Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 May 2013 *

(Article 45 TFEU — Regulation (EEC) No 1408/71 — Article 10 — Old-age benefits — Habitual residence in two different Member States — A survivor's pension received in one of those States and a retirement pension in the other — Withdrawal of one of those benefits — Recovery of benefits to which it is alleged the recipient was not entitled)

In Case C-589/10,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Poland), made by decision of 2 December 2010, received at the Court on 14 December 2010, in the proceedings

Janina Wencel

v

Zakład Ubezpieczeń Społecznych w Białymstoku,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič, J.-J. Kasel (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2012,

after considering the observations submitted on behalf of:

— the Zakład Ubezpieczeń Społecznych w Białymstoku, by K.M. Kalinowska, U. Kulisiewicz and A. Szybkie, acting as Agents,

— the Polish Government, by M. Szpunar, J. Faldyga and A. Siwek, acting as Agents,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the European Commission, by V. Kreuschitz and M. Owsiany-Hornung, acting as Agents,

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

* Language of the case: Polish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 20(2) TFEU and 21 TFEU and certain provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended most recently by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

2 The request has been made in proceedings between Mrs Wencel and the Zakład Ubezpieczeń Społecznych w Białymstoku (the Białystok section of the national social security institution) ('the ZUS') concerning her entitlement to a retirement pension.

Legal context

European Union legislation

3 Article 1(h) of Regulation No 1408/71 defines 'residence' as the place of habitual residence.

4 Under Article 6(b) of Regulation No 1408/71, the regulation is to replace, as regards persons and matters which it covers, the provisions of any social security convention binding at least two Member States.

5 Article 7 of Regulation No 1408/71, entitled 'International provisions not affected by this Regulation', includes, in paragraph 2(c) thereof, among the provisions which it states will continue to apply, 'certain provisions of social security conventions entered into by the Member States before the date of application of [that] Regulation provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III'.

6 The social security conventions which remain applicable under Annex III to Regulation No 1408/71 include, inter alia, the convention concluded by the People's Republic of Poland and the Federal Republic of Germany on pension and accident insurance (umowa r. między Polską Rzeczpospolitą Ludową a Republiką Federalną Niemiec o zaopatrzeniu emerytalnym i wypadkowym) on 9 October 1975 (Dz. U. of 1976, No 16, item 101), as amended ('the Convention of 9 October 1975'), under the conditions and in accordance with the rules laid down by Article 27(2) to (4) of the umowa polsko-niemiecka o zabezpieczeniu społecznym (German-Polish Convention on social security) of 8 December 1980 (Dz. U. of 1991, No 108, item 468).

7 Article 10 of Regulation No 1408/71, headed 'Waiving of residence clauses – Effect of compulsory insurance on reimbursement of contributions', provides in paragraph 1 thereof as follows:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pension[s] for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

…'

8 Article 12 of Regulation No 1408/71 provides as follows:

‘1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance …

2. Save as otherwise provided in this Regulation, the provisions of the legislations of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.’

9 Article 13(1) of Regulation No 1408/71 provides that ‘persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of … Title [II]’.

10 Article 13(2)(f) of Regulation No 1408/71 provides as follows:

‘Subject to Articles 14 to 17:

…

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him … shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.’

11 Article 46a of Regulation No 1408/71 is worded as follows:

‘1. For the purposes of this Chapter, overlapping of benefits of the same kind shall have the following meaning: all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance and/or residence completed by one and the same person.

2. For the purposes of this Chapter, overlapping of benefits of different kinds means all overlapping of benefits that cannot be regarded as being of the same kind within the meaning of paragraph 1.

3. The following rules shall be applicable for the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

…

(d) where provisions on reduction, suspension or withdrawal are applicable under the legislation of only one Member State on account of the fact that the person concerned receives benefits of a similar or different kind payable under the legislation of other Member States or other income acquired within the territory of other Member States, the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation or the income acquired within the territory of other Member States.’

