Judgment of the Court of Justice, Köbler, Case C-224/01 (30 September 2003)

Caption: In its judgment of 30 September 2003, in Case C-224/01, Köbler, the Court of Justice makes clear that, since, in international law, a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive, that principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound, in performing their tasks, to comply with the rules laid down by Community law which directly govern the situation of individuals.

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Publication date: 05/09/2012

Judgment of the Court of 30 September 2003 (1)
Gerhard Köbler v Republik Österreich

Case C-224/01

(Equal treatment - Remuneration of university professors - Indirect discrimination - Length-of-service increment - Liability of a Member State for damage caused to individuals by infringements of Community law for which it is responsible - Infringements attributable to a national court)

In Case C-224/01,

REFERENCE to the Court under Article 234 EC by the Landesgericht für Zivilrechtssachen Wien (Austria), for a preliminary ruling in the proceedings pending before that court between

Gerhard Köbler

and

Republik Österreich,

on the interpretation, first, of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and, secondly, the judgments of the Court in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Köbler, by A. König, Rechtsanwalt,

- the Republic of Austria, by M. Windisch, acting as Agent,

- the Austrian Government, by H. Dossi, acting as Agent,

- the German Government, by A. Dittrich and W.-D. Plessing, acting as Agents,

- the French Government, by R. Abraham and G. de Bergues, and by C. Isidoro, acting as Agents,

- the Netherlands Government, by H.G. Sevenster, acting as Agent,

- the United Kingdom Government, by J.E. Collins, acting as Agent, and D. Andersen QC and M. Hoskins, Barrister,

- the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Köbler, represented by A. König, the Austrian Government, represented by E. Riedl, acting as Agent, the German Government, represented by A. Dittrich, the French Government, represented by R. Abraham, the Netherlands Government, represented by H.G. Sevenster, the United Kingdom Government, represented by J.E. Collins, and by D. Andersen and M. Hoskins, and the Commission, represented by J. Sack and H. Kreppel, at the hearing on 8 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

1. By an order of 7 May 2001, received at the Court on 6 June 2001, the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of, first, Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and, secondly, the judgments of the Court in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

2. Those questions were raised in the course of an action for a declaration of liability brought by Mr Köbler against the Republic of Austria for breach of a provision of Community law by a judgment of the Verwaltungsgerichtshof (Supreme Administrative Court), Austria.

Legal framework

3. Article 48(3) of the Gehaltsgesetz 1956 (law on salaries of 1956, BGBl. 1956/54), as amended in 1997 (BGBl. I, 1997/109) (hereinafter the GG), provides:

In so far as may be necessary in order to secure the services of a scientific expert or an artist from the country or from abroad, the Federal President may grant a basic salary higher than that provided for in Article 48(2) on appointment to a post as a university professor (Article 21 of the Bundesgesetz über die Organisation der Universitäten (Federal law on the organisation of universities), BGBl. 1993/805, hereinafter the UOG 1993) or as an ordinary professor of universities or of an institution of higher education.

4. Article 50a(1) of the GG is worded as follows:

A university professor (Article 21 of the UOG 1993) or an ordinary professor at a university or an institution of higher education who has completed 15 years service in that capacity in Austrian universities or institutions of higher education and who for four years has been in receipt of the length-of-service increment provided for in Article 50(4) shall be eligible, with effect from the date on which those two conditions are fulfilled, for a special length-of-service increment to be taken into account in the calculation of his retirement pension the amount of which shall correspond to that of the length-of-service increment provided for in Article 50(4).

Dispute in the main proceedings

5. Mr Köbler has been employed since 1 March 1986 under a public-law contract with the Austrian State in the capacity of ordinary university professor in Innsbruck (Austria). On his appointment he was awarded the salary of an ordinary university professor, tenth step, increased by the normal length-of-service increment.

6. By letter of 28 February 1996, Mr Köbler applied under Article 50a of the GG for the special length-of-service increment for university professors. He claimed that, although he had not completed 15 years' service as a professor at Austrian universities, he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into

consideration. He claimed that the condition of completion of 15 years service solely in Austrian universities - with no account being taken of periods of service in universities in other Member States - amounted to indirect discrimination unjustified under Community law.

7. In the dispute to which Mr Köbler's claim gave rise, the Verwaltungsgerichtshof, Austria, referred to the Court, by order of 22 October 1997, a request for a preliminary ruling which was registered at the Registry of the Court under Case number C-382/97.

8. By letter of 11 March 1998, the Registrar of the Court asked the Verwaltungsgerichtshof whether, in the light of the judgment of 15 January 1998 in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, it deemed it necessary to maintain its request for a preliminary ruling.

9. By order of 25 March 1998 the Verwaltungsgerichtshof asked the parties for their views on the request by the Registrar of the Court, since on a provisional view the legal issue which was the subject-matter of the question submitted for a preliminary ruling had been resolved in favour of Mr Köbler.

