Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 November 2015 [1]

Case C-12/14

European Commission
v

Republic of Malta

(Failure of a Member State to fulfil obligations — Social security — 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)

I – **Introduction**

1. The rules of secondary law coordinating the social security systems of the Member States contain specific rules limiting or prohibiting the application of domestic provisions against overlapping which have the effect of reducing the old-age pension to which an insured person may be entitled in one Member State by reason of the fact that he receives a benefit of the same kind from another Member State.

2. The implementation of these specific rules lies at the heart of the present dispute, in which the European Commission asks the Court to declare that, by imposing a rule to prevent overlapping of national old-age pensions and civil-service old-age pensions from other Member States, the Republic of Malta has failed to fulfil its obligations under, first, 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, [2] and, secondly, 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. [3]

3. The circumstances at the origin of these proceedings derive from a particular historical context, which the Republic of Malta has set out in its pleadings, and concern retired Maltese citizens who, as they had worked for the British services in Malta prior to 31 March 1979 — the date on which the last British forces left the island — receive both a Maltese retirement pension and a 'supplementary' civil-service pension from the United Kingdom, which, under a provision against overlapping contained in Maltese legislation, is deducted from the Maltese old-age pension.

1 — Original language: French.

2 — Regulation 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').

3 — OJ 2004 L 166, p. 1, and corrected version in OJ 2004 L 200, p. 1.

4. In this Opinion, I will argue that the fact that a pension scheme of a Member State which may be classified as legislation relating to a branch of social security, for the purposes of Article 1(j) of Regulation No 1408/71 and Article 1(l) of Regulation No 883/2004, was not declared to be such by the Member State within whose jurisdiction it falls has no bearing on that classification.

5. I will also submit that, although the service pensions granted under the civil service schemes of the United Kingdom are paid as a supplement to the basic old-age pension provided by the National Health Service and relate to the previous employment of the person concerned, they come within the scope of the system for the coordination of social security schemes.

6. I will conclude that the application should be granted.

II – **Legal framework**

A – *EU law*

1. Regulation No 1408/71

7. The aim of Regulation No 1408/71 is to coordinate national social-security legislation, within the context of the free movement of persons.

8. Article 1 of that regulation, 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) and (2) …

The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope …

…'

9. Article 4 of that regulation, which defines the matters covered thereby, provides, in its paragraph 1:

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

…

(c) old-age benefits;

…'

10. Article 5 of Regulation No 1408/71, entitled 'Declarations by the Member States on the scope of this Regulation', requires, in particular, that the Member States specify the legislation and schemes referred to in Article 4(1) of that regulation in declarations to be notified to the President of the Council of the European Union and published in the *Official Journal of the European Union*.

11. 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', 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 or 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. …

…

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

2. Regulation No 883/2004

12. Regulation No 883/2004 replaced Regulation No 1408/71 with effect from 1 May 2010.

13. Under Article 1 of this regulation, entitled 'Definitions':

'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).

This term excludes contractual provisions other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council …

…'

14. Article 3 of that regulation, entitled 'Matters covered', provides, in paragraph 1 thereof:

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

…

(d) old-age benefits;

…'

15. Article 9 of Regulation No 883/2004, entitled 'Declarations by the Member States on the scope of this Regulation', provides, in paragraph 1 thereof:

'The Member States shall notify the ... Commission in writing of … the legislation and schemes referred to in Article 3 … Such notifications shall indicate the date of entry into force of the laws and schemes in question …'

16. 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:

…

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

3. Directive 98/49/EC

17. The aim of Directive 98/49/EC,[4] according to the first sentence of Article 1 thereof, 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.

18. Recital 4 in the preamble to this directive states that 'the system of coordination provided for in [Regulation No 1408/71], and in particular the rules of aggregation, are not appropriate to supplementary pension schemes, except for schemes which are covered by the term "legislation"'.

19. According to recital 5 in the preamble to the directive, 'no pension or benefit should be subject to both the provisions of this Directive and those of [Regulation No 1408/71]'.

20. The second sentence of Article 1 of Directive 98/49 provides that the protection of members refers to pension rights under both voluntary and compulsory supplementary pension schemes, 'with the exception of schemes covered by Regulation … No 1408/71'.

4 — Council Directive 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).

21. As set out in Article 3 of Directive 98/49:

'For the purpose of this Directive:

(a) "supplementary pension" means retirement pensions and, where provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice, invalidity and survivors' benefits, intended to supplement or replace those provided in respect of the same contingencies by statutory social security schemes;

(b) "supplementary pension scheme" means any occupational pension scheme established in conformity with national legislation and practice, such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons;

…'

B – *Maltese law*

22. Article 56 of the Social Security Act provides that, 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 that Act is to be abated by the amount of such service pension.

