OPINION OF ADVOCATE GENERAL JACOBS

delivered on 27 January 2000 *

Introduction

1. In this reference for a preliminary ruling, the Austrian Oberster Gerichtshof (Supreme Court) asks whether rules for the determination of certain teachers' pay are compatible with Article 48 of the EC Treaty (now Article 39 EC) or Article 7 of Regulation No 1612/68 [1] in that their effect is that previous periods of employment completed in other Member States are treated differently from periods completed in Austria. Because Austria's accession to the European Union is relatively recent, it also refers a question on the temporal effects of the Community provisions in issue. As a preliminary point, however, it queries the admissibility of its request for a preliminary ruling in the light of the special nature of the proceedings before it.

2. In Austria there are two categories of personnel working for federal public authorities: the first consists of civil servants (*Beamte*), appointed by administrative act, not under contract, whose employment is in principle guaranteed for life. Their status is determined by specific laws (*Beamtendienstrechtsgesetz*) and more generally by public law. The second category, with which the present case is concerned, consists of contractual employees (*Vertragsbedienstete*) engaged on the basis of a private law employment contract. Their status is governed by the federal Law on Contractual Public Servants of 1948 (*Vertragsbedienstetengesetz 1948*, hereinafter the 'VBG').

3. It appears that Austria employs at the federal level approximately 40 000 school teachers about 13 500 of whom are contractual teachers (*Vertragslehrer*). The federal government also employs approximately 10 000 university teaching personnel about 1 500 of whom are contractual teaching assistants (*Vertragsassistenten*). According to the applicant in the main proceedings, some 75 000 further teachers are employed at the level of the different federal states (*Bundesländer*). Their status is governed by laws of the Bundesländer which are similar to the federal laws.

* Original language: English.

1 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ English Special Edition 1968 (II) p. 475.

4. The rules relating to the salaries of contractual teachers and contractual teaching assistants employed at the federal level are contained in the VBG. The contentious provision is Paragraph 26 of the VBG which determines the calculation of seniority of contractual public servants for the purpose of classification within the relevant pay scale. The following features are of particular relevance. Previous periods of employment completed in the service of an Austrian public authority or in certain Austrian public or publicly recognised private teaching establishments are automatically taken into account in full. Previous periods of employment spent at comparable institutions abroad are taken into account in full only with the consent of the Federal Minister for Finance which is given only if such periods are 'of special importance for the successful deployment' of the employee in question. A more detailed account of the national legal framework will be given below.

5. The applicant in the main proceedings, Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst (hereinafter 'the Gewerkschaftsbund') is a trade union representing, among others, employees in the public sector.

6. The respondent is the Republic of Austria in its capacity as employer of contractual teachers and contractual teaching assistants.

7. It appears that a number of contractual teachers and contractual teaching assistants had, before being employed by the respondent, completed periods of employment in the public service or in teaching posts in other Member States of the European Union or of the European Economic Area. In many cases those periods of employment had been completed before Austria joined the European Economic Area on 1 January 1994 or the European Union on 1 January 1995. The competent Secretary of State seems to have rejected in 1996 a request by the applicant to treat previous periods of employment completed in other Member States in the same way as such periods completed in Austria.

8. In the main proceedings the Gewerkschaftsbund seeks a declaration that certain categories of contractual teachers and teaching assistants employed by the respondent are entitled to have the following periods of previous employment taken into account from the date of their classification in the relevant pay scale, or from 1 January 1994 if later, namely those completed in States which now belong to the European Union or the European Economic Area in teaching posts in public or State-recognised schools, colleges and universities or in the civil service or for other public-law entities which must be regarded as equivalent to Austrian local authorities. Those periods of employment should be taken into account in accordance with the principles laid down in Paragraph

26 of the VBG applicable to previous periods of service for Austrian authorities or in teaching posts in Austria.

9. The Gewerkschaftsbund, presumably on the basis of Article 48(4) of the EC Treaty and the case-law on that provision, does not seek the same declaration in respect of contractual teachers and teaching assistants whose activity exceptionally involves direct or indirect participation in the exercise of powers conferred by public law or duties designed to safeguard the general interests of the State or other public authorities.

10. The Gewerkschaftsbund seeks the declaration in a special form of procedure which is governed by Paragraph 54(2) to (5) of the *Arbeits- und Sozialgerichtsgesetz* (Law on Labour and Social Courts, hereinafter the 'ASGG'). According to those provisions certain employers' and employees' bodies may bring an action before the Oberster Gerichtshof against other employers' or employees' bodies for a declaration concerning rights or legal relationships which relate to a factual situation independent of any particular named person. That procedure will also be discussed in more detail below.

11. Against that background the Oberster Gerichtshof has referred the following questions for a preliminary ruling:

'1. May a preliminary ruling of the Court of Justice of the European Communities under Article 177 of the EC Treaty [now Article 234 EC] be sought in proceedings in which the Oberster Gerichtshof has to decide, as a court of first and final instance, on the basis of a factual situation independent of particular named persons, alleged by one party and presumed to be true, on an application by that party for a declaration that rights or legal relationships in the field of employment law, which according to the submissions of that party, which are presumed to be true, are of importance for at least three employers or employees, do or do not exist?

If Question 1 is answered in the affirmative,

2. Does Article 48 of the EC Treaty or any other provision of Community law, in particular Article 7 of Council Regulation No 1612/68, preclude the use of different methods for determining the qualifying date for advancement purposes, which affects the classification of contractual teachers and teaching assistants employed by the defendant within the relevant pay scale, in

that, on the one hand, periods of employment completed under a contract of employment with an Austrian local authority or in a teaching post with an Austrian public school, university or establishment of higher education, or with the Academy of Visual Arts or in a State-approved private school in Austria are — provided that the activity in question amounts to at least half of that laid down for full-time employees — taken into account in their entirety as of the date of recruitment whereas, on the other hand, periods of employment completed with comparable establishments of other Member States are taken into account in their entirety only with the approval of the Minister for Finance and when they are of special importance for the successful deployment of the contractual employee, failing which they are taken into account as regards only half of their duration if the employment relationship commenced on or before 30 April 1995 or, if it commenced at a later date, as regards only half of their duration, but only in so far as the periods in question do not exceed a total of three years?

If Questions 1 and 2 are answered in the affirmative,

3. Are periods completed in institutions in Member States comparable to the said institutions to be taken into account without temporal limitation?'

12. Written observations have been submitted by the parties in the main proceedings, namely the applicant Gewerkschaftsbund and Austria in its capacity as respondent in the main proceedings (hereinafter 'Austria as respondent'), by the Commission and also by Austria in its capacity as Member State entitled to submit observations (hereinafter 'the Austrian Government'). Interestingly, the views expressed by Austria as respondent and by the Austrian Government are not identical.

13. Initially the Commission and the Austrian Government asked to present oral argument. Subsequently, both withdrew their requests. In the circumstances the Court decided not to hold a hearing.

