to compulsory insurance under German legislation. Thus, in order to benefit from the job insurance provided by German pension legislation, the migrant worker in question would have to have pursued an activity subject to compulsory insurance for a longer time than workers employed only in the Federal Republic of Germany.

Such different treatment is not admissible in Community law. On the contrary, for the German occupational invalidity pension, as in the law concerning pensions in general, one should take into account, to calculate the length of insurance, all insurance periods which have been completed in employment subject to compulsory insurance under the legislation of another Member State. In conformity with Article 45 (1) of Regulation No 1408/71, the competent German institution should thus take into account insurance periods completed under the legislation of another Member State for the calculation of the qualifying period giving rise to entitlement to an occupational invalidity pension as if they were periods completed in Germany. As a result, the qualifying period required in Germany in order to obtain an occupational invalidity pension by virtue of Paragraph 1246 (3) could be completed, *inter alia*, by cumulating the periods completed in other Member States: the application for an occupational invalidity pension must in that case be granted.

The Commission states that before the entry into force of Point 15, the Bundessozialgericht considered that the German qualifying period could be completed by taking into account periods of insurance completed in another Member State and that the

activity pursued in that country during that period of insurance could be regarded as the 'occupation hitherto pursued' or the 'principal occupation'. The Bundessozialgericht had also considered that even when the 'occupation hitherto pursued' in another Member State was taken into account, the conditions for granting an occupational invalidity pension must be considered only in the light of German legislation if the occupation pursued by a migrant worker in another Member State was recognized as the 'occupation hitherto pursued' or the 'principal occupation' only when it was assimilated to a 'principal occupation' and was remunerated as such, on the basis of criteria in force in the corresponding German trade or business, because only then could it be regarded as equivalent to the corresponding German occupation.

The Commission states that in conformity with that case-law, it was necessary, depending on the case, for the level of the work performed in another Member State, in particular the required knowledge and aptitude and their classification on a corresponding German scale, to be duly established. Since a large number of migrant workers came from countries in which the level of training and the conditions for pursuing an occupation did not correspond to those of the Federal Republic of Germany, it frequently came about that the equivalence of the occupation hitherto pursued in another Member State with the corresponding German 'principal occupation' was denied on those substantive grounds. In any event, such cases sometimes required long and difficult enquiries abroad.

The insertion of Point 15 in Regulation No 1408/71 should be regarded as a reaction to the previous case-law of the Bundessozialgericht. Consideration only of the principal German occupation, even taking into account the insurance periods completed in other Member States, could enable the problems connected with establishing the equivalence of an occupation pursued in another Member State with a German 'principal occupation' to be avoided. In addition, that method avoided the delays to which the enquiries into equivalence gave rise in the procedure for granting pensions.

The note of the German authorities of 18 November 1980 to the Administrative Commission of the European Communities for the Social Security of Migrant Workers concerning the application of Regulations Nos 1408/71 and 574/72, as well as the determination of what constitutes the principal occupation in the procedure for granting a pension confirm the political and legal context surrounding the insertion of Point 15 in Annex VI, Section C of Regulation No 1408/71.

The Commission states that in view of the difficulties which gave rise to the insertion of Point 15 in Regulation No 1408/71, it would be wrong to base entitlement to an occupational invalidity pension solely on the insurance periods completed in the Federal Republic of Germany; however, independently of the cumulation of all the insurance periods completed in the different Member States, which is provided for in principle also in this case by Community law, there are practical reasons for relying solely on the occupation pursued in the Federal Republic of Germany when determining the

nature of the 'previous occupation'. In conformity with Point 15, one should thus, when determining the 'previous occupation' within the meaning of Paragraph 1246 (2), consider only the occupation pursued in the Federal Republic of Germany, even when entitlement to a pension itself may be established only by cumulating all the periods completed in the Member States. The provision excludes only consideration of the occupation pursued in other Member States for the purposes of determining the 'previous occupation' and the 'occupation of reference'.

As regards the second and third questions, if the Court decides not to follow the interpretation proposed by the Commission it should determine whether the rules introduced by Point 15 constitute the codification, for classification purposes, of an existing legal situation or whether they are entirely new provisions as regards their subject-matter.

According to the Commission's analysis concerning the first question put by the Bundessozialgericht, they are new provisions which replace the system which hitherto consisted in taking into account activities pursued in other Member States for the determination of the 'previous occupation' within the meaning of Paragraph 1246 by a provision permitting in future only the occupation pursued in the Federal Republic of Germany to be taken into account. The new provisions thus had a constitutive effect, which they would keep even if it followed that it was necessary to take into account not only 'the occupation hitherto pursued' in the Federal Republic of Germany but also exclusively the insurance periods which were completed there.