III – **Pre-litigation procedure**

23. Prompted by three petitions submitted to the Parliament by three Maltese citizens, who complained that the amount of their pensions under three United Kingdom pension schemes, namely the schemes for personnel of the civil service, the National Health Service and the armed forces,[5] was deducted from their Maltese statutory old-age pension in accordance with Article 56 of the Social Security Act, the Commission sent a letter to the Republic of Malta on 25 November 2010 putting it on notice to submit its observations.

24. The Republic of Malta replied by letter of 27 January 2011, contending, in substance, that the pensions paid under the United Kingdom civil-service schemes do not come within the scope of Regulations No 1408/71 and No 883/2004.

25. By letter of 28 December 2011, the Republic of Malta provided additional supporting information to the Commission.

26. On 28 February 2012, the Commission sent to the Republic of Malta a reasoned opinion in which it reaffirmed its view and invited Malta to comply with that reasoned opinion within two months of its notification.

27. Since the Republic of Malta maintained its position in its reply of 25 July 2012, the Commission decided to bring the present action.

5 — Hereinafter, 'the schemes at issue'.

IV – **The action**

A – *Admissibility of the action*

28. The Republic of Malta challenges the admissibility of the action, claiming that it should have been directed against the United Kingdom, and not against Malta.

29. In support of this argument, the Republic of Malta submits that the schemes at issue were not 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, since the United Kingdom takes the view that those schemes are supplementary occupational schemes coming, not under those regulations, but under Directive 98/49.

30. The Republic of Malta submits that, if the Commission disagrees with a Member State's declaration regarding the benefits which come within the scope of the field of coordination of social-security schemes, then, as guardian of the Treaties, it is required to pursue the matter directly with the Member State concerned and may not take an indirect route by commencing proceedings against another Member State which correctly applies the provisions of those regulations in accordance with that declaration. In the Republic of Malta's opinion, bringing an action against a Member State that is clearly not in a position to adduce evidence relating to a pension scheme that it does not administer amounts to an interference with the right to a fair hearing.

31. The United Kingdom, which is intervening in the proceedings in support of the Republic of Malta, submits that the Commission misused 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 subject to this collateral challenge is deprived of the protection conferred by the pre-litigation procedure and, as intervener, has more limited procedural rights in the infringement proceedings brought.

32. I do not agree with that view and, on the contrary, support the opposite proposition, according to which the fact that the Commission did not bring a prior action for failure to fulfil obligations against the United Kingdom for non-notification of the schemes at issue by means of the declaration made under Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004 in no way affects the admissibility of the action brought against the Republic of Malta because of the application by that Member State of a domestic rule to prevent overlapping.

33. In the first place, it should be borne in mind that the Court has consistently held that the Commission has discretion to bring an action for failure to fulfil obligations at a time which it deems appropriate [6] and the considerations which determine its choice cannot affect the admissibility of that action. [7] Furthermore, the Commission alone is competent to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. [8]

6 — See, to that effect, judgment in *Commission* v *Greece* (C-351/13, EU:C:2014:2150, paragraph 24 and the case-law cited).

7 — See, to that effect, judgments in *Commission* v *Poland* (C-311/09, EU:C:2010:257, paragraph 19 and the case-law cited) and *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 14).

8 — See judgment in *Commission* v *Belgium* (C-395/13, EU:C:2014:2347, paragraph 32 and the case-law cited).

34. A finding that the action for failure to fulfil obligations brought against the Republic of Malta is inadmissible because the Commission did not bring prior infringement proceedings against the United Kingdom would effectively require the Commission to bring two actions based on two materially different instances of conduct, even though it has discretion to bring only one, and, moreover, would impose on it the order in which these two actions were to be brought, although the system laid down in Article 258 TFEU also gives the Commission a discretion in deciding on that order.

35. It is in the exercise of this discretion that the Commission, prompted by petitions submitted by Maltese citizens, decided to bring proceedings against the Republic of Malta, complaining that that Member State had failed to fulfil its obligations by applying a rule to prevent overlapping that provides for the reduction of Maltese old-age pensions in cases where another pension coexists, rather than by bringing an action for failure to fulfil obligations against the United Kingdom because it did not mention the schemes at issue in the declaration provided for by Regulations No 1408/71 and No 883/2004.

36. In the second place, the Court has ruled on numerous occasions that a Member State cannot justify a failure to fulfil obligations under the TFEU by the fact that other Member States have also failed, and continue to fail, to fulfil their own obligations [9] and that the Commission is free to initiate infringement proceedings against only some of the Member States which are in a comparable position from the point of view of compliance with EU law. [10] At the admissibility stage, the impossibility of invoking a plea of failure to fulfil obligations means that the absence of infringement proceedings against one Member State is irrelevant in the assessment of the admissibility of infringement proceedings brought against another Member State. [11] The admissibility of the present action against the Republic of Malta cannot therefore be brought into question by the fact that the Commission has not instituted infringement proceedings against the United Kingdom.