10. By order of 24 June 1998, the Verwaltungsgerichtshof withdrew its request for a preliminary ruling and, by a judgment of the same date, dismissed Mr Köbler's application on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers.

11. That judgment of 24 June 1998 states in particular:

... In its order for reference of 22 October 1997 [in Case C-382/97] the Verwaltungsgerichtshof took the view that the special length-of-service increment for ordinary university professors is in the nature of neither a loyalty bonus nor a reward, but is rather a component of salary under the system of career advancement.

That interpretation of the law, which is not binding on the parties to proceedings before the Verwaltungsgerichtshof, cannot be upheld.

...

It is thus clear that the special length-of-service increment under Paragraph 50a of the 1956 salary law is unrelated to the market value assessment to be undertaken in the course of the appointment procedure, but, rather, its purpose must be seen as the provision of a positive incentive to academics in a very mobile labour market to spend their career in Austrian universities. It cannot therefore be a component of salary as such and, because of its function as a loyalty bonus, requires a certain length of service as an ordinary university professor at Austrian universities as a precondition for eligibility. The treatment of the special length-of-service increment as a component of monthly earnings and the consequent permanent character of the loyalty bonus do not essentially preclude the above interpretation.

Since, in Austria, - in so far as this is of relevance in the present case - the legal personality of the universities is vested in the Federal State alone, the rules in Paragraph 50a of the 1956 salary law apply to only one employer - in contrast to the situation in Germany contemplated in the judgment of the Court of Justice in Case C-15/96 *Kalliope Schöning-Kougebetopoulou* [1998] ECR I-47. Previous periods of service are taken into account in reckoning length of service, as the plaintiff demands, in the course of the assessment of market value in the appointment procedure. There is no provision for any further account to be taken of such previous periods of service in the special length-of-service increment even for Austrian academics who resume teaching in Austria after spending time working abroad and such provision would not be consistent with the notion of rewarding many years' loyalty to an employer deemed by the Court of Justice to justify a rule which in itself breaches the prohibition on discrimination.

As the claim which the complainant seeks to assert here is for a special length of service increment under Paragraph 50a of the 1956 salary law which is a statutory loyalty bonus and as such is recognised by the Court of Justice as justification for legislation conflicting with the prohibition on discrimination, the

complaint based on breach of that prohibition on discrimination is unfounded; it should be dismissed ...

12. Mr Köbler brought an action for damages before the referring court against the Republic of Austria for reparation of the loss which he allegedly suffered as a result of the non-payment to him of a special length-of-service increment. He maintains that the judgment of the Verwaltungsgerichtshof of 24 June 1998 infringed directly applicable provisions of Community law, as interpreted by the Court in the judgments in which it held that a special length-of-service increment does not constitute a loyalty bonus.

13. The Republic of Austria contends that the judgment of the Verwaltungsgerichtshof of 24 June 1998 does not infringe the directly applicable Community law. Moreover, in its view, the decision of a court adjudicating at last instance such as the Verwaltungsgerichtshof cannot found an obligation to afford reparation as against the State.

The questions referred

14. Taking the view that in the case before it the interpretation of Community law was not free from doubt and that such interpretation was necessary in order for it to give its decision, the Landesgericht für Zivilrechtssachen Wien decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?

(2) If the answer to Question 1 is yes:

Is the case-law of the Court of Justice according to which it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law (see inter alia Case C-54/96 *Dorsch Consult* [1997] ECR I-4961) also applicable when the conduct of an institution purportedly contrary to Community law is a judgment of a supreme court of a Member State, such as, in this case, the Verwaltungsgerichtshof?

(3) If the answer to Question 2 is yes:

Does the legal interpretation given in the abovementioned judgment of the Verwaltungsgerichtshof, according to which the special length-of-service increment is a form of loyalty bonus, breach a rule of directly applicable Community law, in particular the prohibition on indirect discrimination in Article 48 [of the Treaty] and the relevant settled case-law of the Court of Justice?

(4) If the answer to Question 3 is yes:

Is this rule of directly applicable Community law such as to create a subjective right for the applicant in the main proceedings?

(5) If the answer to Question 4 is yes:

Does the Court ... have sufficient information in the content of the order for reference to enable it to rule itself as to whether the Verwaltungsgerichtshof in the circumstances of the main proceedings described has clearly and significantly exceeded the discretion available to it, or is it for the referring Austrian court to answer that question?

First and second questions

15. By its first and second questions, which must be examined together, the referring court is essentially asking whether the principle according to which Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance and whether, if so, it is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Observations submitted to the Court

16. Mr Köbler, the German and Netherlands Governments and the Commission consider that a Member State can be rendered liable for breach of Community law owing to a fault attributable to a court. However, those governments and the Commission consider that that liability should be limited and subject to different restrictive conditions additional to those already laid down in the *Brasserie du Pêcheur and Factortame* judgment.