However, in so far as these new provisions bring about a deterioration in the legal situation of migrant workers by withdrawing from them the right to the cumulation of insurance periods completed in the Member States, as only the period of insurance carried out in Germany is now taken into account, the risks arising before 1 July 1982, that is before the entry into force of the new regulation, should not be covered by it. The reply to the second question put by the Bundessozialgericht should therefore be that the rule set out in Point 15 of Regulation No 1408/71 should not be applied to risks which arose before its entry into force in so far as this would make it more difficult for migrant workers to obtain an occupational invalidity pension. As regards the third question put by the Bundessozialgericht, the reply should be that in applying *mutatis mutandis* the approach embodied in Articles 118 and 119 of Regulation No 574/72, the restriction of insurance periods giving rise to entitlement to an occupational invalidity pension to those which were completed in Germany may not have the effect of limiting entitlement to a pension resulting from a risk which occurred before the entry into force of the new rule provided for by Point 15 of Regulation No 1408/71 to the period prior to that date, thereby placing the worker concerned in a less favourable position than that which was assured to him by the Community law previously in force. The principle which underlies those provisions is the protection of acquired rights which is guaranteed by Community law, in particular by the interpretation which it is given by the consistent case-law of the Court, irres-

pective of whether that right finds its origin in Community law or in the domestic law of the Member State.

The Commission proposes that the Court reply to the questions put by the Bundessozialgericht as follows:

'Annex VI, Section C, Point 15 of Regulation No 1408/71 of the Council, as amended by Regulations Nos 2000/83 and 2001/83 should, for the purpose of determining entitlement to an occupational invalidity pension, be interpreted as meaning that the "previous occupation" pursued by the insured person in the Federal Republic of Germany should be relied upon not only when the period of insurance required for entitlement to arise has been completed solely in activities subject to compulsory insurance under German legislation but also when it is necessary to take into account activities subject to compulsory insurance carried out in other Member States, and when the period of insurance required for entitlement results from the cumulation of the periods considered.'

3. Oral procedure

At the sitting on 24 April 1986, Mr Roviello, represented by K. Leingärtner, and the Commission of the European Communities, represented by B. Schulte, presented oral argument.

The Advocate General delivered his Opinion at the sitting on 22 January 1987.

4. Subsequent procedure

By decision of 11 February 1987 under Article 95 (4) of the Rules of Procedure, the Court (Second Chamber), after hearing the views of the Advocate General, referred the case to the Full Court.

By a decision of the same date, the Court, after hearing the views of the Advocate General, decided, under Article 61 of the Rules of Procedure, to reopen the oral procedure. To that end, it called upon the Council, the Commission and the Parliament to submit written observations by 20 March 1987 on the question of the validity of Point 15, in particular whether it was adopted in accordance with procedural requirements. The replies of those institutions were received at the Court Registry on 20 March 1987.

The Council confirmed the arguments as to validity in regard to form already put forward by the Commission. The Council submitted to the Court the report of the Social Questions Group dated 30 March 1983 concerning Point 15.

The Council considered that Point 15 was adopted in accordance with procedural requirements.

Those requirements are laid down in Articles 51 and 235 as follows:

Proposal from the Commission (Articles 51 and 235);

Consultation of the European Parliament (Article 235);

Unanimous adoption by the Council (Articles 51 and 235).

In this case, Article 235 was the legal basis of the amending regulation only in so far as it applied to self-employed persons. However, Article 51 constitutes a sufficient legal basis for the rules applying to employed persons.

The first and third conditions are manifestly fulfilled. With regard to consultation of the Parliament, the Council puts forward the following arguments. That requirement does not presuppose that the Parliament must be consulted on the definitive form of all the elements contained in all the points included in a proposed regulation. Such a requirement would make the legislative procedure much too cumbersome. When the Council has consulted the Parliament on a draft regulation and subsequently proposes to modify the wording thereof, it is not obliged to consult the Parliament again if that modification does not affect the substance of the draft regulation considered as a whole (judgment of the Court of 15 July 1970 in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 68 and 69) or where the changes made are of method rather than of substance (judgment of the Court of 4 February 1982 in Case 1253/79 *Battaglia* v *Commission* [1982] ECR 297).

