Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

26 September 2013*

(Coordination of social security systems — EEA Agreement — Proposal for an amendment — Council decision — Choice of legal basis — Article 48 TFEU — Article 79(2)(b) TFEU)

In Case C-431/11,

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

United Kingdom of Great Britain and Northern Ireland, represented by C. Murrell, acting as Agent, assisted by A. Dashwood QC,

applicant,

supported by:

Ireland, represented by E. Creedon, acting as Agent, assisted by N. Travers BL,

intervener,

v

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

defendant,

supported by:

European Commission, represented by V. Kreuschitz and S. Pardo Quintillán, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 February 2013,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

Judgment

1 By its application, the United Kingdom of Great Britain and Northern Ireland asks the Court of Justice, on the one hand, to annul Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement (OJ 2011 L 182, p. 12) ('the contested decision') and, on the other, in the event that the Court should annul that decision, to maintain its effects until a new decision has been adopted.

Legal context

European Union law

2 Article 48 TFEU, which is one of the provisions on free movement in Title IV of Part Three of the FEU Treaty, is worded as follows:

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

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

…'

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

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

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

…

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

…'

4 Under Article 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, 'none of the provisions of Title V of Part Three of the [FEU Treaty], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland'.

5 In addition, under Articles 1 and 3 of Protocol No 21, the United Kingdom and Ireland are not to take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the FEU Treaty unless they notify the President of the Council in writing of their intention to do so within three months after a proposal or initiative has been presented to the Council.

The EEA Agreement

6 The Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement') was concluded as an association agreement on the basis of Article 238 of the EC Treaty, now Article 217 TFEU, between the European Communities and their Member States at that time, on the one hand, and the States then belonging to the European Free Trade Association (EFTA), namely, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, on the other.

7 In accordance with the fifth recital in the preamble to the EEA Agreement, the parties to that agreement agreed to 'provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area [(EEA)]'.

8 Article 1 of the EEA Agreement is worded as follows:

'1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous [EEA] ...

2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:

(a) the free movement of goods;

(b) the free movement of persons;

(c) the free movement of services;

(d) the free movement of capital;

(e) the setting-up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as

(f) closer cooperation in other fields, such as research and development, the environment, education and social policy.'

9 Article 3 of the EEA Agreement states:

'The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.'

10 Article 6 of the EEA Agreement provides:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.'

11 Article 7 of the EEA Agreement provides:

'Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

…'

12 Article 28 of the EEA Agreement, which reproduces, in essence, the content of Article 45 TFEU, provides as follows:

'1. Freedom of movement for workers shall be secured among EC Member States and EFTA States.

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

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of EC Member States and EFTA States for this purpose;

(c) to stay in the territory of an EC Member State or an EFTA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

…'

13 Article 29 of the EEA Agreement, which reproduces, in essence, the content of Article 48 TFEU, provides:

'In order to provide freedom of movement for workers and self-employed persons, the Contracting Parties shall, in the field of social security, secure, as provided for in Annex VI, for workers and self-employed persons and their dependants, in particular:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Contracting Parties.'

14 Annex VI to the EEA Agreement, which is entitled 'Social security', mentions, under the heading 'Acts referred to', Council Regulation (EEC) No 1408/71 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(II), p. 416) and Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972(I), p. 160).

15 On 1 July 2011, the EEA Joint Committee adopted Decision No 76/2011, the objective of which is, inter alia, to update the references to Regulations Nos 1408/71 and 574/72 in Annex VI to the EEA Agreement, as those regulations had been replaced, respectively, by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43), ('Regulation No 883/2004') and by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1). In addition, Decision No 76/2011, as is apparent from recital 22 in the preamble thereto, seeks to amend Protocol 37 to the EEA Agreement in order to include in its list of committees the Administrative Commission for the coordination of social security systems established by Regulation No 883/2004.

Background to the dispute

16 On 9 September 2010, the European Commission submitted a proposal for a Council Decision on the position to be taken by the European Union concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement. That proposal cited Articles 48 TFEU, 218(9) TFEU and 352 TFEU as constituting the legal basis.

17 On 10 March 2011, the Commission submitted an amended proposal in order to change the legal basis cited. According to the explanatory memorandum to that proposal, as the Lisbon Treaty had extended the competence set out in Article 48 TFEU to self-employed migrant workers, Article 352 TFEU was no longer necessary as a legal basis.

18 On 6 June 2011, the Council accordingly adopted the contested decision on the basis of Articles 48 TFEU and 218(9) TFEU.

