



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 February 2014*

(Coordination of social security systems — Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons — Council decision — Choice of legal basis — Article 48 TFEU — Article 79(2)(b) TFEU)

In Case C-656/11,

ACTION for annulment under Article 263 TFEU, brought on 16 December 2011,

United Kingdom of Great Britain and Northern Ireland, represented initially by C. Murrell, and subsequently by M. Holt, acting as Agents, and by A. Dashwood QC,

applicant,

supported by:

Ireland, represented by E. Creedon, L. Williams and J. Stanley, acting as Agents, and by N.J. Travers BL, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented initially by G. Marhic and M. Veiga, and subsequently by A. De Elera, acting as Agents,

defendant,

supported by:

French Republic, represented by G. de Bergues and N. Rouam, acting as Agents,

European Commission, represented initially by V. Kreuzschitz, and subsequently by S. Pardo Quintillán and J. Enegren, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

* Language of the case: English.

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 October 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the United Kingdom of Great Britain and Northern Ireland requests the Court to annul Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the coordination of social security schemes (OJ 2011 L 341, p. 1; ‘the contested decision’).

Legal context

European Union law

- 2 Article 48 TFEU, which is among the provisions relating to freedom of movement in Title IV of Part Three of the FEU Treaty, is worded as follows:

‘The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

...’

- 3 Article 79 TFEU, which is among the provisions relating to the area of freedom, security and justice in Title V of Part Three of the FEU Treaty, provides:

‘1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

...

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

...'

4 Articles 1 and 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, which is annexed to the EU and FEU Treaties, provide that those Member States are not to take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the FEU Treaty unless they give notice of their intention to do so within three months after the presentation of a proposal or initiative.

5 In addition, Article 2 of Protocol No 21 states:

'In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the [FEU Treaty], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland. ...'

The EC-Switzerland Agreement on the Free Movement of Persons

6 The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons ('the EC-Switzerland Agreement on the Free Movement of Persons') was signed on 21 June 1999 and approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1).

7 According to the preamble to the EC-Switzerland Agreement on the Free Movement of Persons, the contracting parties decided to bring about the free movement of persons between them on the basis of the rules applying in the Community.

8 Article 8 of the EC-Switzerland Agreement on the Free Movement of Persons, headed 'Coordination of social security systems', states that the contracting parties are to make provision, in accordance with Annex II to the agreement ('Annex II on the coordination of social security schemes'), for such coordination with the aim in particular of: securing equality of treatment; determining the legislation applicable; aggregating, for the purpose of acquiring and retaining the right to benefits, and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned; paying benefits to persons residing in the territory of the contracting parties; and fostering mutual administrative assistance and cooperation between authorities and institutions.

9 Article 1 of Annex II on the coordination of social security schemes provides:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the [EC-Switzerland Agreement on the Free Movement of Persons] and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

- 10 Section A of Annex II on the coordination of social security schemes, headed ‘Acts referred to’, mentions Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) and Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 160), as well as a number of regulations which amended those two regulations.

Regulations (EC) No 883/2004 and No 987/2009

- 11 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) states in Article 90(1) that it is to repeal Regulation No 1408/71 from the date of its application. Article 90(1) provides, however, that Regulation No 1408/71 is to remain in force and continue to have legal effect *inter alia* for the purposes of the EC-Switzerland Agreement on the Free Movement of Persons for as long as that agreement has not been modified in the light of Regulation No 883/2004.

- 12 Recital 3 of the preamble to Regulation No 883/2004 states:

‘[Regulation No 1408/71] has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played their part in making the Community coordination rules complex and lengthy. Replacing, while modernising and simplifying, these rules is therefore essential to achieve the aim of the free movement of persons.’

