

INTERPRETATION AND APPLICATION OF EUROPEAN SOCIAL SECURITY COORDINATION RULES

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Abstract in original language

Although the form and content of the social security provisions belong to the competences of an individual Member State, the coordination of the national systems is one of the crucial fields of European cooperation, as it is closely associated to the free movement principles. The most important act in this respect is Regulation 1408/71 (now repealed by Regulation 883/2004) and the subsequent modifications and related acts, which are basically aimed to guarantee equal treatment and non discrimination.

Key words in original language

European social security, national social security systems, coordination, interpretation, preliminary questions

1. INDIRECT INTRODUCTION

Each member state has developed a separate social security system based on historical differences, needs and options of each country. Despite a certain similarity and interaction these systems distinct quite a lot. Later the individual states begun to recognize problems, especially with cross-border workers, and tried to solved them somehow. The tried to unify their systems or more precisely establish some common standards and interconnect the existing systems.

The initial coordination was based on bilateral agreements which were soon added or promoted by multilateral ones. The highest level of coordination has reached the European Union. However, full harmonization process will (if ever) take many years more.

The aim of this contribution is to discuss current European social security rules and find out some interpretative and application difficulties which occurs in connection with them. Firstly the European point of view is mentioned. Second part of the text is focused on national (Czech) level.

2. LEGISLATIVE BACKGROUND

Where should be found the legal basis for making coordination rules in the area of social security? As well as for all other regulated areas it is necessary to have a brief look in the Treaties. First of all, Preamble and the Part I of the TFEU^[1] establish the basic objectives, values and principles of the EU. Hereinafter, Part II TFEU which prohibits any discrimination on grounds of nationality and establishes the Citizenship of the Union should be regard as essential source as well

as the provision connected with European social policy. But primarily, Part IV TFEU – provisions establishing free movement of persons, services and capital – should be considered as the key one, especially Chapter I - workers, Article 48, which constitutes the legal basis for the Regulations.

Also the Charter of Fundamental Rights of the European Union should be mentioned as a primary source, above all Article 34 - Social security and social assistance.

Secondary law acts has also been adopted. The most important are Regulation 883/2004^[2] and Regulation 987/2009.^[3] Some Directives are relevant in this area too, e.g. Directive 86/378.^[4]

2.1 THE REGULATIONS

Regulation 883/2004 and Regulation 987/2009 has been the current coordination regulation in force since May 2010, which is not long time ago. Thus, which regulation should be relevant for the most of cases? First regulation in this area - Regulation 3^[5] - was set up in 1957 as one of the first regulation at all. Then in 1971 the Regulation 3 was replaced by two other regulations – the Regulation 1408/71^[6] and the Regulation 574/72.^[7] But in few decades also these Regulations demanded for a change.

The purpose of the regulations is to prevent migrants who are employed in more than one country from losing their social benefits due to another citizenship, residence or failing to reach required period of insurance specified in national law. But, the regulations are limited to the coordination of existing national social systems without further interfere with their substance.

3. APPLICATION AND INTERPRETATION OF THE SOCIAL SECURITY RULES

European social security rules have been given lot of time to be developed quite well. The crucial acts of coordination in this field are regulations, which are as acts of general legal force directly applicable in all Member States. In other words, these provisions are binding to all and must be respected by national authorities and administrations. Even in cases where a national law is in conflict with the regulation, the regulation has priority.

In general, in most cases the European social security rules are respected and applied correctly. However, as we should suppose, there are some problematic situation arising as will be mention later. Sometimes national institutions have either intentionally or not incorrectly interpreted and applied European provisions.

Because of the fact that the current Regulations has not been in force for long period yet, most of cases are ruled under the previous ones. Beside that, it is also possible to pass over so-called Implementing Regulation 987/2009 for its complementary character. Therefore, for

the purpose of this contribution the crucial one is the Regulation 1408/71.

