JUDGMENT OF THE COURT (Fifth Chamber)
24 September 1998 *

In Case C-35/97,

Commission of the European Communities, represented by Pieter Jan Kuyper, Legal Adviser, and Pieter van Nuffel, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Kareen Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

APPLICATION for a declaration that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic has failed to fulfil its obligations under Article 48(2) of the EC Treaty and 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),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 March 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 January 1997 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic has failed to fulfil its obligations under Article 48(2) of the EC Treaty and 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).

The Community legal framework

2 The third and fourth recitals in the preamble to Regulation No 1612/68 state that 'the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed' and that 'such right must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services'.

3 Article 7(1) and (4) of that regulation provide as follows:

'1. 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.

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

4 According to Article 42(2) of Regulation No 1612/68, the regulation 'shall not affect measures taken in accordance with Article 51 of the Treaty'.

5 The first subparagraph of Article 1(j) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, hereinafter 'Regulation No 1408/71'), provides that the term 'legislation' is to mean 'statutes, regulations and other provisions and all other implementing measures, present or future, relating to branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a)'. However, according to the second subparagraph of that provision, the term 'excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope'.

6 Under Article 71(1)(a)(ii) of Regulation No 1408/71:

'A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense'.

The national legal framework

7 In France, in addition to the general old-age insurance scheme, there are supplementary retirement pension schemes established pursuant to collective agreements

concluded by both sides of industry (employers and trade unions). Those schemes are financed by contributions paid by both employers and employees to the institution which manages the scheme. In terms of Article L 731-5 of the Social Security Code, membership of one of the supplementary schemes is compulsory for employees.

8 Title IV of the General Agreement of 24 July 1979 for the welfare of employees of steel companies in eastern and northern France affected by reorganisation ('the Agreement') lays down, in Articles 18 to 27, the welfare scheme applicable to 'employees aged 55 or over who are placed in early retirement'.

9 Article 18 of the Agreement provides: 'Early retirement of frontier workers aged 55 or over who reside in Belgium shall be effected in accordance with the conditions laid down in Annex VI'.

10 Under Article 21, other employees aged 55 or over who are placed in early retirement are to receive, until reaching normal retirement age, the unemployment benefits provided for by the rules annexed to the Agreement of 27 March 1979 establishing the compensation scheme for workers deprived of employment. Up to the age of 60, those benefits are supplemented, if necessary, by an additional sum financed from State funds, so that the beneficiary receives at least a monthly income equal to 70% of previous gross remuneration.

11 Article 22 of the Agreement provides that employees aged 55 or over who enter into early retirement are to receive, up to the age of 59, a further supplement to their income, also financed from State funds. The amount of the supplement depends on the age at which the employee concerned goes into early retirement.

12 Article 23 of the Agreement lays down the minimum amount of the guaranteed income payable to those concerned.

13 Under Article 27 of the Agreement, they are provided with certain social security cover, including the award of 'free' supplementary retirement points ('concessionary points') until they reach normal retirement age. During the pre-litigation procedure the French Government stated that this benefit is financed 'by means of the payment by the unemployment insurance scheme to the supplementary retirement pension institutions (AGIRC — Association Générale des Institutions de Retraite des Cadres and Arrco — Association des Régimes de Retraite Complémentaire) of sums corresponding to the contributions which would have been paid by the employers and employees if the latter had been kept in employment'.

14 According to Article 2 of Annex VI to the Agreement, frontier workers residing in Belgium who are placed in early retirement receive benefits which are different from those granted to employees residing in France and which are intended to guarantee them 'a monthly income of the same amount as that provided for in Article 21 and Article 22' of the Agreement. That amount may not in any circumstances be lower than that guaranteed by Article 23 of the Agreement.