- 13 Article 2 of Regulation No 883/2004, headed ‘Persons covered’, provides in paragraph 1:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

- 14 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1) states in Article 96(1) that Regulation No 574/72 is repealed with effect from 1 May 2010. However, Regulation No 574/72 is to remain in force and continue to have legal effect *inter alia* for the purposes of the EC-Switzerland Agreement on the Free Movement of Persons until such time as that agreement is amended on the basis of Regulation No 987/2009.

- 15 Recital 1 of the preamble to Regulation No 987/2009 states:

‘Regulation ... No 883/2004 modernises the rules on the coordination of Member States’ social security systems, specifying the measures and procedures for implementing them and simplifying them for all the players involved. Implementing rules should be laid down.’

The contested decision

- 16 On 28 June 2010, the European Commission put forward its first proposal for a Council decision amending Annex II on the coordination of social security schemes. Acting upon that proposal, the Council adopted Decision 2011/505/EU of 6 December 2010 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the

free movement of persons as regards the replacement of Annex II to that Agreement on the coordination of social security schemes (OJ 2011 L 209, p. 1). That decision was adopted on the basis of Article 79(2)(b) TFEU, in conjunction with Article 218(9) TFEU.

17 The United Kingdom stated that it wished, while not taking part in the Council decision, to reach an agreement with the Swiss Confederation which would exclude economically inactive persons from the coordination of social security systems. Since the Swiss authorities indicated that they were not able to accept this proposal or the draft decision of the Joint Committee as they stood, a fresh proposal for a Council decision, which had Article 48 TFEU, in conjunction with Article 218(9) TFEU, as its legal basis, was put forward by the Commission on 24 October 2011.

18 The Council adopted the contested decision on that basis, only the United Kingdom and Ireland voting against the decision. Following its adoption, the Joint Committee adopted, on 31 March 2012, the decision replacing Annex II on the coordination of social security schemes. That decision entered into force on 1 April 2012.

19 Recital 3 of the preamble to the contested decision states:

‘In order to preserve a coherent and correct application of the legal acts of the Union and to avoid administrative and possibly legal difficulties, Annex II [on the coordination of social security schemes] needs to be amended to integrate new legal acts of the Union to which the [EC-Switzerland Agreement on the Free Movement of Persons] does not currently refer.’

20 Article 1 of the contested decision states that the position to be taken by the European Union in the Joint Committee is to be based on the draft decision of the Joint Committee set out in Annex I to the contested decision.

21 Recitals 2 and 3 of the preamble to that draft decision of the Joint Committee are worded as follows:

‘(2) Annex II to the Agreement on the coordination of social security schemes was last amended by Decision No 1/2006 of 6 July 2006 ... and should now be updated to take account of the new legal acts of the European Union that have entered into force since then, in particular [Regulation No 883/2004] and the measures adopted to implement that regulation.

(3) [Regulation No 883/2004] has replaced [Regulation No 1408/71].’

22 Article 1 of the draft decision states:

‘Annex II [on the coordination of social security schemes] is replaced by the Annex to this Decision.’

23 The annex to the draft decision contains the new version of Annex II on the coordination of social security schemes, in which the reference to Regulation No 883/2004, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43), and to Regulation No 987/2009 replaces the initial reference to Regulations No 1408/71 and No 574/72 and to the regulations which amended them.

Forms of order sought and procedure before the Court

24 The United Kingdom claims that the Court should annul the contested decision and order the Council to pay the costs.

25 The Council contends that the action should be dismissed and the United Kingdom ordered to pay the costs.

- 26 By order of the President of the Court of 22 May 2012, Ireland was granted leave to intervene in support of the form of order sought by the United Kingdom, whilst the French Republic and the Commission were granted leave to intervene in support of the form of order sought by the Council.

