Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012*

(Protocol on the Statute of the European System of Central Banks and of the ECB — Article 36 — Protocol on the Privileges and Immunities of the European Communities — Articles 13, 15 and 23 — ECB Headquarters Agreement — Article 15 — Applicability to ECB staff of the provisions of German social welfare law providing for a parental allowance)

In Case C-62/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hessisches Landessozialgericht (Germany), made by decision of 4 February 2011, received at the Court on 10 February 2011, in the proceedings

Land Hessen

v

Florence Feyerbacher,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, K. Schiemann (Rapporteur), A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Feyerbacher, represented by herself,

— the German Government, by T. Henze, acting as Agent,

— the European Commission, by F. Clotuche-Duvieusart and B. Eggers, acting as Agents,

— the European Central Bank (ECB), by E. Carlini and M. López Torres, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

* Language of the case: German.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the Agreement of 18 September 1998 between the German Government and the European Central Bank on the Headquarters of the ECB (BGBl. 1998 II, p. 2745; 'the Headquarters Agreement'), in particular of Article 15 of that agreement, read in conjunction with Article 36 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (OJ 1992 C 191, p. 68), in the version annexed to the EC Treaty ('the Protocol on the Statute of the ESCB and of the ECB').

2 The reference has been made in the course of proceedings between Ms Feyerbacher and Land Hessen (the *Land* of Hesse, Germany) concerning a refusal to grant parental allowance.

Legal context

The Protocol on Privileges and Immunities

3 Article 13 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (JO 1967, 152, p. 13), in the version annexed to the EC and Euratom Treaties, applicable to the facts in the main proceedings ('the Protocol on privileges and immunities'), was worded as follows:

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

4 Article 15 of that protocol provided:

'The Council shall, acting unanimously on a proposal from the Commission, lay down the scheme of social security benefits for officials and other servants of the Communities.'

5 The first paragraph of Article 23 of that protocol was worded as follows:

'This Protocol shall also apply to the European Central Bank [ECB], to the members of its organs, and to its staff, without prejudice to the provisions of the Protocol on the Statute of the [ESCB and of the ECB].'

The Protocol on the Statute of the ESCB and of the ECB

6 Article 36(1) and (2) of the Protocol on the Statute of the ESCB and of the ECB, in the version applicable to the facts in the main proceedings, was worded as follows:

'36.1. The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2. The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.'

The Headquarters Agreement

7 According to the fifth paragraph of the preamble to the Headquarters Agreement, that agreement is intended to 'define the privileges and immunities of the [ECB] in the Federal Republic of Germany as laid down in the Protocol on the privileges and immunities of the European Communities'.

8 Pursuant to the sixth paragraph of that preamble, that agreement had been concluded, inter alia, 'in view of the necessity of putting the [ECB] in the Federal Republic of Germany in a position to achieve its objectives and perform its tasks fully and effectively'.

9 Under the heading 'Definitions', Article 1.9 of that agreement states:

'"Staff" means staff of the ECB within the meaning of Article 4c of Council Regulation (Euratom, ECSC, EEC) No 549/69 of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the privileges and immunities of the Communities apply (OJ, English Special Edition 1969 (I), p. 119), as amended by Council Regulation (EC, ECSC, Euratom) No 1198/98 of 5 June 1998 (OJ 1998 L 166, p. 3).'

10 Under the title 'Non-applicability of German labour and social welfare law', Article 15 of that agreement states:

'Pursuant to Article 36 of [the Protocol on the Statute of the ESCB and of the ECB], the conditions of employment of the members of the Executive Board and the employees of the ECB shall not be subject to either the substantive or the procedural labour and social welfare law of the Federal Republic of Germany'.

The Conditions of Employment of the ECB

11 Acting on, inter alia, the basis of Article 36(1) of the Protocol on the Statute of the ESCB and of the ECB, the Governing Council of the ECB adopted the 'Conditions of Employment for Staff of the European Central Bank' ('the ECB conditions of employment'). Article 9(a) and (c) of the ECB conditions of employment provides:

'Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the application of these Conditions of Employment.

...

No specific national law governs these Conditions of Employment. ...'

12 Articles 21, 24 and 36 of the ECB conditions of employment state that all the allowances referred to therein 'are complementary to any other allowances of the same nature provided by other sources. Members of staff shall claim and declare such allowances, which shall be deducted from those payable by the ECB'.