37. In the third place, it is also apparent from settled case-law that the procedure laid down in Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under the TFEU or secondary legislation. Where such a finding has been made, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it. [12] To reiterate the wording upheld by the Court, an action for failure to fulfil obligations is the *ultima ratio* to ensure compliance with EU law, by making the European Union's interests enshrined in the Treaty prevail. [13]

38. The Republic of Malta therefore cannot, in order to justify the failure to fulfil its obligations, plead difficulties in understanding foreign pension schemes, difficulties that are, after all, an integral part of the application both of a system for the coordination of different social security schemes and of a domestic rule to prevent overlapping that provides for the reduction of pensions particularly when they exist alongside certain benefits provided in other Member States.

39. In the fourth place, I cannot agree with the United Kingdom's argument that the Commission misused its powers by indirectly challenging that Member State, in an incidental manner, depriving it of its right to be heard. Misuse of power presupposes the adoption, by an EU institution, of a measure the exclusive, or at least the main, purpose of which is to achieve an end other than that stated or to evade a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

9 — See judgment in *Commission* v *Spain* (C-48/10, EU:C:2010:704, paragraph 33 and the case-law cited).

10 — See judgment in *Commission* v *Italy* (C-531/06, EU:C:2009:315, paragraph 24).

11 — See judgment in *Commission* v *France* (C-1/00, EU:C:2001:687, paragraph 75).

12 — See judgment in *Commission* v *Italy* (C-68/11, EU:C:2012:815, paragraphs 62 and 63).

13 — See judgment in *Commission* v *Spain* (C-196/07, EU:C:2008:146, paragraph 28 and the case-law cited).

In this instance, since the subject-matter of the action, set out 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 maintained that the Commission, which is not required to state the reasons that prompted it to bring the action for failure to fulfil obligations, has in any way misused its powers. [14]

40. The fact that the Court may find it necessary, in an action for failure to fulfil obligations brought against a Member State, to classify the legislation of another Member State with regard to EU law does not affect the admissibility of the action for failure to fulfil obligations and does not mean that the procedural rights of the latter Member State, an intervener in the proceedings, have been infringed. It should be pointed out in this regard that the argument by analogy which the United Kingdom believes it can derive from the fact that, in the context of Article 267 TFEU, a request for a preliminary ruling from a national court provides a means for examining only the measures adopted by that Member State, is based on an incorrect premiss, since, quite to the contrary, the Court has upheld the admissibility of a question referred for a preliminary ruling which was intended to enable a court in one Member State to determine whether the provisions of another Member State were compatible with EU law. [15]

41. In the light of all of the foregoing considerations, I take the view that the present action for failure to fulfil obligations must be declared admissible.

B – *The substance of the action*

1. The scope *ratione personae* of Regulations No 1408/71 and No 883/2004

42. Stating that the present proceedings relate, in practice, essentially to two categories of pensioners, one of which covers Maltese citizens who have never worked in the United Kingdom or in any other Member State and who receive a service pension from the United Kingdom exclusively on account of work performed for the British services in Malta prior to the closure of the British military base on 31 March 1979, [16] the Republic of Malta submits that, in the absence of any cross-border element, this category does not, under any circumstances, come within the scope *ratione personae* of Regulations No 1408/71 and No 883/2004.

43. This argument is manifestly unfounded.

44. First, by contesting the applicability of the system for the coordination of social security schemes only as regards Maltese citizens who have always worked in Malta, the Republic of Malta thereby concedes that this system applies to those Maltese citizens who have also worked in the United Kingdom or in another Member State. The exclusion of certain specific situations is not therefore capable of rendering unfounded the Commission's complaint alleging that the Maltese legislation against overlapping is incompatible with EU law.

14 — See, to that effect, judgment in *Commission* v *Spain* (C-562/07, EU:C:2009:614, paragraph 25).

15 — See, inter alia, to that effect, judgment in *Eau de Cologne & Parfümerie-Fabrik 4711* (C-150/88, EU:C:1989:594, paragraph 12).

16 — According to the Republic of Malta, the other category of citizens concerned comprises individuals who were employed by the British services in Malta prior to 31 March 1979 and who went on to work in the United Kingdom after that date or who previously worked in the civil service of the United Kingdom and subsequently worked in Malta.

