Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 17 March 2016[1]

Case C-187/15

Joachim Pöpperl
v
Land Nordrhein-Westfalen
(Request for a preliminary ruling

from the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf, Germany))

(Article 45 TFEU — Freedom of movement for workers — Civil servants who leave their Member State to take up employment in another Member State — Legislation providing for non-application of civil service benefits and for transfer to general statutory pension insurance scheme))

I – Introduction

1. When civil servants decide to leave the service of Land Nordrhein-Westfalen (the respondent) prior to retirement, they are no longer entitled to participate in the special civil service benefits pension scheme. Their insurance periods completed under that special scheme are retrospectively transferred to the general statutory pension insurance scheme. However, such a transfer may result in a considerable reduction in the amount of pension eventually received by the civil servant.

2. Mr Pöpperl (the applicant), previously a civil servant with the respondent, left the civil service of Land Nordrhein-Westfalen in order to take up a position in Austria. The question referred by the national court hearing his case, the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf), enquires in essence, whether the compulsory transfer to the general statutory pension insurance scheme and the corresponding decrease in the applicant's pension entitlements are compatible with free movement of workers guaranteed by Article 45 TFEU.

II – Legal framework

A – *EU law*

3. Article 45 TFEU reads as follows:

'1. Freedom of movement for workers shall be secured within the Union.

1 — Original language: English.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…

4. The provisions of this Article shall not apply to employment in the public service.'

4. Article 60 of Regulation (EC) No 883/2004[2] contains 'Special provisions for civil servants'. Article 60(2) states:

'2. … if the legislation of a competent Member State makes the acquisition, liquidation, retention or recovery of the right to benefits under a special scheme for civil servants subject to the condition that all periods of insurance be completed under one or more special schemes for civil servants in that Member State, or be regarded by the legislation of that Member State as equivalent to such periods, the competent institution of that State shall take into account only the periods which can be recognised under the legislation it applies.

If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for the receipt of these benefits, these periods shall be taken into account for the award of benefits under the general scheme or, failing that, the scheme applicable to manual or clerical workers, as the case may be.'

B – *National law*

5. National legislation affecting the applicant's pension entitlements is, on the one hand, Book VI of the federal Social Code ('Book VI SGB')[3] and, on the other hand, two measures of the Land Nordrhein-Westfalen: the Law on Civil Service Pensions of North Rhine-Westphalia ('LBeamtVG NRW')[4] and the Law on the Civil Service of North Rhine-Westphalia ('LBG NRW').[5]

6. The retirement pension of civil servants of Land Nordrhein-Westfalen is governed by the LBeamtVG NRW. Paragraph 4 of that law provides, among other things, that retirement pensions shall be calculated on the basis of pensionable remuneration and pensionable service. At the same time, it follows from Paragraph 28(3) LBG NRW that '[a]fter release from employment the former civil servant shall have no right to benefits from the employer, unless otherwise provided by law …'.

7. At the federal level, Paragraph 1 of Book VI SGB lays down the framework for the general statutory pension insurance scheme. While Paragraph 5 of Book VI SGB exempts civil servants from the general statutory pension insurance scheme, Paragraph 8 makes them subject to it, if they leave 'their employment without a right to or expectancy of a pension from employment or lost their right to a pension …'. The general statutory pension insurance scheme operates by extending back over the period during which the concerned person remained exempted.

2 — Regulation 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).

3 — Sechstes Buch Sozialgesetzbuch (SGB VI) — Gesetzliche Rentenversicherung.

4 — Beamtenversorgungsgesetz für das Land Nordrhein-Westfalen (Landesbeamtenversorgungsgesetz — LBeamtVG NRW).

5 — Beamtengesetz für das Land Nordrhein-Westfalen (Landesbeamtengesetz — LBG NRW).

8. Furthermore, Paragraph 107(b) of the Law on Pensions for Federal Civil Servants and Judges [6] ('BeamtVG') lays down general rules on the apportionment of the costs related to civil service benefits to be paid by public law employers to a civil servant who, during his or her career, changes public employer by leaving one Land to go to another or by leaving a Land to work for federal public employer or vice versa. That provision and related German legislation provide for coordination as regards pensions of civil servants changing from one public law employer to another within Germany.