19 By Decision No 76/2011, the EEA Joint Committee made the envisaged amendments to Annex VI and Protocol 37 to the EEA Agreement. However, certain constitutional requirements still require to be satisfied by one of the Contracting Parties to the EEA Agreement before that decision can enter into force.

20 Taking the view that the contested decision had been adopted on an incorrect legal basis and that it ought to have been adopted on the basis of Article 79(2)(b) TFEU, the United Kingdom brought the present action.

Forms of order sought and procedure before the Court

21 The United Kingdom claims that the Court should:

— annul the contested decision;

— limit the temporal effects of that decision until the Council adopts, on the basis of Article 79(2)(b) TFEU, a new decision; and

— order the Council to pay the costs.

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

23 By order of the President of the Court of 10 January 2012, Ireland and the Commission were granted leave to intervene in support of the forms of order sought by the United Kingdom and the Council respectively.

24 The oral procedure was closed on 21 March 2013 after the Advocate General delivered her Opinion.

25 By document lodged at the Court Registry on 23 May 2013, the United Kingdom requested the Court to order that the oral procedure be reopened pursuant to Article 83 of the Court's Rules of Procedure.

26 In support of that request, the United Kingdom claims that the Opinion of the Advocate General set out new arguments which were at no time the subject of submissions by the parties and which are liable to influence the Court's decision.

27 In that regard, it should be observed that the Court may at any moment, having heard the Advocate General, order the reopening of the oral procedure under Article 83 of its Rules of Procedure, inter alia if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties or the parties concerned referred to in Article 23 of the Statute of the Court of Justice of the European Union (see Case C-116/11 *Bank Handlowy and Adamiak* [2012] ECR, paragraph 28 and the case-law cited).

28 However, in the present case, after hearing the Advocate General, the Court considers that it has all the information necessary to rule on the action brought by the United Kingdom and that that information has been the subject of debate before it.

29 The application for the oral procedure to be reopened must therefore be dismissed.

The action

Arguments of the parties

30 The United Kingdom, supported by Ireland, seeks the annulment of the contested decision on the ground that it was adopted by incorrectly citing Article 48 TFEU as the substantive legal basis. According to the United Kingdom, as the Court clearly acknowledged in its judgment in Case 238/83 *Meade* [1984] ECR 2631, Article 48 TFEU concerns the competence of the European Union to take measures solely with regard to workers who are nationals of the Member States.

31 By contrast, in so far as it seeks to extend, by means of an international agreement, the provisions of Regulation No 883/2004 to nationals of the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway, the contested decision intends to confer additional social security rights on third-country nationals. Such a measure ought for that reason to have been adopted on the basis of Article 79(2)(b) TFEU, which precisely allows for the adoption of measures defining 'the rights of third-country nationals residing legally in a Member State'. In addition, Article 79(2)(b) TFEU has been used for the purposes of adopting similar measures which extended such rights to nationals of third countries such as the People's Democratic Republic of Algeria, the State of Israel, the Former Yugoslav Republic of Macedonia, the Kingdom of Morocco and the Republic of Tunisia.

32 The United Kingdom also submits that the choice between one or other of those provisions of the FEU Treaty as a legal basis requires that considerably different legislative procedures be followed, which will have significant consequences both for the United Kingdom and for Ireland.

33 In particular, unlike the measures adopted under Article 48 TFEU, the measures adopted on the basis of Article 79 TFEU apply to those Member States only if they exercise the option to be bound by those measures pursuant to Protocol No 21.

34 Consequently, the adoption of the contested decision on the incorrect basis of Article 48 TFEU deprived the United Kingdom and Ireland of the option that they have, by virtue of EU primary law, to opt out of the adoption of a decision extending social security rights to nationals of EFTA States and to not be bound by such a decision.

35 While accepting that, since the entry into force of the Treaty of Amsterdam, Article 79(2) TFEU has indeed been used to confer social security rights on third-country nationals, the Council, supported by the Commission, takes the view that such a legal basis is not suitable for the adoption of the contested decision.

36 There is, it is submitted, nothing in the EEA Agreement to indicate that that agreement was concluded in the context of developing the 'common immigration policy' and that it 'aim[s] at ensuring … the efficient management of migration flows', within the meaning of Article 79 TFEU.

37 In addition, according to the Council, to consider that the amendment to the EEA Agreement, proposed by the contested decision, is part of the European Union's immigration policy, with the connected consequences – the exclusion of the Kingdom of Denmark and the possibility for the United Kingdom and Ireland to exercise their opt-out – would not be in line with the European Union's commitments in relation to the EFTA States under the EEA Agreement and could jeopardise the attainment of the main objective of the EEA Agreement, which is to provide for the fullest possible realisation of the internal market within the whole EEA.