The procedures for implementing the legislation of certain Member States, contained in a special annex (in this case, Annex VI) in accordance with the provisions of Article 89 of Regulation No 1408/71, do not in general constitute provisions which affect the substance of the regulation and therefore also do not affect alterations thereof, which means that there is no need to consult the European Parliament again. However, the Council does not exclude the possibility that a 'special feature of the legislation of the Member States' might infringe the principles of Community law concerning the coordination of social security legislation and thus affect the substance of the regulation, with the result that the European Parliament would once again have to be consulted. That is not the case, however, in regard to Regulation No 2000/83, since the Council 'made use of that alteration to resolve certain other problems' connected with national legislation on social security, and in that connection the Council refers to the judgment of the Court of 9 December 1982 in Case 309/81 *Klughardt* v *Hauptzollamt Hamburg-St Annen* [1982] ECR 4291.

The European Parliament refers to the numerous resolutions and reports of its competent committees in which the question of further consultation of the Parliament was considered. According to the Parliament, it may be inferred from the proposals adopted up to the present by it that further consultation is necessary when:

(1) the Commission proposal or Council measure envisaged contains a material alteration of the proposal on which the Parliament has expressed its view;

(2) that alteration is not manifestly in accordance with the wishes of the Parliament.

In practice, the existence of a 'material alteration' may be evidenced by the following factors:

(a) *Alteration in the subject-matter* (Alterations concerning the purpose and scope

of the measure or the persons to whom it is addressed, the beneficiaries of it or the persons affected by it);

(b) *Alteration in the nature of the measure* (Alterations in the 'legal technique', for example, transfer of implementing powers, authorization accompanied by limitations or a prohibition with exceptions, an exhaustive list of conditions or a list containing examples thereof);

(c) *Alteration in the form of the measure* (Alterations in legal form, of the legal basis, alteration of a measure in force or a new version, alteration of the period of validity).

The Parliament refers to the judgments of the Court of 15 July 1970 (Case 41/69 *Chemiefarma*) and 4 February 1982 (Case 1253/79 *Battaglia*), cited above, in which the Court stated that the Parliament must be consulted again when a substantive modification has been made to a proposal on which it has already expressed its opinion.

The second paragraph of Article 149 of the EEC Treaty provides that the Commission may alter its original proposal 'in particular where the Assembly has been consulted on that proposal'. The Commission must therefore take account of the Parliament's opinion when it alters its initial proposal. It may be concluded that if alterations going beyond the initial proposal are subsequently made, the Parliament must once again be consulted in order to ensure its effective participation in the legislative process.

None the less, the problem of reconsultation also arises if the alteration of the proposal does not formally emanate from the Commission but was envisaged by the Council acting unanimously under the first paragraph of Article 149 of the EEC Treaty. The right of the Parliament to participate in the legislative process of the Community cannot depend on whether the Commission or the Council has made essential alterations to the initial proposal.

The Parliament notes that up to the present, it has not been the Council's practice to consult the Parliament again even though it has adopted similar criteria to the Parliament in regard to further consultation.

In this case, the Parliament approved the Commission's proposal of 21 December 1982 under the procedure without report (Rule 99 of the Rules of Procedure of the European Parliament). The choice of that simplified procedure indicates that the Parliament considered that the proposal in question constituted a mere updating of Regulation No 1408/71 since the alterations proposed were not of major legal importance and were purely technical in nature.

As the Commission's proposal indicated, the initial intention was to improve certain provisions in the light of the experience obtained in the implementation of Regulation No 1408/71, and in particular to take account of the additional advantages granted in the mean time by the social security schemes of the Member States.

By virtue of Point 15, the number of potential beneficiaries was considerably reduced compared to the Commission's proposal and to Community law as in force up to that time. Point 15 thus reversed the initially positive orientation of the Commission's proposal, which was designed to introduce improvements in favour of workers.

Since Point 15 altered the subject-matter of the regulation by restricting the scope thereof, that restriction constitutes an essential alteration of the Commission's proposal.

The Parliament rejects the argument to the effect that Point 15 is justified by its purely technical character. Although Article 89 of Regulation No 1408/71 makes it necessary to take account of certain special features in the social security legislations of the Member States, it merely authorizes a clarification of the rules by reason of the differences between the social security schemes of the Member States. It does not permit the Council to depart from Article 51 of the EEC Treaty in such a way as to restrict in a discriminatory manner the number of beneficiaries.

The new proposal adopted by the Council in no way corresponds to the wishes of the Parliament. If it had been aware of Point 15, the Parliament would have asked to be consulted again.

The alteration made by Point 15 was provided for neither expressly nor impliedly in the Commission's proposal. The Parliament therefore did not have an opportunity to consider that possibility in its debates and was thus prevented from expressing its opinion on that essential alteration.

The Commission refers to the judgment of the Court of 15 July 1970 in Case 41/69 (*Chemiefarma*), cited above, and examines the consultation procedure and the scope of the provisions at issue in that case.