17. In that connection the German and Netherlands Governments claim that there is a sufficiently serious breach for the purposes of that judgment only if a judicial decision disregarded the applicable Community law in a particularly serious and manifest way. According to the German Government, breach of a rule of law by a court is particularly serious and manifest only where the interpretation or non-application of Community law is, first, objectively indefensible and, secondly, must be subjectively regarded as intentional. Such restrictive criteria are justified in order to safeguard both the principle of *res judicata* and the independence of the judiciary. Moreover, a restrictive regime of State liability for damage caused by mistaken judicial decisions is in keeping, in the German Government's view, with a general principle common to the laws of the Member States as laid down in Article 288 EC.

18. The German and Netherlands Governments maintain that the liability of the Member State should remain limited to judicial decisions against which no appeal lies, in particular because Article 234 EC imposes an obligation to make a reference for a preliminary ruling only on courts called upon to make such decisions. The Netherlands Government considers that State liability can be incurred only in the event of a manifest and serious infringement of that obligation to make a reference.

19. The Commission submits that a limitation of State liability on account of judicial decisions exists in all the Member States and is necessary in order to safeguard the authority of *res judicata* of final decisions and thus the stability of the law. For that reason it advocates that the existence of a sufficiently serious breach of Community law should be recognised only where the national court is manifestly abusing its power or discernibly disregarding the meaning and scope of Community law. In the present case, the alleged fault by the Verwaltungsgerichtshof is excusable and that fact is one of the criteria enabling it to be concluded that there has not been a sufficiently serious breach of the law (Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 43).

20. For their part the Republic of Austria and the Austrian Government (hereinafter together referred to as the Republic of Austria), and the French and United Kingdom Governments, maintain that the liability of a Member State cannot be incurred in the case of a breach of Community law attributable to a court. They rely on arguments based on *res judicata*, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC.

21. The Republic of Austria claims in particular that a re-examination of the legal appraisal by a court adjudicating at last instance would be incompatible with the function of such a court since the purpose of its decisions is to bring a dispute to a definitive conclusion. Moreover, since the Verwaltungsgerichtshof conducted a detailed examination of Community law in its judgment of 24 June 1998, it would be consonant with Community law to preclude another possibility of bringing proceedings before an Austrian court. Moreover, the Republic of Austria maintains that the conditions for rendering a Member State liable cannot differ from those applicable to the liability of the Community in comparable circumstances. Since the second paragraph of Article 288 EC cannot be applied to an infringement of Community law by the Court of

Justice, because in such a case it would be required to determine a question concerning damage which it itself had caused, so as to render it judge and party at the same time, nor can the liability of the Member States be incurred in respect of damage caused by a court adjudicating at last instance.

22. Moreover, the Republic of Austria contends that Article 234 EC is not intended to confer rights on individuals. In the context of a preliminary-reference procedure pending before the Court the parties to the main proceedings can neither amend the questions referred for a preliminary ruling nor have them declared irrelevant (Case 44/65 *Singer* [1965] ECR 965). Moreover, only the infringement of a provision intended to confer rights on individuals is capable in a proper case of rendering the Member State liable. Accordingly, that liability cannot be incurred in the case of an infringement of Article 234 EC by a court adjudicating at last instance.

23. The French Government claims that a right to reparation on the ground of an allegedly mistaken application of Community law by a definitive decision of a national court would be contrary to the principle of *res judicata*, as upheld by the Court in Case C-126/97 *Eco Swiss* [1999] ECR I-3055. That government claims in particular that the principle of *res judicata* constitutes a fundamental value in legal systems founded on the rule of law and the observance of judicial decisions. However, if State liability for infringement of Community law by a judicial body were recognised, that would be to call in question the rule of law and observance of such decisions.

24. The United Kingdom Government states that, as a matter of principle and save where a judicial act infringes a fundamental right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), signed in Rome on 4 November 1950, no action in damages can be brought against the Crown in respect of judicial decisions. It adds that the principle on which the principle of State liability is based, namely that rights conferred by Community rules must be effectively protected, is far from being absolute and cites in that regard the application of fixed limitation periods. That principle would be capable of founding a remedy in damages against the State only in rare cases and in respect of certain strictly defined national judicial decisions. The advantage to be gained from acknowledging that damages may be obtained in respect of judicial decisions is therefore correspondingly small. The United Kingdom Government considers that that advantage must be weighed against certain powerful policy concerns.

25. In that regard it cites, first, the principles of legal certainty and *res judicata*. The law discourages re-litigation of judicial decisions except by means of an appeal. That is both to protect the interests of the successful party and to further the public interest in legal certainty. The Court has in the past shown itself willing to limit the principle of effective protection in order to uphold the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle (judgment in *Eco Swiss*, cited above, paragraphs 43 to 48). Acknowledgment of State liability for a mistake by the judiciary would throw the law into confusion and would leave the litigating parties perpetually uncertain as to where they stood.