45. Secondly and above all, the absence of any physical movement does not preclude the existence of a connecting factor of such a kind as to render Regulations No 1408/71 and No 883/2004 applicable. Although these regulations do not apply to situations which are confined in all respects within a single Member State,[17] the Court has consistently held that the decisive criterion for the applicability of these regulations is that the person concerned is affiliated to a social security scheme of one or more Member States within the framework of which he has completed periods of insurance.[18]

46. The category of pensioners who, according to the Republic of Malta, are excluded from the scope *ratione personae* of Regulations No 1408/71 and No 883/2004 encompasses individuals who are entitled to a Maltese retirement pension as well as to a United Kingdom occupational retirement benefit under one of the schemes at issue. That double affiliation is sufficient to justify the applicability of those regulations.

2. The material scope of Regulations No 1408/71 and No 883/2004

a) The effect of the absence of any reference to the schemes at issue in the declarations mentioned in Article 5 of Regulation No 1408/71 and in Article 9(1) of Regulation No 883/2004

47. The Republic of Malta states that it considers itself fully bound by the United Kingdom's evaluation of its own civil service pension schemes, which have been consistently omitted from its declarations under Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004.

48. The Republic of Austria and the United Kingdom share the Republic of Malta's view as regards the consequences of the absence of a declaration by a Member State.

49. The Commission supports the opposite view.

50. This question has already been answered in the case-law of the Court.

51. In its judgment in *Beerens*,[19] the Court ruled that the fact that a national law or regulation has not been specified in the declarations referred to in Article 5 of Regulation No 1408/71 is not of itself proof that that law or regulation does not come within the material scope of that regulation.[20]

52. This case-law approach, which the Court has reiterated on numerous occasions, inter alia in its judgment in *Pérez García and Others*,[21] seems to me to be completely justified. If, as suggested by the Republic of Malta, the Republic of Austria and the United Kingdom, the application of Regulations No 1408/71 and No 883/2004 to particular legislation were to be excluded simply because such legislation was not specified by the Member State in its declaration, the provisions of those regulations would be deprived of their substance and their uniform application would become impossible, since any Member State could unilaterally bypass the rules on the coordination of social security schemes by refraining from mentioning a scheme which, nevertheless, objectively comes within the material scope of those regulations.

17 — See, to that effect, order in *El Youssfi* (C-276/06, EU:C:2007:215, paragraph 39 and the case-law cited) and judgment in *Gouvernement de la Communauté française and Gouvernement wallon* (C-212/06, EU:C:2008:178, paragraph 33 and the case-law cited).

18 — See, to that effect, judgment in *Keller* (C-145/03, EU:C:2005:211, paragraph 38 and the case-law cited).

19 — 35/77, EU:C:1977:194.

20 — Paragraph 9. The Court had already stated, in relation to Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (*Journal Officiel* 1958, p. 561), which preceded Regulation No 1408/71 and also provided for the notification of national social security legislation, that the application of Regulation No 3 to particular legislation was not precluded simply because the latter came into force after that regulation and was not notified (see, to that effect, judgments in *van der Veen* (100/63, EU:C:1964:65, at p. 573) and *Dingemans* (24/64, EU:C:1964:86, at p. 653)).

21 — C-225/10, EU:C:2011:678, paragraph 36 and the case-law cited. See also judgment in *Snares* (C-20/96, EU:C:1997:518, paragraph 35 and the case-law cited).

53. It should also be noted that, as is apparent from the use of the verbs 'shall specify' and 'shall notify' in, respectively, Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004, these provisions express, not a simple option, but an actual obligation requiring Member States to declare their statutory provisions and regulations in order to determine the precise extent of the system for the coordination of social security schemes. This obligation to declare would be deprived of all effectiveness if Member States were allowed to exclude from the scope of the system, by failing to act, schemes which, nevertheless, can be objectively classified as 'social security schemes'.

54. Moreover, the case-law concerning the non-effect of failing to make a declaration calls to mind other, equally consistent, case-law, in terms of which 'the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation'.[22] The concept of social security benefit therefore has an autonomous definition under EU law which is not affected by national classification criteria.

55. I should also state that, in contrast to the Republic of Austria's analysis of the matter, I do not think that the implications of the Court's case-law on the effect of failing to make a declaration should be limited to the Member State that ought to have submitted such declaration, whilst the other Member States might take the view that legislation which is not mentioned in the declaration does not come within the material scope of Regulations No 1408/71 and No 883/2004. The suggested approach, which involves giving different treatment, under EU law, to national systems depending on the Member State concerned, would clearly and directly undermine the requirement of uniform application of the rules on the coordination of social security schemes.

56. These are my reasons for taking the view that the fact that the schemes at issue were not specified by the United Kingdom in the declaration made under Article 5 of Regulation No 1408/71 and Article 9(1) of Regulation No 883/2004 cannot in itself constitute proof that the schemes do not come within the material scope of those regulations.