9. Paragraph 107(b) BeamtVG was modified following the conclusion of the State Treaty on the apportionment of civil service benefits in the event of federal and state cross-border changes of employer by the federal government and the respective Länder ('the State Treaty'). [7] The State Treaty followed a constitutional reform adopted in 2006 which, among other things, transferred the competence over civil servants' pensions from the federal government to the Länder.

III – Facts, procedure and questions referred

10. The applicant was employed as a civil servant — a teacher — by the respondent between 1 September 1978 and 31 August 1999. On 31 August 1999, he resigned in order to take up a position as a teacher with the Land Kärnten in Austria.

11. On 25 April 2013, the respondent informed the applicant that due to his past decision to leave the civil service, he was not entitled to a pension under the civil service benefits scheme. Instead, he had been transferred to and insured under the general statutory pension insurance scheme for the entire period of his employment with the respondent.

12. According to the referring court, the applicant's pension under the general statutory pension insurance scheme amounts to a monthly sum of EUR 1050.67. However, had the applicant been entitled to the civil service benefits scheme instead of being transferred to the general statutory pension insurance scheme for the years of service he had completed for the respondent, he would have a right to a monthly pension amounting to EUR 2263.03 or even to EUR 2728.18. [8]

13. Due to his civil servant status, the applicant did not have the possibility to contract additional pension insurance and could not subscribe to it retrospectively. He attempted to do so but the respondent refused his request by a decision of 10 February 2009.

14. The applicant disagreed with the aforementioned transfer from the civil service benefits scheme to the general statutory pension insurance scheme and challenged it before the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf). The order for reference does not detail the applicant's arguments in the main proceedings. However, it can be inferred from the text of the order that he considers that transfer to be incompatible with Article 45 TFEU.

6 — Gesetz über die Versorgung der Beamten und Richter des Bundes, Beamtenversorgungsgesetz.

7 — Staatsvertrag über die Verteilung von Versorgungslasten bei bund- und länderübergreifenden Dienstherrenwechseln, vom 16. Dezember 2009 und 26. Januar 2010 (BGBl. 2010 I S. 1290). State Treaty of 16 December 2009 and 26 January 2010 on the apportionment of civil servant benefits in the event of federal and state cross-border changes of employer. The State Treaty entered into force on 1 January 2011.

8 — For the sake of completeness, it ought to be pointed out that the German Government and the respondent challenge the comparison made by the referring court as regards the applicant's pension entitlements under the civil service benefits scheme, on one hand, and under the general statutory pension scheme, on the other hand. They argue that both categories of pension entitlements are different in nature and that specific pension entitlements can only be determined when the concerned person effectively retires, in the light of the legal situation existing at that particular moment. I disagree for two reasons. First, as regards the appropriateness of such comparison, I am bound to defer to the analysis made by the referring court. Second, the classification of the civil service benefits under German law cannot affect the autonomous EU law assessment of that scheme, which focuses, by its very nature, on factual operation of a national scheme, and not on the specific dogmatic box it might be put into by the national law. From this point of view, there appears to be nothing questionable with the comparison carried out by the referring court. With regard to its overall operation, the special civil service benefits scheme can certainly be seen as a specific pension system for civil servants.

15. The Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf) decided to stay the proceedings and refer the following questions for a preliminary ruling:

‘(1) Is Article 45 TFEU to be interpreted as precluding a national law according to which a person employed as a civil servant in a Member State loses his expectancies concerning a retirement pension (civil servant benefits) arising from employment as a civil servant because, in order to take up employment in another Member State, that person was released from the civil service at his own wish, when at the same time national law provides that that person is insured retrospectively in the statutory pension scheme on the basis of the gross salary received as a civil servant, although the resulting pension rights are less than the lost retirement pension expectancies?

(2) If the reply to the first question is in the affirmative for all or some civil servants, is Article 45 TFEU to be interpreted as meaning that, in the absence of other national provisions, the earlier appointing body of the civil servant in question has to pay the civil servant either the amount of retirement pension on the basis of the period of pensionable service in the earlier civil service post, reduced by the amount of pension rights arising from the retrospective insurance, or to compensate him financially in some other way for the loss of the retirement pension, although under national law only the civil servant benefits provided for by that law may be granted?’