15 The Belgian authorities agreed to treat frontier workers resident in Belgium as though they had been employed in the Belgian steel industry and were covered by the Belgian early retirement pension scheme, so that those workers received the unemployment benefits payable to such Belgian employees. Those benefits are supplemented, under Article 2 of Annex VI to the Agreement, by 'an additional allowance financed from French State funds' which is intended to guarantee payment of the minimum income.

16 In addition to that income, under Article 4 of Annex VI workers resident in Belgium qualify for certain of the social security benefits referred to in Article 27 of the Agreement. The benefits enjoyed by workers resident in Belgium include the right to receive supplementary retirement benefits from the time when they reach

normal retirement age. However, workers resident in Belgium are not awarded concessionary points such as those awarded under Article 27(2)(1) of the Agreement to employees residing in France.

Pre-litigation procedure

17 The Commission learned of the provisions of the Agreement when it received complaints from Belgian frontier workers who had been placed in early retirement and who considered that the Agreement discriminated against them.

18 By letter of 5 October 1993, the Commission called upon the French Government to submit to it, within a period of two months, its observations on the question whether the Agreement might be incompatible with Article 48(2) of the Treaty and Article 7 of Regulation No 1612/68.

19 On 28 August 1995, unconvinced by the reply which it received by communication of 5 August 1994, the Commission sent a reasoned opinion to the French Government and requested it to comply with that opinion within two months of its notification.

20 The French Government replied to the reasoned opinion by communication of 19 December 1995, in which it reiterated its view that the provisions of the Agreement were compatible with Community law.

21 It was against that background that the Commission decided to bring the present action before the Court.

The action

22 The Commission considers that the Agreement infringes Article 48(2) of the Treaty and Article 7(1) of Regulation No 1612/68, in that it treats national workers differently from frontier workers residing in Belgium as regards the terms of dismissal applicable to them. Whilst workers resident in France aged 55 or over who are placed in early retirement are granted concessionary points until they reach normal retirement age, that advantage is not granted to persons in the same situation who reside in Belgium.

23 Consequently, the terms on which workers residing in France are dismissed are more favourable than those applicable to frontier workers resident in Belgium. According to the Court's case-law, use of the criterion of residence may give rise to covert discrimination based on nationality (Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779 and Case C-151/94 *Commission* v *Luxembourg* [1995] ECR I-3685).

24 In the Commission's view, the French Republic is responsible for the incompatibility of the provisions of the Agreement with Community law. Although the system of supplementary retirement schemes is based on collective agreements, the French Republic rendered them compulsory by enactment of Article L 731-5 of the Social Security Code. Furthermore, public authorities are actively involved in the management of that system, particularly as regards maintenance of its financial balance. Moreover, at no stage in the pre-litigation procedure did the French Government deny that it would be liable if the Agreement were found to be incompatible with Community law.

25 The French Government points out that, in paragraph 20 of the judgment in Case C-57/90 *Commission* v *France* [1992] ECR I-75, the Court held that the French supplementary retirement schemes introduced pursuant to collective agreements did not constitute legislation within the meaning of the first subparagraph of Article 1(j) of Regulation No 1408/71 and consequently fell outside the scope of the matters covered by that regulation.

26 The French Government explains that the award of concessionary points is funded under the French unemployment insurance scheme, 'Unedic'. In accordance with Article 71(1)(a)(ii) of Regulation No 1408/71, workers resident in Belgium who are placed in early retirement are eligible for the unemployment benefits granted under the legislation of the Member State in which they reside. In those circumstances, Unedic cannot be required to finance a contribution which is in fact a benefit for persons covered by the legislation of another Member State.

27 According to the defendant Member State, it is therefore Regulation No 1408/71 that has led to workers in the same situation finding themselves the subject of one or other of two different compensation schemes, depending on whether they are resident in France or in Belgium.

28 The French Government further maintains that frontier workers who are wholly unemployed cannot under any circumstances be eligible for the social advantages granted both in France and in Belgium. Regulation No 1612/68 makes no provision for the 'exportation' of the social advantages to which it refers. Only the social security benefits to which Regulation No 1408/71 applies are exportable.