The German-Polish Conventions

12 Article 4 of the Convention of 9 October 1975 provides as follows:

‘1. Retirement pensions are to be granted by the insurance institution of the State in whose territory the recipient resides, in accordance with the provisions applicable to such institution.

2. For the purpose of calculating pension entitlements under the rules applicable to the institution referred to in paragraph 1, periods of insurance, periods of employment and other similar periods completed in the other State shall be taken into account by that institution as if they had been completed in the territory of the first State.

3. The right to a pension as referred to in paragraph 2 exists only during the period of residence in the territory of the State whose insurance institution established the pension. During that period, a person in receipt of a pension shall not enjoy any rights, vis-à-vis the insurance institutions of the other State, in respect of period of insurance, periods of employment or other similar periods completed in that other State …’

13 Article 27(2) of the German-Polish Social Security Convention of 8 December 1990 provides that rights acquired up to 1 January 1991 in one of the States party to the Convention of 9 October 1975 will not be disputed, provided the recipient resides in the territory of that State.

Polish legislation

14 In Poland, retirement and other pensions are governed by the ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych (Law on retirement and other pensions provided by the Social Security Fund) of 17 December 1998, in its consolidated version (Dz. U. of 2009, No 153, item 1227) (‘the Law on retirement pensions’).

15 Article 114(1) of that law provides that the right to benefits and the amount thereof is to be reassessed at the request of the person concerned or on the institution’s own initiative where, after the decision on benefits has become final, new evidence is presented or circumstances existing before the decision was issued are disclosed which may affect the right to benefits or the amount thereof.

16 Under Article 138(1) and (2) of the Law on retirement pensions, any person who has received benefits to which they were not entitled is required to repay them. Benefits paid out in spite of circumstances justifying the cessation or suspension of the right to benefits or termination of benefits payments in full or in part, where the person receiving the benefits has been advised that they are not entitled to them, are to be regarded as benefits paid without entitlement.

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

17 Mrs Wencel, a Polish national born on 25 February 1930, has been registered since 1954 as resident in the city of Białystok (Poland). Her husband, also of Polish nationality, settled, after their marriage in 1975, in Frankfurt-am-Main (Germany), where he was registered as resident and had an established employment relationship entailing the payment of social security contributions. As from 1984, he received an incapacity pension in Germany. Mrs Wencel frequently went to Germany to see her husband, who spent all his holidays, including public holidays, in Poland.

18 According to a residence registration certificate issued by the municipality of Frankfurt-am-Main, Mrs Wencel was permanently resident in Germany as from 1984. She obtained a residence permit in Germany but never worked there. On the other hand, from 1984 to 1990 she was employed as a

childminder by her daughter-in-law in Poland. By decision of the ZUS of 24 October 1990, she acquired the right to a Polish retirement pension, by virtue of the insurance periods completed in Poland. Following the death of her husband in 2008, the German insurance institution granted Mrs Wencel a survivor's pension on the basis, inter alia, of her residence in Germany. She is currently living in Poland with her son, daughter-in-law and grandchildren.

19 In 2009, the ZUS was informed that Mrs Wencel was registered as resident in both Poland and Germany. Relying on a declaration of 24 November 2009, in which Mrs Wencel stated that she was resident in Germany but had spent all holidays, including public holidays, in Poland, the ZUS issued two decisions on the basis of Articles 114 and 138 of the Law on retirement pensions.

20 In its first decision, of 26 November 2009, the ZUS reversed the decision to grant a retirement pension of 24 October 1990 and suspended payment of that pension. According to the ZUS, under Article 4 of the Convention of 9 October 1975, an application for a retirement pension may be considered solely by the insurance institution of the State in which the applicant is resident. As Mrs Wencel had been permanently resident in Germany since 1975, she was not entitled to a retirement pension from the Polish insurance scheme. By its second decision, of 23 December 2009, the ZUS required Mrs Wencel to repay the sums received over the previous three years, to which it claimed she was not entitled.