16. Written observations were submitted by the German Government, the respondent [9] and the Commission. Those who submitted written observations, as well as the applicant, [10] presented oral arguments at a hearing held on 14 January 2016.

IV – Assessment

A – *Question 1*

17. By its first question, the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf) wishes to know, in essence, whether Article 45 TFEU must be interpreted as precluding national legislation that retrospectively modifies, to the disadvantage of the beneficiary, the pension regime applicable to a civil servant who has resigned to take up a new job in a different Member State.

18. In order to assess whether the legislation at issue constitutes discrimination or a restriction (or both) which is incompatible with the freedom of movement for workers (section 2), I shall first determine which EU law provisions are relevant for that assessment (section 1).

1. Applicable law

19. The applicant and the respondent as well as the Commission agree that Article 45 TFEU applies to the facts of this case. There is indeed no doubt that the applicant is a worker within the meaning of Article 45 TFEU. [11] At the same time, his situation does not fall under the public service exception set out in Article 45(4) TFEU. [12]

9 — By a letter of 10 August 2015, the respondent fully subscribed to the position expressed by the German federal government without submitting separate written observations.

10 — The applicant submitted written observations but he did so after the end of the written stage of the proceedings.

11 — See, inter alia, order in *Marhold* (C-178/04, EU:C:2005:164, paragraph 19).

12 — Firstly, that exception concerns *access* to employment which is not at stake in the present case. Secondly, the Court has confirmed that a teacher is not covered by that exception. See order in *Marhold* (C-178/04, EU:C:2005:164, paragraphs 21 to 23 and the case-law cited).

20. The applicability of Article 45 TFEU to the present case therefore does not raise any issue. Conversely, the relevance of Regulation No 883/2004 does.

21. The German Government and the respondent rely on Regulation No 883/2004, and specifically on Article 60(2), to maintain the compatibility of the national legislation at issue with Article 45 TFEU. The applicant also refers to Regulation No 883/2004, but for a different purpose: he stresses the importance attached by that regulation to the protection of acquired rights.

22. It is clear that today, civil servants' social security rights are subject to coordination rules laid down by Regulation No 883/2004. Initially, special schemes applicable to civil servants were excluded from the intra-EU coordination under Regulation (EEC) No 1408/71,[13] the predecessor of Regulation No 883/2004. In reaction to the judgment of the Court in *Vougioukas*,[14] that exception was deleted by Regulation (EC) No 1606/98.[15]

23. However, in spite of being generally applicable to the pension entitlements of civil servants, Regulation No 883/2004 does not apply to the applicant's situation on the facts of the present case. As the Commission rightly points out, the applicant does not aim to have his pension rights transferred from one Member State to another. Rather, he wishes that his pension rights acquired in Germany under the civil service benefits scheme are maintained despite the fact that he decided to take up employment in Austria.

24. The factual situation in the main proceedings does not involve any coordination of the applicant's pension rights in the sense of Regulation No 883/2004. That regulation is thus not applicable in the present case. My ensuing analysis in this Opinion will therefore be conducted only with regard to Article 45 TFEU.

2. Substantive assessment

25. The Court has acknowledged that Member States retain the power to organise their social security schemes. However, it has also repeatedly stated that when exercising that power, they must respect the provisions of the Treaty on freedom of movement for workers.[16]

26. Those provisions, of which Article 45 TFEU is one, are intended to facilitate the pursuit by EU citizens of occupational activities throughout the European Union. They preclude measures which might place nationals of Member States at a disadvantage if they wish to pursue an economic activity in another Member State.[17]

27. Intuitively, it is quite clear that the national legislation at issue places the applicant at a certain disadvantage, due to his decision to take up employment in Austria. As the referring court points out, that particular disadvantage takes the form of the loss of more than a half of the amount of his pension entitlements.

13 — Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971, L 149, p. 2). Pursuant to Article 4(4) of that regulation, it did '… not apply to … special schemes for civil servants and persons treated as such'.

14 — C-443/93, EU:C:1995:394.

