



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 March 2016 ^{* *}

(Failure of a Member State to fulfil obligations — Social security — Regulation (EEC) No 1408/71 — Article 46b — Regulation (EC) No 883/2004 — Article 54 — Old-age pensions — Rules against overlapping — Persons entitled to an old-age pension under the rules of one Member State and to a civil-service pension under the rules of another Member State — Reduction in the amount of the old-age pension)

In Case C-12/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 10 January 2014,

European Commission, represented by K. Mifsud-Bonnici and D. Martin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Malta, represented by A. Buhagiar and P. Grech, acting as Agents,

defendant,

supported by

Republic of Austria, represented by C. Pesendorfer and G. Hesse, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by J. Beeko, S. Behzadi-Spencer and V. Kaye, acting as Agents, assisted by T. de la Mare QC,

interveners,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: Y. Bot,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 16 July 2015,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 12 November 2015,
gives the following

Judgment

- 1 By its action, the European Commission asks the Court to declare that, by deducting the value of civil-service old-age pensions from other Member States from Maltese old-age pensions, the Republic of Malta has failed to fulfil its obligations under Article 46b of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1; ‘Regulation No 1408/71’) and under Article 54 of 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), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4; ‘Regulation No 883/2004’).

Legal context

EU law

Regulation No 1408/71

- 2 Article 1(j) of Regulation No 1408/71, entitled ‘Definitions’, provides:

‘For the purpose of this Regulation:

...

- (j) “legislation” means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4[1].

...’

- 3 Article 4(1)(c) of that regulation, entitled ‘Matters covered’, provides:

‘This Regulation shall apply to all legislation concerning the following branches of social security:

...

- (c) old-age benefits;

...’

- 4 Article 5 of that regulation lays down an obligation for Member States to make declarations on its scope. It is worded as follows:

‘The Member States shall specify the legislation and schemes referred to in Article 4(1) ... in declarations to be notified and published in accordance with Article 97.’

5 According to Article 46b of Regulation No 1408/71, entitled 'Special provisions applicable in the case of overlapping of benefits of the same kind under the legislation of two or more Member States':

'1. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall not be applicable to a benefit calculated in accordance with Article 46(2).

2. The provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State shall apply to a benefit calculated in accordance with Article 46(1)(a)(i) only if the benefit concerned is:

(a) either a benefit, which is referred to in Annex IV, part D, the amount of which does not depend on the length of the periods of insurance of residence completed,

or

(b) a benefit, the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialised and a later date. In the latter case, the said provisions shall apply in the case of overlapping of such a benefit:

(i) either with a benefit of the same kind, except where an agreement has been concluded between two or more Member States providing that one and the same credited period may not be taken into account two or more times;

(ii) or with a benefit of the type referred to in (a).

The benefits referred to in (a) and (b) and agreements are mentioned in Annex IV, part D.'

6 Article 97 of Regulation No 1408/71, entitled 'Notification pursuant to certain provisions', lays down:

'1. The notifications referred to in Article ... 5 ... shall be addressed to the president of the Council [of the European Union]. They shall indicate the date of entry into force of the laws and schemes in question ...

2. Notifications received in accordance with the provisions of paragraph 1 shall be published in the *Official Journal of the European Communities*.'

Regulation No 883/2004

7 Regulation No 1408/71 was replaced by Regulation No 883/2004, which, in accordance with Article 91 thereof and with Article 97 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1), became applicable on 1 May 2010, the date from which Regulation No 1408/71 was repealed.

8 Article 1 of Regulation No 883/2004 defines the word 'legislation' as follows:

'For the purposes of this Regulation:

...

(l) "legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...'

- 9 Article 3 of that regulation, entitled 'Matters covered', provides in subparagraph 1(d):

'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(d) old-age benefits;

...'

- 10 Article 9 of that regulation, entitled 'Declarations by the Member States on the scope of this Regulation', is worded as follows:

'1. The Member States shall notify the Commission of the European Communities in writing of ... the legislation and schemes referred to in Article 3 ... Such notifications shall indicate the date from which this Regulation will apply to the schemes specified by the Member States therein.

2. These notifications shall be submitted to the ... Commission every year and shall be given the necessary publicity.'

- 11 Article 54 of that regulation, entitled 'Overlapping of benefits of the same kind', provides:

'1. Where benefits of the same kind due under the legislation of two or more Member States overlap, the rules to prevent overlapping laid down by the legislation of a Member State shall not be applicable to a pro-rata benefit.