Question 1: Admissibility

14. With its first question, the national court wishes to know whether its request for a preliminary ruling is admissible. Its doubts arise from the special character of the procedure.

Nature of proceedings

15. The Oberster Gerichtshof describes the nature of the main proceedings, as provided for in Paragraph 54(2) to (5) of the ASGG, as follows.

16. The object of the proceedings is a declaration that rights or legal relationships which concern a factual situation independent of any particular named person exist or do not exist. The application must concern a point of substantive law in the field of employment law disputes as defined by the ASGG. The point of law in question must be of importance for at least three employers or employees.

17. Applications can be brought by employers' or employees' bodies which are capable of entering into collective agreements. They can seek such a declaration only within the scope of their activity. Potential respondents are employers' or employees' bodies which are also capable of entering into collective agreements. However, according to the case-law of the Oberster Gerichtshof, as set out in the order for reference, in cases concerning the public sector the employing public entity may act as respondent or applicant instead of an employers' representation.

18. The Oberster Gerichtshof decides as a court of first and final instance. It appears from the order for reference and more specifically its introductory section that when sitting in those cases it is composed of five members, three permanent judges of the Oberster Gerichtshof and two knowledgeable lay members.

19. As regards procedure, the Oberster Gerichtshof must base its legal assessment on the facts alleged by the applicant without further examination. Nor may the applicant's assertion that the decision is of importance for at least three employers or employees be examined further. The respondent may not dispute the facts alleged by the applicant and may submit only legal arguments.

20. The parties, the Commission and the Austrian Government have provided the Court with the following additional information on the procedure in question.

21. The central purpose of the adoption of the ASGG in 1985 was to improve access to the courts for employees and employers. According to the *travaux préparatoires* that goal was to be achieved by a concentration and acceleration of proceedings and by the introduction of collective rights of action. Moreover, in factual situations raising legal questions of general interest it should be not for individuals but for employers' or

employees' bodies to bring necessary 'test' cases.

22. In its case-law the Oberster Gerichtshof has emphasised that in the procedure at issue employers' and employees' bodies should submit for judgment only truly typical factual situations of general importance and that it is not competent to answer *in abstracto* legal questions of a general nature without reference to sufficiently concrete factual situations.

23. The proceedings are contentious, the parties being the applicant and the respondent. Interested third parties may submit observations. The applicant determines whether to bring proceedings and the parties determine their scope.

24. The final decision is binding on the parties. They cannot make a second application for a declaration relating to the same factual situation and raising the same legal questions.

25. Although the decision is in no way binding on other courts, it is obviously intended to have persuasive authority on parallel proceedings concerning individual employers and employees. Thus, according to Paragraph 54(5) of the ASGG the running of time for bringing parallel proceedings is suspended with regard to the rights and legal relationships forming the subject of the proceedings under Paragraph 54(2) of the ASGG.

The issues on admissibility

26. The Oberster Gerichtshof expresses doubts about the judicial nature of the proceedings at issue and consequently about the admissibility of its request for a preliminary ruling.

27. The applicant Gewerkschaftsbund, the Austrian Government and the Commission consider that the questions referred are admissible and that the first question should be answered in the affirmative. The proceedings before the Oberster Gerichtshof present, in their view, the essential elements of true judicial proceedings.

28. According to Austria as respondent the Court is not competent to reply to the first

question. Referring to *Grogan*,[2] *ERT*[3] and *Commission* v *Germany*[4] it argues that the question whether it is appropriate for a national court to decide cases at first and final instance lies outside the scope of Community law.

29. That argument seems to be based on a misconception of the national court's question. It is true that the issue of the legality of national procedural arrangements might in certain circumstances lie outside the scope of Community law.[5] However the Oberster Gerichtshof does not ask whether Community law precludes or prohibits provisions under which disputes such as that in the main proceedings are settled by one court at first and final instance. It merely asks whether, in view of the peculiarities of the main proceedings, Article 177 of the EC Treaty allows it to seek a preliminary ruling. Thus, its question concerns only the admissibility of its request for a preliminary ruling and the interpretation of Article 177 which is a rule of Community law.

30. A further source of possible confusion is the national court's reference to the two *Foglia* v *Novello*[6] judgments. There the issue was whether the case before the referring court was of a hypothetical or contrived nature.

31. In the present case, in contrast, doubts as to the admissibility of the reference arise only with regard to the nature of the procedure. No one has claimed that the actual dispute between the applicant and the respondent is contrived or not genuine.

32. Why then does the Oberster Gerichtshof have doubts with regard to its right to refer questions for a preliminary ruling in proceedings of this nature?

33. In the order for reference the Oberster Gerichtshof explains that in the past it has taken the view that the procedure provided for in Paragraph 54(2) to (5) of the ASGG did not correspond to the traditional image of judicial decision-making. In its view, it was rather an opinion on the law, clothed in the appearance of a judicial decision. It therefore regarded those provisions as questionable on constitutional grounds and in particular because it was seised in such cases as a court not of final instance but of first and only instance. We are also told that the Austrian Verfassungsgerichts-

2 — Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685.

3 — Case C-260/89 *ERT* [1991] ECR I-2925.

4 — Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575.

5 — Case C-177/94 *Perfili* [1996] ECR I-161.

6 — Cases 104/79 [1980] ECR 745 and 244/80 [1981] ECR 3045.

hof (Constitutional Court) has dismissed applications made by the Oberster Gerichtshof to set aside the rules governing the procedure in question as unconstitutional.

34. The Oberster Gerichtshof refers also to *Foglia* v *Novello I* and *II*,[7] *Greis Unterweger*,[8] *Borker*[9] and *Job Centre*[10] and states that Article 177 does not give the Court of Justice the task of delivering opinions on general or hypothetical questions, but merely confers jurisdiction on it to answer questions which correspond to an objective requirement for an effective decision in a specific legal dispute. According to the Oberster Gerichtshof it is thus not clear whether the requested ruling is necessary to enable it to give 'judgment' within the meaning of Article 177.

35. The decisive issue is thus whether the procedure and the final decision under Article 54(2) to (5) of the ASGG are sufficiently judicial in nature within the meaning of the case-law of the Court.

36. The case-law on the judicial nature of a given national procedure or decision arguably forms part of a broader body of case-law on the concept of 'court or tribunal' within the meaning of Article 177. In that regard it is well established that whether the referring body is covered by that concept is a question of Community law alone.[11] In order to establish whether a given body is a 'court or tribunal' the Court takes account of a cluster of different factors,[12] such as whether the body concerned is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[13]

37. From an institutional point of view the Oberster Gerichtshof clearly fulfils all those criteria. It is established by law and exercises its activities on a permanent basis; its independence is equally beyond doubt. The fact that two of the five judges are knowledgeable lay members is a common feature of labour law tribunals and cannot prevent it from judging as a court *of a Member State*.

38. I therefore turn to the core of the matter, namely the function which the Oberster Gerichtshof performs in the main proceedings. In that regard, it is settled case-law that a national court may refer a

7 — Cases 104/79 and 244/80, cited in note 6.