15 — Council Regulation of 29 June 1998 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover special schemes for civil servants (OJ 1998 L 209, p. 1).

16 — Most recently, judgment in *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraph 38 and the case-law cited). See also judgment in *Gouvernement de la Communauté française and Gouvernement wallon* (C-212/06, EU:C:2008:178, paragraph 43).

17 — Judgments in *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraph 39 and the case-law cited), and *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 22 and the case-law cited).

28. The question remains, however, what type of disadvantage does the national legislation amount to? Furthermore, can it be justified? In order to answer this question, I will assess whether that legislation is discriminatory (section a)); or whether it constitutes a restriction to freedom of movement for workers (section b)) and if so, whether such discrimination or restriction can be justified (section c)).

a) Existence of discrimination

29. The national legislation in question applies to civil servants without distinction on the grounds of nationality. It is therefore quite clear that it does not amount to *direct* discrimination: the prohibited ground for differentiation (nationality) is not the ground for differentiation in the present case. [18]

30. However, Article 45 TFEU prohibits not only direct discrimination based on nationality, but also indirect discrimination. [19]

31. The Court classifies as indirectly discriminatory national legislation that applies irrespective of nationality, but, at the same time, is *intrinsically* liable to affect migrant workers *more* than national workers of the State whose legislation is at issue and if there is a risk that it will place the former at a *particular* disadvantage. [20] The Court has also held that 'in order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question'. [21] Furthermore, it is not necessary to establish that the provision in question in fact affects a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. [22]

32. In the present case, the Commission submits that the legislation at issue leads to indirect discrimination because it is intrinsically liable to affect migrant workers more and place them at a particular disadvantage when compared with national workers.

33. However, as the German Government and the respondent explain, the application of the legislation at issue is not linked to the departure of the civil servant to another Member State. Its application is therefore not triggered by the fact that a civil servant migrates to another Member State. It is triggered by his or her departure from the civil service of the respondent. Thus, according to the German Government and the respondent, workers who leave the civil service in order to take up employment within Germany with other, private employers are in exactly the same position as those leaving to go abroad.

34. The position advanced by the German Government and by the respondent is not illogical. Indeed, there is nothing in the operation of the legislation at issue that makes it *intrinsically* liable to affect migrant workers *more* than national workers by placing the former at a *particular* disadvantage, if one accepts that the triggering event for that consequence is the departure from the civil service.

18 — Judgments in *Commission* v *France* (167/73, EU:C:1974:35, paragraphs 44 to 46), and *Marsman* (44/72, EU:C:1972:120, paragraph 4).

19 — Judgment in *Graf* (C-190/98, EU:C:2000:49, paragraph 14 and the case-law cited).

20 — Judgments in *Larcher* (C-523/13, EU:C:2014:2458, paragraph 32 and the case-law cited); *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* (C-514/12, EU:C:2013:799, paragraph 26 and the case-law cited); *Erny* (C-172/11, EU:C:2012:399, paragraph 41 and the case-law cited); and *O'Flynn* (C-237/94, EU:C:1996:206, paragraphs 18 to 20). Emphasis added.

21 — Judgments in *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* (C-514/12, EU:C:2013:799, paragraph 27), and *Erny* (C-172/11, EU:C:2012:399, paragraph 41 and the case-law cited).

22 — Judgment in *Larcher* (C-523/13, EU:C:2014:2458, paragraph 33 and the case-law cited).

35. I wish to stress all three words of the definition of indirect discrimination as set out by the Court: *intrinsically, more*, and *particular*. They reflect the gist of the prohibition of indirect discrimination: on seemingly neutral grounds of differentiation, the legislation or regime in question is bound to hit the protected group (here, migrant workers) harder than the general group (here, those remaining in Germany but leaving the civil service). In cases involving indirect discrimination, such a face-value-assessment (*intrinsically*) may then be supplemented by statistical arguments: *more* members of the protected group are affected and/or there is a *particular* disadvantage.