The action

Arguments of the parties

- 27 The United Kingdom, supported by Ireland, complains that the Council chose Article 48 TFEU as the substantive legal basis for the contested decision.
- 28 Those parties to the dispute submit that Article 48 TFEU, which is designed to facilitate freedom of movement within the European Union of persons who are or have been economically active and their families, cannot constitute the substantive legal basis for the contested decision which seeks the replacement of Annex II on the coordination of social security schemes, one of the effects of which is to extend to Swiss nationals who are neither economically active nor members of the family of an active person rights which they did not previously possess. They contend that Article 79(2)(b) TFEU constitutes the appropriate legal basis for the adoption of such a measure, as that provision confers competence on the European Parliament and the Council to adopt measures relating to the ‘definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’.
- 29 In not choosing Article 79(2)(b) TFEU as the legal basis for the contested decision, the Council denied the United Kingdom and Ireland the right that they derive from Protocol No 21 not to take part in the adoption of that decision and not to be bound by it.
- 30 In support of this complaint, the United Kingdom submits that Article 48 TFEU is a provision ancillary to the principle of free movement within the European Union for employed and self-employed migrant workers who are nationals of Member States. The competence which that article confers cannot be extended to the adoption of measures for the benefit of third-country nationals or economically inactive persons.
- 31 As the mention of self-employed migrant workers in Article 48 TFEU was added in the FEU Treaty, the United Kingdom further contends that the authors of the Treaty would have mentioned economically active persons in that article if this had been their intention.
- 32 The United Kingdom observes, moreover, that Article 79(2)(b) TFEU has, until very recently, been the legal basis for measures adopted in the field of social security that apply to third-country nationals. That provision cannot be set aside on the ground that the contested decision merely updates the EC-Switzerland Agreement on the Free Movement of Persons, because it is the substance of a measure which determines whether it can be adopted under the competence conferred by a given provision of the FEU Treaty, not its relationship to earlier measures.
- 33 Nor, in the United Kingdom’s submission, is it possible to rely on the case-law resulting from Case 22/70 *Commission v Council* (‘ERTA’) [1971] ECR 263, now codified in Articles 3(2) TFEU and 216(1) TFEU. It cannot be inferred from that case-law that the adoption of an internal measure laying down common rules could result in the enlargement of the substantive competence conferred upon the European Union under the legal basis in question, in contravention of the principle of conferral.

- 34 Ireland states that the Council cannot extend the scope of Article 48 TFEU on the basis of the presence in the EC-Switzerland Agreement on the Free Movement of Persons of provisions comparable to Articles 45 TFEU and 48 TFEU as, first, the scope of primary law cannot be extended by secondary acts concluding association agreements with third countries and, second, the appropriate legal basis for the contested decision must be determined not by reference to the agreement in execution of which it has been taken, but by reference to the aim and content of the measures involved. Furthermore, it contests the idea that attainment of the aims of the EC-Switzerland Agreement on the Free Movement of Persons may be jeopardised by the United Kingdom and Ireland not opting into a decision adopted under Article 79(2)(b) TFEU.
- 35 Invited to present observations at the hearing on the inferences to be drawn from the judgment in Case C-431/11 *United Kingdom v Council* [2013] ECR, the United Kingdom and Ireland submitted that the conclusion which the Court reached in that judgment cannot apply to the contested decision in this case, as the contested decision was adopted in a different context.
- 36 In their submission, the Court's conclusion in that judgment is founded in particular on the finding that a close association exists between the European Union and the Member States of the European Free Trade Association (EFTA) and that the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement') has the aim of providing for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area (EEA), so that the market established within the European Union is extended to the EFTA Member States. However, first, no similar instrument binding the European Union and the Swiss Confederation exists. Second, the EC-Switzerland Agreement on the Free Movement of Persons does not reflect those characteristics and in many respects falls short of the EEA Agreement in terms of ambitions, liberalisation and legal integration.
- 37 The Council, supported by the French Republic and the Commission, contests that analysis and contends that Article 48 TFEU was the correct substantive legal basis for adopting the contested decision.
- 38 It states that the aim of the contested decision is to ensure that the European Union's *acquis* on the coordination of social security systems, modified by Regulation No 883/2004 and its implementing regulation, namely Regulation No 987/2009, applies in relation both to Swiss nationals residing in the European Union and to nationals of a Member State of the European Union residing in the Swiss Confederation. The impact of Regulation No 883/2004 extends well beyond the changes made to the personal scope of Regulation No 1408/71, because it replaces, updates and simplifies the relevant rules. The purpose of the contested decision is to update the social security coordination rules already in force between the contracting parties.
- 39 As to the content of the contested decision, the Council observes that that decision establishes the position to be taken by the European Union within the Joint Committee and essentially provides for Regulations No 883/2004 and No 987/2009 to be included in Annex II on the coordination of social security schemes, replacing Regulation No 1408/71 and related measures, which are no longer applicable within the European Union.
- 40 The inclusion of those regulations in Annex II on the coordination of social security schemes follows directly from the commitments entered into by the European Union in the framework of the EC-Switzerland Agreement on the Free Movement of Persons. The very essence of that agreement is, as is apparent in particular from Article 8 thereof which reproduces the wording of Article 48 TFEU, to implement the free movement of persons between the European Union and the Swiss Confederation in the same way as it is implemented within the European Union. Pursuant to its general scheme and objectives, the EC-Switzerland Agreement on the Free Movement of Persons is expected to integrate any relevant new secondary European Union legislation with a view to ensuring homogeneity and equivalence of rights and obligations within its area of application.