8 — Case 318/85 [1986] ECR 955.

9 — Case 138/80 [1980] ECR 1975.

10 — Case C-111/94 [1995] ECR I-3361.

11 — Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261.

12 — See, for example, Case C-54/96 *Dorsch Consult* v *Bundesbaugesellschaft Berlin* [1997] ECR I-4961, paragraph 23 of the judgment.

13 — See, for example, Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 17 of the judgment.

question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. [14]

39. Many elements of the procedure at issue are typical of judicial proceedings: the Oberster Gerichtshof's jurisdiction under Paragraph 54(2) to (5) of the ASGG is compulsory in the sense that either party may bring a case before the Oberster Gerichtshof irrespective of the objections of the other; the procedure is governed by law; it is *inter partes* and the parties determine the scope of the proceedings; in its decision the court applies rules of labour and social law rather than principles of fairness.

40. What then are the special features of the Austrian procedure and do they prevent it from being of a judicial nature?

41. I will discuss three issues: the nature of the disputes brought before the Oberster Gerichtshof and of the procedure at issue; the nature of the final decision it is called upon to take; and, finally, whether the findings on the first two issues are affected by the fact that the Oberster Gerichtshof decides as a court of first and final instance.

The nature of the dispute

42. The first question is thus whether the Oberster Gerichtshof decides on real cases meaning legal disputes of a judicial nature and whether it does so in a procedure of a judicial nature.

43. Three features seem relevant. First, we are faced with a declaratory remedy; secondly, the right of action is exercised collectively by an employers' or employees' association; and, thirdly, arguments are limited to points of law whereas the facts alleged by the applicant can be challenged only to a limited extent.

44. Declaratory judgments are an important element of developed procedural systems. They may prevent at an early stage potentially costly infringements of a contract or the law where the rights and obligations of the parties are uncertain. Usually the risks inherent in declaratory

14 — Case 318/85 *Greis Unterweger*, cited in note 8, paragraph 4 of the order; Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14 of the judgment; Case C-256/97 *DMT Transport*, judgment of 29 June 1999, paragraph 9.

proceedings are limited by rules designed to prevent the courts from giving advisory opinions in hypothetical cases and to avoid unnecessary litigation.

45. The Court has therefore never refused to deal with a reference merely because the questions were referred in declaratory proceedings. [15] In a borderline case the Court held: 'Although the main actions seek a declaratory remedy and, having the aim of preventing infringement of a right under threat, must necessarily be based on hypotheses which are, by their nature, uncertain, such actions are none the less permitted under national law, as interpreted by the referring court. Consequently, the questions submitted by that court meet an objective need for the purpose of settling disputes properly brought before it.' [16]

46. As regards the procedure under scrutiny we are told by the Gewerkschaftsbund and by the Commission that an application may be dismissed where the applicant does not invoke a special legal interest in the declaration (*Feststellungsinteresse*). No such interest exists for instance where the respondent has never contested the rights at issue.

47. Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents. The danger of abuse of such collective rights of action is again normally tackled by national procedural rules. Consequently, the Court has never objected to national rules providing for such collective rights of action and in practice often deals with questions referred in proceedings brought by interested associations. [17]

48. Accordingly, neither the declaratory nature of the remedy nor the collective exercise of the right of action can call into question the judicial nature of the dispute and the procedure.

49. The truly original feature of the procedure at issue is thus the set of rules dealing

15 — See, for example, Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 14 of the judgment.

16 — Case C-415/93 *Union Royale Belge des Sociétés de Football and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 65 of the judgment.

17 — See, for example, Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* [1995] ECR I-1923.

with the relationship between the law and the facts. As already stated, the rights or legal relationships on which the declaration is sought may be independent of any particular named person. The point of law in question must however be of importance for at least three employers or employees.

50. The Oberster Gerichtshof thus does not decide disputes related to a concrete case involving clearly identified persons. It is expected to decide disputes related to a set of at least three factual situations which raise the same legal problem. The idea is to extrapolate from that set of actual situations 'typical' but abstract facts.

51. None the less — and this is confirmed by all the observations submitted — the Oberster Gerichtshof cannot be asked to decide theoretical legal questions wholly unrelated to existing facts.

52. Are the disputes to be decided by the Oberster Gerichtshof then of a judicial nature?

53. In my view, there is a fundamental difference between a court confronted with, on the one hand, an abstract legal question wholly unrelated to existing facts and, on the other hand, a legal question related to abstract but typical facts.

54. In the first situation courts normally refuse to deal with the case. Thus, a Scottish judge once said: 'Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. Courts are neither a debating club nor an advisory bureau....' [18]

55. The reasons for that attitude, which is probably universally shared, are easy to understand. There is, first, the danger that the court might take an uninformed and therefore wrong decision. A legal question can best be answered in the factual context where the law will actually have to be applied. The parties' arguments will be more forceful and to the point if they can be linked to specific facts. Secondly, courts are reluctant to rule where their decision will have no practical consequences for at least one of the parties. They do not like

18 — *Macnaughton* v *Macnaughton's Trustees* 1953 S.C. 387 per Lord Thomson (Lord Justice Clerk) at p. 392.

acting as a 'moot court'. It is felt that the resources of the judiciary are mis-allocated where the hypothetical situation might never occur. Finally, there is the fear that an issue which in practice will arise, if at all, only in the future may be prejudged on the wrong basis. That in turn would considerably weaken the authority of judicial decision-making. The Court of Justice has therefore held with regard to its own activities that its duty under Article 177 of the Treaty is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. [19]

56. But in a representative action like the present, namely one where a court is confronted with typical but abstract facts, many of the objections to hypothetical cases are not relevant or have less force. The fact that the case is a condensate of several situations may even assist the court, because exceptional situations can more easily be recognised and isolated as such. There is no danger that the legal question may never become relevant since it is already relevant in all the real cases represented by the 'typical' one. The decision will have practical consequences not only in one but in many cases. The only threat to the judgment's authority is that the courts dealing with the 'real' cases may distinguish them on the facts. I am therefore satisfied that a representative action of the present kind, based on typical but abstract facts, is in principle of a judicial nature.

57. That conclusion is not affected by the admittedly unusual rules of evidence — the fact that the Oberster Gerichtshof must base its legal assessment on the typical facts alleged by the applicant without further examination, that the applicant's assertion with regard to the decision's importance for at least three employers or employees must also not be examined further and that the respondent is thus confined to legal arguments.

58. It is true that those rules create a theoretical risk of abuse in that they seem to allow the applicant to alter the nature of the procedure and to oblige the Oberster Gerichtshof to decide hypothetical legal questions unconnected to any existing factual situation. Such abuses are however unlikely given the limits on who can use the procedure. Moreover, the Gewerkschaftsbund and the Commission have stressed that the Oberster Gerichtshof has developed a body of case-law specifically designed to prevent such abuses. There is no suggestion in the present case that the

19 — Case 244/80 *Foglia* v *Novello*, cited in note 6, paragraph 18 of the judgment.

issue is purely hypothetical. The mere possibility of isolated abuses of a procedure should not have any bearing on the broader question whether references made in the context of that procedure are as such admissible.