38 The Council accordingly submits that, in so far as the contested decision seeks to extend the new EU *acquis* on social security systems to EFTA States which are Contracting Parties to the EEA Agreement and as that *acquis* is indispensable to the attainment of the main objective pursued by the EEA

Agreement by guaranteeing nationals of those States effective freedom of movement within the European Union, Article 48 TFEU is indeed the appropriate legal basis upon which the European Union may adopt its position in that regard.

39 In its reply, the United Kingdom explains more fully why it refuses to accept the proposal put forward in the contested decision to include Regulation No 883/2004 within the EEA Agreement. In that regard, the United Kingdom states that that regulation, in relation to Regulation No 1408/71, referred to in Annex VI to the EEA Agreement, inter alia extends the scope *ratione personae* of EU social security to 'inactive' citizens. However, the United Kingdom objects to any extension of the social security system to non-active third-country nationals and that is also the very reason why it decided not to participate in the adoption of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p.1).

40 The Council takes issue with that reasoning and submits that Regulation No 1408/71, which applied to employed persons and, from 1981, to self-employed persons, already covered various categories of economically 'non-active' citizens, such as retired persons, students or persons on unpaid leave. Consequently, it argues, there is no difference between the scope *ratione personae* of Regulation No 1408/71 and that of Regulation No 883/2004.

41 Furthermore, despite the Council's express request, the United Kingdom did not provide any substantive information on the number and categories of persons at present covered by Regulation No 883/2004 who did not come within the scope of Regulation No 1408/71.

Findings of the Court

42 As a preliminary point it must be observed, as the Advocate General has noted in point 31 of her Opinion, that all the parties to the present proceedings agree that, from a procedural point of view, the Council was right to cite Article 218(9) TFEU as the basis for the adoption of the contested decision.

43 By contrast, the United Kingdom challenges, in its application, the use of Article 48 TFEU as the substantive legal basis for the adoption of that decision.

44 In that regard, it should be borne in mind that, according to settled case-law, the choice of the legal basis for an act of the European Union must rest on objective factors amenable to judicial review, which include the aim and content of that measure (C-130/10 *Parliament* v *Council* [2012] ECR, paragraph 42 and the case-law cited).

45 In the present case, the contested decision, as is clear from the recitals in the preamble thereto and in its sole article, seeks to define the position to be taken by the European Union within the EEA Joint Committee concerning a proposed amendment to Annex VI and Protocol 37 to the EEA Agreement.

46 In particular, as noted in paragraph 15 above, the contested decision seeks, essentially, on the one hand, to update the references to Regulations Nos 1408/71 and 574/72 in Annex VI to the EEA Agreement, as those regulations have been replaced by Regulations Nos 883/2004 and 987/2009, and, on the other hand, to include in the list of committees set out in Protocol 37 to the EEA Agreement the Administrative Commission for the coordination of social security systems established by Regulation (EC) No 883/2004.

47 The objective of the contested decision is thus to allow the EU *acquis* on the coordination of social security systems, amended by Regulations Nos 883/2004 and 987/2009, to be applicable also to EFTA States which are Contracting Parties to the EEA Agreement.

48 In so far as the contested decision seeks to amend the rules on coordination of social security systems laid down in the EEA Agreement, it is also necessary to take account of the context of which that decision is part, and, inter alia, of the objective and content of that agreement, in order to establish whether Article 48 TFEU is the appropriate legal basis for the adoption of that decision.

49 In this regard, it should be borne in mind at the outset that the EEA Agreement establishes a close association between the European Union and the EFTA States based on special, privileged links between the parties concerned.

50 As the Court has already had occasion to state, one of the principal aims of the EEA Agreement, to which the United Kingdom and Ireland are also parties, is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States (Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 29).

51 So far as the present case is concerned, the EEA Agreement enshrines inter alia, in Article 28, the freedom of movement for workers among Member States and EFTA States and recognises, in Article 29, the rights in the field of social security pertaining thereto, which are drafted in essentially identical terms to those of Articles 45 TFEU and 48 TFEU respectively.

52 It is in that context that the association established by the EEA Agreement covers, in accordance with Article 1(2)(f) thereof, closer cooperation in the field of social policy and requires, pursuant to its Article 3, the parties not only to facilitate cooperation within the framework of that agreement but also to abstain from any measure which is liable to jeopardise the attainment of the objectives pursued by that agreement.

53 It should also be noted that, pursuant to Article 7 of the EEA Agreement, acts referred to in the annexes to the EEA Agreement or in the decisions of the EEA Joint Committee are to be binding on all the Contracting Parties and made part of their internal legal order.

