Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 27 April 2023 [1]

Case C-45/22

HK
v
Service fédéral des Pensions (SFP)

(Request for a preliminary ruling from the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium))

(Reference for a preliminary ruling – Coordination of social security systems – Regulation (EC) No 883/2004 – Article 55(1)(a) – Overlapping of benefits of different kinds – Division of the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits – Definition of 'amounts as they have been taken into account'– Respect for the special characteristics of national social security legislation – Person benefiting from several retirement and survivors' pensions paid by different Member States – Application of national rules to prevent overlapping – Methods of calculating the amount of a survivors' pension)

I. Introduction

1. The objective of Regulation (EC) No 883/2004, [2] as is apparent from recitals 1 and 45 thereof, is to ensure the coordination of national social security systems of the Member States in order to guarantee that the right to free movement of persons can be exercised effectively and, therefore, to contribute towards improving the standard of living and conditions of employment of persons moving within the European Union.

2. In that context, that regulation aims, in particular, to limit the scope of national rules to prevent overlapping with regard to retirement and survivors' pensions which have the effect of reducing the benefit to which an insured person may be entitled in one Member State by reason of the fact that he or she receives a benefit from another Member State. [3] Accordingly, Article 55(1)(a) of that regulation states that, if the receipt of benefits of a different kind or other income requires the application of the rules to prevent overlapping provided for by the legislation of the Member States concerned regarding two or more independent benefits, the competent institutions are to divide the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits subject to those rules.

[1] Original language: French.

[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 and corrigendum OJ 2004 L 200, p. 1).

[3] See Opinion of Advocate General Bot in *Commission* v *Malta* (C-12/14, EU:C:2015:755, point 1).

3. How can we interpret the words 'amounts as they have been taken into account' within the meaning of that provision? More specifically, should the total amount of the benefits concerned or rather the portion of the income which exceeds a ceiling in respect of overlapping of the various benefits considered be divided? That is, in essence, the question referred by the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium), which is unprecedented in that the Court of Justice has never before interpreted Article 55 of Regulation No 883/2004.

4. The request for a preliminary ruling has been made in proceedings between HK, who receives several retirement and survivors' pensions from different Member States, and the Service fédéral des Pensions (Federal Pensions Service, Belgium; 'the SFP') concerning the methods of calculating HK's Belgian survivors' pension following the death of his spouse.

II. Legal framework

A. European Union law

1. Regulation (EEC) No 1408/71

5. Article 46c of Regulation (EEC) No 1408/71,[4] inserted into that regulation by Regulation (EEC) No 1248/92,[5] entitled 'Special provisions applicable in the case of overlapping of one or more benefits referred to in Article 46a(1) with one or more benefits of a different kind or with other income, where two or more Member States are concerned', states in paragraph 1 thereof:

'If the receipt of benefits of a different kind or other income entails the reduction, suspension or withdrawal of two or more benefits referred to in Article 46(1)(a)(i), the amounts which would not be paid in strict application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation of the Member States concerned shall be divided by the number of benefits subject to reduction, suspension or withdrawal.'

6. Regulation No 1408/71 was repealed and replaced, as from 1 May 2010, by Regulation No 883/2004.

2. Regulation No 883/2004

7. Recitals 1, 4, 28 to 31 and 45 of Regulation No 883/2004 state:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

[4] Council Regulation 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 (OJ 1971 L 149, p. 2).

[5] Council Regulation of 30 April 1992 amending Regulation No 1408/71 (OJ 1992 L 136, p. 7).

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

…

(28) There is a need to determine the amount of a pension calculated under the method used for aggregation and pro-rata calculation and guaranteed by Community law where the application of national legislation, including rules concerning reduction, suspension or withdrawal, is less favourable than the aforementioned method.

(29) To protect migrant workers and their survivors against excessively stringent application of the national rules concerning reduction, suspension or withdrawal, it is necessary to include provisions strictly governing the application of such rules.

(30) As has constantly been reaffirmed by the Court of Justice, the Council is not deemed competent to enact rules imposing a restriction on the overlapping of two or more pensions acquired in different Member States by a reduction of the amount of a pension acquired solely under national legislation.

(31) According to the Court of Justice, it is for the national legislature to enact such rules, bearing in mind that it is for the Community legislature to fix the limits within which the national provisions concerning reduction, suspension or withdrawal are to be applied.

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that article, this Regulation does not go beyond what is necessary, in order to achieve that objective.'

8. Article 2 of that regulation, entitled 'Persons covered', states:

'1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

2. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.'

9. 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;

(e) survivors' benefits;

…'

10. Chapter 5 of Title III of that regulation, entitled 'Old-age and survivors' pensions', includes inter alia Articles 52 to 55 thereof.