- 41 Furthermore, according to the Council and the Commission, whilst the contracting parties to the EC-Switzerland Agreement on the Free Movement of Persons have undertaken to take all appropriate measures to ensure fulfilment of their obligations under that agreement, the exclusion of one or more Member States could in practice jeopardise the attainment of the aims of the agreement and would run counter to the European Union's obligations to the Swiss Confederation.
- 42 As regards economically inactive persons, the Council, the French Republic and the Commission observe that most of these persons were already covered under Regulation No 1408/71 and that the notion of 'worker' in this field has always been interpreted very broadly. The new category of economically inactive persons covered by Regulation No 883/2004 is very limited and is even more restricted in the context of the EC-Switzerland Agreement on the Free Movement of Persons. Article 48 TFEU can therefore constitute an appropriate and sufficient legal basis for the adoption of the contested decision, equally in relation to this residual category of persons, as the extension of the mechanism for the coordination of social security systems to economically inactive Swiss nationals is not the main aim or component of the contested decision.
- 43 As to Article 79(2)(b) TFEU, the Council submits that the amendment of the provisions on the coordination of social security systems is not a measure which pertains to the development of the common immigration policy. The contested decision does not aim to ensure the efficient management of migration flows, to facilitate external border controls, to regulate immigration within the European Union or to ensure the fair treatment of Swiss nationals.
- 44 In this connection, the Commission states that the EC-Switzerland Agreement on the Free Movement of Persons is not concerned merely with the 'fair treatment' of Swiss nationals residing legally in a Member State, but enables both Swiss nationals and those of the European Union, when in the other party's territory, to benefit from rights equivalent to those contained in European Union measures. That agreement and the contested decision thereby guarantee that all those nationals can exercise their right to free movement without losing their social security rights and without being discriminated against.
- 45 The French Republic adds that Article 48 TFEU constitutes a more specific provision than Article 79(2)(b) TFEU for adopting a decision which has the aim of putting in place a mechanism for the coordination of social security schemes.
- 46 At the hearing, the Council and the Commission submitted that the criteria defined in *United Kingdom v Council* for determining the legal basis of a measure designed to amend an existing agreement apply to the contested decision and confirm that Article 48 TFEU is the appropriate legal basis.