21 On 4 January 2010, Mrs Wencel challenged both those decisions before the Sąd Okręgowy – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku (Labour and Social Security Chamber of the Regional Court, Białystok), alleging breach of provisions of European Union law on freedom of movement and residence. The fact that she had two places of habitual residence should not, in Mrs Wencel's view, deprive her of the right to a retirement pension in Poland. She also claimed that the declaration of 24 November 2009 had been written in haste under pressure from ZUS staff and does not therefore reflect the true position.

22 By judgment of 15 September 2010, that court dismissed the actions brought by Mrs Wencel on the ground that, even though an individual may be registered as resident in two different Member States, such a person is precluded, under Article 4 of the Convention of 9 October 1975, from having two separate centres of interests. The effect of the transfer of Mrs Wencel's centre of interests to Germany was to confer competence on the German insurance institution for pension purposes. Moreover, in spite of the advice contained in the decision granting her a retirement pension, Mrs Wencel omitted to inform the ZUS of her decision to leave Poland.

23 Mrs Wencel appealed against that judgment before the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku.

24 According to that court, it is apparent from Article 10 of Regulation No 1408/71 that a person resident in the territory of one Member State cannot be deprived of his entitlement to benefits accrued under the legislation of another Member State. Although that provision does not refer to the situation of a person who has two simultaneous habitual residences, it should be acknowledged that such a person is also covered by Article 10. After setting out all the factors militating in favour of a finding that Mrs Wencel did in fact have two simultaneous habitual residences and that, from 1975 to 2008, she spent half her time in Poland and the other half in Germany, the referring court concluded that Mrs Wencel's situation is atypical and that the failure on her part to submit a declaration concerning the transfer of her centre of interests may be explained by the fact that she genuinely considered that she had two places of residence of equal status for the purposes of Article 1(h) of Regulation No 1408/71.

25 The appeal court has doubts as to whether Mrs Wencel may be deprived of her entitlement to benefits on the sole ground that she has two habitual residences. According to that court, the decisions of the ZUS appear to be at odds with the principle of freedom of movement within the European Union.

26 Since, following the accession of the Republic of Poland to the European Union in 2004, the provisions of the Convention of 9 October 1975 are applicable, in accordance with Article 7(2)(b) of Regulation No 1408/71, only if they are no less favourable than the provisions of that regulation, Mrs Wencel's right to benefits should not, pursuant to Articles 20 TFEU and 21 TFEU and Article 10 of the regulation, be subject to any reduction by reason of the fact that, for over 30 years, she had two places of residence of equal status.

27 Moreover, the referring court asks whether a retirement pension may be withdrawn retroactively, even though the person concerned has not been informed of the requirement to notify the competent insurance institution of any factors which might affect that institution's decision when considering retirement pension applications.

28 In those circumstances the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Białymstoku decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the principle of freedom of movement and residence in the Member States of the European Union, as expressed in Articles 21 TFEU and 20(2) TFEU, mean that Article 10 of … Regulation … No 1408/71 … must be interpreted as meaning that old-age cash benefits acquired under the legislation of one Member State are not to be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient lived simultaneously (had two habitual residences of equal status) in the territory of two Member States, including one other than that in which the institution responsible for payment of the retirement pension is situated?

(2) Must Articles 21 TFEU and 20(2) TFEU and Article 10 of … Regulation … No 1408/71 … be interpreted as precluding the application of national provision Article 114(1) of the [Law on retirement pensions], in conjunction with Article 4 of the Convention of 9 October 1975 …, which entails re-examination of the case by the Polish pension institution and removal of the pension right of a person who, for many years, has had simultaneously two habitual residences (two centres of interests) in two countries now belonging to the European Union and who did not, prior to 2009, submit an application or declaration concerning the transfer of residence to one of those countries?