26. Secondly, the United Kingdom Government submits that the authority and reputation of the judiciary would be diminished if a judicial mistake could in the future result in an action for damages. Thirdly, it maintains that the independence of the judiciary within the national constitutional order is a fundamental principle in all the Member States but one which can never be taken for granted. Acceptance of State liability for judicial acts would be likely to give rise to the risk that that independence might be called in question.

27. Fourthly, inherent in the freedom given to national courts to decide matters of Community law for themselves is the acceptance that those courts will sometimes make errors that cannot be appealed or otherwise corrected. That is a disadvantage which has always been considered acceptable. In that regard the United Kingdom Government points out that, in the event that the State could be rendered liable for a mistake by the judiciary, with the result that the Court could be called upon to give a preliminary ruling on that point, the Court would be empowered not only to pronounce upon the correctness of judgments of national supreme courts but to assess the seriousness and excusability of any error into which they had fallen. The consequences of this for the vital relationship between the Court and the national courts would

clearly not be beneficial.

28. Fifthly, the United Kingdom Government points to the difficulties in determining the court competent to adjudicate on such a case of State liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of *stare decisis*. Sixthly, it maintains that, if State liability for a mistake by the judiciary can be incurred, the same conditions for the liability of the Community for mistakes by the Community judicature would have to apply.

29. Specifically in regard to the second question, Mr Köbler and the Austrian and German Governments submit that it is for the legal system of each Member State to designate the court competent to adjudicate on disputes involving individual rights derived from Community law. That question should therefore be answered in the affirmative.

Reply by the Court

Principle of State liability

30. First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty (Joined Cases C-6/90 and C-9/90 *Francovich* and Others [1991] ECR I-5357, paragraph 35; *Brasserie du Pêcheur and Factortame*, cited above, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20, Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 106 and *Haim*, cited above, paragraph 26).

31. The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 32; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62 and *Haim*, cited above, paragraph 27).

32. In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 34).

33. In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.

35. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

36. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur and Factortame*, cited above, paragraph 35).

37. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.

38. In that regard the importance of the principle of *res judicata* cannot be disputed (see judgment in *Eco Swiss*, cited above, paragraph 46). In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

39. However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

40. It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.

41. Nor can the arguments based on the independence and authority of the judiciary be upheld.

42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.

44. Several governments also argued that application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.

45. In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court.

46. According to settled case-law, in the absence of Community legislation, it is for the internal legal order

of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; *Frankovich and Others*, cited above, paragraph 42, and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12).

47. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (judgments in Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32 and *Dorsch Consult*, cited above, paragraph 40).

48. It should be added that, although considerations to do with observance of the principle of *res judicata* or the independence of the judiciary have caused national legal systems to impose restrictions, which may sometimes be stringent, on the possibility of rendering the State liable for damage caused by mistaken judicial decisions, such considerations have not been such as absolutely to exclude that possibility. Indeed, application of the principle of State liability to judicial decisions has been accepted in one form or another by most of the Member States, as the Advocate General pointed out at paragraphs 77 to 82 of his Opinion, even if subject only to restrictive and varying conditions.

49. It may also be noted that, in the same connection, the ECHR and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance (see ECt.HR, *Dulaurans* v *France*, 21 March 2000, not yet published).

50. It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

Conditions governing State liability

51. As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties (*Haim*, cited above, paragraph 36).

52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur and Factortame*, cited above, paragraph 57).

57. The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, cited above, paragraph 66).

58. Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (*Francovich* and Others, paragraphs 41 to 43 and *Norbrook Laboratories*, paragraph 111).

59. In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Third question

60. At the outset it must be recalled that the Court has consistently held that, in the context of the application of Article 234 EC, it has no jurisdiction to decide whether a national provision is compatible with Community law. The Court may, however, extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of Community law, for the purpose of enabling that court to resolve the legal problems before it (see, inter alia, the judgment in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 19).

61. In its third question the national court essentially seeks to ascertain whether Article 48 of the Treaty and Article 7(1) 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) are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Observations submitted to the Court

62. First, Mr Köbler claims that the special length-of-service increment provided for in Article 50 of the GG is not a loyalty bonus but an ordinary element of salary, as the Verwaltungsgerichtshof initially acknowledged. Moreover, until the judgment of the Verwaltungsgerichtshof of 24 June 1998 no Austrian

court considered that the abovementioned allowance constituted a loyalty bonus.

63. Next, even on the supposition that that allowance is a loyalty bonus and such a bonus could justify indirect discrimination, Mr Köbler maintains that there is no settled and certain case-law of the Court on this point. In those circumstances the Verwaltungsgerichtshof acted ultra vires in withdrawing its request for a preliminary ruling and in reaching its determination alone since the interpretation and definition of concepts of Community law is exclusively a matter for the Court.