57. While I do not deny that real difficulties may stand in the way of a Member State faced with the non-declaration of a scheme by another Member State, I do not, however, believe that these warrant an infringement of the rules on the coordination of social security schemes. Moreover, the practical difficulties to which I have just referred should be resolved, in part, by the establishment of a system for cooperation and exchange of data between Member States' authorities and institutions.[23] Furthermore, as the Commission points out, the Member States are able to put questions to it in the event of doubt or to consult the Administrative Commission for the Coordination of Social Security Systems, one of the tasks of which is specifically to deal with all questions of interpretation of the coordination rules.[24] I should also state that the difficulty, or even the impossibility, that the Republic of Malta might face were it to examine the schemes at issue must be assessed having regard to the fact that that Member State and the United Kingdom share a common history of such a kind as to facilitate the Republic of Malta's understanding of the pension scheme applicable to its own citizens who, prior to 1979, worked for the British forces on Maltese territory.

58. Since I refuse to consider that the non-declaration of a scheme is tantamount to its exclusion from the material scope of Regulations No 1408/71 and No 883/2004, it is necessary to ascertain whether or not the schemes at issue can be objectively classified as 'social security schemes' within the meaning of those regulations.

22 — See judgment in *Lachheb* (C-177/12, EU:C:2013:689, paragraph 28 and the case-law cited).

23 — See Chapter II 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 No 883/2004 (OJ 2009 L 284, p. 1).

24 — See Article 72(a) of Regulation No 883/2004.

b) Classification of the schemes at issue

59. Under Article 1(j) of Regulation No 1408/71, '*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) and (2)', while Article 1(l) of Regulation No 883/2004 provides that this term '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)'.

60. In order to come within the scope of the coordination of social security schemes, a pension scheme must therefore, first, be in the nature of 'legislation', within the meaning of the abovementioned provisions, and, second, satisfy the condition of relating to one of the branches expressly listed in Article 4(1) of Regulation No 1408/71 and Article 3(1) of Regulation No 883/2004.

61. As regards the first condition, the Court has held that the definition of 'legislation', within the meaning of Article 1(j) of Regulation No 1408/71, is remarkable for its breadth, including as it does all provisions laid down by law, regulation and administrative action by the Member States, and must be taken to cover all the national measures applicable in the particular case.[25] These considerations also apply in regard to Article 1(l) of Regulation No 883/2004.

62. Although the United Kingdom raises an objection, to which I will return below, claiming that this criterion should not be the sole criterion, as the Commission would have it, it does not deny that the provisions governing the schemes at issue have a statutory source, for the purposes of the abovementioned provisions, in so far as those schemes are laid down in regulations concerning the Principal Civil Service Pension Scheme 1974, the National Health Service Pension Scheme 1995 and the Armed Forces Pension Scheme 1975.

63. As regards the second condition, the Court has consistently held that a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 and in Article 3(1) of Regulation No 883/2004.[26]

64. First, it is common ground and not disputed that the provisions relating to the granting of the pension confer a legally defined right on the recipients and that the pension is granted automatically to persons who fulfil certain objective criteria, without any individual and discretionary assessment of personal needs.

65. Secondly, it is necessary to examine whether the schemes at issue relate to the risk of old-age referred to in Article 4(1)(c) of Regulation No 1408/71 and in Article 3(1)(d) of Regulation No 883/2004.

66. According to settled case-law, in this regard, the essential characteristic of the old-age benefits referred to in those provisions lies in the fact that they are intended to safeguard the means of subsistence of persons who, when they reach a certain age, leave their employment and are no longer required to hold themselves available for work at the employment office.[27] Given that the benefits paid under the schemes at issue in the present case pursue precisely the same objective, which is to protect persons who have reached a certain age by ensuring that they have the necessary means in the light of, in particular, their needs as pensioners, they constitute old-age benefits.

25 — See judgments in *Commission* v *Belgium* (150/79, EU:C:1980:201, paragraph 4 and the case-law cited) and *de Ruyter* (C-623/13, EU:C:2015:123, paragraph 32).

26 — See judgment in *Commission* v *Slovakia* (C-361/13, EU:C:2015:601, paragraph 47 and the case-law cited).

27 — Ibidem (paragraph 55 and the case-law cited).

67. Since the condition relating to the granting of the benefit without any individual and discretionary assessment and the condition that the benefit must relate to one of the risks listed in Article 4(1) of Regulation No 1408/71 and in Article 3(1) of Regulation No 883/2004 are satisfied, it follows that the schemes at issue, which, moreover, have a statutory source, must be classified as 'social security schemes', within the meaning of Regulations No 1408/71 and No 883/2004.