36. However, none of those requirements appears to be fulfilled on the facts of this case. On its face, the legislation at issue affects migrant and non-migrant workers in the same way: both lose their civil service pension benefit entitlements if they leave the civil service of the respondent. Moreover, it has not been established that, in purely quantitative terms, migrant workers would be more affected by the rule than those remaining within Germany but leaving the civil service. In fact, even a contrary assumption could reasonably be made: the number of persons losing their civil service pension benefit entitlements because of a move to a private employer within Germany might be even higher than the number of those losing it because of a move to another Member State.

37. Therefore, I do not consider that, on its face, the legislation at issue is *intrinsically* liable to affect migrant workers *more* than national workers. For this reason, I am of the view that the legislation at issue does not indirectly discriminate between migrant and non-migrant workers.

b) Existence of a restriction

38. The reach of Article 45 TFEU is nonetheless not limited to direct and indirect discrimination based on nationality. Established case-law [23] of the Court states that Article 45 TFEU also captures national rules applicable irrespective of the nationality of the workers concerned, but which are capable of hindering or rendering less attractive the exercise of their freedom of movement by precluding or deterring a national of a Member State from leaving his country of origin. This also concerns national measures that apply indistinctly to national and cross-border situations but that directly affect access to the employment markets in other Member States. [24]

39. Thus, it is clear that, beyond the categories of direct and indirect discrimination, there is the restriction category. For a national measure to fall within that category, it suffices that it is liable to *hinder* or to *render less attractive* the exercise of the freedom in question. Within that logic, the comparison between reference groups (which is the key analytical tool for both types of discrimination) is to a great extent suppressed. Rather, for the restriction category the focus is only on the protected group, that is, the migrant workers, and the effects the contested measure has on the likelihood of them exercising freedom of movement under the Treaty.

40. Recently, the Court assessed Cypriot legislation which deprived civil servants under the age of 45 of their pension rights when they resigned from the Cypriot civil service to pursue a professional activity in another Member State. The Court classified that deprivation as a deterrent to civil servants seeking to leave their employment in the Cypriot civil service. It concluded that the legislation in question amounted to a restriction on the free movement of workers because it directly affected the access of Cypriot civil servants to the employment markets in other Member States. [25]

23 — For example, judgments in *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* (C-514/12, EU:C:2013:799, paragraph 30 and the case-law cited); *Las* (C-202/11, EU:C:2013:239, paragaph 20); *Casteels* (C-379/09, EU:C:2011:131, paragraph 22); *Gouvernement de la Communauté française and Gouvernement wallon* (C-212/06, EU:C:2008:178, paragraph 45 and the case-law cited); and *Bosmann* (C-415/93, EU:C:1995:463, paragraph 96 and the case-law cited).

24 — Judgment in *Bosmann* (C-415/93, EU:C:1995:463, paragraph 103).

25 — Judgment in *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraphs 45, 47 and 51 and the case-law cited).

41. The same analysis should also be applied in the present case. A teacher who is a civil servant employed by the respondent and who wishes to take up employment in another Member State has to renounce his civil servant status and the benefits associated therewith. I agree with the Commission that this is likely to hinder, or certainly to make less attractive, the exercise of the right of free movement and to deter such a person from leaving employment with the respondent.

42. At the same time, I consider that the deterrent effects of the legislation at issue are not too indirect or uncertain.[26] In other words, there is a sufficient degree of proximity between the national legislation in question and its impact on migrant workers. As stated above in the previous section, I agree with Germany and the respondent that the *immediate* cause, or the triggering event, for the applicant's decrease in pension benefit amounts was him leaving the civil service of the respondent. However, in order to be able to take up an employment in Austria, he was left with no choice but to leave the civil service. Thus, the consequence of him losing a substantial part of his pension entitlements was quite *direct* and *certain* and clearly connected to his exercise of free movement.

43. Thus, by analogy to the Court's position in *Commission* v *Cyprus*, I am of the view that the legislation in the present case constitutes a restriction to the free movement of workers. It deters civil servants employed by the respondent from exiting their employment in order to access the employment markets of other Member States.

c) Justification

44. A national measure that amounts to a restriction on free movement of workers is not permitted under Article 45 TFEU unless it pursues one of the legitimate aims listed in the Treaty or is justified by overriding reasons in the public interest.