As was already written above, the Regulation 1408/71 was repealed by Regulation 883/2004. What were the main problematic features, which led to the change of the act?

“This Regulation has been frequently amended and many judgements of the Court of Justice concerned this Regulation. As a result, the Regulation has become very complicated and this was considered problematic for migrant workers and also for legal aid advisers and judges the Regulation was difficult to apply. This complexity is the more problematic as it may impede the main objective of the Regulation, that is, the promotion of free movement of workers. Some of the main causes of the complexity are:

- the text of the Regulation can not and must not be interpreted without taking the judgements - of the Court of Justice into account
- the case law has grown considerably in length and complexity in the course of time
- the Regulation provides many exemptions to its main rules
- the lack of an explanatory memorandum to the Regulation. This means that all provisions had to be interpreted as they stand, unless the Court has interpreted... Also, the material scope of the Regulation was limited...”[\[8\]](#)

3.1 THE COURT OF JUSTICE

The role of the Court of Justice in social security question has been fundamental. Since the beginning few hundreds cases on the interpretation of the Regulation has been already decided. The majority of them was in favour of foreign workers and their families, which clearly demonstrates its importance in protection of European citizens. The role of the Court is essential when any doubts arise about the scope and extent of the Regulation, its application to individual cases and its interpretation with regard to national laws. The Court decides mostly in preliminary ruling.

The Court of Justice contributed and still contributes to the free movement of persons, apparently in the same extend as the Regulation itself. The Court strongly helped with the drawing up the concept of the new regulations.

In current case law the Court tends to very extensive interpretation, emphasising on the wide use of the Regulation with putting the freedom of movement in the first place. Trying to avoid excessive bureaucracy is also desired.

To mention very briefly some particular cases from recent times it is necessary to divide whole area into smaller parts. To simplify, the

logical structure of the Regulation is used. Many cases on personal or matter extent has been already decided (Borger,[\[9\]](#) Stewart[\[10\]](#)). Several aspects of pension insurance are also brought at the Court, e.g. aggregation of periods and their identification (Barreira Pérez),[\[11\]](#) definition of pension benefits (Noteboom)[\[12\]](#) or different rules for calculation and entitlement in different countries (Tomaszewska).[\[13\]](#) Probably the best known judgements came from the field of health insurance (Kohll[\[14\]](#) as one of the oldest, or Ivanov Elchinov[\[15\]](#)). Another field are family benefits (Schwemmer),[\[16\]](#) unemployment benefits (De Cuyper)[\[17\]](#) and many others.

With no exaggeration it is possible to say that without the Court of Justice, the protection offered by the European provisions would be less efficient, less complete and less satisfactory. The Court is the legal guardian of European citizens who are exercising their right to free movement and residence within Europe.

4. CZECH COURTS

„The pension system in the Czech republic is to a large extent a continuation of the solution applied before the economic changes of 1989. The basic element of the continuation consists in maintenance the pay-as-you-go solution without the intention of introducing any changes. This remains in contrast with the basic changes in the functioning of the systems in the neighbouring countries, such as Poland or Hungary.“[\[18\]](#) Nonetheless shortly after the revolution and before the accession to the European Union, the most of the legal acts were replaced with respect to the European law.

All national authorities are bound to apply the European law, which also applies to the Czech social security ones. A special role play administrative courts as a higher form of dispute resolution. Among them The Supreme Administrative Court *„... is the supreme jurisdiction dealing with matters in the jurisdiction of administrative courts. Administrative courts in general provide protection of public subjective rights of natural and legal persons (in procedures dealing with actions against the decisions of administrative authorities), which is supplemented by protection against failure of administrative authorities to act and protection from unlawful interference, instruction and coercion from administrative authorities...“[\[19\]](#)*

With regard to huge jurisdiction of the Supreme Administrative Court,[\[20\]](#) it can be assumed that this institution, as the supreme administrative authority, properly applies the European law. The Supreme Administrative Court is considered as dynamic and creative institution with afford of full and quality reflection of the European law.