2. The rules to prevent overlapping shall apply to an independent benefit only if the benefit concerned is:

(a) a benefit the amount of which does not depend on the duration of periods of insurance or residence,

or

(b) a benefit the amount of which is determined on the basis of a credited period deemed to have been completed between the date on which the risk materialised and a later date, overlapping with:

(i) a benefit of the same type, except where an agreement has been concluded between two or more Member States to avoid the same credited period being taken into account more than once, or

(ii) a benefit referred to in subparagraph (a).

The benefits and agreements referred to in subparagraphs (a) and (b) are listed in Annex IX.'

Directive 98/49/EC

- 12 Article 1 of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ 1998 L 209, p. 46) provides:

‘The aim of this Directive is to protect the rights of members of supplementary pension schemes who move from one Member State to another, thereby contributing to the removal of obstacles to the free movement of employed and self-employed persons within the Community. Such protection refers to pension rights under both voluntary and compulsory supplementary pension schemes, with the exception of schemes covered by Regulation ... No 1408/71.’

National law

Maltese law

- 13 Article 56 of the Maltese Social Security Act provides:

‘Where a person is entitled to a Service Pension, other than a Service Pension which has been commuted, at any time, in whole, any pension arrived at in accordance with the provisions of articles 53 to 55 of this Part shall be abated by the amount of such Service Pension.’

United Kingdom law

- 14 The three pension schemes in force in the United Kingdom and applicable in the present case are the National Health Service Pension Scheme, the Principal Civil Service Pension Scheme and the Armed Forces Pension Scheme 1975, to the extent that the latter concerns members of staff of the Royal Air Force who had entered into service before 6 April 2005 (together, the ‘pension schemes at issue’). The Principal Civil Service Pension Scheme and the National Health Service Pension Scheme were adopted on the basis of the law on pensions of 1972 (Superannuation Act 1972). The measures on the pension scheme applicable to members of the Royal Air Force included in the Armed Forces Pension Scheme 1975 were adopted on the basis of the competences granted under the Air Force (Constitution) Act 1917.

Pre-litigation procedure

- 15 On 25 November 2010, prompted by three petitions submitted to the European Parliament by Maltese citizens who complained that the amount of the pension that they received under the pension schemes at issue was deducted from their Maltese statutory old-age pension, in accordance with Article 56 of the Maltese Social Security Act, the Commission sent a letter of formal notice to Malta on the possible incompatibility of that provision with Article 46b of Regulation No 1408/71 and Article 54 of Regulation No 883/2004.
- 16 The Republic of Malta replied to the letter of formal notice by letters dated 27 January and 28 December 2011.
- 17 By letter of 28 February 2012, the Commission sent the Republic of Malta a reasoned opinion in which it reaffirmed its view and invited the Member State to comply with that reasoned opinion within two months of its notification. The Republic of Malta maintained its position in a letter of 25 July 2012.

- 18 Dissatisfied with the reply given by the Republic of Malta, the Commission decided to bring the present action.
- 19 By decisions of the President of the Court of 4 August 2014, the Republic of Austria and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Republic of Malta.

The action

Admissibility

Arguments of the parties

- 20 The Republic of Malta challenges the admissibility of the present action, claiming that the Commission ought to have brought it against the United Kingdom, and not against Malta.
- 21 The Republic of Malta contends that the pension schemes at issue were not mentioned in the declarations made by the United Kingdom under Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004, because the United Kingdom takes the view that those schemes are not within the material scope of those regulations. According to the Republic of Malta, if the Commission objects to a Member State's declaration regarding the benefits falling within the scope of a regulation concerning social security, it must carry out the assessment of the matter directly with the Member State concerned. In the present case, the only Member State in a position to put forward arguments and evidence is the United Kingdom. Thus, an action against the Republic of Malta is an interference with the right to a fair hearing.
- 22 The United Kingdom, which has intervened in support of the Republic of Malta's line of argument, submits that the Commission misuses its powers by having recourse to the procedure laid down in Article 258 TFEU in order to challenge the measures of another Member State. According to the United Kingdom, the Member State which is the object of this challenge is deprived of the protection conferred by the infringement procedure and, even if it were granted leave to intervene, only more limited procedural rights are available to it in this context.
- 23 The Commission submits that the Court should reject the plea of inadmissibility raised by the Republic of Malta and the United Kingdom.