13 Under Article 29 of the ECB conditions of employment, ECB staff members are entitled to unpaid parental leave. Further, under Article 5(11) of the 'European Central Bank Staff Rules', parental leave can be for up to a maximum of three years per dependent child, although the same staff member cannot obtain, in total, more than six years of parental leave. During parental leave, the staff member retains, without paying the various relevant contributions, his or her right to allowances for the dependent child and to education allowances as well as to his or her entitlements to an invalidity

pension and to benefits paid in the event of death, and continues to be covered by the ECB pension scheme. Similarly, he or she continues, in return for payment of a contribution, to be covered by the ECB's health and accident insurance scheme.

German law

14 Paragraph 1(1) of the Federal Law on parental allowance and parental leave (Bundeselterngeld- und Elternzeitgesetz) of 5 December 2006 (BGBl. 2006 I, p. 2748; 'the BEEG') states:

'A person shall be entitled to parental allowance if

1. he is permanently or ordinarily resident in Germany,

2. lives in the same household as his child,

3. looks after and raises that child himself, and

4. has no or no full-time employment.'

15 The first sentence of Paragraph 3(3) of the BEEG provides as follows:

'Benefits similar to parental allowance which a person with an entitlement under Paragraph 1 of the present law may claim in a country other than Germany or against an international or supranational organisation shall be set off against parental allowance to the extent that they are payable for the same period and regulations adopted on the basis of the Treaty establishing the European Community do not apply.'

16 Under Paragraph 2(1) of the BEEG it is necessary, for the purpose of calculating the amount of the parental allowance, to 'take into consideration, … in accordance with the Law on Income Tax (Einkommensteuergesetz), the amount of positive income which is taxable in Germany'.

17 Paragraphs 30 and 31 of the first part of the Social Security Code — General Principles (Erstes Buch Sozialgesetzbuch — Allgemeiner Teil) provides:

'Paragraph 30

(1) The provisions of the present Code shall apply to all persons who have their domicile or habitual place of residence within the area to which this Code applies.

(2) This Code shall not prejudice provisions derived from international or supranational law …

Paragraph 31

The rights and obligations relating to the social benefits of the present Code may be determined, adopted, amended or repealed only if this is required or authorised by law.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Ms Feyerbacher is a German national and is resident in Germany, where she pursued an occupation in respect of which she was subject to German income tax and to the payment of German social security contributions.

19 Having, in the meantime, become a member of the staff of the ECB, Ms Feyerbacher received a salary which was subject to Community tax and, from the date on which she took up her duties, she was covered by the conditions of employment laid down by that institution and her salary was not subject to German income tax or to the payment of German social security contributions.

20 After the birth of her child on 5 September 2008, Ms Feyerbacher submitted an application to the German authorities for the parental allowance provided for by the BEEG.

21 Ms Feyerbacher claimed that Article 15 of the Headquarters Agreement, which deals with 'conditions of employment', did not in any way preclude the granting of such a benefit, as the parental allowance is funded, not through compulsory social security contributions from which that Article 15 has the effect of exempting ECB staff, but through tax revenue. Further, in the present case, she argued, there is no aggregation of benefits since the ECB does not pay any such allowance to her.

22 Ms Feyerbacher's application was rejected by decisions of the *Land* Hessen of 4 December 2008 and 8 January 2009 on the grounds that, pursuant to the provisions of the Protocol on the privileges and immunities and Article 15 of the Headquarters Agreement, ECB staff members are subject to European Union law, and not to German employment and social welfare law, with the result that Ms Feyerbacher, whose income is, moreover, not taxable in Germany, had no entitlement to the parental allowance.

23 By judgment of 30 September 2009, the Sozialgericht Frankfurt (Social Court, Frankfurt) (Germany) set aside the decisions of the *Land* Hessen and ordered the latter to pay to Ms Feyerbacher parental allowance for the first 12 months following the birth of her child.

24 An appeal against that judgment was brought before the Hessisches Landessozialgericht (Higher Social Court of Hesse, Germany), which takes the view that the conditions set out in Paragraph 1(1) of the BEEG have been met, with the result that Ms Feyerbacher should benefit from the parental allowance unless it can be established that entitlement to that allowance is, in the present case, excluded by virtue of a specific provision.