64. Finally, Mr Köbler submits that the criteria governing the grant of the special length-of-service increment preclude any justification for the indirect discrimination which it applies against him. That allowance is payable irrespective of the question as to the Austrian university in which the claimant has performed his duties and it is not even a requirement that the claimant should have taught for 15 years continuously in the same discipline.

65. Stating that the Court cannot interpret national law, the Republic of Austria maintains that the third question must be construed as meaning that the referring court wishes to obtain an interpretation of Article 48 of the Treaty. In that regard it claims that that provision does not preclude a system of remuneration which enables account to be taken of the qualifications acquired with other national or foreign employers by a candidate for a post with a view to determining his salary and which, moreover, provides for an allowance which may be termed a loyalty bonus, eligibility for which is linked to a specific period of service with the same employer.

66. The Republic of Austria explains that, in the light of the fact that Mr Köbler, as an ordinary university professor, is in an employment relationship governed by public law, his employer is the Austrian State. Therefore, a professor passing from one Austrian university to another does not change employer. The Republic of Austria points out that there are also private universities in Austria. The professors teaching there are employees of those establishments and not of the State with the result that their employment relationship is not governed by the GG.

67. The Commission contends for its part that Article 50a of the GG discriminates, in breach of Article 48 of the Treaty, between periods of service completed in Austrian universities and those completed in the universities of other Member States.

68. According to the Commission, the Verwaltungsgerichtshof in its final assessment clearly misconstrued the scope of the judgment in *Schöning-Kougebetopoulou*, cited above. In the light of the fresh elements of national law, the Commission considers that that court ought to have persisted with its request for a preliminary ruling at the same time as reformulating it. In fact, the Court has never expressly adjudged that a loyalty bonus can justify a discriminatory provision in regard to the workers of other Member States.

69. Moreover, the Commission claims that, even if the special length-of-service increment at issue in the main proceedings is to be regarded as a loyalty bonus, it cannot justify an impediment to freedom of movement for workers. It considers that, in principle, Community law does not preclude an employer from seeking to retain qualified employees by offering increases in salary or bonuses to its staff depending on length of service in the undertaking. None the less, the loyalty bonus provided for in Article 50a of the GG is to be distinguished from bonuses which produce their effects solely within the undertaking inasmuch as it operates at the level of the Member State concerned to the exclusion of the other Member States and thus directly affects freedom of movement of teachers. Moreover, the Austrian universities are not only in competition with the establishments of the other Member States but also amongst themselves. Yet, the provision mentioned does not produce effects in regard to the latter type of competition.

Reply by the Court

70. The special length-of-service increment granted by the Austrian State qua employer to university professors under Article 50a of the GG secures a financial benefit in addition to basic salary the amount of which is already dependent on length of service. A university professor receives that increment if he has

carried on that profession for at least 15 years with an Austrian university and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment.

71. Accordingly, Article 50a of the GG precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed by a university professor in a Member State other than the Republic of Austria.

72. Such a regime is clearly likely to impede freedom of movement for workers in two respects.

73. First, that regime operates to the detriment of migrant workers who are nationals of Member States other than the Republic of Austria where those workers are refused recognition of periods of service completed by them in those States in the capacity of university professor on the sole ground that those periods were not completed in an Austrian university (see, in that connection, with regard to a comparable Greek provision, Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraphs 20 and 21).

74. Secondly, that absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom. In fact, on their return to Austria, their years of experience in the capacity of university professor in another Member State, that is to say in the pursuit of comparable activities, are not taken into account for the purposes of the special length-of-service increment provided for in Article 50a of the GG.

75. Those considerations are not altered by the fact relied on by the Republic of Austria that, owing to the possibility afforded by Article 48(3) of the GG to grant migrant university professors a higher basic salary in order to promote the recruitment of foreign university professors, their remuneration is often more than that received by professors of Austrian universities, even after account is taken of the special length-of-service increment.

76. In fact, on the one hand, Article 48(3) of the GG offers merely a possibility and does not guarantee that a professor from a foreign university will receive as from his appointment as a professor of an Austrian university a higher remuneration than that received by professors of Austrian universities with the same experience. Secondly, the additional remuneration available under Article 48(3) of the GG upon appointment is quite different from the special length-of-service increment. Thus, that provision does not prevent Article 50a of the GG from having the effect of occasioning unequal treatment in regard to migrant university professors as opposed to professors of Austrian universities and thus creates an impediment to the freedom of movement of workers secured by Article 48 of the Treaty.

77. Consequently, a measure such as the grant of a special length-of-service increment provided for in Article 50a of the GG is likely to constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68. Such a measure could be accepted only if it pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37 and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104).

78. In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that the special length-of-service increment provided for in Article 50a of the GG constituted under national law a bonus seeking to reward the loyalty of professors of Austrian universities to their sole employer, namely the Austrian State.

79. Accordingly, it is necessary to examine whether the fact that under national law that benefit constitutes a loyalty bonus may be deemed under Community law to indicate that it is dictated by a pressing public-interest reason capable of justifying the obstacle to freedom of movement that the bonus involves.