11. Article 52 of Regulation No 883/2004, entitled 'Award of benefits', provides in paragraphs 1 to 3 thereof:

'1. The competent institution shall calculate the amount of the benefit that would be due:

(a) under the legislation it applies, only where the conditions for entitlement to benefits have been satisfied exclusively under national law (independent benefit);

(b) by calculating a theoretical amount and subsequently an actual amount (pro-rata benefit), as follows:

(i) the theoretical amount of the benefit is equal to the benefit which the person concerned could claim if all the periods of insurance and/or of residence which have been completed under the legislations of the other Member States had been completed under the legislation it applies on the date of the award of the benefit. If, under this legislation, the amount does not depend on the duration of the periods completed, that amount shall be regarded as being the theoretical amount;

(ii) the competent institution shall then establish the actual amount of the pro[-]rata benefit by applying to the theoretical amount the ratio between the duration of the periods completed before materialisation of the risk under the legislation it applies and the total duration of the periods completed before materialisation of the risk under the legislations of all the Member States concerned.

2. Where appropriate, the competent institution shall apply, to the amount calculated in accordance with subparagraphs l(a) and (b), all the rules relating to reduction, suspension or withdrawal, under the legislation it applies, within the limits provided for by Articles 53 to 55.

3. The person concerned shall be entitled to receive from the competent institution of each Member State the higher of the amounts calculated in accordance with subparagraphs l(a) and (b).'

12. Article 53 of that regulation, entitled 'Rules to prevent overlapping', is worded as follows in paragraphs 1 and 2 thereof:

'1. Any overlapping of invalidity, old[-]age and survivors' benefits calculated or provided on the basis of periods of insurance and/or residence completed by the same person shall be considered to be overlapping of benefits of the same kind.

2. Overlapping of benefits which cannot be considered to be of the same kind within the meaning of paragraph 1 shall be considered to be overlapping of benefits of a different kind.'

13. Under Article 54 of that regulation, entitled 'Overlapping of benefits of the same kind':

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

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

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

or

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

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

or

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

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

14. Article 55 of that regulation, entitled 'Overlapping of benefits of a different kind', states in paragraph 1(a) thereof:

'If the receipt of benefits of a different kind or other income requires the application of the rules to prevent overlapping provided for by the legislation of the Member States concerned regarding:

(a) two or more independent benefits, the competent institutions shall divide the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits subject to the said rules;

however, the application of this subparagraph cannot deprive the person concerned of his/her status as a pensioner for the purposes of the other Chapters of this Title under the conditions and the procedures laid down in the Implementing Regulation'.

B. Belgian law

15. Under the first and fourth paragraphs of Article 20 of arrêté royal nº 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travailleurs salariés (Royal Decree No 50 of 24 October 1967 on retirement and survivors' pensions of employed persons),[6] in the version applicable to the dispute in the main proceedings ('Royal Decree No 50'):

'A survivors' pension may not be aggregated with a retirement pension or with any other benefit taking the place of a retirement pension, save up to such amount as may be determined by the King.

…

The King shall determine to what extent a survivors' pension may be reduced, where the surviving spouse receives a survivors' pension or any other benefit taking their place granted under the retirement and survivors' pensions scheme of a foreign country or under a regime applicable to the staff of an institution governed by public international law.'

16. Article 52(1) of arrêté royal du 21 décembre 1967 portant règlement général du régime de pension de retraite et de survie des travailleurs salariés (Royal Decree of 21 December 1967 on the general regulation of the retirement and survivors' pension scheme for employed persons),[7] in the version applicable to the dispute in the main proceedings ('the Royal Decree of 21 December 1967'), provides:

'Where the surviving spouse can claim both a survivors' pension under the pension scheme for employed persons and one or more retirement pensions, or any other benefit taking the place thereof under the pension scheme for employed persons or under one or more other pension schemes, the survivors' pension may be aggregated with those retirement pensions only up to a sum equal to 110% of the amount of the survivors' pension which would have been awarded to the surviving spouse for a complete contributions record.

…

Where the spouse referred to in the first subparagraph can also claim one or more survivors' pensions or other benefits taking their place within the meaning of Article 10*bis* of [Royal Decree No 50], the survivors' pension may not be greater than the difference between, first, 110% of the amount of the survivors' pension for a complete contributions record and, secondly, the total of the amounts of the retirement pensions, or other benefits taking their place referred to in the first subparagraph, and an amount equal to the survivors' pension of an employed person for a complete contributions record, multiplied by the fraction or the sum of the fractions which express the amount of the survivors' pensions in the other pension schemes, excluding the scheme for self-employed persons. Those fractions are the ones which have been or would have been laid down for the application of the said Article 10*bis*.

…'

[6] *Moniteur belge* of 27 October 1976, p. 11246.

[7] *Moniteur belge* of 16 January 1968, p. 441.

17. Article 52*bis* of the Royal Decree of 21 December 1967 provides:

'For the purposes of the third and fourth paragraphs of Article 20 of Royal Decree No 50, the amount of the survivors' pension of the surviving spouse, granted pursuant to Royal Decree No 50, the Law of 20 July 1990 (or the Royal Decree of 23 December 1996), shall be reduced by the amount of the survivors' pension or any other benefit taking their place granted under the retirement and survivors' pensions scheme of a foreign country or under a regime applicable to the staff of an institution governed by public international law, which cannot be waived.'