25 The referring court observes in this regard that Article 15 of the Headquarters Agreement, interpreted in the light of Article 36 of the Protocol on the Statute of the ESCB and of the ECB to which it refers, might, in principle, constitute such a specific provision.

26 However, that court finds that this could be the case only if, first, those provisions were to take precedence over the application of the conflict-of-law rules of German social welfare law. It would also be necessary to determine, in that regard, whether the Headquarters Agreement forms part of European Union law, and therefore takes precedence over national law, or whether it is an international agreement without supranational significance which, by virtue of the national legislation implementing that agreement, has the same rank as other formal German legislation.

27 Secondly, that court observes that, if it were to be assumed that Article 15 of the Headquarters Agreement takes precedence over German law, that provision could exclude Ms Feyerbacher from entitlement to the parental allowance only if the words 'conditions of employment', referred to in that provision and in Article 36 of the Protocol on the Statute of the ESCB and of the ECB, in its German-language version, were to be interpreted as meaning that all provisions of German law relating to social benefits are inapplicable to ECB staff, whether or not those benefits relate to social security or whether they are, as in the case of parental allowance, financed by taxation.

28 The Hessisches Landessozialgericht notes that doubts remain in that regard in so far as, interpreted literally, those words might refer only to the conditions subject to which the employment relationship is created or to the framework conditions of the employment contract, which may, in this case, include aspects of the employment relationship relating to the social security system, but not necessarily the social benefits funded by tax and linked to the principle of territoriality.

29 Thirdly, the Hessisches Landessozialgericht raises the question whether Article 15 of the Headquarters Agreement does indeed constitute a conflict rule designating the conditions of employment laid down by the ECB as being applicable, to the exclusion of the law of the State of residence of Ms Feyerbacher, and whether, in such a case, the judgment in Case C-352/06 *Bosmann* [2008] ECR I-3827 should not be interpreted as meaning that the Federal Republic of Germany remains free none the less to apply its legislation to the fullest extent where it does not prejudice the interested party but brings only additional benefits.

30 In that respect, that court asks, inter alia, whether the judgments in Case C-293/03 *My* [2004] ECR I-12013 and in Case C-185/04 *Öberg* [2006] ECR I-1453 are not such as to dictate such an approach, in particular given that the first of those judgments points out that, in the light of Article 10 EC, it cannot be accepted that national legislation can impede and, therefore, discourage the exercise of a professional activity within an institution of the European Union by depriving an employee of the enjoyment of social benefits to which he would have been entitled under his national scheme had he not undertaken such an activity. It is, however, necessary to determine whether the fact that ECB staff are exempt from German tax on wages, whereas the parental allowance is tax-funded, precludes transposition of that view to a case such as that at issue in the main proceedings.

31 In those circumstances, the Hessisches Landessozialgericht decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Is the [Headquarters Agreement] part of European Union law which takes precedence over national law or does it constitute an international treaty?

(2) Must Article 15 of the Headquarters Agreement, in conjunction with Article 36 of [the Protocol on the Statute of the ESCB and of the ECB], be interpreted restrictively, with the result that the applicability of German social security law conferring the benefit in question is excluded only where, pursuant to the “Conditions of Employment”, the ECB confers a comparable social benefit on its staff?

(3) If Question 2 is answered in the negative:

(a) Must the abovementioned provisions be interpreted as meaning that they preclude the application of a national provision which grants family benefits only on the basis of the territorial principle?

(b) Is the reasoning of the Court of Justice in Case C-352/06 *Bosmann* …, paragraphs 31 to 33, relevant to the application of the abovementioned provisions? Does Article 15 of the Headquarters Agreement, in conjunction with Article 36 of [the Protocol on the Statute of the ESCB and of the ECB] not deprive the Federal Republic of Germany of the power to grant family benefits to employees of the ECB resident in Germany?’

The questions referred for a preliminary ruling

32 By those questions, the referring court asks, in essence, whether Article 15 of the Headquarters Agreement, read in conjunction with Article 36 of the Protocol on the Statute of the ESCB and of the ECB, precludes the Federal Republic of Germany from being able to grant an allowance such as that at issue in the main proceedings.

33 As a preliminary point, it is appropriate to examine the German Government's argument that the fact that the European Union is not a party to the Headquarters Agreement renders the present reference for a preliminary ruling inadmissible.