80. The Court has not yet had the opportunity of deciding whether a loyalty bonus can justify an obstacle to

freedom of movement for workers.

81. At paragraphs 27 of the judgment in *Schöning-Kougebetopoulou*, cited above, and 49 of the judgment in Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, the Court rejected the arguments advanced in that regard by the German and Austrian Governments respectively. Indeed, the Court there stated that the legislation at issue was not on any view capable of seeking to reward the employee's loyalty to his employer, because the increase in salary which that worker received in respect of his length of service was determined by the years of service completed with a number of employers. Since, in the cases giving rise to those judgments, the increase in salary did not constitute a loyalty bonus, it was not necessary for the Court to examine whether such a bonus could in itself justify an obstacle to freedom of movement for workers.

82. In the present case the Verwaltungsgerichtshof held in its judgment of 24 June 1998 that the special length-of-service increment provided for in Article 50a of the GG rewards an employee's loyalty to a single employer.

83. Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, given the particular characteristics of the measure at issue in the main proceedings, the obstacle which it entails clearly cannot be justified in the light of such an objective.

84. First, although all the professors of Austrian public universities are the employees of a single employer, namely the Austrian State, they are assigned to different universities. However, on the employment market for university professors, the various Austrian universities are in competition not only with the universities of other Member States and those of non-Member States but also amongst themselves. As to that second kind of competition the measure at issue in the main proceedings does nothing to promote the loyalty of a professor to the Austrian university where he performs his duties.

85. Second, although the special length-of-service increment seeks to reward workers' loyalty to their employer, it also has the effect of rewarding the professors of Austrian universities who continue to exercise their profession on Austrian territory. The benefit in question is therefore likely to have consequences in regard to the choice made by those professors between a post in an Austrian university and a post in the university of another Member State.

86. Accordingly, the special length-of-service increment at issue in the main proceedings does not solely have the effect of rewarding the employee's loyalty to his employer. It also leads to a partitioning of the market for the employment of university professors in Austria and runs counter to the very principle of freedom of movement for workers.

87. It follows from the foregoing that a measure such as the special length-of-service increment provided for in Article 50a of the GG results in an obstacle to freedom of movement for workers which cannot be justified by a pressing public-interest reason.

88. Accordingly, the reply to the third question referred for a preliminary ruling must be that Articles 48 of the Treaty and 7(1) of Regulation No 1612/68 are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the GG, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof in its judgment of 24 June 1998, constitutes a loyalty bonus.

Fourth and fifth questions

89. By its fourth and fifth questions, which must be dealt with together, the national court is essentially seeking to ascertain whether, in the main proceedings, the liability of the Member State is incurred owing to an infringement of Community law by the judgment of the Verwaltungsgerichtshof of 24 June 1998.

Observations submitted to the Court

90. In regard to the fourth question, Mr Köbler, the German Government and the Commission claim that Article 48 of the Treaty is directly applicable and creates for individuals subjective rights which the authorities and national courts are required to safeguard.

91. The Republic of Austria maintains that it is appropriate to give a reply to the fourth question only if the Court does not reply to the preceding questions in the manner suggested by it. Inasmuch as the fourth question was raised only in the event of an affirmative reply to the third question, which it regards as inadmissible, it proposes that the Court should not reply to that fourth question. Moreover, it claims that it is unclear since the order for reference contains no reasoning in regard to it.

92. As regards the fifth question, Mr Köbler maintains that the reply to it should be in the affirmative since the Court has to hand all the materials enabling it to rule itself on whether in the main proceedings the Verwaltungsgerichtshof clearly and significantly exceeded the discretion available to it.

93. The Republic of Austria considers that it is for the national courts to apply the criteria concerning the liability of the Member States for loss or damage caused to individuals by infringements of Community law.

94. None the less, in the event that the Court should itself reply to the question whether the liability of the Republic of Austria is incurred, it maintains, first, that Article 177 of the EC Treaty (now Article 234 EC) is not intended to confer rights on individuals. It considers therefore that that condition governing liability is not satisfied.

95. Secondly, it is undeniable that, in the context of a dispute pending before them, the national courts have a large margin of discretion in determining whether or not they are obliged to formulate a request for a preliminary ruling. In that regard the Republic of Austria maintains that, since in its judgment in *Schöning-Kougebetopoulou* the Court considered that loyalty bonuses are not, in principle, contrary to the provisions relating to freedom of movement for workers, the Verwaltungsgerichtshof rightly concluded that, in the case before it, it was entitled itself to decide the questions of Community law.

96. Thirdly, should the Court acknowledge that the Verwaltungsgerichtshof did not observe Community law in its judgment of 24 June 1998, the conduct of that court could not in any event be characterised as a sufficiently serious breach of that law.