54 In particular, as regards an EU regulation, Article 7(a) of the EEA Agreement expressly provides that such an act is 'as such' to be made part of the internal legal order of the Contracting Parties, that is to say, without any implementing measures being required for that purpose.

55 Consequently, as the Commission has correctly pointed out, the contested decision does not seek only to regulate the social rights of nationals of the three EFTA States concerned, but also, and in the same manner, to regulate the social rights of EU citizens in those EFTA States. In other words, the amendment to the EEA Agreement contemplated by the contested decision not only enables, in essence, nationals of Iceland, Liechtenstein and Norway to invoke the rights conferred by Regulations Nos 883/2004 and 987/2009 within the European Union, but also enables nationals of the Member States to rely on those rights in Iceland, Liechtenstein and Norway.

56 That said, it must be held that, so far as the present case is concerned, at the time when the EEA Agreement was concluded, Regulation No 1408/71, which was then in force, was incorporated into Annex VI and Protocol 37 to that agreement, and the rules on the coordination of social security systems contained in it were thus extended to the entire EEA.

57 However, in so far as the contested decision seeks to replace the reference to Regulation No 1408/71 with a reference to Regulation No 883/2004, the latter having repealed the former, it should be noted that, from a substantive point of view, that decision makes it possible, in compliance with the

commitments entered into by the parties to the EEA Agreement and with the level of integration already attained since its entry into force, to retain the extension of social rights to nationals of the States concerned as already intended and given effect to by the EEA Agreement since 1992.

58 The contested decision is thus precisely one of the measures by which the law governing the EU internal market is to be extended as far as possible to the EEA, with the result that nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens.

59 Were it not for the amendment contemplated by the contested decision, free movement of persons could not be exercised within the EEA under the same social conditions as within the European Union, which would undoubtedly undermine the development of the association and the realisation of the objectives pursued by the EEA Agreement.

60 It follows that it is necessary to replicate the modernisation and simplification of the rules on the coordination of social security systems which apply within the European Union, specifically referred to by the contested decision when replacing Regulation No 1408/71 with Regulation No 883/2004, also at the level of the EEA.

61 In those circumstances, it must be held that, taking into account the context of which it forms part, it was possible for the contested decision to be legitimately adopted on the basis of Article 48 TFEU.

62 That said, and in the interest of completeness, it must be noted that, contrary to what the United Kingdom and Ireland claim, Article 79(2) TFEU cannot form the basis for the adoption of a measure such as the contested decision.

63 First of all, as the Advocate General has noted in points 39 to 41 of her Opinion, Article 79(2) TFEU must be interpreted in the context of which it forms part, namely Chapter 2, entitled 'Policies on border checks, asylum and immigration', of Title V of the FEU Treaty and in the light of Article 79(1) TFEU, under which the European Union seeks to develop a common immigration policy aimed at ensuring 'the efficient management of migration flows, fair treatment of third-country nationals … and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.

64 However, it is clear that a measure such as the contested decision, regard being had for the context of the development of the association with EFTA States of which it forms part and, inter alia, the objectives pursued by that association, is manifestly irreconcilable with such purposes.

65 Next, the possibility cannot be discounted that recourse to Article 79(2) TFEU, entailing an opt-out clause for the United Kingdom and/or Ireland, would in practice be liable, in breach of Article 3 of the EEA Agreement referred to in paragraph 52 above, to undermine the realisation of the objectives pursued by that agreement. In particular, in the event that no agreement were to be concluded between those Member States and the EFTA States concerned, such recourse would give rise to two parallel regimes for the coordination of social security systems.

66 Lastly, so far as concerns the argument put forward by the United Kingdom and Ireland that recourse to Article 79(2) TFEU is justified in the present case by reason of the fact that that provision has already been used by the EU legislature as the basis for the adoption of similar decisions concerning other third countries, that argument cannot be upheld in the present case.

67 In that regard, suffice it to note that, in accordance with settled case-law, the legal basis for an act must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other EU measures which might, in certain cases, display similar characteristics (see, inter alia, Case C-94/03 *Commission* v *Council* [2006] ECR I-1, paragraph 50 and the case-law cited).

68 In the light of all the foregoing considerations, it must therefore be held that the contested decision was correctly adopted by using Article 48 TFEU as the substantive legal basis.

69 Accordingly, the action must be dismissed as being unfounded.

Costs

70 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to Article 140(1) of the Rules of Procedure, the interveners in this case are to bear their own respective costs.

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

1. Dismisses the action;

2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;

3. Orders Ireland and the European Commission to bear their own respective costs.

[Signatures]