In the event that the answer is in the negative:

(3) Must Articles 20(2) TFEU and 21 TFEU and Article 10 of … Regulation No 1408/71 … be interpreted as precluding the application of national provision Article 138(1) and (2) of [the Law on retirement pensions], which entails the demanding by the Polish pension institution of repayment of a retirement pension in respect of the period of the last three years from a person who, from 1975 to 2009, had simultaneously two habitual residences (two centres of interests) in two countries now belonging to the European Union, where that person had not, at the time the application for the grant of a retirement pension was examined and after the pension was received, been advised by the Polish insurance institution of the need to inform it that he has two habitual residences in two countries and of the need to submit an application or declaration concerning the choice of an insurance institution in one of those countries as competent for the purpose of considering applications concerning retirement pensions?'

Consideration of the questions referred

Preliminary observations

29 In the light of the particular circumstances of the present case and the need to provide the referring court with a useful answer, it is necessary, as a preliminary issue, to determine whether and, if so, to what extent the provisions of Regulation No 1408/71 are applicable in a situation such as that in the main proceedings.

30 As regards, first, the applicability *ratione temporis* of Regulation No 1408/71, it should be noted that that regulation entered into force in Poland upon its accession to the European Union, namely on 1 May 2004.

31 In the present case, while Mrs Wencel acquired the right to a retirement pension by virtue of a decision of the ZUS of 24 October 1990, the fact nevertheless remains that that right was removed and Mrs Wencel was required to repay the sums received during the three previous years, to which, it was alleged, she was not entitled, as a result of the decisions of 26 November and 23 December 2009.

32 Consequently, it is the latter two decisions, issued after the accession of the Republic of Poland to the European Union, which are the subject of the dispute in the main proceedings.

33 Moreover, according to settled case-law, although Regulation No 1408/71, as new legislation concerning social security for migrant workers applicable in Poland with effect from 1 May 2004, was, in principle, valid at that point only for the future, it may nevertheless apply to the future effects of situations which came about during the period of validity of the old legislation (see, to that effect, Case C-290/00 *Duchon* [2002] ECR I-3567, paragraph 21 and the case-law cited).

34 Accordingly, the legality of the decisions of 26 November and 23 December 2009 must be assessed in the light of Regulation No 1408/71, in so far as the provisions of the conventions on social security are not applicable.

35 With regard, second, to the applicability *ratione materiae* of Regulation No 1408/71, it should be recalled that, under Article 7(2)(c) of that regulation, the provisions of social security conventions set out in Annex III to the regulation continue to apply, notwithstanding the provisions of Article 6 of the regulation, which provides that the regulation is to replace the provisions of any social security convention binding two or more Member States as regards persons and matters which it covers (Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 87).

36 As the Convention of 9 October 1975 is listed in Annex III to Regulation No 1408/71, it remains applicable, in principle, even after the entry into force in Poland of Regulation No 1408/71 if one of the two other conditions laid down in Article 7(2)(c) of the regulation is met, namely if the application of the provisions of the Convention of 9 October 1975 is more favourable to the beneficiaries or if the convention arises from specific historical circumstances and its effect is limited in time.

37 Accordingly, Regulation No 1408/71 continues to apply only to the extent that the bilateral conventions concluded before its entry into force do not impede its application (see, to that effect, Case 28/68 *Torrekens* [1969] ECR 125, paragraphs 19 to 21). However, an EU law provision which, like Article 7(2) of that regulation, gives precedence to the application of a bilateral convention, cannot have a purport that conflicts with the principles underlying the legislation of which it is part (see, by analogy, Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraph 51).

38 It follows that EU law may be applied not only to all situations which, in accordance with the requirements set out in Article 7(2) of Regulation No 1408/71, do not fall within the scope of the Convention of 9 October 1975 but also where the provisions of that convention are inconsistent with the principles on which the regulation is based.

39 Those principles, which underlie the provisions for the coordination of national social security legislation, are closely connected with freedom of movement for persons, the most important principle of which is that the activities of the European Union are to include, in particular, the abolition, as between Member States, of obstacles to freedom of movement for persons (see, to that effect, Case C-127/11 *van den Booren* [2013] ECR, paragraph 43 and the case-law cited).

40 Moreover, since Mrs Wencel has exercised her freedom of movement, her situation is governed by the principles on which Regulation No 1408/71 is based. Given that the international convention in question was not adopted for the purpose of putting those principles into effect, it is possible that, in a situation such as that in the main proceedings, it might undermine those principles.

41 It must therefore be concluded that Mrs Wencel's situation must be assessed on the basis of Regulation No 1408/71.

Consideration of the questions referred

42 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether EU law must be interpreted as meaning that a social security institution is entitled to withdraw, retroactively, the pension right of an insured person who, for many years, has had two habitual residences simultaneously in two different Member States, and to demand repayment of any pension to which, it is alleged, the person concerned is not entitled, on the ground that the insured person receives a survivor's pension in another Member State in the territory of which he has also been resident.

43 First, it is necessary to determine whether a person may legitimately, for the purposes of the application of Regulation No 1408/71, in particular Article 10 thereof, claim to have simultaneously two habitual residences in two different Member States.

44 Article 10 of Regulation No 1408/71 sets out the provisions concerning the waiver of residence clauses, in so far as it ensures that the competent State will be responsible for payment of social security benefits where the insured person resides or transfers his residence to a Member State other than that in which the institution responsible for payment is situated.

45 Since it is not possible, however, to ascertain on the basis of the wording of Article 10 of Regulation No 1408/71 whether it is permissible under the regulation to have two habitual residences in two different Member States, it must be borne in mind that the regulation establishes a system for the coordination of national social security schemes and lays down, in Title II, rules governing the determination of the legislation to be applied.

46 The Court has already held that those provisions are not only intended to ensure that the persons concerned are not left without social security cover because there is no legislation which is applicable to them (see, to that effect, Case 92/63 *Nonnenmacher* [1964] ECR 281, pp. 281, 287 and 288), but also to ensure that the persons concerned are subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid the complications which may arise from that situation (see, to that effect, Case 60/85 *Luijten* [1986] ECR 2365, paragraph 12).

47 The principle that the person concerned is to be subject to the social security scheme of only one Member State finds expression in particular in Article 13(1) (see, to that effect, inter alia, *Luijten*, paragraph 13) and Article 13(2)(f) of Regulation No 1408/71, as observed by the Advocate General at point 28 of his Opinion, as well as Article 14a(2) of the regulation (Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 12).

48 Since the system introduced by Regulation No 1408/71 uses the residence of the person concerned as the connecting factor for the determination of the legislation applicable, it cannot be accepted, without depriving the provisions referred to in the preceding paragraph of all practical effectiveness, that a person may have, for the purposes of Regulation No 1408/71, a number of habitual residences in different Member States.

49 That finding is supported by the Court's case-law on the concept of 'residence' for the purposes of European Union legislation applicable to social security schemes for migrant workers. Indeed, where a connection may be established between a person's legal position and the legislation of a number of Member States, the Court has held that the concept of the Member State in which a person resides refers to the State in which that person habitually resides and where the habitual centre of his interests is to be found (see, to that effect, Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 29 and the case-law cited).

50 The development in the case-law of a list of factors to be taken into consideration for the purpose of determining a person's habitual residence, which is now codified in Article 11(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), reflects the importance of establishing a single place of residence.

51 Consequently, it must be concluded that Article 10 of Regulation No 1408/71 must be interpreted as meaning that, for the purposes of the application of that regulation, a person cannot have simultaneously two habitual residences in two different Member States.

52 Second, in order to establish the competent institution for the purpose of calculating the pension rights of a person in a situation such as that of Mrs Wencel, it is for the national court to determine, in the light of all the relevant evidence before it, the Member State in which the habitual residence of the person concerned is situated, within the meaning of the case-law cited above.

53 It should be noted in that regard, first, that the applicant worked in Poland and that her work was connected with a family relationship she had there.

54 Next, the applicant was granted, with effect from 1990, a retirement pension on the basis of the contributions made by her for that purpose in Poland.

55 Lastly, it is for the national court to determine whether the declaration made by Mrs Wencel in 2009, at the request of the ZUS, to the effect that she was resident in Germany, is at variance with the facts, in particular in the light of the fact that, at the very least since the death of her husband in 2008, her centre of interests appears to have shifted, now being located solely in Poland.

56 On the assumption that the competent institution is located in that Member State on account of the fact that the person concerned is resident there, it is necessary, thirdly, to ascertain whether that institution may legitimately withdraw, retroactively, her pension entitlement and require her to repay any pension to which it is alleged she was not entitled, on the ground that she receives a survivor's pension in another Member State in whose territory she had also been resident.

57 As regards overlapping benefits, it should be noted, first, that under Article 12(1) of Regulation No 1408/71, the regulation can neither confer nor maintain, in principle, the right to several benefits of the same kind for one and the same period of insurance.

58 In so far as it transpires, as is apparent from the written observations submitted to the Court, that the Polish retirement pension received by Mrs Wencel in Poland was calculated on the basis of her employment record in that Member State and that the German survivor's pension is paid to her on account of the employment record of her late husband in Germany, those two benefits cannot be considered to be benefits of the same kind (see, to that effect, Case 197/85 *Stefanutti* [1987] ECR 3855, paragraph 13; Case C-366/96 *Cordelle* [1998] ECR I-583, paragraphs 20 and 21; and *van den Booren*, paragraphs 32 and 33).

59 Second, it is apparent from Article 12(2) of Regulation No 1408/71 that provisions on reduction laid down in the legislation of a Member State may, unless that regulation provides otherwise, be invoked 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 (Case C-107/00 *Insalaca* [2002] ECR I-2403, paragraph 22).

60 Consequently, Regulation No 1408/71 does not preclude the application of national legislation which has the effect of reducing the amount of the pension which the insured person may claim on the basis that that person is entitled to old-age benefits in another Member State, provided the limits imposed by Regulation No 1408/71 are observed.

61 Those limits are imposed, inter alia, by Article 46a(3)(d) of Regulation No 1408/71, which provides that the benefit payable under the legislation of the first Member State may be reduced only within the limit of the amount of the benefits payable under the legislation of the other Member State.

62 It follows from the foregoing that Mrs Wencel's Polish old-age pension cannot be withdrawn retroactively on the ground that she receives a German survivor's benefit. However, that pension may be reduced, up to the limit of the amount of the German benefits, on the basis of any Polish rule precluding the cumulation of benefits. It is for the referring court to ascertain whether such a rule exists in the present case.

63 If such a rule exists in the Polish legal system, the application of which is not precluded by Regulation No 1408/71, it will also be necessary to verify whether the provisions of the FEU Treaty preclude such application.

64 As already pointed out at paragraph 37 above, the interpretation of Regulation No 1408/71 thus arrived at is to be understood without prejudice to the outcome which might result were the provisions of primary law found to be applicable. The finding that a national measure may be consistent with a provision of a secondary law measure, in this case Regulation No 1408/71, does not necessarily have the effect of removing that measure from the scope of the Treaty's provisions (Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 66 and the case-law cited, and *van den Booren*, paragraph 38).

65 It is in that context that the national court has referred the questions for a preliminary ruling in the light of European Union primary law, in particular Articles 20(2) TFEU and 21 TFEU.

66 It is clear that Mrs Wencel's situation falls within the scope of Article 45 TFEU.

67 To the extent that the case in the main proceedings falls within the scope of that provision, it is not necessary to rule on the interpretation of Articles 20(2) TFEU and 21 TFEU. Those provisions, which set out generally the right of every citizen of the European Union to move and reside freely within the

territory of the Member States, find specific expression in Article 45 TFEU in relation to freedom of movement for workers (see, to that effect, Case C-379/11 *Caves Krier Frères* [2012] ECR, paragraph 30 and the case law cited).

68 In that regard, it is sufficient to note that Article 45 TFEU gives effect to a fundamental principle under which, in particular, the activities of the European Union are to include the abolition, as between Member States, of obstacles to freedom of movement for persons (*van den Booren*, paragraph 43 and the case-law cited).

69 As a result, European Union law militates against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Member State nationals of the fundamental freedoms guaranteed by the Treaty (*van den Booren*, paragraph 44 and the case-law cited).

70 National measures of that kind may be allowed only if they pursue a legitimate objective in the public interest, are appropriate for the purpose of ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (*van den Booren*, paragraph 45 and the case-law cited).

71 Accordingly, it is for the national court to assess the compatibility of the rules of national legislation at issue with the requirements of European Union law by determining whether the rule requiring the withdrawal of a pension entitlement and the repayment of sums to which, it is claimed, the person concerned was not entitled, which applies without distinction to Polish nationals and to nationals of other Member States, does not in fact lead, in respect of the person concerned, to an unfavourable situation in comparison with that of a person whose situation has no cross-border element, and, if such a disadvantage is established in the present case, whether the national rule at issue is justified by objective considerations and is proportionate to the legitimate objective pursued by national law (*van den Booren*, paragraph 46).

72 In carrying out that examination, the referring court should also bear in mind that the principle of cooperation in good faith laid down in Article 4 TFEU requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 45 TFEU (see *van Munster*, paragraph 32, and *Leyman*, paragraph 49).

73 In the light of the foregoing considerations, the answer to the questions referred is as follows:

— Article 10 of Regulation No 1408/71 must be interpreted as meaning that, for the purposes of the application of the regulation, a person cannot have simultaneously two habitual residences in two different Member States;

— under the provisions of Regulation No 1408/71, in particular Articles 12(2) and 46a, the competent institution of a Member State cannot, in circumstances such as those in the main proceedings, legitimately withdraw, retroactively, the entitlement to a retirement pension of the person concerned and require that person to repay any pension to which it is alleged he was not entitled on the ground that he receives a survivor's pension in another Member State in whose territory he has also been resident. However, the amount of the retirement pension paid in the first Member State may be reduced, up to the limit of the amount of the benefits received in the other Member State, by virtue of the application of any national rule precluding the cumulation of benefits;

— Article 45 TFEU must be interpreted as not precluding, in circumstances such as those in the main proceedings, a decision requiring the amount of the retirement pension paid in the first Member State to be reduced, up to the limit of benefits received in the other Member State, by virtue of the application of any rule precluding the cumulation of benefits, provided that decision does not lead, in respect of the recipient of those benefits, to an unfavourable situation in comparison with

that of a person whose situation has no cross-border element and, where such a disadvantage is established, provided that it is justified by objective considerations and is proportionate to the legitimate objective pursued by national law, which it falls to the national court to verify.

Costs

74 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 (First Chamber) hereby rules:

Article 10 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended most recently by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, must be interpreted as meaning that, for the purposes of the application of the regulation, a person cannot have simultaneously two habitual residences in two different Member States.

Under the provisions of Regulation No 1408/71, in particular Articles 12(2) and 46a, the competent institution of a Member State cannot, in circumstances such as those in the main proceedings, legitimately withdraw, retroactively, the entitlement to a retirement pension of the person concerned and require that person to repay any pension to which it is alleged he was not entitled on the ground that he receives a survivor's pension in another Member State in whose territory he has also been resident. However, the amount of the retirement pension paid in the first Member State may be reduced, up to the limit of the amount of the benefits received in the other Member State, by virtue of the application of any national rule precluding the cumulation of benefits.

Article 45 TFEU must be interpreted as not precluding, in circumstances such as those in the main proceedings, a decision requiring the amount of the retirement pension paid in the first Member State to be reduced, up to the limit of the benefits received in the other Member State, by virtue of the application of any rule precluding the cumulation of benefits, provided that decision does not lead, in respect of the recipient of those benefits, to an unfavourable situation in comparison with that of a person whose situation has No cross-border element and, where such a disadvantage is established, provided that it is justified by objective considerations and is proportionate to the legitimate objective pursued by national law, which it falls to the national court to verify.

[Signatures]