Findings of the Court

- 24 According to the settled case-law of the Court it is for the Commission, when it considers that a Member State has failed to fulfil its obligations, to assess whether it is appropriate to act against that State, to determine which provisions the State has infringed, and to choose when it will initiate infringement proceedings against it; the considerations which determine that choice cannot affect the admissibility of its action (judgment in *Commission v Poland*, C-311/09, EU:C:2010:257, paragraph 19 and the case-law cited).
- 25 Given this discretion, the lack of infringement proceedings against one Member State is irrelevant in the assessment of the admissibility of infringement proceedings brought against another Member State. The admissibility of the present action cannot therefore be called in question because the Commission has not initiated infringement proceedings against the United Kingdom.

- 26 As regards the plea in law based on an alleged misuse of powers, suffice it to state that, in accordance with the Court's settled case-law, the Commission does not have to show a legal interest in bringing proceedings or to state the reasons why it is bringing an action for failure to fulfil obligations. In the present case, since the subject-matter of the action as it is to be found in the application corresponds to the subject-matter of the dispute as stated in the letter of formal notice and in the reasoned opinion, it cannot validly be claimed that the Commission misused its powers (see, to that effect, judgment in *Commission v Spain*, C-562/07, EU:C:2009:614, paragraph 25 and the case-law cited).
- 27 As the Advocate General stated at point 40 of his Opinion, the admissibility of an action for failure to fulfil obligations against a Member State cannot be called in question by the fact that the Court may find it necessary, in the context of that action, to classify, with regard to EU law, another Member State's body of rules. Nor can such clarification give rise to an infringement of the procedural rights of the latter Member State, an intervener in the proceedings.
- 28 It is apparent from the foregoing considerations that this action is admissible.

Substance

Arguments of the parties

- 29 In its application, the Commission claims, in the first place, that the pension schemes at issue fall within the scope of Regulations Nos 1408/71 and 883/2004.
- 30 According to that institution, the United Kingdom's civil-service pension schemes, on the one hand, provide for old-age benefits, within the meaning of Article 4(1)(c) of Regulation No 1408/71 and Article 3(1)(d) of Regulation No 883/2004 and, on the other hand, are based on 'legislation' within the meaning of Article 1(j), first subparagraph, and Article 1(l), first subparagraph, of those regulations respectively.
- 31 In the second place, the Commission claims that Article 46b of Regulation No 1408/71 and Article 54 of Regulation No 883/2004 preclude a provision of national law such as Article 56 of the Maltese law on social security, inasmuch as it provides for the reduction of the amount of the old-age pension paid under Maltese law up to the amount of the United Kingdom's civil service pension.
- 32 In its response, the Republic of Malta, supported in that regard by the Republic of Austria and the United Kingdom, contends, in particular, that it is bound by the fact that the United Kingdom's schemes were never mentioned in the declaration made by the United Kingdom under Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004. Member States are not to be required to assess independently the nature of the benefits granted by other Member States, thereby ignoring the declarations made by them under those provisions. Such a claim would prejudice the legal force and the status of those declarations of the Member State concerned, jeopardise the whole of the social security coordination system put in place by those regulations and give rise to practical and administrative difficulties.
- 33 The Republic of Malta, supported in that respect by the United Kingdom, also contends that the United Kingdom's civil service pension schemes may be regarded as supplementary pension schemes falling within the scope of Directive 98/49. When a Member State has not made a declaration under Regulation No 1408/71 or Regulation No 883/2004 and it seems that that Member State regards the pension schemes as falling within the scope of Directive 98/49, those pensions must be considered excluded from the scope of Regulation No 1408/71 and Regulation No 883/2004.

34 The Commission, in whose view Directive 98/49 is not applicable here, contends that the lack of a reference to the pension schemes at issue in the United Kingdom's declarations may not be regarded by the Republic of Malta as proof that those schemes are not covered by the provisions at issue. According to the Commission, it follows from the settled case-law of the Court that the Republic of Malta ought to have assessed the applicability of Regulations Nos 1408/71 and 883/2004 to the British pension schemes, not in the light of whether or not a benefit is classified as a social security benefit under national legislation, but on the constituent elements of the benefit concerned.

Findings of the Court

35 The Commission's heads of claim seek a declaration, first, that the Member States have a duty to check the legislation of another Member State in order to satisfy themselves that that legislation, even though it has not been the object of a declaration, by that other Member State, under Article 5 of Regulation No 1408/71 or Article 9(1) of Regulation No 883/2004, falls within the scope *ratione materiae* of those regulations, next, that such verification, if it had been carried out by the Republic of Malta, ought to have reached the conclusion that the pension schemes at issue provide old-age benefits and are based on laws within the ambit of Regulations Nos 1408/71 and 883/2004 and, finally, that, consequently, the application of Article 56 of the Maltese law on social security, in that it prohibits the overlapping of benefits deriving from the pension schemes at issue with the service pension owed under Maltese law, is incompatible with Article 46b of Regulation No 1408/71 and Article 54 of Regulation No 883/2004.