45. Furthermore, the application of such a measure has to be proportionate to the legitimate aim pursued. In general, proportionality is the examination of the match between stated aim(s) and chosen mean(s). In order to comply with the principle of proportionality, the measures adopted should be *appropriate* to attain the legitimate objectives pursued; they shall not exceed what is *necessary* to attain them (where there are several regulatory alternatives, recourse must be had to the least onerous); and the disadvantages caused must not be disproportionate to the aims pursued (*internal balancing*, or proportionality *stricto sensu*).[27]

46. The respondent and the German Government claim that the legislation is justified by the legitimate aim of ensuring the 'proper functioning of the civil service'.

47. It ought to be stressed that at the hearing, the respondent confirmed that this objective is pursued *at the level of Land Nordrhein-Westfalen* (as opposed to at the federal level). It will therefore be considered from that perspective. Conditioning the grant of the civil service benefits scheme on the civil servant remaining in the employment of the respondent until retirement aims at retaining qualified workers in the civil service of that Land.

48. I accept that such an objective may constitute an overriding reason in the public interest.[28]

26 — Judgment in *Gouvernement de la Communauté française and Gouvernement wallon* (C-212/06, EU:C:2008:178, paragraph 51); order in *Marhold* (C-178/04, EU:C:2005:164, paragraph 27); and judgment in *Graf* (C-190/98, EU:C:2000:49, paragraphs 24 and 25).

27 — Judgments in *Léger* (C-528/13, EU:C:2015:288, paragraph 58 and the case-law cited); *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraph 54); *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* (C-514/12, EU:C:2013:799, paragraph 36 and the case-law cited); and *Casteels* (C-379/09, EU:C:2011:131, paragraph 30 and the case-law cited). See also my Opinion in C-134/15, *Lidl* (point 40 and the case-law cited).

28 — See, by analogy, order in *Marhold* (C-178/04, EU:C:2005:164, paragraph 32 et seq.); judgment in *Köbler* (C-224/01, EU:C:2003:513, paragraph 80 et seq.). In these cases, the German and Austrian Governments respectively argued that the national measures at issue were justified because they rewarded the loyalty of civil servants, *in casu* university professors.

49. The first step of the proportionality analysis consists of assessing whether the means chosen, that is, the effective downgrading of the pension entitlements of workers who leave the civil service of the Land prior to their retirement, are *appropriate* for achieving the stated aim, which is to retain qualified workers in the civil service of Land Nordrhein-Westfalen.

50. I do not think so for one simple reason: while stating that the aim of the legislation at issue is to keep qualified civil servants in the employment of Land Nordrhein-Westfalen, the same legislation allows for the 'exit' of civil servants from that Land to take up employment with other German Länder or with the federal government.

51. As explained at the hearing by the respondent, civil servants who leave Land Nordrhein-Westfalen to take up employment with other public employers in a different Land or at the federal level, in principle, retain their entitlement to the civil service benefits scheme, subject to the rules provided for by their new public employer. This is because there are coordination mechanisms that exist between the respondent and other public employers within Germany.

52. The respondent explained at the hearing that such coordination between public employers as regards pensions of civil servants migrating *within* Germany was provided for by the legislation applicable at the relevant time, that is, upon the applicant's resignation from civil service.

53. Moreover, following the 2006 constitutional reform in Germany, competence over civil service pensions was transferred from the federal government to the Länder. This change was followed by the conclusion of the State Treaty, which underlines in its preamble, in quite explicit terms, the importance of intra-German civil servant mobility and the consequent need for coordination of their pension entitlements.

54. In the light of these elements, I do not think that the substitution of the civil servant benefits scheme with the general statutory pension scheme is *appropriate* to attain the objective of ensuring the proper functioning of the respondent's civil service. It cannot be claimed that such an aim is being genuinely pursued at the level of Land Nordrhein-Westfalen if, at the same time, the applicable legislation allows for 'exit' to other Länder and the federal civil service.

55. For the sake of completeness, it may be added that the legislation at issue goes beyond what is necessary and that it does not provide for a proper balance between the interests of the different parties involved.

