ECLI:EU:C:2016:550

JUDGMENT OF THE COURT (First Chamber)

13 July 2016 (*)

(Reference for a preliminary ruling — Article 45 TFEU — Freedom of movement for workers — Civil servant of a Member State who has left the public service in order to be employed in another Member State — National legislation providing in that case for loss of the retirement pension rights acquired in the civil service and for retrospective insurance under the general old-age insurance scheme)

In Case C-187/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf, Germany), made by decision of 16 April 2015, received at the Court on 24 April 2015, in the proceedings

Joachim Pöpperl

v

Land Nordrhein-Westfalen,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, A. Arabadjiev, J.-C. Bonichot, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General: M. Bobek,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2016,

after considering the observations submitted on behalf of:

– Mr Pöpperl, by J. Düsselberg, Rechtsanwalt,

– Land Nordrhein-Westfalen, by R. Messal and C. Brammer,

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

– the European Commission, by M. Kellerbauer and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2 The request has been made in proceedings between Joachim Pöpperl and Land Nordrhein-Westfalen (*Land* of North Rhine-Westphalia, Germany) concerning the loss of retirement pension rights following resignation from a civil servant's post with that *Land* in order to be employed in a Member State other than the Federal Republic of Germany.

Legal context

3 Paragraph 28(3) of the Beamtengesetz für das Land Nordrhein-Westfalen (Law on the Civil Service of the *Land* of North Rhine-Westphalia) provides:

'After release from employment the former civil servant shall have no right to benefits from the employer, unless otherwise provided by law …'

4 Paragraph 8 of the Sozialgesetzbuch Sechstes Buch (Sixth Book of the Social Code; 'SGB VI') states:

'(1) Also insured are persons

1. who are insured retrospectively or

2. ...

Persons who are insured retrospectively shall be treated in the same way as persons subject to compulsory insurance.

(2) The following persons shall be insured retrospectively:

1. persons who, as civil servants or judges for life, for a fixed term or on a trial basis, professional soldiers and non-permanent soldiers, and civil servants on a temporary basis in preparatory service,

2. ...

were exempt from insurance or were exempted from compulsory insurance, if they have left their employment without a right to or expectancy of a pension from employment or lost their right to a pension and there are no grounds for deferring the payment of contributions ... Retrospective insurance extends over the period during which persons were exempt from insurance or exempted from compulsory insurance (retrospective insurance period). In the case of withdrawal by reason of death, there will be retrospective insurance only where a right to a surviving dependant's pension can be claimed.'

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

5 According to the order for reference, Mr Pöpperl was a temporary civil servant employed by the *Land* of North Rhine-Westphalia from 1 September 1978 to 30 April 1980 and a permanent civil servant in its employment as a teacher from 1 August 1980 to 31 August 1999.

6 Mr Pöpperl resigned voluntarily from his post as a civil servant on 1 September 1999 and started in that month to work as a teacher in Austria.

7 After giving up his status of civil servant, Mr Pöpperl was insured retrospectively under Paragraph 8 of SGB VI with the Bundesversicherungsanstalt für Angestellte (Federal Insurance Institution for Employees, Germany), now the Deutsche Rentenversicherung Bund (German Pension Insurance Association), in respect of the period from 1 September 1978 to 1 September 1999.

8 Unlike teachers who do not have the status of civil servant, Mr Pöpperl did not have the possibility of additional pension cover with the Versorgungsanstalt des Bundes und der Länder (Pension Institution of the Federal Republic and the *Länder*, Germany). An application which Mr Pöpperl submitted in that regard was rejected by the *Land* of North Rhine-Westphalia by decision of 10 February 2009.

9 Consequently, Mr Pöpperl has a right, after reaching the requisite age, to a retirement pension pursuant to SGB VI that would amount to EUR 1 050.67 per month in respect of periods of education, study and retrospective insurance, whereas, if the law of the *Land* of North Rhine-Westphalia were to provide that rights to a civil servant's retirement pension are not lost if the status of civil servant is lost, he would be able to claim a retirement pension entitlement of EUR 2 263.03 per month on the basis of his full-time work from 1 September 1978 to 31 August 1999. That sum would increase to

EUR 2 728.18 per month if periods of study were taken into account as if they were periods of earlier employment.

10 Following a request on his part, Mr Pöpperl was informed by the *Land* of North Rhine-Westphalia by decision of 25 April 2013 that, since he had given up his status of civil servant, he could not claim any retirement pension entitlement in that capacity and that he had been insured retrospectively for his entire period of employment with that *Land*.

11 Mr Pöpperl appealed against that decision to the referring court, submitting that the obligation of retrospective insurance is contrary to EU law, more specifically to Article 45 TFEU.

12 In this regard, the referring court observes, first of all, in particular that the difference of EUR 1 677.51 in retirement pension benefits which results, as is apparent from paragraph 9 of the present judgment, from the obligation of retrospective insurance laid down by the legislation of the Member State concerned is liable to make access to the employment market in another Member State more difficult, since the loss of the rights to a civil service retirement pension is such as to deter civil servants from seeking employment in another Member State.

13 However, according to the referring court, in German law there are relevant differences between the retirement pension scheme for civil servants and the general old-age insurance scheme. The employment relationship in the civil service is based on the principle of life-long employment and, compared with other workers, a civil servant is bound to his employer in a particular and more comprehensive way. The basis of the right to a retirement pension and of the employer's corresponding obligation to the civil servant to provide financial support is the civil servant's duty, on account of his recruitment into the public service, to dedicate himself entirely to his employer, to which all that working capacity will be available, in principle on a life-long basis. If the public-law employment relationship is terminated by the civil servant, that normally ends the obligation to provide him with financial support and the obligation to provide for his welfare that are associated with it.

14 According to the explanation of the referring court, those differences or particular features are reflected in the differences in the systems of social cover, which in turn result in differences in the amount of retirement pension benefits.

15 Thus, the determining factor for a civil servant's retirement pension is the number of years of pensionable service, the system rewarding the number of years for which a civil servant has worked for his employer. In return, the civil servant accepts that his gross salary during his period of active service is normally less than that of an employee who has the same qualifications and works in the same field. On the other hand, in the general old-age insurance scheme, retirement pensions are calculated, in principle, on the basis of the gross remuneration insured each calendar year, converted into pay points.

16 As regards, next, the effects of retrospective insurance for a civil servant, in this instance with the status of teacher, who has resigned from his post, the referring court observes that that insurance is intended to place him in the situation which he would have been in if he had contributed to the general old-age insurance scheme throughout his career as a civil servant.

17 The referring court notes, furthermore, that the law applicable in the *Land* of North Rhine-Westphalia gave Mr Pöpperl no possibility other than to give up his status of civil servant if he wanted to begin a new employment relationship in Austria. Unlike the situation when there is a change of employer in the territory of the Federal Republic of Germany, for example from one *Land* to another or from a *Land* to the federal administration, there is no possibility of being transferred or seconded to the civil service of another Member State while retaining the retirement pension rights already acquired.

18 In those circumstances, the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 45 TFEU to be interpreted as precluding a national law according to which a person employed as a civil servant in a Member State loses his expectancies concerning a retirement pension (civil servant benefits) arising from employment as a civil servant because, in order to take up employment in another Member State, that person was released from the civil service at his own wish, when at the same time national law provides that that person is insured retrospectively in the statutory pension scheme on the basis of the gross salary received as a civil servant, although the resulting pension rights are less than the lost retirement pension expectancies?

2. If the reply to the first question is in the affirmative for all or some civil servants, is Article 45 TFEU to be interpreted as meaning that, in the absence of other national provisions, the earlier appointing body of the civil servant in question has to pay the civil servant either the amount of retirement pension on the basis of the period of pensionable service in the earlier civil service post, reduced by the amount of pension rights arising from the retrospective insurance, or to compensate him financially in some other way for the loss of the retirement pension, although under national law only the civil servant benefits provided for by that law may be granted?'

Consideration of the questions referred

Question 1

19 By its first question, the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a person having the status of civil servant in a Member State who leaves his post voluntarily in order to be employed in another Member State loses his retirement pension rights under the retirement pension scheme for civil servants and is insured retrospectively under the general old-age insurance scheme, conferring

entitlement to a retirement pension lower than the retirement pension that would result from those rights.

20 It should be noted at the outset that it is apparent from the request for a preliminary ruling that the applicant in the main proceedings contests, in terms of an infringement of Article 45 TFEU, not the loss, as such, of his retirement pension rights under the retirement pension scheme for civil servants, which results from his resignation from his post with the *Land* of North Rhine-Westphalia, but the difference in amount between the pension entitlement which he had acquired, at the time of his resignation, under that scheme and his pension entitlement, since then, under the general old-age insurance scheme.

21 The referring court should therefore be understood as raising by the first question the issue whether legislation such as that at issue in the main proceedings is compatible with Article 45 TFEU in so far as it results in that difference in amount.

22 In that regard, it should be recalled that, although Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe EU law and, in particular, the provisions of the FEU Treaty on freedom of movement for workers and the right of establishment (see judgments of 1 April 2008 in *Gouvernement de la Communauté française and gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 43, and of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 38).

23 The Court has consistently held that all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity there (see judgments of 15 December 1995 in *Bosman*, C-415/93, EU:C:1995:463, paragraphs 94 and 95; of 1 April 2008 in *Gouvernement de la Communauté française and gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 44; and of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 39).

24 While EU primary law admittedly can offer no guarantee to an insured person that moving to a Member State other than his Member State of origin will be neutral in terms of social security, in particular where sickness benefits and old-age pensions are concerned, since, given the disparities between the Member States' social security schemes and legislation, such a move may be to the advantage of the person concerned in terms of social protection, or not, depending on the circumstances, it is settled case-law that, where its application is less favourable, national legislation is consistent with EU law only to the extent that, in particular, it does not place the worker concerned at a disadvantage compared with those who pursue all their activities in the Member State

where it applies and does not purely and simply result in the payment of social security contributions on which there is no return (see judgment of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 40 and the case-law cited).

25 Thus, the Court has repeatedly held that the aim of Articles 45 TFEU and 48 TFEU would not be achieved if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the social security advantages afforded them by the legislation of one Member State (see judgments of 1 April 2008 in *Gouvernement de la Communauté française and gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 46, and of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 41).

26 Moreover, according to the Court's case-law, Articles 45 TFEU and 48 TFEU are intended in particular to prevent a worker who, by exercising his right of freedom of movement, has been employed in more than one Member State from being treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (see judgments of 30 June 2011 in *da Silva Martins*, C-388/09, EU:C:2011:439, paragraph 76, and of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 42).

27 It is not in dispute that, as the Advocate General has noted in points 41 to 43 of his Opinion, legislation such as that at issue in the main proceedings, under which a civil servant of the *Land* of North Rhine-Westphalia must give up the status of civil servant when, prior to retirement, he resigns from his post in order to be employed in the private sector in the Federal Republic of Germany or in order to be employed in another Member State, means that, whatever the duration of his employment as a civil servant, he, first, loses the retirement pension rights under the retirement pension scheme for civil servants and, secondly, is insured retrospectively under the general old-age insurance scheme, which confers entitlement to a retirement pension of an amount considerably lower than the retirement pension that would result from the lost rights.

28 Such legislation constitutes a restriction on freedom of movement for workers since, even though it also applies to civil servants of the *Land* of North Rhine-Westphalia who resign in order to work in the private sector in their Member State of origin, it is liable to prevent or deter them from leaving their Member State of origin to take up employment in another Member State. That legislation thus directly affects the access of civil servants of the *Land* of North Rhine-Westphalia to the employment market in Member States other than the Federal Republic of Germany and is thus such as to impede freedom of movement for workers (see, to this effect, judgments of 15 December 1995 in *Bosman*, C-415/93, EU:C:1995:463, paragraphs 98 to 100 and 103, and of 21 January 2016 in *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 47).

29 It is settled case-law that national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue an objective in the public interest, are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain

the objective pursued (see, inter alia, judgment of 12 September 2013 in *Konstantinides*, C-475/11, EU:C:2013:542, paragraph 50).

30 The *Land* of North Rhine-Westphalia and the German Government submit that the national legislation at issue in the main proceedings is justified by the legitimate objective of ensuring the proper functioning of the public authorities, in that it seeks, in particular, to ensure the loyalty of civil servants and thus continuity and stability of the civil service. At the hearing before the Court, the *Land* of North Rhine-Westphalia stated that this objective is pursued as regards the public authorities generally and, in particular, those of the *Land* of North Rhine-Westphalia.

31 In that regard, without it being necessary to decide whether the proper functioning of the public authorities constitutes an overriding reason in the public interest that can justify a restriction on freedom of movement for workers, it should be recalled that such a restriction must, in any event, be appropriate for securing the attainment of that objective and not go beyond what is necessary to attain it.

32 It is true that the national legislation at issue in the main proceedings, inasmuch as it is liable to deter civil servants from leaving the public authorities and thus to ensure continuity in staffing guaranteeing stability in the performance of those authorities' tasks, could be such as to secure attainment of the objective of the proper functioning of the public authorities.