18. The first subparagraph of Article 7(1) of arrêté royal du 23 décembre 1996, portant exécution des articles 15, 16 et 17 de la loi du 26 juillet 1996 portant modernisation de la sécurité sociale et assurant la viabilité des regimes légaux des pensions (Royal Decree of 23 December 1996 implementing Articles 15, 16 and 17 of the Law of 26 July 1996 modernising social security and ensuring the viability of statutory pension schemes),[8] in the version applicable to the dispute in the main proceedings, provides:

'Where the spouse died before the retirement pension commenced, the survivors' pension shall be equal to 80% of the retirement pension, calculated at the rate provided for in point (a) of the first subparagraph of Article 5(1) of the present decree that would have been awarded to the spouse pursuant thereto.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

19. HK's spouse died on 29 November 2016.

20. As of 1 December 2016, HK personally received a Belgian retirement pension in the annual amount of EUR 11 962.55 and a Spanish retirement pension in the annual amount of EUR 8 276.28. In so far as his spouse had been employed in Belgium, Spain and Finland, HK also received, following the death of his spouse, a Spanish survivors' pension in the annual amount of EUR 5 123.88 and a Finnish survivors' pension in the annual amount of EUR 1 281.24.

21. With regard to Belgium, the SFP informed HK, by letter of 3 January 2017, that it was examining his possible right to a Belgian survivors' pension. On 22 December 2017, the SFP informed HK that he was not entitled to such a survivors' pension on the grounds that the amount of his retirement pensions was too high. On 26 December 2017, HK filed a complaint with the SFP against that decision. Subsequently, HK and the SFP exchanged letters relating to the rules for taking into account HK's various pension benefits in order to determine whether and to what extent he was entitled to a Belgian survivors' pension.

22. By decision of 18 September 2019, the SFP informed HK that, after re-examining his situation, he was entitled to a Belgian survivors' pension in the annual amount of EUR 1 929.03 gross as from 1 December 2016. The SFP indicated that HK's entitlement to a Belgian survivors' pension had been examined automatically on the grounds that the Republic of Finland applied national rules to prevent overlapping. The SFP further stated that, when fixing that gross amount, the ceiling in respect of overlapping had been taken into account since HK also benefited from a Belgian retirement pension.

[8] *Moniteur belge* of 17 January 1997, p. 904.

23. On 14 April 2020, HK brought an action before the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking)), the referring court, against the SFP's decision of 18 September 2019, arguing that, under Article 55 of Regulation No 883/2004, he was entitled to a Belgian survivors' pension in the annual amount of EUR 6 339.01 gross.

24. The referring court observes that Belgian legislation authorises, while limiting it, the overlapping of a retirement pension and a survivors' pension, on the basis of the first subparagraph of Article 20 of Royal Decree No 50, implemented by the first subparagraph of Article 52(1) of the Royal Decree of 21 December 1967. Furthermore, it follows from the fourth subparagraph of Article 20 of Royal Decree No 50, read in conjunction with Article 52*bis* of the Royal Decree of 21 December 1967, that the overlapping between the survivors' pension of a Belgian employed worker and one or several survivors' pensions granted under foreign legislation is not authorised. Under Article 52*bis*, the amount of the survivors' pension of a Belgian employed worker is reduced by the amount of the survivors' pension or pensions granted under a foreign scheme.

25. However, under Article 54 of Regulation No 883/2004, where benefits of the same kind from several Member States overlap, national rules to prevent overlapping apply only to certain benefits, which are listed in Annex IX to that regulation. The survivors' pension for an employed person is not included in the list of benefits set out in that annex by the Kingdom of Belgium. Consequently, Article 52*bis* of the Royal Decree of 21 December 1967 is not applicable to the dispute in the main proceedings. On the basis of the first subparagraph of Article 52(1) of that Royal Decree, the SFP thus took into account the Belgian and Spanish retirement pensions awarded to HK personally.

26. According to the referring court, in the present case, the overlapping of the survivors' pension for an employed person and various retirement pensions (Belgian and foreign) must be regarded as the overlapping of benefits of a different kind, within the meaning of Article 55 of Regulation No 883/2004, since benefits calculated on the basis of the professional careers of two different persons cannot be regarded as benefits of the same kind.

27. The referring court further states that Article 52 of Regulation No 883/2004 makes a distinction between 'independent benefit' and 'pro-rata benefit' and that the person concerned is entitled to receive from the competent institution of each Member State concerned the higher of the amounts calculated in accordance with subparagraphs (a) and (b) of Article 52(1). In the present case, the SFP calculated that, for both the Belgian retirement and survivors' pensions, the independent benefit was more advantageous for HK than the pro-rata benefit. The referring court states that, according to its assessment, HK was not entitled to a survivors' pension in the context of the calculation of the pro-rata benefit, within the meaning of Article 52(1)(b) of that regulation.

28. According to that court, with regard to the calculation of the independent benefit, HK is entitled to a survivors' pension solely by virtue of the application of Article 55(1)(a) of Regulation No 883/2004. Another worker with a Belgian retirement pension for employed persons of an amount equivalent to that received by HK – EUR 20 238.83 – would not have received any survivors' pension in Belgium. HK is therefore in a more advantageous position as a result of the application of EU law.