56. As regards the element of *necessity*, it is clear that the stated objective could be pursued by less restrictive means. By way of example, in its order for reference, the referring court pointed out that three Länder — Land Baden-Württemberg, Land Hessen and Land Niedersachsen — offer civil servants who have been released the possibility of keeping their benefits corresponding to their past years of service. There is no reason to assume that those Länder do not also seek to attain the objective of the 'proper functioning of the civil service'. However what is significant is that they do so by less onerous means.

57. Finally, I consider that the legislation at issue does not strike a *reasonable balance* between the public and private interests involved. The applicant worked for the respondent for more than 20 years. This is a substantial period of one's career. According to the order for reference, the applicant's resulting pension rights are less than a half of what they would be if the legislation at issue did not extinguish his rights to the civil service benefits scheme upon his departure to Austria. Such a consequence strikes me as being particularly harsh from the applicant's perspective on the one hand, while being particularly beneficial from the respondent's on the other.

58. In the light of the foregoing, I suggest that the Court responds to the first preliminary question that Article 45 TFEU must be interpreted as precluding national legislation that leads to a substantial decrease in pension entitlements of a worker, such as in the case of the applicant in the main proceedings, by reason of his decision to take up employment in another Member State.

B – *Question 2*

59. By its second preliminary question, the referring court wishes to know, in substance, what actions the competent national authorities should take if it is established that Article 45 TFEU precludes the legislation at issue. It enquires about the consequences that flow from the potential finding of incompatibility and the way in which such a judgment of the Court should be implemented at the national level.

60. Such matters are traditionally left to the discretion of the competent national authorities, pursuant to the principle of national procedural autonomy, and also because they involve the interpretation or the potential redrafting of national laws.[29] However, in order to provide the referring court with a useful reply on a question it has explicitly asked, I shall at least address this issue by outlining relevant guidance that can be inferred from existent case-law of the Court.

61. In proposing an answer to the second question of the referring court, my analysis will be on two levels: structural and individual.

1. Structural level

62. It is settled case-law that national legislation which is not compatible with EU law has to be interpreted in conformity with it. If that proves impossible, it has to be disapplied.[30] There is nonetheless no strict order of precedence between the two: their order will depend on the individual case.[31] In general, however, interpretation in conformity with EU law might be more advisable since it minimises the impact on the national legal system,[32] provided that it is still able to ensure compatibility with EU law by interpretation.

63. Even if *interpretation in conformity with EU law* might be the preferred approach, it has its clear limits. In particular, the Court has recognised that interpretation in conformity with EU law cannot serve as the basis for an interpretation of national law *contra legem*.[33]

64. I agree with the applicant that such a limit appears to have been reached in the present case. It follows from the order for reference, and it was further explained at the hearing, that the competent authorities can only grant pension claims on the basis and within the limits clearly set by law, as required by the principle of legality. In those circumstances, the Commission's suggestion to read 'the

29 — For example, in the context of the preliminary rulings procedure, Advocate General Lenz already stated in his Opinion in *Wagner Miret* that '[t]he Court of Justice has neither the task of interpreting nor jurisdiction to interpret legal provisions of the Member States' (C-334/92, EU:C:1993:322, point 20).

30 — See, inter alia, Opinion of Advocate General Kokott in *Taricco and Others* (C-105/14, EU:C:2015:293, points 107 to 111 and the case-law cited).

31 — On the one hand, see, inter alia, judgments in *Pflücke* (C-125/01, EU:C:2003:477, paragraph 48); *Santex* (C-327/00, EU:C:2003:109, paragraphs 62 to 65); and *Murphy and Others* (157/86, EU:C:1988:62, paragraph 11) showing preference for interpretation in conformity with EU law. On the other hand, see, for example, the proposition in judgment in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 113 and 124) stating that the obligation of interpretation in conformity with EU law has been imposed in particular where a provision of a directive lacks direct effect, that is, implying in fact that interpretation in conformity with EU law comes into play only when direct effect is impossible.

32 — See, in general, Sacha Prechal, *Directives in EC Law*, second edition, Oxford University Press, 2005, pp. 314 and 315.

33 — Recently, inter alia, judgment in *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 31 and 32 and the case-law cited).

unless otherwise provided by law' provision in Paragraph 28(3) LBG NRW as referring to EU law, and to construe pension claims on the basis of that interpretation, seems to go somewhat too far. However, whether such a reading of the national legislation would indeed lead to a *contra legem* interpretation is for the national court to ascertain.