59. I conclude therefore on that point that the procedure under scrutiny and the cases decided under it are in principle of a judicial nature.

The nature of the decision

60. Is the final decision which the Oberster Gerichtshof is called upon to take equally of a judicial nature?

61. It is well established that references in procedures ending with non-binding legal opinions are in principle inadmissible. [20] As already stated, the real purpose of the procedure at issue is to provide strong persuasive authority for parallel proceedings concerning individual employers and employees. In that regard several of those submitting written observations emphasise the *Leitungsfunktion* (guiding function) of the Oberster Gerichtshof's decisions. It is for that reason that the time-limits for bringing such parallel proceedings are suspended.

62. The Oberster Gerichtshof's decision thus has the typical features of a test case judgment: the decision is important not so much because of its direct legal consequences but for its indirect significance in other cases.

63. I do not think that judgments with such effects can be treated as non-binding advisory opinions for the purposes of Article 177 of the Treaty. First, they are at least legally binding on the parties to the proceedings. Furthermore, where ordinary national procedures have been used by one of the parties in order to bring a test case and the national court has then referred questions for a preliminary ruling, the Court has never hesitated to reply to those questions. [21] I do not think that the Court's attitude can be different where the national procedure is specifically designed to encourage cases similar to test cases in their effects. Indeed such proceedings may be highly desirable in the interest of procedural economy.

20 — Case 318/85 *Greis Unterweger*, cited in note 8; see however for a more lenient approach the Opinion of Advocate General Mayras in Case 36/73 *Nederlandse Spoorwegen* v *Minister Verkeer en Waterstaat* [1973] ECR 1299, at page 1317 and Joined Cases C-69/96 to C-79/96 *Garofalo and Others* v *Ministero della Sanità* [1997] ECR I-5603, paragraphs 18 to 27 of the judgment.

21 — Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, Opinion of Advocate General Reischl at page 1127, and Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraphs 16 and 17 of the judgment.

64. A comparison with the effects of preliminary rulings under Article 177 of the Treaty may also be appropriate. The main objective of the preliminary ruling procedure is to achieve uniform interpretation and application of Community law in all cases raising identical issues. Nevertheless, since such a ruling is binding at least for the referring jurisdiction, there can be no doubt about its judicial nature.

65. Accordingly, the Oberster Gerichtshof's final decisions are also of a judicial nature.

A court of first and final instance

66. The last point to consider is that the Oberster Gerichtshof decides as a court of first and final instance. If anything, arguments for the admissibility of references from the Oberster Gerichtshof may be stronger than in the ordinary case. When questions are referred by the only body able to hear a certain type of case, the Court should reply in order to further the uniform application of Community law. The development of national case-law in a given area without the deciding bodies being able or bound to refer questions for a preliminary ruling is clearly undesirable. Such a development would threaten the coherence of the Community legal order and the effective protection of the rights of individuals which they derive from Community law. Those considerations for the effectiveness of Article 177 of the Treaty have always been an underlying reason for the Court accepting references from bodies of a disputed judicial nature.[22] Furthermore, and particularly in the circumstances of the present case, Article 177(3) of the Treaty must be borne in mind: that provision obliges courts or tribunals against whose decisions there is no judicial remedy to make references and pursues a goal very similar to the one emphasised by the case-law just quoted.

67. Accordingly, the request for a preliminary ruling is admissible.

Question 2: Compatibility with EC law

68. At issue is whether a rule such as Paragraph 26 of the VBG infringes Arti-

22 — Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, paragraph 16 of the judgment; implicit, for example, in Case 318/85 *Greis Unterweger*, cited in note 8, paragraph 3 of the order, and Case C-134/97 *Victoria Film*, cited in note 14, paragraph 18 of the judgment.

cle 48 of the EC Treaty or Article 7 of Regulation No 1612/68 in that previous periods of employment completed in Austria are treated differently from periods completed in other Member States.

69. The VBG applies, according to Paragraph 1(1) thereof, to all persons who are in a private-law employment relationship with the federal State. Part I of the VBG contains *inter alia* in Paragraphs 8a to 26 the general rules on their remuneration. According to Paragraph 37 of the VBG, contractual teachers are contractual civil servants, to which many of the general provisions on remuneration apply. The same follows with regard to contractual teaching assistants from Paragraph 51(1) of the VBG.

70. The monthly remuneration due to a contractual public servant who falls within a given pay scale and who is classified within that pay scale in a given pay group varies according to pay steps. Once classified in a pay group a contractual teacher or teaching assistant advances every two years to the next pay step provided for in respect of him. That advancement is determined, unless otherwise provided, by the qualifying date for advancement purposes which in turn is to be ascertained in accordance with the contentious rule, Paragraph 26 of the VBG.

71. The application of Paragraph 26 of the VBG leads to the following results.

72. According to Paragraph 26(1) and (2) of the VBG previous periods of employment in the service of an Austrian public authority, public teaching institution or publicly recognised private teaching institution are automatically treated as preceding in their entirety the date on which the person concerned is engaged as a contractual employee.

73. Other previous periods of employment, namely periods completed abroad or in Austria in an institution not covered by Paragraph 26(2) of the VBG (e.g. a private bank), are taken into account in full only where it is in the public interest to do so and with the consent of the Federal Minister for Finance; such consent is given only if such periods are 'of special importance for the successful deployment' of the contractual public servant (Paragraph 26(1) and (3) of the VBG). Where those periods do not fulfil those conditions they are taken into account to the extent of one half if the service as Austrian contractual employee started not later than 30 April 1995 (under the former version of Paragraph 26(3) of the VBG); they are taken into account to the extent of one half in so far as the periods do not exceed a total of three years, if the service started after that date (under the current version of Paragraph 26(3) of the VBG).

74. According to the Austrian case-law submitted by the applicant, the authorities' decisions on the incorporation of those other periods of employment are subject to judicial review. The decisions have to be taken in the framework of a regular administrative procedure. According to that case-law the public interest referred to in Paragraph 26(3) of the VBG lies in the fact that Austrian public entities benefit — without having to bear the costs of education and practical training — from qualified new employees who are immediately able to operate competently.

75. It appears furthermore that with regard to the criterion of 'special importance for successful deployment' the authorities have to establish what activities or studies were actually performed, how long they lasted and what knowledge and abilities were acquired. They must then establish what tasks actually had to be performed by the applicant in the course of the first six months of his new employment in Austria, to what extent he was more successful in his new employment than other employees without similar previous experience and whether there was a causal link between such experience and such success. Where all those elements speak in favour of the person concerned and where without his previous experience he would have been considerably less successful in his new employment, his previous activity is of 'special importance' for his successful deployment within the meaning of the VBG. It has also been held by Austrian courts that the division by the authorities of periods of previous employment or studies into periods the whole of which and periods only part of which are taken into account is lawful where a certain period sufficed to acquire the knowledge and experience necessary for successful deployment.