29. It is apparent from the order for reference that, so far as concerns the Belgian survivors' pension at issue, HK and SFP arrive at the same result with regard to the following elements:

– HK's survivors' pension amounts to EUR 7 638.46 – that is to say 80% of the retirement pension for employed persons of his wife – calculated on the basis of a 'household' rate;

– the ceiling in respect of overlapping of that pension is EUR 16 458.42 – that is to say 110% of EUR 14 962.20,[9] – pursuant to Article 52(1)(a) of Regulation No 883/2004, relating to an independent benefit;

– the total amount of retirement pensions to be taken into account for the application of Article 52 of the Royal Decree of 21 December 1967, that is to say the annual amount of the Belgian (EUR 11 962.55) and Spanish (EUR 8 276.28) retirement pensions, amounts to EUR 20 238.83.

30. It also follows from the order for reference that the interpretations of HK and the SFP differ as to the calculation of the amount by how much the ceiling has been exceeded. According to the SFP, in order to determine that amount, the amount of the survivors' pension (EUR 7 628.46) and the total amount of the retirement pensions (EUR 20 238.83) should be added and then the ceiling in respect of overlapping (EUR 16 458.42) should be subtracted, which equals the sum of EUR 11 418.87. The reduced survivors' pension is calculated as follows: the amount of the survivors' pension (EUR 7 638.46) minus the amount by which the ceiling in respect of overlapping has been exceeded (EUR 11 418.87) is divided by two (the number of survivors' pensions subject to overlapping rules, in the present case, the Belgian and Finnish survivors' pensions, with the Spanish survivors' pension not being reduced), that is to say EUR 5 709.43, with the result that the annual survivors' pension amounts to EUR 1 929.03 (EUR 7 638.46 minus EUR 5 709.43).

31. HK's calculation differs in that, for the calculation of the amount by which the ceiling in respect of overlapping has been exceeded, the amount of the survivors' pension (EUR 7 638.46) should be added to the total amount of the retirement pensions (EUR 20 238.83), which is divided by two (EUR 10 119.41), minus the ceiling in respect of overlapping (EUR 16 458.42), which equals EUR 1 299.45. The reduced survivors' pension is thus calculated by subtracting EUR 1 299.45 from EUR 7 638.46, resulting in the annual amount of EUR 6 399.01.

32. The referring court notes that, according to the SFP, the competent Finnish authorities followed the same process as the SFP when calculating the Finnish survivors' pension notified to HK on 10 November 2017. The referring court states that HK, meanwhile, refers to information available on the website of the Caisse nationale d'assurance vieillesse (France) (French social security body which administers the basic pension schemes of private-sector employees, self-employed persons, public officials and artists/authors), and, in particular, Circular No 2010/54 of 21 May 2010 (Technical Note No 3: Survivors' Pensions).[10]

[9] The referring court states that that amount, which is equal to the full survivors' pension, is arrived at by multiplying the sum of EUR 7 481.10 (total pensions amount for the years in respect of which he was normally and principally employed) by 44/22 (inverse career record for the years in respect of which he was normally and principally employed only).

[10] That document is available (in French) at: https://www.legislation.cnav.fr/Pages/texte.aspx?Nom=circulaire_cnav_2010_54_21052010_note3.

33. The referring court further states that the rule laid down in Article 55(1)(a) of Regulation No 883/2004 was not, as such, included in Article 46c of Regulation No 1408/71, which results from Regulation No 1248/92, and that Article 55(1)(a) seems to have modified it by no longer referring to 'the amounts which would not be paid in strict application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation of the Member States concerned'.

34. In those circumstances, the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the rule laid down in Article 55(1)(a) of [Regulation No 883/2004] that the competent institutions are to divide the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits subject to [the rules to prevent overlapping] be interpreted as meaning that the income as such taken into account when applying the rule to prevent overlapping must be divided by the number of survivors' pensions impacted by the rules against overlapping?

(2) On the contrary, must the rule laid down in Article 55(1)(a) of [Regulation No 883/2004] that the competent institutions are to divide the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits subject to [the rules to prevent overlapping] be interpreted as meaning that it is not the income as such taken into account when applying the rule to prevent overlapping, but rather it is the portion of the income which exceeds a ceiling in respect of overlapping, as, for example, laid down by the national rule at issue, that must be divided by the number of survivors' pensions impacted by the rules against overlapping?'

35. Written observations were submitted by HK, the Belgian and Finnish Governments, and the European Commission.

IV. Analysis

36. By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 55(1)(a) of Regulation No 883/2004 must be interpreted as meaning that, if the receipt of benefits of a different kind entails the application of national rules to prevent overlapping with regard to independent benefits, it precludes national legislation under which the competent institutions, for the purposes of calculating the amount of the survivors' pension, divide the amount of income which exceeds a ceiling in respect of overlapping of the various pensions taken into account by the number of survivors' pensions impacted by the rules to prevent overlapping.

37. In the present case, it is apparent from the order for reference that HK receives a Belgian and a Spanish retirement pension and, following the death of his spouse, a Spanish and a Finnish survivors' pension.