68. It is now necessary to examine whether the arguments put forward by the United Kingdom call this analysis into question.

69. In the first place, the United Kingdom contends that the purely formal criterion of the statutory origin of the scheme is not the sole and decisive criterion. In this connection, it submits that the schemes at issue are of an 'occupational' nature and are designed to provide their recipients with 'supplementary' occupational benefits, which are in addition to the basic retirement pension paid by the National Health Service and which therefore meet the definition of 'supplementary pension', within the meaning of Directive 98/49. These schemes, the United Kingdom argues, thus fall outside the rules on the coordination of social security schemes and instead are covered exclusively by the specific provisions governing supplementary occupational retirement schemes.

70. I do not agree with that view. To my mind, the twofold occupational and supplementary nature of a retirement scheme does not necessarily exclude that scheme from the scope of Regulations No 1408/71 and No 883/2004 if it can also be formally classified as 'social security legislation', as in the case of the schemes here at issue.

71. It is clear that the wide variety of supplementary retirement schemes, which occupy extremely divergent positions from one Member State to the next, results in there being only a subtle distinction between the schemes coming within the scope of the rules on coordination set out in Regulations No 1408/71 and No 883/2004 and the supplementary schemes governed by the specific rules set out in Directive 98/49 as well as in Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights. [28]

72. Among the different 'pillar'- or 'tier'-based configurations that have been suggested, [29] the Commission's configuration divides pension schemes into three pillars: the first pillar covers basic mandatory 'social security schemes', usually financed on a pay-as-you-go basis; the second pillar covers 'occupational schemes' characterised by a link to employment and usually operated on a funded basis; and the third pillar covers 'personal pension plans'. According to this configuration, the schemes under the second and third pillars are 'supplementary schemes' intended to 'supplement public schemes'. [30]

73. However, this traditional pillar-based structure provides only an incomplete and purely descriptive overview of the wide variety of retirement schemes and has no legislative effect whatsoever, particularly as regards the contrast between coordinated schemes and schemes coming within the scope of Directive 98/49.

28 — OJ 2014 L 128, p. 1.

29 — Classifications have been drawn up by the World Bank, which distinguishes between a first pillar comprising a mandatory contributory scheme managed by the State with the limited aim of alleviating old-age poverty, a second pillar consisting of a mandatory savings scheme managed by the private sector and a third pillar consisting of voluntary savings (see the report of the World Bank entitled 'Averting the old age crisis: policies to protect the old and promote growth', Oxford University Press, 1994, p. 16); by the Organisation for Economic Co-operation and Development (OECD), which distinguishes between a first tier covering redistributive pensions and a second tier comprising mandatory insurance pensions (see OECD (2006), 'Pension-system Typology', in *OECD Pensions at a Glance 2005: Public Policies across OECD Countries, OECD Publishing*); and by Eurostat (see *Classification of funded pension schemes and impact on government finance*, Office for Official Publications of the European Communities, Luxembourg, 2004).

30 — See p. 2 of the Communication from the Commission of 11 May 1999 entitled 'Towards a single market for supplementary pensions — Results of the consultations on the Green Paper on supplementary pensions in the single market' (COM(1999) 134 final).

74. In order to identify the criterion for distinguishing between these two types of scheme, it is first necessary to give a literal interpretation of the applicable provisions, which indicates a criterion deriving from the statutory or contractual source of the scheme under consideration. While Article 1(j) of Regulation No 1408/71 and Article 1(l) of Regulation No 883/2004 distinguish between social security 'legislation', which falls within the scope of those regulations, and 'industrial agreements' or 'contractual provisions', which are excluded from their scope,[31] Article 3 of Directive 98/49 defines the term 'supplementary pension' as meaning retirement pensions and, where provided for by the rules of a supplementary pension scheme established in conformity with national legislation and practice, invalidity and survivors' benefits, 'intended *to supplement or replace* those provided in respect of the same contingencies by *statutory* social security schemes'.[32]

75. The scope of Article 3 of Directive 98/49 is clarified by recitals 3 and 4 in the preamble to that directive, which state, respectively, that the system of coordination provided for in, inter alia, Regulation No 1408/71 does not extend to supplementary pension schemes, 'except for' schemes which are covered by the term 'legislation' or in respect of which a declaration has been made, and that the rules of aggregation are not suited to supplementary pension schemes, 'except for' schemes which are covered by the term 'legislation'.

