JUDGMENT OF THE COURT

15 January 2002 *

In Case C-55/00,

REFERENCE to the Court under Article 234 EC by the Tribunale ordinario di Roma (Italy) for a preliminary ruling in the proceedings pending before that court between

Elide Gottardo

and

Istituto nazionale della previdenza sociale (INPS)

on the interpretation of Articles 12 EC and 39(2) EC,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F. Macken and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward (Rapporteur),

* Language of the case: Italian.

A. La Pergola, L. Sevón, M. Wathelet, V. Skouris, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs Gottardo, by R. Ciancaglini and M. Rossi, avvocatesse,

— the Istituto nazionale della previdenza sociale (INPS), by C. De Angelis and M. Di Lullo, avvocati,

— the Italian Government, by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,

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

— the Commission of the European Communities, by P. Hillenkamp, E. Traversa and N. Yerrel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Gottardo, the Istituto nazionale della previdenza sociale (INPS), the Italian Government and the Commission at the hearing on 6 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 April 2001,

gives the following

Judgment

1 By order of 1 February 2000, received at the Court on 21 February 2000, the Tribunale ordinario di Roma (Rome District Court) referred for a preliminary ruling under Article 234 EC a question concerning the interpretation of Articles 12 EC and 39(2) EC.

2 That question has arisen in a dispute between Mrs Gottardo, a French national, and the Istituto nazionale della previdenza sociale (the Italian National Social Security Institute) ('the INPS') concerning Mrs Gottardo's entitlement to an Italian old-age pension.

Community law

3 Article 12 EC provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

4 Article 39(1) and (2) EC provides:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

5 The coordination of national social security legislation comes within the framework of the free movement of persons and is the subject 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 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10) ('Regulation No 1408/71').

6 Article 3 of Regulation No 1408/71 provides:

'1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States 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.

2. ...

3. Save as provided in Annex III, the provisions of social security conventions which remain in force pursuant to Article 7(2)(c) and the provisions of conventions concluded pursuant to Article 8(1) shall apply to all persons to whom this Regulation applies.'

7 Article 1(j), first subparagraph, and 1(k) of Regulation No 1408/71 provides:

'For the purposes of this Regulation:

...

(j) *legislation* means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a).

...

(k) *social security convention* means any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4(1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments'.

National legislation

8 On 14 December 1962 the Italian Republic and the Swiss Confederation signed in Rome a bilateral social security convention, together with its final protocol and joint declarations ('the Italo-Swiss Convention'). In the case of the Italian Republic, that convention was ratified by Law No 1781 of 31 October 1963 (GURI No 326 of 17 December 1963) and entered into force on 10 September 1964.

9 Article 1(1) of the Italo-Swiss Convention provides:

'This Convention shall apply:

(a) In Switzerland:

...

(b) In Italy:

(i) to legislation on invalidity insurance, old-age insurance and survivors' insurance, including the special schemes replacing the general scheme for specified categories of workers;

...'.

10 Article 2 of the Italo-Swiss Convention provides that 'Swiss and Italian nationals shall enjoy equal treatment with regard to the rights and obligations flowing from the legislation referred to in Article 1'.

11 Article 9, which features in Chapter 1 of the third part of the Italo-Swiss Convention, entitled 'Invalidity insurance, old-age insurance and survivors' insurance', establishes what may be termed the 'aggregation principle'. Article 9(1) provides:

'Where, solely on the basis of periods of insurance and periods treated as such completed in accordance with Italian legislation, an insured person is unable to enforce a right to an invalidity benefit, an old-age benefit or a death benefit under the terms of that legislation, periods completed under Swiss old-age insurance and survivors' insurance (periods of contribution and periods so treated) shall be aggregated with periods completed under Italian insurance in order to create entitlement to those benefits, in so far as those periods do not overlap.'

12 On 2 April 1980 the two Contracting States signed an amendment to the Italo-Swiss Convention, which the Italian Republic ratified by Law No 668 of 7 October 1981 (GURI No 324 of 25 November 1981) and which entered into

force on 10 February 1982. Article 3 of that amendment is designed to extend the scope of the aggregation principle, as defined in the preceding paragraph of the present judgment, by adding the following subparagraph to Article 9(1) of the Italo-Swiss Convention:

'In the case where an insured person is unable to enforce a right to benefits even in the light of the preceding subparagraph, periods of insurance completed in third countries linked to both Switzerland and Italy by social security conventions relating to old-age insurance, survivors' insurance and invalidity insurance shall also be aggregated.'