Findings of the Court

- 47 According to settled case-law, the choice of the legal basis for a European Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component (Case C-338/01 *Commission v Council* [2004] ECR I-4829, paragraphs 54 and 55 and the case-law cited, and Case C-130/10 *Parliament v Council* [2012] ECR, paragraphs 42 and 43).
- 48 The legal basis which has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is irrelevant in that regard, as the legal basis for a measure must be determined having regard to its own aim and content (see, to this effect, *United*

Kingdom v Council, paragraph 67 and the case-law cited). It is therefore necessary to reject from the outset the argument put forward by the United Kingdom that Article 79(2)(b) TFEU has already been the legal basis for measures adopted in the field of social security that apply to third-country nationals.

- 49 Nor is the legality of the choice of the legal basis for a European Union measure affected by the consequence that the choice may have as regards whether Protocol No 21, and Protocol No 22 on the position of Denmark annexed to the EU and FEU Treaties, apply.
- 50 On the other hand, the context of the measure in question may be relevant to the choice of its legal basis. Thus, where the measure seeks to amend the rules contained in an existing agreement, it is necessary also to take account of that context and, in particular, of the objective and content of the agreement (see, to this effect, *United Kingdom v Council*, paragraph 48).
- 51 In this instance, since the contested decision was intended to settle the position to be taken by the European Union in the Joint Committee established by the EC-Switzerland Agreement on the Free Movement of Persons as regards the amendment of Annex II on the coordination of social security schemes, it is appropriate to examine, first, the context of the contested decision and, in particular, that agreement's objective and content as far as concerns social security.
- 52 As the Court noted in Case C-351/08 *Grimme* [2009] ECR I-10777, paragraphs 26 and 27, the EC-Switzerland Agreement on the Free Movement of Persons is one of a series of seven sectoral agreements between the same contracting parties, which were signed on 21 June 1999. They were signed after the Swiss Confederation's rejection of the EEA Agreement on 6 December 1992.
- 53 Although the Swiss Confederation did not opt to participate in the EEA and in the European Union's internal market, it is nevertheless linked to the European Union by numerous bilateral agreements covering vast fields and prescribing specific rights and obligations, analogous, in some respects, to those laid down by the FEU Treaty. The objective of these agreements, including the EC-Switzerland Agreement on the Free Movement of Persons, is to strengthen the economic ties between the European Union and the Swiss Confederation (Case C-506/10 *Graf and Engel* [2011] ECR I-9345, paragraph 33).
- 54 The EC-Switzerland Agreement on the Free Movement of Persons was approved on behalf of the Community by Decision 2002/309, on the basis of Article 310 EC (now Article 217 TFEU) which conferred competence on the Community to conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.
- 55 As regards the content of that agreement, it is to be noted that, according to its preamble, the contracting parties decided to bring about between them the free movement of persons on the basis of the rules applying in the Community.
- 56 So far as concerns the coordination of social security systems, Article 8 of the EC-Switzerland Agreement on the Free Movement of Persons thus reproduces the provisions currently in Article 48(a) and (b) TFEU intended to secure, first, the aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries and, second, the payment of benefits to persons resident in the territories of Member States.
- 57 It is apparent from Articles 1 and 2 and Section A of Annex II on the coordination of social security schemes, to which Article 8 of the EC-Switzerland Agreement on the Free Movement of Persons refers, that the contracting parties agreed to apply among themselves Regulations No 1408/71 and No 574/72. In this connection, the term 'Member State(s)' contained in those regulations is to be deemed also to include the Swiss Confederation.