76. These provisions show clearly that, for the purpose of applying the rules on coordination, the EU legislature intended to establish a single general criterion deriving from the statutory or contractual source of the scheme in question. Accordingly, there is no need to draw a distinction depending on whether the scheme is distributive or contributory, or on whether it is mandatory or voluntary, or even on whether it is financed on a pay-as-you-go or a funded basis. Furthermore, the express exclusion of supplementary pension schemes from the scope of Directive 98/49 when they are covered by the term 'legislation' implies that these statutory supplementary schemes come within the scope of Regulations No 1408/71 and No 883/2004.

77. This interpretation, next, is the correct one for reasons of legal certainty, as the definition of an objective and easy-to-apply criterion makes it possible to ensure that the rules on the coordination of social security schemes are uniformly applied to all statutory schemes, while contractual schemes are in principle excluded, unless the Member States have made a declaration in respect of them.

78. The inclusion of all statutory retirement schemes, including supplementary schemes, within the scope of the secondary legislation coordinating the social security systems is, finally, consistent with the aim of protecting the social rights of persons moving within the European Union. In the absence of coordination, the exercise of freedom of movement might be discouraged for the recipients of a supplementary retirement pension granted under a statutory scheme, especially in cases where the basic scheme provides them with only a minimum level of income. In the light of this fundamental aim, the practical coordination difficulties created by the wide range of retirement schemes[33] does not, to my mind, warrant the exclusion of supplementary statutory schemes from the scope of Regulations No 1408/71 and No 883/2004. Such exclusion would, in any event, be contrary to the intention of the EU legislature as expressed clearly in the provisions of those regulations.[34]

31 — Unless the Member State concerned has made a declaration.

32 — Emphasis added.

33 — In the staff working document of 20 October 2005 (SEC(2005) 1293), annexed to the Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights (COM(2005) 507 final), the Commission pointed out, in particular, the difficulties in applying the rules of aggregation to supplementary retirement schemes (section 4.4 of the document) (on the problems associated with coordinating schemes of this kind, see also Leppik, L., 'Coordination of pensions in the European Union: the case of mandatory defined-contribution schemes in the Central and Eastern European countries', *European Journal of Social Security*, volume 8, 1 (2006), p. 35).

34 — It should be observed that recital 4 in the preamble to Directive 98/49, which states that the rules of aggregation are not suited to supplementary pension schemes, except for schemes covered by the term 'legislation', shows clearly that the Council was aware of the practical difficulties which could arise therefrom but nevertheless considered that those difficulties should not prevent the coordination system from applying to statutory schemes.

79. Accordingly, contrary to the United Kingdom's claim, the applicability of those regulations cannot be excluded on the sole ground that the pensions granted under the schemes at issue are supplementary pensions in relation to those provided by the National Health Service. The fact that those pensions are designed, not to ensure a mere minimum level of income for the interested persons, but rather to provide them with an income based on the amount of contributions which they paid during their employment, is also irrelevant.

80. In the second place, the United Kingdom submits that occupational pension entitlements under the schemes at issue are not social security benefits, but pay. The United Kingdom relies on the Court's settled case-law, in particular its judgment in *Barber*,[35] according to which the fact that a benefit is paid after the termination of the employment relationship does not prevent it from being in the nature of pay, even if it is a statutory payment,[36] as well as its judgment in *Beune*,[37] in which the Court acknowledged that a civil service pension scheme which essentially relates to the employment of the person concerned forms part of the pay received by that person.[38]

81. In support of its analysis, the United Kingdom submits that the level of pension entitlement is determined by the length of service and the final salary, and that pensions thus granted are not intended to provide basic subsistence, as is clear from the fact that these pensions may be considerably higher than those provided under the statutory social security scheme.

82. As the Court has consistently held, 'the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being "pay" within the meaning of Article [157 TFEU]'.[39] The Court has thus ruled that 'benefits granted under a pension scheme, which essentially relates to the employment of the person concerned, form part of the pay received by that person and come within the scope of Article [157 TFEU]',[40] even if the scheme has a statutory basis.

83. However, the fact that a retirement pension paid to a worker by reason of his employment relationship must be regarded as pay for the purpose of applying the principle of equal pay for men and women, enshrined in Article 157 TFEU, does not mean that that pension is not in the nature of a social security benefit for the purpose of the application of the coordination measures provided for by Regulations No 1408/71 and No 883/2004.

84. In contrast to what the United Kingdom submits in its pleadings, the classifications of 'pay', within the meaning of Article 157 TFEU, and 'old-age pension', in terms of Regulations No 1408/71 and No 883/2004, are in no way mutually exclusive, since they pursue different aims and have recourse to different criteria.

85. In particular, it should be noted that the determinant criterion for classifying a benefit as 'pay', within the meaning of Article 157 TFEU, based on the finding that the benefit arises from an employment relationship, is irrelevant for the purpose of assessing whether that benefit must be classified as a 'social security benefit'. Likewise, the specific criteria established by the Court for assessing whether a retirement benefit granted by a civil service retirement scheme based on legislation should be classified as 'pay', according to which that benefit must be directly related to the length of service and be calculated by reference to the final salary, are not relevant to the classification of the benefit in the light of the provisions on the coordination of social security schemes.