65. Next, when interpretation in conformity with EU law proves impossible, the national court still has the obligation to give EU law its full effect, if need be, by *disapplying* incompatible provisions of national law, without the prior repeal of those provisions. [34]

66. In the present case, however, it is likely that this method of avoiding incompatibility with EU law will present the competent national authorities with similar practical problems. Social security bodies cannot operate in a legal vacuum which seems to be the result if the national law in the present case is simply disapplied. Again, whether the disapplication of Paragraph 28(3) LBG NRW would create such a legal vacuum or whether it can be compensated for by another provision of national law is for the national court to verify.

67. In the light of the foregoing, it is fair to admit that a structural solution that would bring the national law into line with Article 45 TFEU will most likely have to be a legislative one, as stressed by both applicant and respondent at the hearing. In the field of social security rights, the practice of administrative or judicial bodies interpreting the applicable rules in a broad manner, or putting those rules aside, on *ad hoc* basis, may admittedly constitute an 'emergency' remedy in an individual case compensating for the lack of a systemic solution. In the long term, however, it is unlikely to satisfy the requirements of the predictability of law [35] and the legality of administrative action.

2. Individual level

68. It is again settled case-law that it is for national courts to ensure the legal protection that persons derive from the direct effect of provisions of EU law, such as Article 45 TFEU. [36] Furthermore, the Court has held that where a provision of national law is classified as an unjustified restriction on freedom of movement for workers, 'the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned'. [37]

69. I note the difficulty that may exist in the present case when it comes to calculating the amount of the pension benefits to which the applicant should be entitled. However, it follows from the order for reference that it is possible to conduct such an assessment in respect of the applicant despite his departure from the employment with the respondent.

70. I am of the view that the applicant must have a right to exit the civil service of the respondent to take up employment in another Member State without having his pension rights decreased more than workers who, in comparable circumstances, leave the civil service of the respondent but remain employed as civil servants elsewhere in Germany.

71. It is for the national authorities to ascertain what such comparable entitlements are and to search, within the bounds of the national law, for the means that endow them with the power to grant them to the applicant for the period of his employment with the respondent.

34 — Recently, inter alia, judgment in *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 49 and the case-law cited).

35 — The case-law of the Court in infringement cases concerning the implementation of directives might be referred to by analogy in this regard. See, inter alia, judgment in *Commission* v *United Kingdom* (C-530/11, EU:C:2014:67, paragraph 34 and the case-law cited).

36 — Judgment in *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 19 and the case-law cited) or Opinion of Advocate General Ruiz-Jarabo Colomer in *Terhoeve* (C-18/95 EU:C:1998:177, point 73).

37 — Judgment in *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 57 and the case-law cited).

72. For the reasons discussed above, I suggest that the Court responds to the second preliminary question that it is for the competent national authorities, to identify, by application of their own national law and based on the procedural autonomy that Member States enjoy, the means that provide them with the authority to grant the applicant in the main proceedings pension entitlements comparable to those which he would have received for the period of his employment with the respondent if he had decided to take up employment with another public employer in Germany.

73. Finally, by way of a post scriptum, it ought to be stressed that the analysis conducted in this Opinion concerns solely a worker's 'right to exit' the employment market of a Member State, provided for by Article 45 TFEU. As I noted above, Regulation No 883/2004 is not applicable in the present case. Therefore, the conclusions reached in this Opinion do not affect in any way individual rights or Member States' obligations under that regulation.

V – Conclusion

74. In the light of the foregoing considerations, I propose to the Court to answer the questions referred to it by Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf) as follows:

(1) Article 45 TFEU must be interpreted as precluding national legislation that leads to a substantial decrease in pension entitlements of a worker, such as in the case of the applicant in the main proceedings, by reason of his decision to take up employment in another Member State.

(2) It is for the competent national authorities to identify, by application of their own national law and based on the procedural autonomy that Member States enjoy, the means that provide them with the authority to grant the applicant in the main proceedings pension entitlements comparable to those which he would have received for the period of his employment with the respondent if he had decided to take up employment with another public employer in Germany.