- 58 In the light of those provisions of the EC-Switzerland Agreement on the Free Movement of Persons, the Court has already held, in Case C-247/09 *Xhymshiti* [2010] ECR I-11845, paragraph 31, that for the purposes of the application of those regulations the Swiss Confederation is to be equated with a Member State of the European Union.
- 59 It follows from the foregoing that, by concluding in 2002 the EC-Switzerland Agreement on the Free Movement of Persons, the European Union extended to the Swiss Confederation the application of its legislation concerning coordination of social security systems, then contained in Regulations No 1408/71 and No 574/72. That legislation, extended in that way, benefits both Swiss nationals who are in the European Union and nationals of Member States of the European Union who are in Switzerland.
- 60 As regards, second, the content of the contested decision, the position of the European Union established by that decision consists – as is apparent from its title, from Article 1 thereof, and from Annex I thereto – in replacing, in Annex II on the coordination of social security schemes, the reference to Regulations No 1408/71 and No 574/72 and to the regulations which amended them with a reference to Regulation No 883/2004, as amended by Regulation No 988/2009, and to Regulation No 987/2009. It is to be remembered, in this regard, that Regulations No 883/2004 and No 987/2009 repealed Regulations No 1408/71 and No 574/72 whilst, however, maintaining the latter regulations in force for the purposes of the EC-Switzerland Agreement on the Free Movement of Persons until such time as that agreement was amended in the light of the new regulations.
- 61 Third, as to the aim pursued by the contested decision, it is to be noted that, in light of, in particular, recital 3 of the preamble to Regulation No 883/2004 and recital 1 of the preamble to Regulation No 987/2009, those regulations have the objective of replacing the rules on the coordination of social security systems – which were amended and updated on numerous occasions in order to take into account developments at European Union level, including judgments of the Court, and changes in legislation at national level – while modernising and simplifying them.
- 62 It is apparent, on reading recital 3 of the preamble to, and Article 1 of, the contested decision in conjunction with recitals 2 and 3 of the preamble to the draft decision of the Joint Committee annexed to the contested decision, that, as result of this evolution, the latter has the objective of updating Annex II on the coordination of social security schemes by including in it Regulations No 883/2004 and No 987/2009, in order to preserve a coherent and correct application of the legal acts of the European Union and to avoid administrative and possibly legal difficulties.
- 63 It follows that the main aim of the contested decision is, following the entry into force of the new European Union legislation concerning coordination of social security systems, to update also the legislation which has been extended to the Swiss Confederation by the EC-Switzerland Agreement on the Free Movement of Persons and thereby to retain the extension of social rights to citizens of the States concerned as already intended and given effect to by that agreement since 2002 (see, by analogy, *United Kingdom v Council*, paragraph 57).
- 64 It is apparent from the foregoing considerations that, in the light of the context of the contested decision and its content and aim, it could properly be adopted on the basis of Article 48 TFEU.
- 65 That finding is not called into question by the United Kingdom's argument that Article 48 TFEU is designed to facilitate freedom of movement of nationals of the Member States in the internal market and cannot constitute the legal basis for a measure intended to facilitate freedom of movement between the European Union and a third State. As is apparent from *United Kingdom v Council*, Article 48 TFEU can constitute an appropriate legal basis for the adoption of a decision such as that at issue where, as is the case with the Swiss Confederation, the third State has already been equated, under an agreement approved on the basis of Article 217 TFEU, with a Member State of the

European Union for the purposes of applying Regulations No 1408/71 and No 574/72 and the main aim of that decision is to reflect the updating of those regulations effected by Regulations No 883/2004 and No 987/2009.

- 66 Nor is that finding called into question by the United Kingdom's argument that Article 2(1) of Regulation No 883/2004 extended the scope of that regulation to all economically inactive persons, and therefore also to those who did not yet enjoy the rights granted by Regulation No 1408/71. Suffice it to state that the extension of the rules on the coordination of social security systems to Swiss nationals residing in the European Union and falling within that category of economically inactive persons which was not yet covered by Regulation No 1408/71 cannot be regarded as constituting the main or predominant purpose or component of the contested decision, but must, on the contrary, be regarded as incidental to the updating of the body of legislation included in Annex II on the coordination of social security schemes.
- 67 The action should therefore be dismissed.

Costs

- 68 Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.
- 69 In accordance with Article 140(1) of the Rules of Procedure, Ireland, the French Republic and the Commission are to bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
- 3. Orders Ireland, the French Republic and the European Commission to bear their own costs.**

[Signatures]