76. According to the parties the legislation at issue appears to be linked to Article 21(4) of the Austrian Constitution which guarantees employment mobility between the federal, regional and local public service. In that context the second sentence of Article 21(1) of the Austrian Constitution lays down the so-called *Homogenitätsprinzip* (principle of homogeneity) according to which regional public service regulations may not differ from parallel federal laws or regulations to an extent which would seriously hamper mobility within the public service as guaranteed by the aforesaid Article 21(4).

77. Are the rules at issue compatible with the principle of freedom of movement for workers?

78. Under Article 48(1) of the EC Treaty freedom of movement for workers was to be secured by the end of the transitional period at the latest. Under Article 48(2) such freedom of movement entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remu-

neration and other conditions of work and employment. According to its fourth paragraph, Article 48 does not apply to employment in the public service.

79. Under Article 7(1) of Regulation No 1612/68 a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

80. The Gewerkschaftsbund and the Commission consider that the rule at issue infringes the Treaty. Both claim that Article 26 of the VBG results in indirect discrimination on grounds of nationality against workers from other Member States. In their view, neither the differences between national pay schemes and qualifications of teachers nor the existence of the constitutional rules facilitating employment mobility within the Austrian public sector can justify the difference of treatment with regard to the periods of employment taken into account.

81. The Commission adds that apart from indirectly discriminating against workers from other Member States the rule also discourages Austrian nationals from exercising their fundamental freedom under the Treaty to work in other Member States.

82. Austria as respondent and the Austrian Government consider that the rule does not infringe the Treaty. However, two different lines of argument are submitted.

83. Austria as respondent maintains, first, that contractual teachers and teaching assistants are covered by the concept of 'employment in the public service' within the meaning of Article 48(4) of the Treaty. Secondly, it contests the relevance of the Court cases on which the applicant relies [23] since they concerned different factual situations and legal issues. Thirdly, it emphasises that public employers in Austria are linked by the constitutional principle of homogeneity. Therefore, it is said, the element of rewarding loyalty plays a greater role than it would in the absence of that principle.

23 — Case C-419/92 *Scholz* [1994] ECR I-505; Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663; Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* [1998] ECR I-47; Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095.

84. The Austrian Government concedes that the exception in Article 48(4) is not applicable and that there is a *prima facie* restriction of freedom of movement for workers. None the less, in its view, such a restriction is justified. It also invokes the constitutional principle of homogeneity.

85. Two preliminary points can be resolved quickly.

86. In the first place, contractual teachers and teaching assistants are workers within the meaning of Articles 48, 49 and 51 of the Treaty and Article 7 of Regulation No 1612/68. They perform for a certain period of time services in the form of tuition for and under the direction of a school or university in return for which they receive remuneration. The legal nature of the employment relationship and particularly whether it is governed by public or private law is immaterial. [24]

87. Secondly, in the present case the exception of Article 48(4) of the Treaty does not apply.

88. Austria as respondent infers from *Commission* v *Greece* [25] that contractual teachers and teaching assistants are covered by the concept of 'public service' within the meaning of Article 48(4). The same is said to follow from the Austrian classification of their activities as *Hoheitsverwaltung* (administration through exercise of public authority).

89. It is however established case-law that neither teachers nor teaching assistants are normally covered by the Community concept of 'employment in the public service' within the meaning of Article 48(4). [26] In that respect the respondent's reference to *Commission* v *Greece* [27] appears to be misplaced since in paragraph 34 of that judgment the Court expressly states that the generality of posts in the area of education are remote from the specific activities of the public service covered by Article 48(4). The respondent's other argument based on the classification of teachers' activities under Austrian administrative law cannot be accepted either. The effectiveness of the Treaty provisions on freedom of movement for workers require a uniform interpretation and application of the concept of public service which cannot therefore be left to the discretion of the Member States. [28]

24 — Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraphs 17 and 20 to 22 of the judgment; Advocate General Lenz in Case C-4/91 *Bleis* [1991] ECR I-5627, paragraph 10 of the Opinion.

25 — Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285.

26 — Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 7 of the judgment with further references.

27 — Case C-290/94, cited in note 25.

28 — See for example Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 5 of the judgment; Case C-473/93 *Commission* v *Luxembourg*, cited in note 26, paragraphs 26 and 27.

90. Moreover, the present case is not about eligibility for or access to 'employment in the public service' but merely about the determination of seniority for the purposes of calculating remuneration. It is well established that, once a Member State has admitted workers from other Member States to its public service, Article 48(4) cannot justify discriminatory measures against them with regard to remuneration or other conditions of employment, even if employment in the public service within the meaning of that provision is involved. [29] I agree therefore with the referring court which found it difficult to understand why the applicant Gewerkschaftsbund excluded from its application in the main proceedings contractual teachers exercising a school management or supervisory function.

91. Is there an infringement of Article 48 of the Treaty or Article 7(1) of the Regulation? I will first discuss the main issue whether there is an infringement of the principle of non-discrimination on grounds of nationality with regard to workers from other Member States. The secondary issue whether there is also a prohibited obstacle for Austrian workers desiring to work in another Member State will briefly be addressed at the end of the analysis.

29 — See, for example, Case 152/73 *Sotgiu*, cited in note 28, paragraph 4 of the judgment; Case C-187/96 *Commission* v *Greece*, cited in note 25, paragraph 17.

92. *Ratione materiae* Article 48(2) of the Treaty prohibits discrimination 'as regards employment, remuneration and other conditions of work and employment'. Article 7(1) of Regulation No 1612/68 prohibits discrimination 'in respect of any condition of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment'.

93. The present case concerns a rule on the taking into account of previous periods of employment for the determination of the qualifying date for advancement purposes of contractual public servants. That date itself is decisive for the calculation of seniority. Seniority in turn matters because any contractual public servant who belongs to a given pay group within a given pay scale moves after two years to the next pay step.

94. Even if the provision at issue is thus not directly concerned with remuneration, its repercussions on the salaries of contractual public servants are automatic and important. Furthermore, no one has claimed that the determination of the qualifying date for advancement purposes affects other issues not directly related to the employment relationship such as state social security benefits or fiscal treatment. It seems thus to

have consequences exclusively for remuneration which is a matter expressly mentioned in Article 48(2) of the Treaty and Article 7(1) of Regulation No 1612/68.

95. The Court has consistently applied those provisions to rules on the calculation of seniority for the purposes of determining the remuneration due and confirmed thereby explicitly [30] or implicitly [31] that such rules were covered by the notion of 'conditions of employment and work' within the meaning of those provisions.

96. The position is not affected by the Commission's recent proposal for a Regulation amending Regulation No 1612/68 [32] which proposes introducing the following new Article 7(5):

'5. Where working conditions, professional advancement or certain advantages accorded to workers depend, in a Member State, on the occurrence of certain facts or events, any comparable facts or events which have occurred in any other Member State shall entail the same consequences or confer the same advantages accorded.'