In the present case, the Parliament considered the content of Regulation No 2000/83 exhaustively. In the context of that regulation, Point 15, inserted subsequently, dealt with a point of detail and was intended to resolve practical difficulties which arose in regard to the application of the occupational invalidity pension unique to the Federal Republic of Germany to migrant workers from other Member States of the Community. Those difficulties arose out of the case-law of the Bundessozialgericht. The consequence of that case-law was that the insurance institutions in the Federal Republic and, in case of dispute, the courts having jurisdiction in social security matters, were required to determine whether the activity pursued abroad complied largely with the German provisions concerning, *inter alia*, qualifications and rates of pay. Instead, the German insurance institutions had, until then, taken account in the application of Regulation No 1408/71 exclusively of the principal occupation previously pursued during the period of activity covered by the German insurance scheme. Consideration of the occupation pursued abroad which was also required by virtue of the case-law of the Bundessozialgericht proved to be an extremely long and complicated exercise since the rules governing occupations in the other Member States were not explicit in regard to the criteria which, under the German rules on invalidity insurance and old-age pensions, had to be employed to determine the

principal occupation. The proposal to insert Point 15 in Regulation No 1408/71 was intended to permit the German insurance institutions to continue to act as they had done up to that time, that is to say, to take account only of the principal occupation pursued in Germany.

A possible alternative solution would be the payment, in the cases under consideration, on behalf of the German institutions, of the benefits awarded by the insurance institutions of the other Member States, in accordance with the provisions of Community law, and to lay down criteria of comparison at least for the principal categories of occupation. However, that method would require major legislative action.

The Commission points out that occupational invalidity pensions have fallen in the Federal Republic of Germany. Only 10% of the total amount spent on pensions for a reduction in earning capacity is paid for occupational invalidity, the remaining 90% being paid for general incapacity to earn. Similarly, in 1978, occupational invalidity pensions represented 8% of the total of pensions paid for reduction of the capacity to earn whereas 92% of all pensions for reduction of capacity were pensions for incapacity to earn.

Having regard to the substantial reduction in the practical implications of the occupational invalidity pension scheme, Point 15 affects the determination of the previous occupation only by limiting that determination to activities pursued in the Federal Republic.

By contrast, the introduction of that provision was not intended to require that only activities subject to compulsory insurance under German law should be taken into account when the insurance institution is checking that the necessary insurance periods have been completed. It was to clarify that question that the Bundessozialgericht asked the Court to rule in this case. Limiting to periods completed in Germany the insurance periods which may be taken into consideration would in fact constitute a flagrant breach of Community law. The validity of Point 15 as such was not challenged by the Bundessozialgericht. The purpose of the national court was rather to determine the scope of the change introduced by Point 15. In particular, the Bundessozialgericht wished to obtain a reply to the question whether, by reason of that new provision, it was possible for only activities subject to compulsory insurance under German law to be taken into consideration when determining whether the necessary period of insurance (qualifying period) had been completed. The reply to that question, which should be in the negative, flows from the preparatory work which led to the insertion of Point 15 as well as from the scope and purpose of Regulation No 1408/71 and the objective of Article 51 of the EEC Treaty.

Point 15 therefore is intended to clarify the way in which must be determined the question whether the conditions for entitlement to an occupational invalidity pension are fulfilled when it is necessary to establish the exercise of activities subject to compulsory insurance under the legislations of other Member States. Point 15 is intended to eliminate the uncertainties resulting from the case-law developed by the Bundessozialgericht. The solution

adopted is to provide by inserting Point 15 in the regulation that the method which proved itself in the past to be the only practical one is to be applied. The only activities to be taken into consideration as a 'principal occupation' within the meaning of the German legislation on State invalidity insurance and old-age pensions are those covered by the German insurance scheme.

That method is not in contradiction with the principles of free movement laid down in the EEC Treaty or with the provisions of Regulation No 1408/71 which ensure their transposition, since it is manifestly the only way of achieving those aims on a practical level. In that sense, Point 15 is a provision which declares expressly that the method used up to that time in applying the principles of coordination laid down in Regulation No 1408/71 is applicable to the German legislation on occupational invalidity pensions. The Commission emphasizes that the beneficiaries of occupational invalidity pensions are mainly workers subject to compulsory insurance in respect of whom Article 51 of the EEC Treaty constitutes a sufficient legal basis in the context of an amendment of Regulation No 1408/71. It is only among the small number of voluntarily insured persons who receive an occupational invalidity pension that self-employed persons, in respect of whom reference has been made to Article 235 of the EEC Treaty, will also be found. The German statistics concerning pensions do not indicate whether (and, as the case may be, in what proportion) nationals of Member States of the European Communities form part of the latter category.

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