38. So far as concerns the allocation of a Belgian survivors' pension, the referring court states that the Kingdom of Belgium introduced rules to prevent overlapping. According to the Court's case-law, provisions to prevent overlapping laid down in the legislation of a Member State may, unless that regulation provides otherwise, be relied on against persons who receive a benefit from

that Member State if they can claim other social security benefits, even when those benefits are acquired under the legislation of another Member State.[11] Thus, under Article 52(2) of Regulation No 883/2004, the competent institution is to apply, where appropriate, all the rules relating to reduction, suspension or withdrawal, under the legislation it applies, within the limits provided for by Articles 53 to 55 of that regulation.

39. As the referring court notes, Belgian legislation does not authorise the overlapping of the survivors' pension for an employed person with the various survivors' pensions granted under foreign legislation.[12] However, according to that court, under Article 54 of Regulation No 883/2004 with regard to the overlapping of benefits of the same kind, the rules to prevent overlapping are not applicable in the present case.[13] In those circumstances, the present case concerns the methods of calculating the amount of the Belgian survivors' pension received by HK.

40. In that regard, it is apparent from the order for reference that, in the context of the application of Articles 53 to 55 of Regulation No 883/2004, HK and the SFP carry out the same analysis as to the amount of HK's Belgian survivors' pension, the ceiling in respect of overlapping of that pension and the total amount of the retirement pensions to be taken into account.[14] By contrast, the interpretations of HK and the SFP differ as to the next step in the calculation of the amount of the Belgian survivors' pension subject to national rules to prevent overlapping. According to the SFP, it is the portion of the income which exceeds a ceiling in respect of overlapping of the various pensions taken into account that should be divided by two (that is to say the number of survivors' pensions concerned), whereas HK maintains that it is the total amounts of the other retirement pensions concerned which must be divided by two, which results in a Belgian survivors' pension of a higher amount.[15] As HK and the Commission observe, the interpretation favoured by HK is more favourable to him on a personal level but also, in general, for all workers who have exercised their right to freedom of movement.

41. The present case thus raises the question of the interpretation of Article 55(1)(a) of Regulation No 883/2004. As set out in that provision, which the Court has never examined before,[16] 'if the receipt of benefits of a different kind or other income requires the application of the rules to prevent overlapping provided for by the legislation of the Member States concerned regarding two or more independent benefits, the competent institutions shall divide the amounts of the benefit or benefits or other income, as they have been taken into account, by the number of benefits subject to the said rules'. That provision thus provides for the relaxation of national rules to prevent overlapping.[17]

42. In the present case, HK's Belgian survivors' pension is subject to the application of national rules to prevent overlapping, namely Article 52 of the Royal Decree of 21 December 1967.

[11] See, by analogy, judgment of 15 March 2018, *Blanco Marqués* (C-431/16, EU:C:2018:189, paragraph 63 and the case-law cited).

[12] See point 25 of the present Opinion.

[13] See point 26 of the present Opinion.

[14] See point 29 of the present Opinion.

[15] See points 30 and 31 of the present Opinion.

[16] In the case giving rise to the judgment of 15 March 2018, *Blanco Marqués* (C-431/16, EU:C:2018:189), the referring court referred, in its first and sixth questions, to Article 55 of Regulation No 883/2004. However, the Court did not rule on the merits with regard to that article.

[17] As noted by an author mentioned by the referring court, 'that provision seeks to remedy the negative consequences for the recipient of the joint application of the rules to prevent overlapping provided for by the legislation of two or more Member States. Thus, if several independent benefits must be simultaneously reduced by the application of such rules, the amount to which the reduction, suspension or withdrawal relates must be divided by the number of benefits subject to reduction, suspension or withdrawal'. See Robert, F., 'Le régime juridique des pensions de retraite après une carrière dans plusieurs États membres', *Journal de droit européen*, No 223, 2015, p. 354 to 360, in particular p. 359.

43. Furthermore, it is common ground that HK's retirement pensions, on the one hand, and his Belgian survivors' pension, on the other, must be regarded as 'benefits of a different kind', within the meaning of Article 55 of Regulation No 883/2004. Under Article 53(1) of that regulation, any overlapping of invalidity, old-age and survivors' benefits calculated or provided on the basis of periods of insurance and/or residence completed by 'the same person' are to be considered to be overlapping of 'benefits of the same kind'. Benefits calculated or provided on the basis of the careers of two different persons, namely in the present case HK and his spouse, cannot therefore be treated as being 'benefits of the same kind'. [18] Pursuant to Article 53(2), overlapping of benefits which are not 'of the same kind' are to be considered to be overlapping of 'benefits of a different kind'.

44. Moreover, the case in the main proceedings concerns 'independent benefits', within the meaning of Article 55 of Regulation No 883/2004, in so far as, pursuant to Article 52 of that regulation, the SFP considered that, with regard to HK's Belgian retirement and survivors' pensions, the 'independent benefit' put HK in a more advantageous position than the pro-rata benefit. [19] Furthermore, Article 52 of the Royal Decree of 21 December 1967 provides for the application of rules to prevent overlapping with regard to two or more independent benefits.