13 When that amendment entered into force, the countries for which aggregation of insurance periods was possible were the following: the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the Principality of Liechtenstein, the United States of America and the Federal Republic of Yugoslavia. In view of the fact that the French Republic has not concluded a convention with the Swiss Confederation, periods of insurance completed in France cannot, under the Italo-Swiss Convention, be taken into account for acquisition of entitlement to old-age, survivors' or invalidity benefits.

The dispute in the main proceedings and the question submitted

14 Mrs Gottardo, who is an Italian national by birth, renounced that nationality in favour of French nationality following her marriage in France on 7 February 1953 to a French national. According to the information on the case-file, Mrs Gottardo was required at that time to assume the nationality of her husband.

15 Mrs Gottardo worked successively in Italy, Switzerland and France, where she paid social security contributions as follows: 100 weekly contributions in Italy, 252 weekly contributions in Switzerland, and 429 weekly contributions in France. She is in receipt of Swiss and French old-age pensions, which were granted to her without any need for aggregation of periods of insurance.

16 According to the information before the Court, Mrs Gottardo wishes to obtain an Italian old-age pension pursuant to Italian social security legislation. However, even if the Italian authorities took into account the periods of insurance completed in France, in accordance with Article 45 of Regulation No 1408/71, aggregation of the Italian and French periods would not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension. Mrs Gottardo would be entitled to an Italian old-age pension only if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle referred to in Article 9(1) of the Italo-Swiss Convention.

17 Mrs Gottardo's application on 3 September 1996 for an old-age pension was rejected by the INPS, by decision of 14 November 1997, on the ground that she was a French national and that the Italo-Swiss Convention therefore did not apply to her. The administrative appeal which Mrs Gottardo lodged against that decision was dismissed on the same grounds by decision of the INPS of 9 June 1998.

18 Mrs Gottardo thereupon brought the matter before the Tribunale ordinario di Roma, arguing that, since she was a national of a Member State, the INPS was required to recognise her entitlement to a pension under the same conditions as it applied to Italian nationals.

19 Since it was unsure whether the rejection by the INPS of Mrs Gottardo's application solely on the ground of her French nationality was contrary to either Article 12 EC or Article 39 EC, the Tribunale ordinario di Roma decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'[Is] a worker who is a citizen of a Member State with a record of payments of social security contributions to the competent institution of another Member State ... entitled to be awarded an old-age pension on the basis of aggregation of the contributions paid to the institution of a State outside the Union under the convention which the Member State has concluded with the latter and which it applies to its own citizens[?]'

Findings of the Court

20 The essence of the national court's question is whether the competent social security authorities of one Member State (*in casu* the Italian Republic) are required, pursuant to their Community obligations under Article 12 EC or Article 39 EC, to take into account, for the purpose of entitlement to old-age benefits, periods of insurance completed in a non-member country (*in casu* the Swiss Confederation) by a national of a second Member State (*in casu* the French Republic) in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country.

21 Under Article 12 EC, the principle of non-discrimination applies '[w]ithin the scope of application of this Treaty' and 'without prejudice to any special provisions contained therein'. By this latter expression, Article 12 EC refers in

particular to other Treaty provisions in which the general principle which it sets out is given concrete form in respect of specific situations. Such is the case, *inter alia*, with regard to the provisions on the free movement of workers (see, in this connection, Case 186/87 *Cowan* [1989] ECR 195, paragraph 14).

The principle of equal treatment provided for by the Treaty

22 Having been employed as a teacher in two different Member States, Mrs Gottardo has exercised her right of free movement. Her application for an old-age pension on the basis of aggregation of the periods of insurance she has completed comes within the scope both *ratione personae* and *ratione materiae* of Article 39 EC.

23 According to the order for reference, the competent Italian authorities recognise the right of Italian nationals who have paid social security contributions to both the Italian and Swiss social security systems, and who are thus in a situation identical to that of Mrs Gottardo, to receive payment of their old-age pensions through aggregation of the Italian and Swiss periods of insurance.

24 As the INPS acknowledged in its observations, if Mrs Gottardo had retained Italian nationality she would satisfy the conditions of entitlement to an Italian old-age pension. The INPS does not dispute that the sole ground of refusal of Mrs Gottardo's application was that she is a French national. It is thus common ground that the dispute concerns a difference in treatment on the sole ground of nationality.

25 However, according to the Italian Government and the INPS, the latter's refusal to grant Mrs Gottardo an old-age pension on the basis of aggregation of the periods of insurance which she completed in Italy and France, as well as in Switzerland, is justified by the fact that the conclusion by a single Member State — *in casu*, the Italian Republic — of a bilateral international convention with a non-member country, namely the Swiss Confederation, does not come within the scope of Community competence.