97. It cannot be argued that the proposed new provision is necessary in that the existing provisions do not cover the issue. The proposal itself makes it clear that it is intended to codify the case-law of the Court. [33] In any event the new rule could not, if adopted, reduce the scope of Article 7(1) of the Regulation as interpreted in the Court's case-law.

98. The rules under scrutiny therefore fall within the scope *ratione materiae* of Article 48(2) of the Treaty and Article 7(1) of Regulation No 1612/68.

99. Is the prohibition of discrimination on grounds of nationality with regard to remuneration infringed?

100. Obviously there is no direct discrimination on grounds of nationality. The provision does not distinguish between

30 — Case 15/69 *Südmilch* v *Ugliola* [1969] ECR 363, paragraph 5 of the judgment.

31 — Case C-15/96 *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg* and Case C-187/96 *Commission* v *Greece*, both cited in note 23.

32 — Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, submitted by the Commission on 14 October 1998, OJ 1998 C 394, p. 1.

33 — Preamble, recital 4.

workers of different nationalities but between periods of employment completed in certain Austrian institutions and other periods of employment. Periods in those Austrian institutions may also have been completed by workers of other Member States since under Austrian law — and that has been emphasised by the Austrian Government — equal access to employment for foreign teachers is guaranteed and provisions for the recognition of foreign diplomas are in place.

101. However, it is well established that Article 48(2) of the Treaty and 7(1) of Regulation No 1612/68 prohibit equally all covert forms of discrimination which, by the application of distinguishing criteria other than nationality, lead in fact to the same result. [34]

102. A national provision must be regarded as indirectly discriminatory if, first, it is intrinsically liable to affect migrant workers more than national workers with a consequent risk that it will place the former at a particular disadvantage and, secondly, it is not based on objective considerations independent of nationality or is not proportionate to a legitimate aim which it pursues. [35]

103. At issue is a provision which distinguishes between periods of employment completed in specified institutions in Austria and other periods of previous employment. The distinguishing criterion used has both an institutional and a territorial dimension.

104. Where a person has worked for example in industry or commerce and not for one of the categories of employers enumerated in Paragraph 26(2) of the VBG, the less favourable regime applies independently of whether those periods were completed in Austria or abroad. That institutional effect has not been challenged before the national court, has not been referred for a preliminary ruling, and, in any event, seems to lie outside the scope of Community law. Consequently I will not discuss it.

105. Where previous periods of employment have been completed in the service of one of the categories of employers listed in Paragraph 26(2) of the VBG, the applicable regime depends on the Member State in which those periods have been completed.

34 — Case 152/73 *Sotgiu*, cited in note 28, paragraph 11 of the judgment; Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 37; indirectly already in Case 15/69 *Südmilch* v *Ugliola*, cited in note 30, paragraph 6.

35 — See to that effect Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraph 20 of the judgment; Case C-57/96 *Meints* v *Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, paragraph 45; Case C-15/96 *Schöning-Kougebetopoulou*, cited in note 23, paragraph 21; Case C-35/97 *Commission* v *France*, cited in note 34, paragraph 38.

106. Such territorial differentiation has been brought before the Court on many occasions. The taking into account of periods of employment or insurance completed in other Member States is often relevant for the grant of social security benefits. [36] In the following three cases which were referred to in all the observations submitted, the employment relationship itself was affected by whether previous periods of employment in the public service were taken into account.

107. In *Scholz* [37] a public body in Italy when recruiting staff took into account candidates' periods of employment in the public service. The body did so only with regard to periods of employment completed in the Italian public service and not with regard to periods completed in the public service of another Member State.

108. In *Schöning-Kougebetopoulou* [38] a doctor's classification within a given pay group depended on whether previous periods of employment had been completed with an employer covered by a public sector collective agreement.

109. In *Commission* v *Greece* [39] the grant of seniority increments and the placing on a particular point on a grading scale in the public service was dependent on whether previous periods of employment had been completed in the Greek or in another Member State's public service.

110. In all three cases the Court held that the fact that the national rules at issue precluded the taking into account of previous periods of employment completed in other Member States' public services constituted unjustified indirect discrimination and was in breach of Article 48(2) of the EC Treaty.

111. In *Scholz*, which concerned access to employment, a parallel infringement of Articles 1 and 3 of Regulation No 1612/68 had been alleged. The Court refused to apply the latter provisions and held that they had no independent force since they merely clarified and gave effect to the rights already contained in the Treaty.

112. In the two other cases, however, which concerned remuneration, the Court applied Article 48(2) of the EC Treaty and Article 7(1) of Regulation No 1612/68 in parallel. I will follow the latter approach.

36 — See, for example, C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033 and more recently Case C-360/97 *Nijhuis* v *Bestuur van het Landelijk Instituut Sociale Verzekeringen* [1999] ECR I-1919.

37 — Case C-419/92, cited in note 23.

38 — Case C-15/96, cited in note 23.

39 — Case C-187/96, cited in note 23.

113. The present case — and here I agree with the Austrian Government — is in one respect new. Whereas the national rules in the aforesaid three cases simply excluded the possibility of taking into account periods of employment completed in other Member States, the Austrian rules under scrutiny do not. Such periods may be taken into account in their entirety where they fulfil certain conditions established by law. Where they do not, at least part of the period is taken into account.

114. I will briefly recall those conditions. Formally the consent of the Federal Minister for Finance is required. From a substantive point of view those periods will be taken into account only if they are in the public interest and of special importance for the successful deployment of the contractual public servant.

115. Thus a first difficult question seems to arise: is there a Community law obligation to give automatic recognition to periods of employment in the public service of other Member States or may a Member State examine the comparability of the periods involved?

116. It is obvious that with regard to remuneration in the public service the Member States pursue different policies which in turn lead to different systems. Furthermore there are major differences also in respect of the amounts paid. In the absence of Community legislation the Member States are free to have such divergent legislation.

117. It is also well established that the Community prohibitions of discrimination on grounds of nationality are in principle not concerned with any disparities in treatment which may result, between Member States, merely from divergences existing between the laws of the various Member States. [40]

118. That may be the reason why the Court seems to have accepted in *Commission* v *Greece* that such a comparison of periods of employment might in principle be admissible. However, the burden of proof seems to lie on the receiving Member State. The Court held:

'Consequently, even in the absence of specific Community legislation on this matter, it is for the Hellenic Republic to establish, at the request of the person concerned, whether or not the post he held in another Member State is equivalent to a

40 — Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, paragraph 18 of the judgment.

post in Greek public service which is taken into account for the purposes of salary scale grading and the grant of a seniority increment. The fact that the Member State in question considers that in practice it is difficult to carry out that comparison cannot in any circumstances justify its refusal to do so.' [41]

119. In the present case, however, the question of principle can be left open whether and if so under what conditions a Member State may engage in a comparison of periods of employment completed in the public service of another Member State. That is because, even if such a comparison were admissible, the substantive conditions for recognition of periods completed abroad must be based on non-discriminatory and objective criteria. [42]

120. Under the provision at issue any period of employment in one of the enumerated Austrian institutions must be fully taken into account. The applicant has stated without being contradicted that that is so independently of the previous activity's comparability with or utility for the new employment. Thus, it is said, employment periods as a primary school teacher or as a communal worker seem to count fully for the determination of the qualifying date for advancement purposes of a newly engaged high-school teacher.