45. Accordingly, the present case concerns, more specifically, the meaning to be given to the words 'the amounts of the benefit or benefits or other income, *as they have been taken into account*', [20] within the meaning of Article 55(1)(a) of Regulation No 883/2004. Those words have equivalents in the different language versions of that provision, in particular in Spanish ('las cuantías de la prestación o prestaciones u otros ingresos, *tal y como hayan sido computados*'), German ('die Beträge der Leistung oder Leistungen oder sonstigen Einkünfte, *die berücksichtigt worden sind*'), Greek ('την ή τις παροχές ή τα άλλα εισοδήματα, *όπως αυτές έχουν ληφθεί υπόψη*'), French ('les montants de la prestation ou des prestations ou des autres revenus, *tels qu'ils ont été pris en compte*'), Italian ('gli importi della o delle prestazioni o di altri redditi, *di cui si è tenuto conto*'), Polish ('kwoty świadczenia lub świadczeń lub innych dochodów, *które zostały uwzględnione*') and Swedish ('förmånen eller förmånerna eller den andra inkomsten *så som de har beaktatset*') (emphasis added).

46. According to settled case-law, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of the context in which it occurs, as well as the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation. [21]

47. In the first place, so far as concerns the wording of Article 55(1)(a) of Regulation No 883/2004, that provision refers to the application of the rules to prevent overlapping provided by the 'legislation of the Member States concerned' and to the 'competent institutions'. Thus, that provision, by the wording 'as they have been taken into account', entrusts the Member States with determining how 'to take into account' the amounts of the benefit or benefits or other income to be divided. In other words, I take the view that the same provision gives the Member States discretion to determine the amounts to be taken into account in the application of their rules to prevent overlapping.

[18] See, to that effect, judgment of 7 March 2013, *van den Booren* (C-127/11, EU:C:2013:140, paragraphs 32 and 33).

[19] See point 28 of the present Opinion.

[20] Emphasis added.

[21] Judgment of 16 March 2023, *Towercast* (C-449/21, EU:C:2023:207, paragraph 31 and the case-law cited).

48. In that regard, HK argues that the subordinate clause 'as they have been taken into account' refers to the main clause 'the amounts of the benefit or benefits or other income', which were determined by the application of national rules to prevent overlapping and that, in the present case, the taking into account of amounts by the Belgian competent institutions corresponds to the selection of one or more retirement pensions. Moreover, the absence, in Article 55(1)(a) of Regulation No 883/2004, of any explicit reference to the taking into account of the amount which exceeds a ceiling in respect of overlapping of the various pensions considered means that that amount cannot be selected and that, furthermore, unlike that provision, Article 55(1)(b) refers to 'all the elements stipulated for applying the rules to prevent overlapping'. [22]

49. Those arguments are not convincing. On the one hand, I take the view that, in the light of the wording of Article 55(1)(a), the amounts referred to may be taken into account when selecting the pensions concerned, as well as when establishing the methods of calculating the amounts selected for division. On the other, that provision does not explicitly state that the total amount of the benefits concerned should be divided. To consider that the words 'the amounts as they have been taken into account' necessarily refer to the total amount of the benefits concerned would be tantamount to depriving those words of meaning or logical reason for existence and would remove the discretion given to the Member States by the EU legislature.

50. Therefore, in my view, the wording of Article 55(1)(a) of Regulation No 883/2004 indicates that the Member States may, pursuant to national rules to prevent overlapping, divide the portion of the income which exceeds a ceiling in respect of overlapping of the various pensions considered. The Member States may also decide, as the case may be, to divide instead the total amount of the benefits concerned.

51. That interpretation is corroborated, in the second place, by the context of Article 55(1)(a) of Regulation No 883/2004.

52. Under recital 29 of that regulation, it is necessary to protect migrant workers and their survivors against 'excessively stringent application' of the national rules concerning reduction, suspension or withdrawal. Consequently, the objective of that regulation is not to abolish national rules to prevent overlapping, but only to limit their effects when their application is particularly unfavourable to workers who have exercised their right to freedom of movement. In my view, it does not appear that the taking into account, by a Member State, of the amount which exceeds a platform in respect of overlapping of the various pensions considered is particularly unfavourable for the workers concerned. [23]

53. In addition, recital 4 of that regulation states that it is necessary to respect the *special characteristics of national social security legislation* and to draw up only a system of coordination. It is also apparent from recitals 30 and 31 of Regulation No 883/2004 that it is for the national legislature to enact rules imposing a restriction on the overlapping of two or more pensions acquired in different Member States, whereas it is for the EU legislature to fix the limits within which the national provisions are to be applied.

[22] Under Article 55(1)(b) of Regulation No 883/2004, 'if the receipt of benefits of a different kind or other income requires the application of the rules to prevent overlapping provided for by the legislation of the Member States concerned regarding … one or more pro[-]rata benefits, the competent institutions shall take into account the benefit or benefits or other income and all the elements stipulated for applying the rules to prevent overlapping as a function of the ratio between the periods of insurance and/or residence established for the calculation referred to in Article 52(1)(b)(ii)'.