97. Fourthly, the Republic of Austria claims that there cannot be any causal link between the withdrawal by the Verwaltungsgerichtshof of the request for a preliminary ruling addressed to the Court and the damage actually alleged by Mr Köbler. Those arguments are in fact based on the plainly unacceptable supposition that, if the request had been maintained, the preliminary ruling by the Court would necessarily have upheld Mr Köbler's arguments. In other words, underlying those arguments is the implication that the damage constituted by non-payment of the special length-of-service increment for the period from 1 January 1995 to 28 February 2001 would not have occurred if the request for a preliminary ruling had been maintained and had resulted in a decision of the Court. However, it is neither possible for a party to the main proceedings to found arguments on a prejudgment as to what the Court would have decided in the case of a request for a preliminary ruling, nor is it permissible to claim damage under that head.

98. For its part, the German Government maintains that it is for the national court to determine whether the conditions governing the liability of the Member State are satisfied.

99. The Commission considers that the liability of the Member State is not incurred in the main proceedings. In fact, although in its view the Verwaltungsgerichtshof in its judgment of 24 June 1998 misinterpreted the *Schöning-Kougebetopoulou* judgment, cited above and, moreover, infringed Article 48 of the Treaty in ruling that Article 50a of the GG was not contrary to Community law, that infringement is in some way excusable.

Reply by the Court

100. It is clear from the case-law of the Court that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of Community law (*Brasserie du Pêcheur and Factortame*, paragraph 58), in accordance with the guidelines laid down by the Court for the application of those criteria (*Brasserie du Pêcheur and Factortame*, paragraphs 55 to 57; *British Telecommunications*, cited above, paragraph 411; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* and *Others* [1996] ECR I-5063, paragraph 49, and *Konle*, cited above, paragraph 58).

101. None the less, in the present case the Court has available to it all the materials enabling it to establish whether the conditions necessary for liability of the Member State to be incurred are fulfilled.

The rule of law infringed, which must confer rights on individuals

102. The rules of Community law whose infringement is at issue in the main proceedings are, as is apparent from the reply to the third question, Articles 48 of the Treaty and 7(1) of Regulation No 1612/68. Those provisions specify the consequences resulting from the fundamental principle of freedom of movement for workers within the Community by way of the prohibition of any discrimination based on nationality as between the workers of the Member States, in particular as to remuneration.

103. It cannot be disputed that those provisions are intended to confer rights on individuals.

The sufficiently serious nature of the breach

104. The course of the procedure which led to the judgment of the Verwaltungsgerichtshof of 24 June 1998 should be kept in view.

105. In the dispute pending before it between Mr Köbler and the Bundesminister für Wissenschaft, Forschung und Kunst (Federal Minister for Science, Research and Art) concerning the latter's refusal to grant Mr Köbler the special length-of-service increment provided for in Article 50a of the GG, that court, by order of 22 October 1997 registered at the Registry of the Court under Case number C-382/97, referred to the Court for a preliminary ruling a question on the interpretation of Article 48 of the Treaty and Articles 1 to 3 of Regulation No 1612/68.

106. The Verwaltungsgerichtshof states in that order, inter alia, that in order to decide the issue pending before it: it is essential to know whether it is contrary to Community law under Article 48 of the EC Treaty ... for the Austrian legislature to make the grant of the special length-of-service increment for ordinary university professors, which is in the nature of neither a loyalty bonus nor a reward, but is rather a component of salary under the advancement system, dependent on 15 years service at an Austrian university.

107. First, that order for reference reveals without any ambiguity that the Verwaltungsgerichtshof considered at that time that under national law the special length-of-service increment in question did not constitute a loyalty bonus.

108. Next, it follows from the written observations of the Austrian Government in Case C-382/97 that, in order to demonstrate that Article 50a of the GG was not capable of infringing the principle of freedom of movement for workers enshrined in Article 48 of the Treaty, that Government merely contended that the special length-of-service increment provided for by that provision constituted a loyalty bonus.

109. Finally, the Court had already held at paragraphs 22 and 23 of its *Schöning-Kougebetopoulou* judgment, cited above, that a measure which makes a worker's remuneration dependent on his length of

service but excludes any possibility for comparable periods of employment completed in the public service of another Member State to be taken into account is likely to infringe Article 48 of the Treaty.

110. Given that the Court had already adjudged that such a measure was such as to infringe that provision of the Treaty and also that the only justification cited in that regard by the Austrian Government was not pertinent in the light of the order for reference itself, the Registrar of the Court, by letter of 11 March 1998, forwarded a copy of the judgment in *Schöning-Kougebetopoulou* to the Verwaltungsgerichtshof so that it could examine whether it had available to it the elements of interpretation of Community law necessary to determine the dispute pending before it and asked it whether, in the light of that judgment, it deemed it necessary to maintain its request for a preliminary ruling.