26 The Italian Government refers in this regard to the wording of Article 3 of Regulation No 1408/71, read in the light of the definitions contained in Article 1(j) and (k) thereof, as interpreted by the Court in Case C-23/92 *Grana-Novoa* [1993] ECR I-4505.

27 In *Grana-Novoa*, cited above, the applicant, who was a Spanish national, had performed work subject to compulsory social insurance, first in Switzerland and subsequently in Germany. The German authorities had refused her a German invalidity pension on the ground that she had worked for an insufficient number of years in Germany. In exactly the same way as Mrs Gottardo in the main proceedings in the present case, Mrs Grana-Novoa sought to rely on the provisions of a convention concluded between the Federal Republic of Germany and the Swiss Confederation, application of which was limited to German and Swiss citizens, in order to have account taken of the periods of insurance which she had completed in Switzerland.

28 The first question submitted by the Bundessozialgericht (Federal Social Court, Germany) asked the Court to rule on the interpretation of the term 'legislation' in Article 1(j) of Regulation No 1408/71. The Court ruled that a convention concluded between a single Member State and one or more non-member countries does not come within the concept of legislation, as that term is used in Regulation No 1408/71. The Bundessozialgericht's second question, which concerned the principle of equal treatment, was posed only in the event that the first question should be answered in the affirmative and was for that reason not addressed by the Court.

29 The question submitted in the present case is based on application of the principles flowing directly from the provisions of the Treaty, so it is appropriate to recall the Court's case-law on bilateral international conventions.

30 With regard to a cultural agreement concluded between two Member States which reserved entitlement to study scholarships exclusively to nationals of those two States, the Court has ruled that Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) obliged the authorities of those two Member States to extend the benefit of the training bursaries provided for by that bilateral agreement to Community workers established within their territory (Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 16).

31 The Court has also ruled that if application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate application of that provision and, to that end, to assist every other Member State which is under an obligation under Community law (*Matteucci*, cited above, paragraph 19).

32 With regard to a bilateral international treaty concluded between a Member State and a non-member country for the avoidance of double taxation, the Court has pointed out that, although direct taxation is a matter falling within the competence of the Member States alone, the latter may not disregard Community rules but must exercise their powers in a manner consistent with Community law. The Court accordingly ruled that the national treatment principle requires the Member State that is party to such a treaty to grant to permanent establishments of companies resident in another Member State the advantages provided for by the agreement on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see, in this connection, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraphs 57 to 59).

33 It follows from that case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect.

34 It follows from all of the foregoing that, when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

35 It also follows that the Court's interpretation of the term 'legislation' in Article 1(j) of Regulation No 1408/71 cannot affect the obligation of every Member State to comply with the principle of equal treatment laid down in Article 39 EC.

The existence of objective justification

36 Disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country may, it is true,

constitute an objective justification for the refusal by a Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention (see, to that effect, *Saint-Gobain ZN*, cited above, paragraph 60).

37 However, the INPS and the Italian Government have failed to establish that, in the case in the main proceedings, the obligations which Community law imposes on them would compromise those resulting from the commitments which the Italian Republic has entered into *vis-à-vis* the Swiss Confederation. The unilateral extension by the Italian Republic, to workers who are nationals of other Member States, of the benefit of having insurance periods which they completed in Switzerland taken into account for the purpose of acquiring entitlement to Italian old-age benefits would in no way compromise the rights which the Swiss Confederation derives from the Italo-Swiss Convention and would not impose any new obligations on that country.

38 The only objections which the INPS and the Italian Government have put forward to justify refusal to allow aggregation of the insurance periods completed by Mrs Gottardo relate to a possible increase in their financial burden and administrative difficulties in liaising with the competent authorities of the Swiss Confederation. Those grounds cannot justify the Italian Republic's failure to comply with its Treaty obligations.

39 The answer to the question submitted by the national court must therefore be that the competent social security authorities of one Member State are required, pursuant to their Community obligations under Article 39 EC, to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country.

Costs

40 The costs incurred by the Italian and Austrian Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunale ordinario di Roma by order of 1 February 2000, hereby rules:

The competent social security authorities of one Member State are required, pursuant to their Community obligations under Article 39 EC, to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country by a national of a second Member State in

circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country.

Rodríguez Iglesias Macken von Bahr

Gulmann Edward La Pergola

Sevón Wathelet Skouris

Cunha Rodrigues Timmermans

Delivered in open court in Luxembourg on 15 January 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President