[23] Thus, having regard to the second subparagraph of Article 55(1)(a) of Regulation No 883/2004, the person concerned is not deprived of his or her status as a pensioner for the purposes of the other relevant provisions of that regulation.

54. In the light of those recitals, I share the position adopted by the Finnish Government that Article 55(1)(a) of that regulation does not bring about harmonisation of a particular method of calculating survivors' pensions or their amount. It is for the competent national authorities to determine those methods in the context of the application of that provision. A Member State may thus opt to divide the amount which exceeds a ceiling in respect of overlapping of the various pensions considered. In other words, the context of that provision does not require the Member States to adopt the interpretation that is the most favourable to the person concerned as to the amount to be divided.

55. More generally, according to the Court's case-law, the FEU Treaty offers no guarantee to a worker that extending his or her activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be more or less advantageous or disadvantageous for the worker in terms of social welfare. It follows that, even where its application is thus less favourable, such legislation is still compatible with Articles 45 and 48 TFEU if it does not place the worker concerned at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it there, and if it does not simply result in the payment of social security contributions on which there is no return. [24]

56. In the present case, with regard to the case in the main proceedings, the referring court noted that HK is entitled to a Belgian survivors' pension solely by virtue of the application of Article 55(1)(a) of Regulation No 883/2004. [25] In those circumstances, EU law, in any event, even where that provision is applied by dividing the amount which exceeds a ceiling in respect of overlapping of the various pensions considered, benefits the migrant worker. [26]

57. In the third place, the interpretation that a Member State may choose to divide the portion of the income which exceeds a ceiling in respect of overlapping of the various pensions considered is supported by the objectives pursued by Regulation No 883/2004. It follows from the Court's case-law that Regulation No 883/2004 seeks, as is apparent from recitals 1 and 45 thereof and from Article 42 EC, now Article 48 TFEU, to ensure the free movement of workers within the European Union, while respecting the special characteristics of national social security legislation, and to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively and, thereby, to contribute towards improving the standard of living and conditions of employment of persons who move within the European Union. [27]

58. In that regard, also according to the Court's case-law, Regulation No 883/2004 does not establish a common scheme of social security, but allows different national social security schemes to exist. Member States retain the power to organise their social security schemes and, in the absence of harmonisation at EU level, it is for each Member State to determine in its

[24] See judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid workers)* (C-372/20, EU:C:2021:962, paragraph 80 and the case-law cited).

[25] See point 28 of the present Opinion.

[26] In that regard, the Court held that if the application of EU law provisions causes migrant workers to obtain an advantage over non-migrant workers, this is not, for all that, discriminatory, since migrant workers are not in a situation comparable to that of workers who have never left their own country and, on the other hand, that any differences which may exist to the benefit of migrant workers do not result from the interpretation of EU law but rather from the lack of any common social security system or of any harmonisation of the existing national schemes, which cannot be mitigated by the mere coordination at present practised (see judgment of 22 April 1993, *Levatino*, C-65/92, EU:C:1993:149, paragraph 49 and the case-law cited).

[27] Judgment of 3 June 2021, *TEAM POWER EUROPE* (C-784/19, EU:C:2021:427, paragraph 58 and the case-law cited).

legislation, in particular, the conditions for entitlement to social benefits, in conformity with the law of the European Union.[28] Furthermore, the absence of a common system of social security implies that, while not penalising workers exercising their right to freedom of movement, it is necessary to *safeguard the financial integrity* of the social security schemes of the Member States.[29] The aim of rules to prevent overlapping is thus to obviate unjustified duplication of social security benefits.[30]

59. Accordingly, it follows from the objectives of Regulation No 883/2004 that the Member States are competent to determine how they intend to take into account the amounts of the benefit or benefits or other income, in the context of the application of Article 55(1)(a) of that regulation, in particular with a view to safeguarding the financial integrity of national social security schemes. To that effect, the Member States are authorised to take measures to promote long-term equilibrium of the schemes, so as to continue to protect all insured persons.

60. In the present case, the Belgian Government argues that, pursuant to applicable national rules on the pensions of employed persons, namely Article 52(1) of the Royal Decree of 21 December 1967, in the event of the overlapping of retirement pensions and survivors' pensions, the rules to prevent overlapping apply only to the secondary right (survivors' pension) and not to the personal right (retirement pension), a characteristic which explains the methods for calculating the amount of a survivors' pension which have been applied. I take the view that such an approach falls within the Member States' competence, and it is not for the EU legislature or the Court to impose precise methods for calculating the amounts to be taken into account and which would apply to all Member States.