35 — C-262/88, EU:C:1990:209.

36 — Paragraphs 12, 16 and 17.

37 — C-7/93, EU:C:1994:350.

38 — Paragraph 46.

39 — See judgment in *Maruko* (C-267/06, EU:C:2008:179, paragraph 44 and the case-law cited).

40 — See judgment in *Commission* v *Greece* (C-559/07, EU:C:2009:198, paragraph 42).

86. The Court has also already acknowledged this possibility of concurrent classifications by holding, in its judgment in *Niemi*,[41] that a benefit paid under a retirement scheme notified as a scheme coming within the scope of Regulation No 1408/71 must be classified as 'pay', in the light of Article 157 TFEU, since it satisfies the criteria characterising the employment relationship.[42]

87. It follows that neither the fact that the schemes at issue are occupational schemes granting pensions which are linked to the prior employment relationship and are regarded as continuing salary as recompense for the work carried out during the period of employment, nor the fact that those benefits relate directly to the length of service completed and that their amount must be calculated by reference to the final salary, is capable of precluding the application of Regulations No 1408/71 and No 883/2004, since those benefits constitute social security benefits. Moreover, since the amendment made following the adoption of Regulation (EC) No 1606/98,[43] special retirement schemes for civil servants have been expressly included within the scope of Regulation No 1408/71, even though they are occupational schemes characterised by the fact that the pension received is regarded as a straightforward extension of the salary for active employment.[44]

88. This conclusion is not affected, either, by the fact — relied on by the United Kingdom — that pensions provided under the Armed Forces Pension Scheme 1975 not only accrued at statutory retirement age, since, in particular, a life pension was paid at age 37 to officers with 16 years' service after age 21 or at age 40 to other ranks with 22 years' service after age 18.

89. Apart from the fact that this argument relates to only one of the three schemes at issue, I take the view that the immediate payability of certain pensions to their recipients, as soon as their duties have come to an end, even though they have not reached the statutory retirement age, does not alter the nature of these pensions which, being for life, are payable until death.

90. This interpretation of the notion of old-age benefit is supported by the definition of '*early* old-age benefit' in Article 1(x) of Regulation No 883/2004,[45] in order to distinguish it from 'pre-retirement benefit' which, moreover, also comes within the material scope of this regulation. An early old-age benefit is defined as 'a benefit provided before the normal pension entitlement age is reached and which either continues to be provided once the said age is reached or is replaced by another old-age benefit'. The possibility of receiving a pension early does not therefore mean that it is not an old-age benefit, according to the autonomous meaning of this notion under EU law.

91. The foregoing interpretation is also borne out by the case-law of the Court, which accepts that the fact that entitlement to a pension is recognised before the person concerned has reached retirement age does not mean that that benefit is not an old-age pension.[46]

92. In the light of all of these considerations, I take the view that the pensions provided under the schemes at issue come within the scope of Regulations No 1408/71 and No 883/2004. Finding, moreover, that the Republic of Malta does not deny that, by virtue of the basis on which they are calculated, the Maltese pension and the pensions paid by the schemes at issue come within the scope

41 — C-351/00, EU:C:2002:480.

42 — Paragraph 45.

43 — Council Regulation of 29 June 1998 amending Regulation No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 with a view to extending them to cover special schemes for civil servants (OJ 1998 L 209, p. 1).

44 — See, inter alia, as regards the retirement scheme for French civil servants, judgment in *Griesmar* (C-366/99, EU:C:2001:648) and, as regards the retirement scheme for Finnish civil servants, judgment in *Niemi* (C-351/00, EU:C:2002:480).

45 — Emphasis added.

46 — See, to that effect, judgment in *Öztürk* (C-373/02, EU:C:2004:232, paragraph 67).

of Article 46b of Regulation No 1408/71 and of Article 54 of Regulation No 883/2004, I conclude that the complaint alleging that the Republic of Malta applied the Maltese legislation to those pensions in order to prevent overlapping, without taking account of the rules laid down in the above provisions, is well founded.

V – **Conclusion**

93. On the basis of the foregoing considerations, I propose that the Court should:

(1) hold that, by reducing, pursuant to Article 56 of the Social Security Act, Maltese old-age pensions by the amount of United Kingdom pensions provided under the Principal Civil Service Pension Scheme 1974, the National Health Service Pension Scheme 1995 and the Armed Forces Pension Scheme 1975, 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, 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; and

(2) order the Republic of Malta to pay the costs.