„In the first four years of membership of the Czech Republic in the European Union the Supreme Administrative Court did not have any occasion to request for a preliminary ruling. Although there was an important aspect of the EU law in several cases, its interpretation was

so apparent that it was not necessary to ask the Court.“[\[21\]](#) But since then, nine[\[22\]](#) requests for preliminary ruling has been raised by this Court.

4.1 CASE C-399/09: LANDTOVÁ

The most relevant for the purpose of this contribution - Case C-399/09, Landtová[\[23\]](#) - asked for the interpretation of the Regulation 1408/71. The case can be seen as a culmination of long-time disputes taken by Czech and Slovak pensioners, who worked both in the Czech and the Slovak republic, about their social security benefits after the dissolution of the Federal Czech and Slovak Republic. This case was firstly a dispute between Mr. Landtová and the Czech Social Security Association, then it occurs before the Prague City Court, finally before the Supreme Administrative Court and also the Constitutional Court is engaged. The body of the case consists of the entitlement, insurance period and the amount of the partial retirement pension.

4.1.1 THE PRELIMINARY RULING

In those circumstances, the Supreme Administrative Court decided to request for a preliminary ruling and set two questions. The first one was about the interpretation of the Regulation in the sense that it precludes the application of a national rule, which provides the Czech institution to determine the entitlement, period and amount of the supplement, even though, according to the European law, it is the social security institution of the Slovak Republic which is competent. The second question, in essence, concerned with possible discrimination[\[24\]](#) in the judgements of the Constitutional law, which allows payment of a supplement to old age benefit solely to the Czech citizens residing in the territory of the Czech Republic.

The Court of Justice responded that the provisions of the Regulation do not preclude a national rule, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to the bilateral agreement between the Czech Republic and the Slovak Republic,[\[25\]](#) is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. Accordingly, no infringement of the European law was founded.

That is not true for the second question. The Court ruled that the provisions of the Regulation preclude the national rule, which allows the mentioned supplementary payment, but it does not necessarily follow, under the European law, that an individual who satisfies those two requirements should be deprived of such a payment.

Consequently, it is not against the European law if the Czech Republic grants supplementary payments for pensioners, but it should not be distinguished between pensioners with Czech citizenship (direct discrimination) and Czech residence (indirect discrimination) and others, as requires the Czech Constitutional Court. Until the eventual abolition of the possibility to be awarded these benefits, the Czech

Republic should grant them regardless of the citizenship and residence of applicants.

4.1.2 THE CONFLICT OF THE COURTS

The case seems to be the same as many others if it were not for a conflict of the Czech highest courts. This is, from my point of view, the most interesting aspect of the case.

Firstly, a court of the first instance (Prague City Court) annulled the administrative decision and bound the Czech Social Security Association to award Mr. Landtová a supplement to old age benefit, all in accordance with the Constitutional Court judgements. It has to mentioned that the most of these judgements are of the time before accession to the European Union, but the Court adhered to its position also later.[\[26\]](#)

The Czech Social Security Association brought an appeal before the Supreme Administrative Court. The Supreme Administrative Court set aside the judgement and referred it back for further consideration. The City Court adhered to its position, referring again to the judgements of the Constitutional Court, and the Czech Social Security Association brought a further appeal.

The Supreme Administrative Court considered the judgement of the Court of Justice and the fact that the rule was determined by the Constitutional Court for claims arose before the accession to the European Union. For claims arose after the date there is no binding precedent because of their conflict with European law.[\[27\]](#)

Moreover the Court took into account the fact that no such a claim has arose after the accession, more precisely the Czech Social Security Administration has not used the preferential rule, so far no one has been discriminated. In accordance, the applicant in this case, Mr. Landtová, was entitled to a pension after the accession to the European Union, the Supreme Administrative Court ruled that the applicant is not entitled.