61. In the fourth place, such an interpretation is also supported by the legislative history of Article 55(1)(a) of Regulation No 883/2004. As the Court has noted, that regulation modernised and simplified the rules contained in Regulation No 1408/71, while retaining *the same objective* as the latter.[31] In this instance, Article 46c of Regulation No 1408/71, which preceded Article 55(1)(a) of Regulation No 883/2004, stated that if the receipt of benefits of a different kind or other income entails the reduction, suspension or withdrawal of two or more benefits, the amounts which would not be paid in strict application of the provisions concerning reduction, suspension or withdrawal *provided for by the legislation of the Member States concerned* are to be divided by the number of benefits subject to reduction, suspension or withdrawal.[32] Consequently, while the EU legislature chose different wording for Article 55(1)(a)

[28] See, to that effect, judgment of 15 September 2022, *Rechtsanwaltskammer Wien* (C-58/21, EU:C:2022:691, paragraph 61 and the case-law cited).

[29] See, to that effect, judgment of 21 October 2021, *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* (C-866/19, EU:C:2021:865, paragraph 41 and the case-law cited).

[30] See, to that effect, judgment of 8 May 2014, *Wiering* (C-347/12, EU:C:2014:300, paragraph 55 and the case-law cited).

[31] See judgment of 30 September 2021, *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv)* (C-285/20, EU:C:2021:785, paragraph 42 and the case-law cited).

[32] As pointed out by an author cited by the referring court, so far as concerns pensions in respect of old age or survivors, the only substantive change between Regulations No 1408/71 and No 883/2004 relates to one of the rules limiting the scope of national rules to prevent overlapping, namely that it is no longer the amount of the benefit which has not been awarded that is divided, but the benefits or income taken into account for the application of the rule against overlapping. See Morsa, M., 'La coordination des systèmes de sécurité sociale: règlements (CE) 883/2004 et 987/2009 versus règlements n° 1408/71 et 574/72: ce qui a changé au 1er mai 2010', *Journal des tribunaux du travail*, No 1096, 2011, p. 181 to 192, in particular p. 191.

to that proposed by the Commission,[33] Article 46c of Regulation No 1408/71, on the same principle, also referred to amounts determined not by the EU legislature but by the Member States.[34]

62. Lastly, the referring court states that, according to the SFP, the competent Finnish institutions followed exactly the same process when calculating HK's Finnish survivors' pension.[35] As for HK, he refers to a circular from the Caisse nationale d'assurance vieillesse (France) which follows the same interpretation as that which he advocates.[36] However, I see no contradiction in that different approach. As I have previously stated, the Member States are competent to determine the methods for calculating the amount of a survivors' pension, provided that they comply with EU law. In the present case, Article 55(1)(a) of Regulation No 883/2004 authorises the division of either the total amount of the benefits concerned, or the portion of the income which exceeds a ceiling in respect of overlapping of the various benefits considered. The competent institutions of the various Member States may therefore adopt different calculation methods.

63. In the light of all of the foregoing, I consider that Article 55(1)(a) of Regulation No 883/2004 must be interpreted as meaning that, if the receipt of benefits of a different kind entails the application of national rules to prevent overlapping with regard to independent benefits, it does not preclude national legislation under which the competent institutions, for the purposes of calculating the amount of the survivors' pension, divide the amount of income which exceeds a ceiling in respect of overlapping of the various pensions taken into account by the number of survivors' pensions impacted by the rules to prevent overlapping.

V. Conclusion

64. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium) as follows:

Article 55(1)(a) 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

must be interpreted as meaning that, if the receipt of benefits of a different kind entails the application of national rules to prevent overlapping with regard to independent benefits, it does not preclude national legislation under which the competent institutions, for the purposes of

[33] See proposal for a Council regulation (EC) 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 (COM(98) 547 final) (OJ 1998 C 325, p. 12). In its written observations, the Commission stresses that Article 37 of its proposal for a regulation was worded in similar terms to Article 46c of Regulation No 1408/71 and that the wording of Article 55(1)(a) of Regulation No 883/2004 is the result of negotiations during the legislative procedure.

[34] I note, in essence, that some authors follow a different interpretation according to which, in the context of the application of Article 55(1)(a) of Regulation No 883/2004, it is henceforth the aggregated amounts of the pensions, and no longer the reduced amounts, that are divided. See, in particular, Verschueren, H., 'Regulation 883/2004 and invalidity and old-age pensions', *European Journal of Social Security*, Vol. 11, 2009, Nos 1 and 2, p. 143 to 162, in particular, p. 159; Schuler, R., in Fuchs, M. and Cornelissen, R., *EU Social Security Law, A Commentary on EU Regulations 883/2004 and 987/2009*, Beck C.H. – Hart Publishing – Nomos, 2015, pp. 359 to 362, in particular, p. 361; and Lhernould, J.-P., 'Protection sociale et droit de l'Union européenne – Prestations servies dans le cadre des règlements de coordination (CE) nº 883/2004 et (CE) nº 987/2009' *Jurisclasseur Europe*, fasc. 618, 2023, paragraph 53.

[35] In his written observations, HK disputes the SFP's assertion by maintaining that the Finnish authorities did not apply Article 55(1)(a) of Regulation No 883/2004 when they granted him a survivors' pension.

[36] See point 32 of the present Opinion.

calculating the amount of the survivors' pension, divide the amount of income which exceeds a ceiling in respect of overlapping of the various pensions taken into account by the number of survivors' pensions impacted by the rules to prevent overlapping.