34 That argument cannot, however, be upheld. It must be noted, in this regard, that it follows from the fifth paragraph of the preamble to the Headquarters Agreement that that agreement was concluded in order to define the privileges and immunities of the ECB in Germany as laid down in the Protocol on privileges and immunities. In that context, as the Commission and the ECB argue, Article 15 of the Headquarters Agreement merely implements principles established by the Protocol on privileges and immunities of the European Communities, inter alia in Articles 13, 15 and 23 thereof, and by the Protocol on the Statute of the ESCB and of the ECB, in particular in Article 36.

35 As regards the questions referred for a preliminary ruling, these concern, not a possible right of ECB staff to receive social service benefits offered by Member States, but rather the ability of the Member States to grant such benefits.

36 Pursuant to Article 13 of the Protocol on privileges and immunities, the salaries, wages and emoluments paid by the Communities to their officials and other servants are exempt from national taxes and are subject to tax levied by the Communities.

37 Article 15 of the Protocol on privileges and immunities provides that the Council, acting unanimously on a proposal from the Commission, is to lay down the scheme of social security benefits for officials and other servants of the Communities.

38 Under the first paragraph of its Article 23, the Protocol on privileges and immunities applies to the ECB, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the Statute of the ESCB and of the ECB.

39 Article 36(1) of the Protocol on the Statute of the ESCB and of the ECB provides that the Governing Council of the ECB, on a proposal from the Executive Board, is to lay down the conditions of employment of the staff of the ECB.

40 On the basis of the aforementioned provisions, the ECB adopted the ECB conditions of employment. Under those conditions, the salaries, wages and emoluments paid by the ECB to its staff are subject to a tax levied for the benefit of the Communities.

41 The ECB conditions of employment also establish a range of social benefits for ECB staff which are comparable to those normally provided by the Member States and include medical insurance, insurance against the risk of accident, of invalidity and of death, unemployment insurance, a personal pension scheme and a range of family allowances.

42 In particular, it is apparent from the file before the Court that the family allowances provided for by the ECB conditions of employment include a household allowance, a dependent child allowance, an educational allowance, a pre-school allowance and paid maternity leave of 20 weeks.

43 As is apparent from paragraph 12 of the present judgment, the ECB conditions of employment state that those allowances are not entirely independent of allowances from other sources.

44 It is in this context that the questions referred by the national court fall to be examined.

45 In that regard, while it is indeed true that Article 15 of the Headquarters Agreement precludes the State in which the headquarters are situated from imposing on ECB staff substantive or procedural obligations in order to receive the benefits provided for by the ECB conditions of employment, that article does not in any way whatsoever oblige the Federal Republic of Germany, as the State in which the headquarters are situated, to provide for the parental allowance at issue in the main proceedings to be granted to ECB staff (see, by analogy, *Bosmann*, paragraph 27, and Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] ECR I-0000, paragraph 45).

46 Likewise, that article does not deprive the Federal Republic of Germany, which does not make entitlement to such an allowance subject to conditions of employment or insurance, of the ability to grant that allowance to ECB staff members who reside in its territory, since the possibility of such a grant arises, in actual fact, from its legislation and the relevant provisions of European Union law do not exclude that possibility (see, by analogy, *Bosmann*, paragraphs 28, 31 and 32, and *Hudzinski and Wawrzyniak*, paragraphs 48 and 49).

47 With regard to the argument, relied on by the ECB and the Commission, that the ECB's autonomy in determining the conditions of employment means that the allowance at issue in the main proceedings cannot be paid to members of its staff, it is unclear how that payment could adversely affect the independent determination by the ECB of the scheme applicable to its staff.

48 In view of the foregoing, the answer to the questions referred is that Article 15 of the Headquarters Agreement, read in conjunction with Article 36 of the Protocol on the Statute of the ESCB and of the ECB, does not preclude the Federal Republic of Germany from being able to grant an allowance such as that at issue in the main proceedings.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 15 of the Agreement of 18 September 1998 between the German Government and the European Central Bank on the Headquarters of that institution, read in conjunction with Article 36 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, in the version annexed to the EC Treaty, does not preclude the Federal Republic of Germany from being able to grant an allowance such as that at issue in the main proceedings.

[Signatures]