Nevertheless, the conflict between the Supreme Administrative Court, as a great supporter of the European law, and the Constitutional Court, which is more abstemious, still persists. It seems that the Court of Justice tried to find a solution that is satisfactory for all. On one side gives agree with the Supreme Administrative Court. On the other hand, leaves the possibility of supplementary payments required by the Constitutional Court, however the Constitutional Court has never wanted to grant them so widely (surely not with regard to the possibilities of the Czech state budget).

Certainly, this is not the end of the story. There should be another chance given to the Constitutional Court to consider its judgements again. And what is perhaps the most important, a substantive political debate should be conducted, followed by new and much more precise legislation.

5. CONCLUSION

For people working in two or more Member States a transparent and coherent interpretation and application of the social security coordination rules is of great interest.

The European social security rules have been developed quite well. The essential acts for the coordination in this field are regulations, which are directly applicable and must be respected by all national authorities. Also the Court of Justice tends to very extensive interpretation, emphasising the free movement of persons.

In general, European social security rules are usually interpreted and applied correctly. However, some unclear situation occurs, e.g. the Czech provisions governing the partial retirement pension and the mentioned conflict between the Czech Constitutional and the European law. The conflict still remains unsolved and we should impatiently expect the outcome.

[1] Treaty on the Functioning of the European Union

[2] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

[3] 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 on the coordination of social security systems

[4] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes

[5] Regulation n° 3 concerning the social security for migrant workers (1957)

[6] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

[7] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community

[8] EBSCO, European Union, Social Security (supl. 78), web.ebscohost.com, page 25

[9] Case C-516/09: Judgment of the Court of 10 March 2011, Tanja Berger v Tiroler Gebietskrankenkasse.

[10] Case C-503/09: Judgment of the Court of 21 July 2011, Lucy Stewart v Secretary of State for Work and Pensions.

[11] Case C-347/00 : Judgment of the Court of 3 October 2002, Ángel Barreira Pérez v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

[12] Case C-101/04 : Judgment of the Court of 20 January 2005, Roger Noteboom v Rijksdienst voor Pensioenen.

[13] Case C-440/09: Judgment of the Court of 3 March 2011, Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v Stanisława Tomaszewska.

[14] Case C-158/96 : Judgment of the Court of 28 April 1998, Raymond Kohll v Union des caisses de maladie.

[15] Case C-173/09: Judgment of the Court of 5 October 2010, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa.

[16] Case C-16/09: Judgment of the Court of 14 October 2010, Gudrun Schwemmer v Agentur für Arbeit Villingen-Schwenningen.

[17] Case C-406/04. : Judgment of the Court of 18 July 2006, Gérald De Cuyper v Office national de l'emploi.

[18] Poteraj, J: Pension Systems in 27 EU Countries, 2008, page 130

[19] The Supreme Administrative Court: <http://www.nssoud.cz/Obecne-informace/art/557?menu=173>

[20] Two hundreds judgements connected with the Regulation 1408/71 has been published in the Supreme Court's database since 2005

[21] The Supreme Administrative Court: <http://www.nssoud.cz/Proceedings-before-the-Court-of-Justice-of-the-European-Union/art/570?menu=271>

[22] Out of fourteen originated in the Czech republic

[23] Case C-399/09: Judgment of the Court of 22 June 2011, Marie Landtová v Česká správa socialního zabezpečení

[24] Which is prohibited under the Treaties and the combined provisions of Articles 3(1) and 10 of Regulation

[25] Agreement between the Czech Republic and the Slovak Republic signed on 29 October 1992 as a measure to regulate matters after the dissolution of the Czech and Slovak Federal Republic

[26] For example Judgements of the Constitutional Court: II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 301/05

[27] Case 3 Ads 130/2008 : Judgment of the Supreme Administrative Court of 25 August 2011

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