29 Furthermore, in accordance with Article 42(2) of Regulation No 1612/68, the provisions of Regulation No 1408/71 take precedence over those of Regulation No 1612/68. In the present case, that precedence results in the application to frontier workers of an unemployment compensation scheme different from that applicable to national workers.

30 In the French Government's view, persons eligible under the Agreement cannot in any event be regarded as 'frontier workers' because their employment contract has been terminated.

31 Lastly, it maintains that the principle of the protection of legitimate expectations precludes the award of concessionary points to frontier workers resident in Belgium. The award of such points now, nearly 20 years after the Agreement was signed, would impose a heavy financial burden on the French authorities. Moreover, the principle of legal certainty requires the situation at issue to be assessed in accordance with the legal rules which applied at the time when the Agreement was signed.

32 It must be noted at the outset that the present action is concerned solely with those provisions of the Agreement relating to concessionary points, which enable beneficiaries to receive a larger supplementary retirement pension. The concessionary points system, forming as it does an integral part of a supplementary retirement pension scheme, must be assessed in accordance with the provisions applicable to that type of scheme.

33 The French Government does not deny that it will be liable if the Agreement is found to be incompatible with Community law. Indeed, it has itself stated that the award of concessionary points is financed, through Unedic, from public funds. Furthermore, as the Commission has pointed out, membership of supplementary retirement pension schemes has been rendered compulsory by Article L 731-5 of the Social Security Code. The French Republic has therefore assumed responsibility for ensuring that those schemes comply with Community law.

34 As the French Government and the Commission have already pointed out, the Court has held, in paragraphs 19 and 20 of its judgment in *Commission* v *France*, cited above, that the supplementary retirement pension schemes introduced under agreements concluded by the competent authorities with trade or inter-trade bodies, trade-union organisations or individual undertakings or under collective agreements concluded by both sides of industry, membership of which has been rendered com-

pulsory by Article L 731-5 of the Social Security Code, do not constitute legislation within the meaning of the first subparagraph of Article 1(j) of Regulation No 1408/71.

35 It follows that those schemes — together with the system for the validation of concessionary points which forms part thereof — are not covered by Regulation No 1408/71, so that they cannot be assessed in the light of the provisions of that regulation.

36 By contrast, the system of validation, which forms an integral part of the advantages granted to workers in the sector concerned upon their being placed in early retirement, constitutes one of the conditions applicable to their dismissal, within the meaning of Article 7(1) of Regulation No 1612/68. In that regard, Article 7(4) of that regulation provides that any clause of a collective agreement concerning conditions of dismissal is null and void in so far as it lays down discriminatory conditions in respect of workers who are nationals of other Member States.

37 The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see, *inter alia*, Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11, and Case C-57/96 *Meints* v *Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689, paragraph 44).

38 Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*Meints*, cited above, paragraph 45).

39 That is the position as regards the residence condition laid down by the Agreement in relation to the award of concessionary points, which can more easily be fulfilled by French workers — most of whom reside in France — than by workers from other Member States.

40 Moreover, contrary to the arguments advanced by the French Government, frontier workers are entitled to rely on the provisions of Article 7 of Regulation No 1612/68 in the same way as any other worker to whom that article refers. The fourth recital in the preamble to that regulation expressly provides that the right to freedom of movement must be enjoyed 'without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services', whilst Article 7 refers without qualification to 'a worker who is a national of a Member State' (see, to that effect, *Meints*, paragraphs 49 and 50).

41 The application of Article 7(1) of Regulation No 1612/68 to the present case cannot be precluded by the fact that the concessionary points system benefits persons whose contract of employment has terminated. Workers are guaranteed certain rights linked to their status as such, including those referred to in Article 7(1) of Regulation No 1612/68 concerning conditions of dismissal, even when they are no longer in an employment relationship (see, to that effect, Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 36).