111. By order of 25 March 1998, the Verwaltungsgerichtshof asked the parties to the dispute before it for their views on the request by the Registrar of the Court, observing, on a provisional basis, that the point of law forming the subject-matter of the preliminary-reference procedure in question had been resolved in favour of Mr Köbler.

112. By order of 24 June 1998, the Verwaltungsgerichtshof withdrew its reference for a preliminary ruling, taking the view that it was no longer necessary to persist with that request in order to resolve the dispute. It stated that the decisive question in the present case was whether the special length-of-service increment provided for in Article 50a of the GG was a loyalty bonus or not and that that question had to be decided in the context of national law.

113. In its judgment of 24 June 1998 the Verwaltungsgerichtshof held that, in its order for reference of 22 October 1997, it had taken the view that the special length of service increment for ordinary university professors is in the nature neither of a loyalty bonus nor of a reward, and that that interpretation of the law, which is not binding on the parties to proceedings before the Verwaltungsgerichtshof, cannot be upheld. The Verwaltungsgerichtshof then comes to the conclusion that that benefit is in fact a loyalty bonus.

114. It follows from the foregoing that, after the Registrar of the Court had asked the Verwaltungsgerichtshof whether it was maintaining its request for a preliminary ruling, the latter reviewed the classification under national law of the special length-of-service increment.

115. Following that reclassification of the special length-of-service increment provided for in Article 50a of the GG, the Verwaltungsgerichtshof dismissed Mr Köbler's action. In its judgment of 24 June 1998 it inferred from the judgment in *Schöning-Kougebetopoulou* that since that benefit was to be deemed a loyalty bonus, it could be justified even if it was in itself contrary to the principle of non-discrimination laid down in Article 48 of the Treaty.

116. However, as is clear from paragraphs 80 and 81 hereof, the Court did not express a view in the judgment in *Schöning-Kougebetopoulou* on whether and if so under what conditions the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified. Thus the inferences drawn by the Verwaltungsgerichtshof from that judgment are based on an incorrect reading of it.

117. Accordingly, since the Verwaltungsgerichtshof amended its interpretation of national law by classifying the measure provided for in Article 50a of the GG as a loyalty bonus after the judgment in *Schöning-Kougebetopoulou* had been sent to it and since the Court had not yet had the opportunity of expressing a view on whether the obstacle to freedom of movement for workers constituted by a loyalty bonus could be justified, the Verwaltungsgerichtshof ought to have maintained its request for a preliminary ruling.

118. That court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt (Case 283/81 *CILFIT and Others* [1982] ECR 3415, paragraphs 14 and 16). It was therefore obliged under the third paragraph of Article 177 of the Treaty to maintain its request for a preliminary ruling.

119. Moreover, as is clear from the reply to the third question, a measure such as the special length-of-service increment provided for in Article 50a of the GG, even if it may be classified as a loyalty bonus, entails an obstacle to freedom of movement for workers contrary to Community law. Accordingly, the Verwaltungsgerichtshof infringed Community law by its judgment of 24 June 1998.

120. It must therefore be examined whether that infringement of Community law is manifest in character having regard in particular to the factors to be taken into consideration for that purpose as indicated in paragraphs 55 and 56 above.

121. In the first place, the infringement of Community rules at issue in the reply to the third question cannot in itself be so characterised.

122. Community law does not expressly cover the point whether a measure for rewarding an employee's loyalty to his employer, such as a loyalty bonus, which entails an obstacle to freedom of movement for workers, can be justified and thus be in conformity with Community law. No reply was to be found to that question in the Court's case-law. Nor, moreover, was that reply obvious.

123. In the second place, the fact that the national court in question ought to have maintained its request for a preliminary ruling, as has been established at paragraph 118 hereof, is not of such a nature as to invalidate that conclusion. In the present case the Verwaltungsgerichtshof had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in *Schöning-Kougebetopoulou*, cited above. Thus, it was owing to its incorrect reading of that judgment that the Verwaltungsgerichtshof no longer considered it necessary to refer that question of interpretation to the Court.

124. In those circumstances and in the light of the circumstances of the case, the infringement found at paragraph 119 hereof cannot be regarded as being manifest in nature and thus as sufficiently serious.

125. It should be added that that reply is without prejudice to the obligations arising for the Member State concerned from the Court's reply to the third question referred.

126. The reply to the fourth and fifth questions must therefore be that an infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landesgericht für Zivilrechtssachen Wien by order of 7 May 2001, hereby rules:

1. The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious

and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

2. Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the Gehaltsgesetz 1956 (law on salaries of 1956), as amended in 1997, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof (Austria) in its judgment of 24 June 1998, constitutes a loyalty bonus.

3. An infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

Rodríguez Iglesias
Puissochet
Wathelet
Schintgen
Timmermans
Gulmann
Edward
La Pergola
Jann
Skouris
Macken
Colneric
von Bahr
Cunha Rodrigues
Rosas

Delivered in open court in Luxembourg on 30 September 2003.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President

(1) Language of the case: German.