121. With regard to periods of employment completed in other Member States in institutions corresponding to the ones listed in Paragraph 26(2) of the VBG, the person concerned has to prove two things, namely that it is in the public interest to take account of those periods and that they are of special importance for the successful deployment of the contractual public servant. Moreover, it appears from the national case-law which has been invoked that that is a difficult burden to discharge.

122. The fundamental difference is thus that periods completed abroad are scrutinised with regard to their specific utility for the new post whereas periods completed in Austria are not. Such a provision imposes stricter requirements on periods completed abroad and is therefore liable to affect migrant workers from other Member States more than national workers since the former are more likely to have spent parts of their working life in other Member States. Consequently there is a risk that it will place those migrant workers at a particular disadvantage.

123. The first part of the indirect discrimination test having been completed, the next issue is whether the provision under scru-

41 — Case C-187/96 *Commission* v *Greece*, cited in note 23, paragraph 22 of the judgment.

42 — Case 1/78 *Kenny* v *Insurance Officer*, cited in note 40, paragraph 18 of the judgment.

tiny is based on objective considerations independent of the nationality of the employees concerned and whether it is proportionate to its legitimate aims.

124. The main argument invoked by the Austrian Government is the basic difference between the situation at Community level where diversity of public service laws prevails and the situation within Austria where the constitutional principle of homogeneity guarantees harmonised remuneration systems and public sector mobility.

125. First, I must point out an inconsistency in that argument with regard to teachers who were previously employed by Austrian private schools. It seems to me that they are not covered by the constitutional guarantee of job mobility and their employers are not obliged to comply with the homogeneity principle. None the less, they seem to benefit from the more favourable regime.

126. In any event, such differences between the national and the Community situation could at most be invoked in order to justify a Member State's policy of comparing periods completed abroad with periods spent in a 'homogeneous' national framework rather than taking them automatically into account. They cannot justify a difference of substantive requirements. They cannot explain why periods completed abroad must be of 'special importance' whereas periods completed in Austria need not. Even where a Member State is entitled to assess the comparability of facts or events which occurred in another Member State, the use of double or in other words discriminatory standards is prohibited.

127. The Austrian Government's second argument is that contrary to the situation in *Schöning-Kougebetopoulou* the objective of rewarding loyalty plays a greater role in the Austrian context where employers are linked by the principle of homogeneity.

128. That argument seems in several respects misconceived. First, the argument seems to assume that owing to the principle of homogeneity there is greater uniformity of working conditions in the Austrian context than in *Schöning-Kougebetopoulou*. However, the reverse seems to be true: in the latter case working conditions were not merely loosely harmonised but at least partly unified by means of a collective agreement between employers and employees.

129. Secondly, as already stated, it seems to be inconsistent to invoke the homogeneity principle where publicly recognised private schools do not appear to be bound by it and teachers who work for those schools do not benefit from the constitutional guarantee of public sector mobility.

130. Thirdly and most importantly, given the multiplicity of employers potentially concerned — the Austrian Federation, the Bundesländer, the communes and even publicly recognised private schools — the purpose of the rule cannot be the desire to reward employee loyalty to a particular employer.[43] On the contrary, it is apparent from the Austrian constitutional rules that with regard to periods of employment completed in Austria the system is designed to afford maximum mobility within a group of legally separate employers.

131. While I do not question the legitimacy of such an objective, I cannot see why a discriminatory restriction of the mobility of migrant workers within the Community is necessary or even useful in order to further mobility within the Austrian public service. In my view the Austrian Constitution's goal of public sector job mobility and the Treaty's goal of mobility of migrant workers are not mutually exclusive or even conflicting but can readily coexist.

132. None of the parties has argued that the real purpose of the Austrian rules is to reward and encourage either loyalty to the public service in its entirety or a particular kind of public service ethos. Such an argument could not in any event in my view succeed because it can provide no objective justification for disregarding periods of previous employment in the public service of another Member State.[44]

133. The last argument advanced by the Austrian Government concerns the consequences of an obligation automatically to incorporate periods completed abroad. Such an obligation, it is said, would constitute a one-sided burden on those States whose pay systems take into account previous periods of employment in the public service. In its view, a supplementary burden could arise where contractual pub-

43 — Case C-15/96, *Schöning-Kougebetopoulou* v *Freie und Hansestadt Hamburg*, cited in note 23, paragraph 27 of the judgment.

44 — See my Opinion in Case C-419/92 *Scholz*, cited in note 23, at paragraph 27.

lic servants become later on in their career public servants appointed by administrative act (*Beamte*), since there is at present no mechanism for distribution of the resulting pension burden among the public service employers of the different Member States.

134. I would stress at the outset that the critical issue in the present case is not the duty automatically to take into account periods of employment completed abroad but the Community law prohibition on relying on discriminatory substantive requirements when doing so. In any event, first, Austria appears to be just one of many Member States to rely with regard to its public service on a pay system which takes account of previous periods of public service employment. [45] Secondly, burdensome financial consequences for a Member State, which moreover have not been substantiated, are never a valid justification for infringements of a fundamental freedom. [46] Thirdly, pension rights of civil servants are not at issue in the present proceedings: the provision under scrutiny concerns contractual teachers and teaching assistants who may (but will not necessarily) later become civil servants appointed by administrative act; classification is only for the purposes of determining their remuneration and not for pension purposes. In any event, the Council has in the meantime adopted Regulation (EC) No 1606/98 amending Regulations (EEC) No 1408/71 and No 574/72 with a view to extending them to cover special schemes for civil servants. [47]

135. Nothing thus indicates that Paragraph 26 of the VBG, in so far as it distinguishes between periods completed in certain Austrian institutions and periods completed in similar institutions in other Member States, is based on objective and legitimate considerations independent of the nationality of the migrant workers involved. Accordingly, the provision at issue must be regarded as infringing the prohibition of indirect discrimination on grounds of nationality as regards conditions of work or employment contained in Article 48(2) of the EC Treaty and Article 7(1) of Regulation No 1612/68.

45 — See my Opinion in Case C-15/96 *Schöning-Kougebetopoulou*, cited in note 23, paragraph 24.

46 — See, for example, Case 238/82 *Duphar* and Others v *Netherlands* [1984] ECR 523, paragraph 23 of the judgment.

47 — Council Regulation of 29 June 1998, OJ 1998 L 209 p. 1.

136. The Commission contends, as already stated, that the Austrian rules result also in a restriction of freedom of movement for Austrian workers.