42 Similarly, it cannot be argued that Article 7 of Regulation No 1612/68 does not apply in the present case on the ground, relied on by the French Government, that Unedic cannot be required to finance a contribution in favour of persons residing in Belgium because that would in fact constitute a benefit falling, pursuant to Article 71(1)(a)(ii) of Regulation No 1408/71, within the ambit of the legislation of the Member State of residence.

43 That argument presupposes that the award of concessionary points provided for by the Agreement constitutes an unemployment benefit covered by Regulation

No 1408/71 and that the points must therefore be awarded in accordance with the provisions of that regulation relating to unemployment benefits. However, as stated in paragraph 35 of this judgment, the award of concessionary points is not covered by that regulation.

44 Consequently, consistent with Article 42(2) of Regulation No 1612/68, the application of the provisions of Regulation No 1408/71 is not in question.

45 As regards the principle of the protection of legitimate expectations, neither the fact that the Agreement was concluded nearly 20 years ago, nor the fact that the French authorities have since then regarded the different treatment of frontier workers residing in Belgium as compatible with Community law nor the fact that this judgment may have significant financial implications for the French Republic eliminates the discriminatory nature of the concessionary points system established by the Agreement.

46 As to the principle of legal certainty, it must be noted that the relevant provisions of Regulation No 1612/68 entered into force more than 10 years before the Agreement was concluded. An interpretation given by the Court of Justice to a provision of Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force (see, to that effect, Joined Cases C-367/93 to C-377/93 *Roders* v *Inspecteur der Invoerrechten en Accijnzen* [1995] ECR I-2229, paragraph 42).

47 In view of the real doubt as to the requirements of Community law which it considers characterised the situation in issue at the time, the French Government requested the Court at the hearing to limit the temporal effects of its judgment should the Court find the provisions of the Agreement incompatible with Com-

munity law. The French Government stresses that, if the Court declares in its judgment that the defendant has failed to fulfil its obligations, this will impose on the French authorities, nearly 20 years after the conclusion of the Agreement, a heavy financial burden which may amount to as much as FF 192 million.

48 The Commission states that the complaints it received were lodged by frontier workers who had been dismissed, in accordance with the terms of the Agreement, at the age of 55. However, those persons did not begin to receive their supplementary retirement pension until 10 years later, and it was not until then that they felt the effects of the difference in treatment.

49 The Court would observe here that it is only exceptionally that, in application of the general principle of legal certainty inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith. As the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought (see, to this effect, the judgment in Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625, paragraph 30).

50 In the present case, there is nothing to justify departure from the principle that interpretative judgments are to have retroactive effect.

51 The present case concerns the application of the principle of non-discrimination, which is enshrined both in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68. At the time when the Agreement was concluded, the case-law clearly established, beyond doubt, that this principle prohibited all covert forms of discrimination (see paragraph 37 of this judgment) and that criteria such as the place

of origin or residence of a worker may, according to the circumstances, be tantamount, as regards their practical effect, to unlawful discrimination on the grounds of nationality (*Sotgiu*, cited above, paragraph 11).

52 Furthermore, the financial consequences which may ensue for a State from a judgment of the Court have never justified in themselves limiting its effects. To limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which individuals have under Community law (see, to this effect, the judgment in *Roders and Others*, cited above, paragraph 48).

53 In the light of all the foregoing, and since the French Republic has not indicated any other factor which might objectively justify the discriminatory treatment of frontier workers of which the Commission complains, it must be held that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic has failed to fulfil its obligations under Article 48(2) of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68.

Costs

54 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has been unsuccessful and the Commission has applied for costs, the defendant must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by excluding frontier workers residing in Belgium from qualifying for supplementary retirement pension points after being placed in early retirement, the French Republic has failed to fulfil its obligations under Article 48(2) of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;**

2. **Orders the French Republic to pay the costs.**

Gulmann Wathelet Moitinho de Almeida

Edward Puissochet

Delivered in open court in Luxembourg on 24 September 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber