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LEGAL CASES BEFORE THE EUROPEAN COURT OF JUSTICE IN CONNECTION WITH THE FINANCES OF THE OLD-AGE PENSIONS IN THE COORDINATION REGULATIONS *

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1. Introduction

Freedom of movement of workers is one of the founding principles of the European Community, as laid down in Article 39 of the EC Treaty. It is a fundamental right of individuals, and an essential element of European citizenship. Free movement of workers entitles EU citizens to search for a job in another Member State, to work there without needing a work permit, to live there for that purpose, to stay there even after the employment has finished and to enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages that may help them integrate in the host country.

It is estimated that there are 10.5 million migrant workers in the EU, one million people crossing EU borders for work every day and about 250,000 people who have worked in more than one Member State and need to export a part of their pension rights every year.

Ensuring the right of social security when the right of freedom of movement is exercised has been one of the major concerns for the EU Member States. To achieve this, it was necessary to adopt social security measures which prevent EU citizens working and residing in a Member State other than their own from losing some or all of their social security rights. This contributes to improving the standard of living of the migrant persons.

Recognizing the importance of this issue, the Council adopted two regulations on social security for migrant workers in 1958, Regulations 3/1958 and 4/1958, which were replaced by Regulation (EEC) No. 1408/71, supplemented by Implementing Regulation (EEC) No. 574/72. Nationals from Iceland, Liechtenstein and

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Norway are also covered by way of the European Economic Area (EEA) Agreement, and from Switzerland by the EU-Swiss Agreement.

In 2004, Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems was adopted to replace Regulation (EEC) No. 1408/71. On 16 September 2009, Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for Implementing Regulation (EC) No. 883/2004 on the coordination of social security systems was adopted to replace Regulation (EEC) No. 574/72.

The EU provisions on social security coordination do not replace national social security systems with a single European one. Such a harmonization would not be possible, as the social security systems of the Member States are the result of long-standing traditions deeply rooted in national culture and preferences. Hence, rather than harmonizing the national social security systems, the EU provisions provide for their coordination. Every Member state is free to decide who is to be insured under its legislation, which benefits are granted and under what conditions, how these benefits are calculated and what contributions should be paid.

The *coordination provisions* establish common rules and principles which have to be observed by all national authorities, social security institutions, courts and tribunals when applying national laws. By doing so, they ensure that the application of different national legislations does not adversely affect persons exercising their right to move and to stay within EU Member States. In other words, a person who has exercised the right to move within Europe may not be placed in a worse position than a person who has always resided and worked in one single Member State. A migrant worker could face problems due to the fact that in some Member States, access to social security coverage is based on residence, whilst in others only persons exercising an occupational activity (and the members of their families) are insured. In order to avoid a situation where migrant workers are either insured in more than one Member State or not at all, the coordination provisions determine which national legislation applies to a migrant worker in each particular case.[1]

The principles of coordination of social security systems which were first established by the EU rules in 1957 remain the same today, though the text of the regulations has been changed several times. These principles are:

- only one legislation applicable;
- equality of treatment;
- aggregation of the insurance, residence or work periods; and
- export of benefits.

In the new Regulation a new principle has been added – namely, the principle of good administration. This refers to the obligation of the institutions of Member States to cooperate with one another and provide mutual assistance for the benefit

[1] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 1.

of citizens. Since 1 May 2010 the legislation in force in the field of coordination of social security systems in the EU includes:

- Regulation (EC) No. 883/2004 of the European Parliament and of the Council on the coordination of social security systems, as amended by Regulation (EC) No. 988/2009, hereinafter called the new Regulation;
- 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, hereinafter called the Implementing Regulation; and,
- Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.[2]

The objectives of the modernized EU social security coordination can be summarized as follows:

Extension of coverage in respect of the number of persons covered, the scope of coverage, and areas of social security covered. The population covered by the Regulation will include all nationals of Member States who are covered by the social security legislation of a Member State. This means that not only employees, self-employed persons, civil servants, students and pensioners will be protected by the coordination rules, but also persons who are not part of the active population. This simplifies and clarifies the rules determining the legislation applicable in cross-border situations;

The material coverage of the Regulation is extended to statutory pre-retirement schemes. This means that the beneficiaries of such schemes will be guaranteed payment of their benefits, covered for medical care and entitled to receive family benefits even when they are residents of another Member State;

Amendment of certain provisions relating to unemployment, including retention for a certain period (three months which can be extended to a maximum of six months) of the right to receive unemployment benefit by persons moving to another Member State in order to seek for employment;

Strengthening of the general principle of equal treatment;

Strengthening of the principle of exportability of benefits, meaning that insured persons temporarily staying in another Member State will be entitled to health care which may prove medically necessary during their stay;

Introduction of the principle of good administration, which places an obligation on the institutions of Member States to cooperate with one another and provide mutual assistance for the benefit of citizens.[3]

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[2] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 2.

[3] Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No. 883/2004 and its Implementing Regulation No. 987/2009, International Labour Organization 2010. p. 4.

2. Theoretical background of the old-age pensions in the coordination regulations

As defined in Article 1(w) of the new Regulation, "pension", covers not only pensions but lump-sum benefits. These can be substituted for pensions and payments in the form of reimbursement of contributions or for revaluation increases or supplementary allowances, subject to the provisions of Title III. The coordination of pensions is regulated by Title III, Chapter 5, Articles 50–60 of the new Regulation and Title III, Chapter IV, Articles 43–53 of the Implementing Regulation. The legislation states that people who have worked professionally in the territory of two or more Member States are allowed to retain their accrued benefits under the pension insurance legislation. There are no major changes in the rules of the coordination of pensions in the EU. The principles of the calculation of pensions remain almost the same as those in Regulation (EEC) No. 1408/71.

Basic principles of the coordination of the old-age pensions

The legal regulations for gaining an entitlement to an old-age pension differ from Member State to Member State. If the insured person ceases working in one Member State and continues working in another Member State, the insurance contributions paid in the first State are not transferred to the latter State. This means that the entitlement to a pension originates only towards the State where the claimant participated in pension insurance.

An entitlement of the insured person to an old-age pension may arise in the individual Member States as of different dates. This fact is given primarily by a different pensionable age in these Member State.

Therefore, the European law leaves the different national legislations on pensions unchanged; however, it replaces those provisions which are unfavourable for migrant persons and determines its own rules — coordination rules for these cases. The following two basic principles of social security coordination are most of all applied in the field of pension benefits:

a) Aggregation of periods of insurance. The basic principle is an aggregation of periods of insurance for the purposes of gaining entitlement to benefit. Its purpose is to exclude the unfavourable impact of the situation when a person who had been insured in several States does not fulfil the condition of the required insurance period in some of them (or in any of them). In this case, a Member State shall take into consideration periods gained in other Member States — and the periods before the accession of Hungary to the EU, too, prior to 1st May, 2004 — for gaining the entitlement to benefit.[4]

[4] The aggregation of insurance periods shall take into account periods of insurance or residence completed in the legislation of another Member State. There are also special provisions on the aggregation of periods for different situations, i.e. in a specific activity, in an occupation which is subject to a special scheme for employed or self-employed persons (Articles 6 and 51 of the new Regulation, Articles 12 and 13 of the Implementing Regulation) and specific provisions for civil servants (Article 60 of the new Regulation). Article 44 of the Implementing Regulation outlines the rules for taking child raising-periods into account when calculating a pension.

There is a special provision if the person concerned is insured in a Member State for an insurance period shorter than one year. In this case the State concerned is not obliged to award a pension, unless the entitlement to it arises from its national legislation.[5]

According to the principle of the aggregation of periods of insurance, the same period can be taken into account only once. This means that persons who during their previous employment abroad paid contributions to the Hungarian pension insurance in Hungary and were simultaneously insured in a foreign social insurance scheme can expect that this period will be considered only once when the pension is awarded.[6]

b) The export of (pension) benefits. The old-age pension will be paid to the claimant regardless of where he/she stays or resides within the European Union or the European Economic Area without the any reduction, modification or suspension. Pensions are paid after the announcement of the claim and the calculation of the benefit by the Member States concerned. Each Member State which is obliged to award partial pension shall pay benefits. According to the portability principle, if the entitled person leaves the territory of the Member State of payment and moves to another Member State, cash benefits — with special respect to pensions — will be paid to the territory of the other Member State, according to the principle of the export of benefits. [7]

Claiming the benefit

When a person claims a benefit in a Member State, all of the institutions of other Member States where the person carried out their activity must start the procedure of establishing rights and calculating benefits for that person unless the person expressly requests that the award of old-age benefits under the legislation of one or more Member States be deferred.[8] The institutions have to advise the person on the consequences of deferment in order to assess whether to exercise the right or not.[9]

Calculation of benefits

Every Member State first calculates the amount of benefits due under national legislation, taking into account the anti-overlapping provisions. Then, every Member State calculates the *pro-rata pension* amount due. Each State is to grant the higher amount between the two benefits.[10]

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5 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 123.

6 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 124.

7 Hajdú, József: Coordination of the old-age pension in the EU In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 124.

8 Article 50 of the new Regulation.

9 Article 46(2) of the Implementing Regulation.

10 Article 56(1) (a) of the new Regulation.

Pro-rata calculation of a pension requires that the institution calculate the amount of the pension which the person could claim if all periods of insurance or residence had been completed under its legislation when the periods completed under all periods under all Member State legislations is longer than the maximum period required to receive full benefit. This is limited to the maximum benefit amount under its legislation.[11]

Member States may waive the pro-rata pension calculation if certain conditions are fulfilled, as mentioned in Article 52(4) of the new Regulation. In part 1 of Annex VIII, Member States may list their schemes providing benefits in which periods of time are of no relevance to the calculation, and in these cases can waive the pro-rata calculation.

Period of insurance for less than a year

If a person has been insured in a Member State for less than one year and this Member State does not grant a pension, another Member State may not waive the pro-rata calculation, as I mentioned earlier. To guarantee that this period is not lost, the new Regulation takes into account the existence of "funded" schemes and schemes based on pension accounts simulating capitalized schemes. Article 52(5) of amended Regulation (EC) No. 883/2004 provides that the pro-rata calculation shall not apply to schemes providing benefits in which periods of time are of no relevance to the calculation.

Article 51 regarding the aggregation of periods has also been added here, explaining how the benefit is calculated in the case of special schemes.

The institution of a Member State is not required to grant a benefit if the total periods completed under its legislation do not reach a year, and if no entitlement to a benefit is created under its legislation. The institutions of the other States concerned take those periods into account only for the calculation of the theoretical pension.[12]

For the calculation of a person's benefit, their earnings under the legislation of the institution paying the pension will be taken into account.[13]

Any benefit paid by the institution of a Member State can be reviewed when the rights were exercised under the legislation of another Member State or when the worker asked for deferment under the legislation of another Member State. This cannot be done if the periods have already been taken into account for the initial calculation.[14]

Rules to prevent overlapping

The coordination regulations establish specific rules to prevent the overlapping of benefits (of the same or of a different kind) calculated or provided on the basis of the same insurance, employment or residence periods.[15]

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11 Article 56(1) (a) of the new Regulation.
12 Article 57 of the new Regulation.
13 Article 56(1) (c) of the new Regulation
14 Article 50(4) of the new Regulation.
15 Articles 53–55 of the new Regulation.

Complement for the minimum pension

If the total amount of an insured's pension is less than the minimum pension in their country of residence, the amount of the pension in their country of residence is increased so that the total reaches the minimum pension in that State.[16]

Provisional instalments and advance payments of benefits

If while investigating a claim for benefits the institution establishes that the claimant is entitled to an independent benefit under the applicable legislation, it will pay that benefit provisionally. That payment shall be considered provisional if the amount may be affected by the result of the claim investigation procedure. Each institution paying the provisional benefits or advance payments are to inform the claimant without delay of the provisional nature of the measure and of any rights of appeal the claimant has in accordance with its legislation.

Calculation of old-age pension benefits — Dual calculation system

Claims are judged by the competent institution in each Member State pursuant to national legislation and the provisions of the Regulation. If the claimant has entitlement according to the national legislation of the given Member State, the pension is calculated with the so called double calculation:
1. The claimant has entitlement to national pension
A) The benefit payable according to the national legislation is calculated on the basis of the period of insurance completed in that Member State and the average earnings. This is called theoretical pension.
B) The proportional part of the pension is calculated according to the following (pro rata pension):
a) the sum of the theoretical pension is calculated; this is the pension which would be paid if the claimant had completed all his/her periods of insurance in the given Member State; and
b) the proportional part of the pension is calculated, which reflects the proportion of the period of service completed in the given Member State to the entire period of insurance.
The more favourable pension of the two — that is the higher amount — shall be awarded and paid.
2. *If the claimant has no entitlement to national pension,* different rules are to be applied. In this case only the proportional pension (pro rata temporis) can be calculated. The pension from each Member State shall be paid to the claimant according to national legislation.[17]

[16] Article 58 of the new Regulation.
[17] HAJDÚ, József: Coordination of the old-age pension in the EU. In: *Emlékkönyv Román László születésének 80. évfordulójára.* Pécs, 2008, p. 125.

3. Case law in connection with the calculation of the pensions

3.1. Manzoni-case[18]

This case is on the interpretation of Article 51 of the EEC Treaty and Article 46(3) of regulation No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

Two questions have been referred in the context of an action concerning the way in which the competent Belgian institution calculated the invalidity pension of an Italian national, the plaintiff in the main action, who worked first in Italy and then in Belgium as an underground worker in the mines. In Belgium that worker satisfied all the conditions laid down by the national legislation for entitlement to an invalidity pension under the scheme for mineworkers. On the other hand, for his entitlement to benefit in Italy, he had to have recourse to the provisions of article 45 of regulation No. 1408/71; for the purposes of calculating that benefit, the periods actually completed in both member states were aggregated and the Italian benefit was apportioned. Relying on the rule for the limitation of benefits laid down by article 46(3) of regulation no 1408/71, the Belgian institution believed it could reduce the invalidity pension by the amount of the apportioned Italian benefit and claimed repayment of the amount overpaid.

The Court decided, that the Article 46(3) of regulation No. 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on benefits acquired in different member states by a reduction in the amount of a benefit acquired under the national legislation of a member state alone.

Salgado González case[19]

By order of 9 May 2011, received at the Court on 6 June 2011, the Tribunal Superior de Justicia de Galicia (Spain) referred to the Court for a preliminary ruling four questions on the interpretation of Council Regulation (EEC) No. 1408/71 of 14 June 1971, as amended by Council Regulation (EC) No. 1791/2006 of 20 November 2006. (Regulation No. 1408/71) and 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 as amended by Regulation (EC) No. 988/2009 of the European Parliament and of the Council of 16 September 2009 (Regulation No. 883/2004).

According to the Spanish national law, Article 161(1) (b) of the General Law on Social Security makes entitlement to an old-age pension conditional upon, inter alia, having paid contributions for at least 15 years. Article 162(1) of the General Law on Social Security provides that 'the basis for determination of the retirement pension, under the contributory scheme, will be the quotient given by dividing by

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[18] Judgment of the Court of 13 October 1977. — Renato Manzoni v Fonds national de retraite des ouvriers mineurs. — Reference for a preliminary ruling: Tribunal du travail de Charleroi — Belgium. — Case 112–76.

[19] Case C-282/11 Concepción Salgado González v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

210 the contribution bases of the interested party during the 180 months immediately before the month preceding the operative event'.

Ms Salgado González made contributions in Spain to the Special Scheme for Self-Employed Persons (Régimen Especial de Trabajadores Autónomos), for a total of 3711 days, from 1 February 1989 to 31 March 1999, and in Portugal for a total of 2,100 days, from 1 March 2000 to 31 December 2005.

Ms Salgado González applied for a retirement pension in Spain, which was granted from 1 January 2006. In calculating Ms Salgado González's pension, the INSS added her Spanish contribution bases from 1 April 1984 to 31 March 1999, which relate to the 15 years immediately preceding payment of her last contribution to the Spanish social security. The INSS then divided those contribution bases by a divisor of 210 (which corresponds to the number of ordinary monthly contributions and of extraordinary annual contributions paid during 180 months or 15 years) in accordance with Article 162(1) of the General Law on Social Security. This resulted in a 'base reguladora' or a basis for determination. Given that Ms Salgado González only started contributing to the Spanish social security from 1 February 1989, the contribution bases for the period 1 April 1984 to 31 January 1989 were calculated by the INSS as 0, thus leading to a reduction of her basis for determination (base reguladora).

Ms Salgado González's basis for determination was eventually fixed at EUR336.83 per month. The basis for determination (base reguladora) for 1 April 1984 to 31 March 1999 was then reduced by multiplying it by 53%, corresponding to Ms Salgado González's years of contribution and also by 63.86% corresponding to a pro rata temporis for Spain.

Having exhausted the preliminary administrative route, Ms Salgado González brought an action before the Juzgado de lo Social (Social Court) No. 003, Ourense, claiming differences in retirement pension. The Juzgado de lo Social dismissed her application. That decision was appealed by Ms Salgado González to the referring court.

The referring court in the order for reference notes that in calculating the basis for determination (base reguladora), the INSS relied on Heading H, paragraph 4 (Spain), of Annex VI to Regulation No. 1408/71 combined with Article 162(1) of the General Law on Social Security. It is this combined application that has given rise to doubts on behalf of the referring court.

The questions were raised in proceedings brought by Ms Salgado González against the *Instituto Nacional de la Seguridad Social* (National Social Security Institute, "the INSS") and the *Tesorería General de la Seguridad Social* (General Social Security Fund, "the TGSS") concerning the calculation of Ms Salgado González's old-age pension. The referring court seeks clarification on whether the application of certain provisions of Regulation No. 1408/71 or Regulation No. 883/2004 in conjunction with Article 162(1) of the Spanish General Law on Social Security (la Ley General de la Seguridad Social) leads to an undue reduction of the pension of a self-employed migrant worker.

The Court answered the questions referred by the Tribunal Superior de Justicia de Galicia (Spain) for a preliminary ruling as follows: Where a self-employed migrant

worker has insurance contributions in one or more Member States for a period equal to or in excess of a reference period provided by Spanish legislation, Article 46(2) (a) and Article 47(1) (g) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Heading H, paragraph 4 (Spain), of Annex VI of Regulation No. 1408/71 preclude the calculation of that worker's theoretical Spanish benefit on the basis of his actual Spanish contributions, during the years immediately preceding payment of his last contribution to the Spanish social security, where the sum thus obtained is divided by a divisor, corresponding to the number of ordinary monthly contributions and extraordinary annual contributions payable over the reference period, which fails to take account of the fact that the worker exercised his right to free movement.

3.2. Salgado Alonzo case[20]

This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 39 EC and 42 EC and of Articles 45 and 48(1) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Council Regulation (EC) No. 1606/98 of 29 June 1998.

Mrs Salgado Alonso, who was born on 30 May 1936, applied to INEM on 7 August 1992 for the special unemployment allowance for unemployed persons over 52 years of age. At the time, she was able to establish actual periods of insurance of 74 months — more than six years — under German legislation, between 29 June 1964 and 30 July 1970, of 26 months under Swiss legislation, between 1 December 1971 and 31 March 1975, and 182 days under Spanish legislation, between 8 January and 7 July 1992.

The INEM[21] initially refused to grant her the special unemployment allowance, on the ground that she had not completed in Spain the necessary minimum qualifying period of 15 years.

Mrs Salgado Alonso thereupon brought proceedings against that decision before the Juzgado de lo Social n o 2 de Orense (Social Court No. 2, Orense, Spain), which by judgment of 22 June 1993 ruled that she was entitled to that allowance. INSS and TGSS and the Spanish Government explain that judgment essentially by reference to the fact that, in accordance with the Spanish case-law at the time, even qualifying periods of shorter duration completed abroad were recognised as equiva-

[20] Case C-306/03 Cristalina Salgado Alonso v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS).

[21] The Instituto Nacional de Empleo (National Institute of Employment, 'INEM').

lent to the qualifying period of 15 years required by Article 161(1) (b) of the General Social Security Law.[22]

Mrs Salgado Alonso thus received the unemployment allowance for unemployed persons over 52 years of age from 7 August 1992 to 30 May 2001, that is, a period of 3 219 days during which old-age insurance contributions were paid on her behalf by INEM. In May 2001, on reaching the age of 65, Mrs Salgado Alonso applied for the award of the pension she was entitled to under the German, Swiss and Spanish social security schemes. While she was granted pensions in Germany and Switzerland, INSS, by decision of 21 March 2002, rejected her application on the ground that she had not completed in Spain the minimum contribution period necessary for acquiring the right to a pension and that Article 46(2) of Regulation No. 1408/71 on the aggregation of periods of insurance was not applicable, in accordance with Article 48(1) of that regulation, since the period of insurance completed in Spain was less than one year. INSS also based its refusal on the 28th Additional Provision of the General Social Security Law. On 13 February 2002, Mrs Salgado Alonso brought proceedings against INSS and TGSS before the Juzgado de lo Social n o 3 de Orense (Social Court No. 3, Orense), seeking a declaration that she was entitled to receive a retirement pension under the Spanish legislation from 31 May 2001.

In support of her application, she submitted essentially that there should be taken into consideration not only the initial period of 182 days of contribution she had completed in Spain but also the entire period during which INEM had paid contributions on her behalf to the statutory old-age insurance scheme while she was receiving the special unemployment allowance, so that she could now rely in Spain on a total of 3 401 days of contribution, a period of more than nine years and three months of contribution.

The INSS, in applying both Heading H, paragraph 4 (Spain), of Annex VI to Regulation No. 1408/71 and Article 162(1) of the General Law on Social Security, adds the actual contributions of the insured person during the 15 years immediately preceding the last contribution to the Spanish social security, and divides the sum by 210.

The Court (Second Chamber) decided as follows: Articles 39 EC and 42 EC and Article 45 of Regulation No. 1408/71, in the version amended and updated by Regulation No. 118/97, as amended by Regulation No. 1606/98, must be interpreted as not precluding a national provision which does not allow the competent authorities of a Member State to take into consideration, for the purposes of acquiring the right to a retirement pension under the national scheme, certain periods of insurance completed on the territory of that State by an unemployed worker during which contributions to old-age insurance were paid by the unemployment benefit

[22] That national case-law had, however, been altered in the meantime to take account of the Court's judgments in Joined Cases C-88/95, C-102/95 and C-103/95 Martínez Losada and Others [1997] ECR I-869 and Case C-320/95 Ferreiro Alvite [1999] ECR I-951.

agency, such periods being taken into consideration solely for the calculation of the amount of that pension.

4. Case law in connection with the aggregation of the pensions

Tomaszewska case[23]

The present reference for a preliminary ruling concerns the interpretation of Article 45 of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Regulation (EC) No. 1992/2006 of the European Parliament and of the Council of 18 December 2006.

The reference has been made in the context of proceedings between Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu (Social Security Institution — Nowy Sącz Branch) ('the Zakład Ubezpieczeń Społecznych') and Ms Tomaszewska concerning the account to be taken of the period of contribution which she completed in another Member State and the detailed rules for determining the minimum period required under Polish law for acquisition of entitlement to a retirement pension.

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 (Dziennik Ustaw 2004, No. 39, item 353) ('the Law on retirement pensions').

Article 5 of the Law on retirement pensions provides:
1. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, the following periods shall be taken into account, subject to paragraphs 2 to 5:
   (1) contribution periods as referred to in Article 6;
   (2) non-contribution periods as referred to in Article 7.
2. In establishing entitlement to a retirement pension or any other pension, and in the calculation of the amount thereof, non-contribution periods shall be taken into account up to a maximum of one third of the proven contribution periods.
Article 10(1) of that Law provides: In establishing entitlement to a retirement pension and in calculating the amount thereof, the following periods shall also be included and treated as contribution periods, subject to Article 56:
   (3) periods of employment on agricultural holdings after the age of 16, falling before 1 January 1983, where the contribution and non-contribution periods established pursuant to Articles 5 to 7 are shorter than the period required for the award of a retirement pension, to the extent necessary to supplement this period.

[23] Case C-440/09 Zakład Ubezpieczeń Społecznych Oddział w Nowym Sączu v Stanisława Tomaszewska.

Article 29(1) (1) of the Law on retirement pensions is worded as follows:

> 'Insured persons who were born before 1 January 1949 and who have not attained the retirement age laid down in Article 27(1) may retire:
>
> (1) in the case of a woman — after attaining the age of 55 — where she has a contribution and non-contribution period amounting to at least 30 years or has a contribution and non-contribution period amounting to at least 20 years and has been declared to be totally incapable of working.'

Under Article 46 of that Law:

> '1. Insured persons born after 31 December 1948 and before 1 January 1969 shall also be entitled to a retirement pension, subject to the conditions laid down in Articles 29, 32, 33 and 39, in so far as they satisfy the following cumulative conditions:
>
> (1) they have not become affiliated to an open pension fund or applied to transfer funds accumulated in an account in an open pension fund, via the Social Security Institution, to the State budget;
>
> (2) they satisfy the conditions for obtaining a retirement pension laid down in these provisions up to 31 December 2008.'

Ms Tomaszewska, who was born on 1 March 1952, applied for an early retirement pension when she reached the age of 55.

She had not become affiliated to the open retirement fund and had completed, in Poland, contribution periods of 181 months, non-contribution periods of 77 months and 11 days and periods of employment on her parents' agricultural holding of 56 months and 25 days. She had also completed, in the former Republic of Czechoslovakia, contribution periods totalling 49 months.

By a decision of 2 August 2007, the Zakład Ubezpieczeń Społecznych rejected Ms Tomaszewska's application for a retirement pension on the ground that she had failed to furnish proof that she had completed the mandatory minimum 30-year insurance period prescribed in Article 29(1)(1) of the Law on retirement pensions. Since, under Article 5(2) of that Law, the non-contribution periods may not exceed one third of the contribution periods completed in Poland, the Zakład Ubezpieczeń Społecznych credited her with only 181 months in respect of contribution periods and 60 months and 10 days in respect of non-contribution periods. As Ms Tomaszewska also did not hold a certificate attesting to her total incapacity for work, the Zakład Ubezpieczeń Społecznych found that she did not satisfy the conditions laid down for early retirement for women.

Ms Tomaszewska brought an action against that decision before the Sąd Okręgowy w Nowym Sączu (Regional Court, Nowy Sącz). By judgment of 7 December 2007, that court partially upheld Ms Tomaszewska's claim, holding that she was entitled to a proportional retirement pension as from 14 May 2007.

By judgment of 5 August 2008, the Sąd Apelacyjny w Krakowie (Court of Appeal, Cracow) dismissed the appeal brought by the Zakład Ubezpieczeń Społecznych and upheld the decision delivered at first instance.

According to the Sąd Apelacyjny w Krakowie, the aggregation of the insurance periods completed in and outside Poland allows for full account to be taken of the

contribution periods completed in Poland and outside Poland, in accordance with the principle of equal treatment of migrant workers. The fact of not allowing the non-contribution periods to exceed one third of the contribution periods completed in Poland gives rise to a situation in which non-contribution periods are taken into account in a less favourable manner in the case of migrant workers than in the case of individuals who can furnish proof of relatively lengthy contribution periods in Poland.

The Zakład Ubezpieczeń Społecznych lodged an appeal in cassation, arguing that there had been a misinterpretation of Article 45(1) of Regulation No. 1408/71, Article 15(1) (a) of Council Regulation (EEC) No. 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No. 1408/71 [OJ, English Special Edition 1972(I), p. 159], as updated and amended by Regulation No. 118/97 ('Regulation No. 574/72'), and also of Article 5(2) of the Law on retirement pensions, claiming that the Sąd Apelacyjny w Krakowie had erred in holding that the non-contribution periods completed in Poland must be taken into account up to a maximum of one third of proven Polish and foreign contribution periods

On those grounds, the Court (Fifth Chamber) hereby rules: Article 45(1) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No. 118/97 of 2 December 1996, as amended by Regulation (EC) No. 1992/2006 of the European Parliament and of the Council of 18 December 2006, must be interpreted as meaning that, in the determination of the minimum insurance period required by national law for the purpose of the acquisition by a migrant worker of entitlement to a retirement pension, the competent institution of the Member State concerned must take into consideration, for the purposes of determining the limit which non-contribution periods may not exceed in relation to contribution periods, as provided for by the legislation of that Member State, all insurance periods completed in the course of the migrant worker's career, including those completed in other Member States.

5. Closing remarks

Each EU Member State has its own national regulation of social insurance. For economic, historical and practical reasons, these differ from country to country. Therefore the differences between national systems could cause problems when the European citizen migrates and two or more Member States are involved. This article dealt mainly these problems and difficulties. However, the EU social security legislation coordinates these national schemes to ensure that the application of different national regulations does not adversely affect persons who move within the European Union and the European Economic Area. (EEA)

This coordination means that Member States may freely determine detailed rules such as the conditions that must be met in order to qualify for the rights, the

way in which the benefits are calculated, but they must at the same time respect the common rules and principles of EU legislation. [24]

Mulders case[25]

This request for a preliminary ruling concerns the interpretation of Articles 1(r) and 46 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.

The request was made in proceedings between Mr Mulders and the Rijksdienst voor Pensionen (National Belgian Pensions Office) ('the RVP') concerning the failure to take into account, for the purpose of calculating his retirement pension in Belgium, a period of incapacity for work in respect of which he received sickness insurance benefit in another Member State, namely the Netherlands.

Mr Mulders, a Belgian national resident in Belgium, worked in that Member State from 25 January 1957. As a result of an accident at work on 2 October 1962, a permanent invalidity rate of 10% was applied to Mr Mulders. The Belgian Fund for Accidents at Work awarded him a benefit with effect from 1 January 1969 on the basis of his permanent invalidity. As of 14 November 1966, Mr Mulders was employed as a frontier worker in Maastricht (the Netherlands).

On 10 February 1982, Mr Mulders was declared incapable of work in the Netherlands and therefore received, by way of sickness insurance benefit, the benefit provided for by the Netherlands WAO, equivalent to a rate of incapacity for work of 80% to 100% ('the WAO benefit'). Contributions were deducted from that benefit, including pension contributions paid under the Netherlands AOW into the Netherlands social security scheme.

Mr Mulders received the WAO benefit until 25 October 1997. During 1996, Mr Mulders applied for his pension, both in the Netherlands, to the Sociale Verzekeringsbank van Amstelveen (Social Insurance Office, Amstelveen) ('the Netherlands SV') and in Belgium, to the RVP.

By decision of 20 November 1997, the RVP granted Mr Mulders a retirement pension. However, for the purpose of calculating the pension, account was not taken of the period from 10 February 1982, the date on which he was recognized as being incapable of work in the Netherlands, to 25 October 1997. The RVP based its decision on the statement provided by the Netherlands SV setting out the periods during which Mr Mulders had been insured in the Netherlands.

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[24] HAJDÚ, József: Coordination of the old-age pension in the EU. In: *Emlékkönyv Román László születésének 80. évfordulójára*. Pécs, 2008, p. 141.

[25] In Case C-548/11, REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeidshof te Antwerpen (Belgium), made by decision of 27 October 2011, received at the Court on 31 October 2011, in the proceedings Edgard Mulders v Rijksdienst voor Pensioenen.

On 13 January 1998, on examining the pension application submitted by Mr Mulders in the Netherlands, the Netherlands SV took the view that, during the period referred to above, Mr Mulders had not been insured under the Netherlands AOW because, at the same time as he had been in receipt of the WAO benefit, he had also been in receipt of a benefit in Belgium on the basis of accident at-work insurance. Such benefits could not be combined under Netherlands legislation and precluded any entitlement to the insurance cover provided by the Netherlands AOW.

By application of 12 February 1998, Mr Mulders challenged the RVP's decision before the Arbeidsrechtbank te Tongeren (the Labour Tribunal, Tongeren).

By judgment of 9 June 1999, that court declared the action unfounded. However, it referred to the competent Netherlands court, in accordance with Article 86 of Regulation No. 1408/71, Mr Mulders' claim for recognition of the period from 10 February 1982 to 25 October 1997 as a period of insurance for the purposes of his retirement pension.

On 8 July 1999, Mr Mulders lodged an appeal before the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp) against the decision of the Arbeidsrechtbank te Tongeren of 9 June 1999. He argued that the failure to take account of the period of incapacity for work following the definitive cessation of his activities as an employed person in the Netherlands was liable to affect the right of freedom of movement conferred by European Union law, by depriving him of benefits guaranteed by the legislation of a Member State.

On 24 November 1999, on the basis of the documents forwarded by the Arbeidsrechtbank te Tongeren, the Netherlands SV concluded that Mr Mulders had not been insured during the period in question under the Netherlands AOW. According to that authority, since Mr Mulders had definitively ceased working in the Netherlands on 10 February 1982, his old-age insurance position had to be assessed as of that date solely on the basis of Netherlands legislation, since the rules for determining the applicable legislation laid down in Regulation No. 1408/71 no longer had any effect in his regard. Moreover, the Netherlands SV also stated that, as regards the period from 10 February 1982 to 25 October 1997, Mr Mulders did not comply either with Article 6(1) (b) of the Netherlands AOW — which provides that, for AOW insurance purposes, a person who does not reside in the Netherlands is required to have worked in that Member State in a position that is subject to income tax — or with Netherlands legislation which precludes the cumulation of the WAO benefit with benefits received under foreign legislation

It is apparent from the European Commission's observations, which refer to information provided by the RVP in the main proceedings, that Mr Mulders has not appealed against the Netherlands SV's decision.

In those circumstances, the Arbeidshof te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
Is Article 46 of … Regulation … No. 1408/71 … infringed in cases where, in the calculation of the pension of a migrant worker, a period of incapacity for work during which a work incapacity benefit was awarded and contributions under the

[Netherlands AOW] were paid is not regarded as a "period of insurance" within the meaning of Article 1(r) of that regulation? On those grounds, the Court (Third Chamber) decided:

Articles 1(r) and 46 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, read in the light of Article 13(2) (a) of that regulation and Articles 45 TFEU and 48 TFEU, are to be interpreted, for the purpose of calculating a retirement pension in one Member State, as precluding the legislation of another Member State under which a period of incapacity for work during which sickness insurance benefit — from which contributions were deducted by way of old-age insurance — was paid in that other Member State to a migrant worker is not regarded as a 'period of insurance' within the meaning of those provisions, on the ground that the person concerned is not resident in the latter State and/or was in receipt of a similar benefit under the legislation of the first Member State, which could not be combined with the sickness insurance benefit.