137. It is well established that the Treaty rules on free movement of persons not only forbid discrimination by a Member State against nationals of other Member States but also preclude national legislation which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [48] With regard to workers, the basis for that proposition lies not so much in Article 48(2) or in Article 7(1) of Regulation No 1612/68 but rather in the more general rule of Article 48(1) which protects freedom of movement for workers as such. [49] In both *Scholz* and *Commission* v *Greece* [50] the Advocate General considered that unconditional refusal to recognise periods of employment completed abroad constituted an obstacle to freedom of movement since it deterred persons from taking up employment in other Member States. In my view, the same must be said of the Austrian rules at issue which make recognition of periods completed in other Member States subject to other and more burdensome requirements than recognition of periods completed in Austria. However, neither in *Scholz* nor in *Commission* v *Greece* did the Court find it necessary to address the issue since in any event the rules infringed the prohibition of indirect discrimination on grounds of nationality. Since that applies also in the present case, I will not expand further on that point.

138. I accordingly conclude that rules of a Member State on the taking into account of previous periods of employment for the determination of contractual teachers' and teaching assistants' pay infringe Article 48 of the EC Treaty and Article 7(1) of Regulation No 1612/68 where more onerous requirements are imposed with regard to periods completed in other Member States than with regard to periods completed in comparable institutions in that Member State.

Question 3: Temporal limitation

139. At issue is whether, where a Member State is required to take into account

48 — Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877, paragraph 13 of the judgment; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897, paragraph 13; Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 16 and 23.

49 — See my Opinion in Case C-419/92 *Scholz*, cited in note 23, paragraph 22.

50 — Cited in note 23.

periods completed in certain institutions in other Member States, those periods must be taken into account without temporal limitation.

140. Both the Gewerkschaftsbund and the Commission contend that previous periods of employment have to be taken into account independently of whether those periods were completed before or after the accession of Austria.

141. Article 2 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [51] (hereinafter 'the Act of Accession') provides that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act of Accession.

142. In view of the fact that the Act of Accession contains no transitional provisions with regard to the application of Article 48 of the EC Treaty or Article 7(1) of Regulation No 1612/68, those provisions must be regarded as being immediately applicable and binding on Austria from the date of its accession namely 1 January 1995. [52]

143. Thus, any act or omission by Austria taking place after the date of accession falls under the scope of application *ratione temporis* of the prohibition of direct or indirect discrimination against migrant workers on grounds of nationality with regard to conditions of work or employment.

144. The question is thus whether in taking any decision on comparability the receiving Member State must take into account all periods of employment independently of whether they have been completed before accession. The answer seems clear. Discrimination against nationals of other Member States is prohibited, in the absence of transitional provisions, with immediate effect from the date of accession to the European Union. Previous periods of employment will necessarily have been completed before accession. In the absence of transitional provisions, those periods of employment must therefore necessarily be taken into account.

145. An analogy can be made with the principle of equal pay for men and women

51 — OJ 1994 C 241, p. 21.

52 — Case C-122/96 *Saldanha and MTS* v *Hiross* [1997] ECR I-5325, paragraph 14 of the judgment.

for work of equal value. If — to take an extreme example — men in a particular Member State received an annual increment to take account of their experience and seniority, while women received no such increment, then where (in the absence of transitional provisions) that Member State is required, on accession to the European Union, to give effect to the principle of equal pay, it is obvious that women would be entitled to have account taken of periods of employment completed before accession. It could not sensibly be suggested that, where a man had 10 years' seniority, women would have to wait another 10 years before achieving parity (by which time men would have acquired a further 10 years' seniority). The effect would be to perpetuate discrimination indefinitely. Exactly the same argument applies in the present case to discrimination on grounds of nationality in respect of periods of employment completed in other Member States.

146. Parallels exist also with regard to the recognition of diplomas. The Court in its case-law [53] and the Community legislature [54] have never made the host Member State's obligations with regard to recognition dependent on whether diplomas were acquired after accession of the Member State issuing the diploma or after entry into force of the Community treaties.

147. A different finding would put migrant workers who want to work in a 'new' Member State or to leave that State in order to work in an 'old' Member State at an illogical disadvantage compared to workers moving within the area composed of the 'old' Member States.

148. That result is not affected by judgments such as *Andersson* [55] or *Tsiotras*. [56] In *Andersson* two former employees of a Swedish undertaking which was declared insolvent before the accession of Sweden to the European Union tried to rely on Council Directive 80/987/EEC of 20 October 1980 on the approximation of laws of the Member States relating to the protection of employees in the event of the insolvency of their employer in combination with the principles established in *Francovich*. [57] In *Tsiotras* a Greek national who before his country's accession to the Community had worked in Germany, but who on the date of accession was unemployed, who remained afterwards unem-

53 — Implicit for example in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

54 — See, for example, Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L 19 p. 16.

55 — Case C-321/97 *Andersson and Wikerås-Andersson* v *Svenska Staten*, judgment of 15 June 1999.

56 — Case C-171/91 *Tsiotras* v *Landeshauptstadt Stuttgart* [1993] ECR I-2925.

57 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

ployed and for whom it was objectively impossible to find employment tried to rely against Germany on the freedom of movement for workers. In both cases the Court refused to draw legal conclusions from facts which had occurred before the accession of the respective Member States.

149. In both judgments however the rationale was that Community law rights cannot be acquired before accession and as a consequence cannot be recognised after accession when the conditions for their acquisition or existence are no longer in place. The present case is different since it does not concern recognition of Community law rights allegedly acquired before accession but discriminatory treatment of migrant workers with regard to their current status which itself is the consequence of past events governed by the laws of their respective Member States of origin.

150. It follows that, where the Austrian authorities take decisions on the recognition of previous periods of employment, all such periods have to be taken into account, even those completed before the date of accession.

151. I do not consider that a different result can be reached with regard to Austrian workers having completed relevant periods of employment in other Member States. When such a worker returns to his home country and requests after the date of Austria's accession recognition of previous periods of employment completed in other Member States he must be treated in the same way as any other person enjoying the rights and liberties guaranteed by the EC Treaty. [58]

152. I accordingly conclude that periods completed in institutions in other Member States comparable to the Austrian institutions enumerated in Paragraph 26(2) of the VBG must be taken into account without any temporal limitation; the periods to be taken into account therefore include any such periods completed before the accession of Austria to the European Union.

58 — Compare Case C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 32 of the judgment.

Conclusion

153. The substantive questions referred by the Oberster Gerichtshof, Austria, should therefore in my opinion be answered as follows:

(1) Rules of a Member State on the taking into account of previous periods of employment for the determination of contractual teachers' and teaching assistants' pay infringe Article 48 of the EC Treaty (now Article 39 EC) and Article 7(1) of Regulation No 1612/68 where more onerous requirements are imposed with regard to periods completed in other Member States than with regard to periods completed in comparable institutions in that Member State.

(2) Where a Member State is required to take into account periods completed in certain institutions in other Member States, those periods must be taken into account without any temporal limitation; the periods to be taken into account therefore include any such periods completed before the accession of a Member State to the European Union.