36 As for Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004, they impose on Member States a duty to declare the laws and schemes relating to social security benefits which fall within the scope *ratione materiae* of those regulations and with which the Member States are required to comply, while respecting the requirements stemming from Article 4(3) TEU.

37 It follows from the principle of sincere cooperation, laid down in Article 4(3) TEU, that every Member State, for the purposes of the declarations covered by Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004, must carry out a proper assessment of its own social security regimes and, if necessary, following that assessment, declare them as falling within the scope of those regulations (see, by analogy, judgment in *FTS*, C-202/97, EU:C:2000:75, paragraph 51, and *Herbosch Kiere*, C-2/05, EU:C:2006:69, paragraph 22). It also follows from this principle that the other Member States are entitled to expect that the Member State concerned had fulfilled those obligations.

38 Thus, those declarations create a presumption that the national laws in a declaration under Article 5 of Regulation No 1408/71 and Article 9 of Regulation No 883/2004 fall within the material scope of those regulations and bind, in principle, the other Member States. Conversely, where a Member State has refrained from declaring a national law under those regulations, the other Member States can, generally, infer from it that that law does not fall within the material scope of those regulations.

39 In addition, as long as the declarations made by a Member State are not amended or withdrawn, the other Member States must take them into account. It is incumbent upon the Member State which made the declaration to reconsider its merits and, if necessary, to amend it if another Member State expresses doubts as to the correctness of those declarations (see, to that effect, judgment in *Banks and Others*, C-178/97, EU:C:2000:169, paragraph 43).

40 This finding does not, however, mean that a Member State is denied any chance of responding when it is aware of information that raises doubts regarding the declarations made by another Member State.

41 In the first place, if the declaration raises questions and if the Member States cannot reach agreement, in particular regarding the classification of laws or schemes within the scope of Regulations Nos 1408/71 and 883/2004, they may turn to the Administrative Commission, mentioned in Articles 80 and 81 of Regulation No 1408/71 and in Articles 71 and 72 of Regulation No 883/2004. In

the second place, if that commission does not succeed in reconciling the points of view of the Member States on the question of the legislation applicable in the case in point, it is, where appropriate, for the Member State doubting the correctness of a declaration by another Member State to tell the Commission or, as a last resort, bring proceedings under Article 259 TFEU in order for the Court to examine, in the context of those proceedings, the question of the applicable legislation (see, to that effect, judgment in *Banks and Others*, EU:C:2000:169, paragraph 44).

- 42 Regard being had to the arguments set out by the Commission, it must be added that the finding that a Member State must take into account the declaration made by another Member State is not contrary to the case-law of the Court (see, in particular, judgments in *Beerens*, 35/77, EU:C:1977:194, paragraph 9, and *Hliddal and Bornand*, C-216/12 and C-217/12, EU:C:2013:568, paragraph 46), according to which the fact that a Member State has included a national law or a national regulation in its declaration under Article 5 of Regulation No 1408/71 or Article 9 of Regulation No 883/2004 must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of those regulations, whereas the fact that a national law or a national regulation has not been the object of such a declaration is not, of itself, proof that that law or that regulation does not come within the scope of those regulations.
- 43 Even if there is no general obligation, for the Member States, to establish whether the legislation of the other Member States falls within the scope *ratione materiae* of Regulations Nos 1408/71 and 883/2004, a national court, seised of an action relating to such a law or such a regulation, can always be called upon to examine the classification of the scheme at issue in the case before it and, if necessary, to refer a question relating to that classification to the Court of Justice for a preliminary ruling.
- 44 On the other hand, it does not follow from either of the two articles at issue that it is the duty of the Member States, other than that which introduced that law or regulation but did not declare it, to determine on their own initiative whether that law or regulation must be regarded as falling within the material scope of the regulations concerned.
- 45 It follows from the foregoing that the Commission was wrong to take as a basis for the present action for failure to fulfil obligations the existence of a general duty for the Member States to ascertain whether the laws of the other Member States, notwithstanding the fact that they were not the object of a declaration under Article 5 of Regulation No 1408/71 or of Article 9(1) of Regulation No 883/2004, fall within the material scope of those regulations.
- 46 Consequently, the action must be dismissed in its entirety.

Costs

- 47 Under Article 138(1) of the Rules of Procedure of the Court, 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 Republic of Malta applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. Pursuant to Article 140 of the Rules of Procedure, the Republic of Austria and the United Kingdom are to bear their own costs.

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

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

[Signatures]