33 However, according to the Court's case-law, national legislation and the various relevant rules are appropriate for securing attainment of the objective pursued only if they genuinely reflect a concern to attain that objective in a consistent and systematic manner (see, to this effect, judgments of 10 March 2009 in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 19 May 2009 in *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraph 42).

34 It is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent legislative provisions satisfy those requirements (see, to this effect, judgments of 13 July 1989 in *Rinner-Kühn*, 171/88, EU:C:1989:328, paragraph 15; of 23 October 2003 in *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 82; and of 26 September 2013 in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 48).

35 However, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (judgments of 20 March 2003 in *Kutz-Bauer*, C-187/00, EU:C:2003:168, paragraph 52; of 23 October 2003 in *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 83; and of 26 September 2013 in *Ottica New Line di Accardi Vincenzo*, C-539/11, EU:C:2013:591, paragraph 49).

36 In that regard, it is clear from the documents before the Court and, in particular, from the oral observations of the *Land* of North Rhine-Westphalia, that a civil servant of a *Land* may, if the latter approves his transfer, leave his post with that *Land* in order to take up employment in the public service of another *Land* or of the federal State without being insured retrospectively under the general old-age insurance scheme, thereby enabling him to acquire rights to a retirement pension greater than the retirement pension resulting from that scheme and which are comparable to the rights which he acquired with his initial public-sector employer.

37 That being so, it must be found that the objective of ensuring the proper functioning of the public authorities so far as concerns the *Land* of North Rhine-Westphalia, in particular by encouraging the loyalty of civil servants to the public service, does not appear to be pursued in a consistent and systematic manner, since if a civil servant is transferred he may obtain rights to a retirement pension greater than the pension which he would acquire by virtue of retrospective insurance under the general old-age insurance scheme, even if he leaves the public authority to which he is assigned to go to that of another *Land* or of the federal State. Thus, the national legislation at issue in the main proceedings is not liable to deter civil servants in all circumstances from leaving the public authorities of the *Land* of North Rhine-Westphalia.

38 It follows that that legislation cannot be regarded as appropriate for securing the attainment of the objective of ensuring the proper functioning of the public authorities so far as concerns the *Land* of North Rhine-Westphalia. Accordingly, it cannot be justified by that objective.

39 So far as concerns the objective of ensuring the proper functioning of the public authorities generally in Germany, suffice it to state that, even supposing that the legislation at issue in the main proceedings is appropriate for attaining such an objective, it goes beyond what is necessary to attain it.

40 Indeed, when a civil servant who has worked in the civil service for more than 20 years leaves his post prior to retirement, that legislation results in the loss of all the retirement pension rights corresponding to the years of service that he has completed under the retirement pension scheme for civil servants and in retrospective insurance under the general old-age insurance scheme, conferring entitlement to a retirement pension considerably lower than the retirement pension that would result from those rights. Furthermore, it is apparent from the order for reference that, under the law of certain *Länder*, former civil servants who have resigned from the public service of those *Länder* may retain the rights acquired under the retirement pension scheme for civil servants, and this amounts to a less restrictive measure than the legislation at issue in the main proceedings.

41 In the light of the foregoing considerations, the answer to the first question is that Article 45 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a person having the status of civil servant in a Member State who leaves his post voluntarily in order to be employed in another

Member State loses his retirement pension rights under the retirement pension scheme for civil servants and is insured retrospectively under the general old-age insurance scheme, conferring entitlement to a retirement pension lower than the retirement pension that would result from those rights.

Question 2

42 By its second question, the referring court asks, in essence, should the reply to the first question be in the affirmative, what conclusions it must draw therefrom in order to comply with the requirements of Article 45 TFEU.

43 In that regard, it must be borne in mind that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it (see, to this effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited, and of 11 November 2015 in *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 34).

44 It is true that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to the content of EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (see, to this effect, judgments of 15 April 2008 in *Impact*, C-268/06, EU:C:2008:223, paragraph 100, and of 15 January 2014 in *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 39).

45 If an interpretation of national law in conformity with EU law is not possible, the national court must fully apply EU law and protect rights which the latter confers on individuals, disapplying, if necessary, any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law (see, to this effect, judgment of 18 December 2007 in *Frigerio Luigi & C.*, C-357/06, EU:C:2007:818, paragraph 28).

46 Where national law, in breach of EU law, provides that a number of groups of persons are to be treated differently, the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned. The arrangements applicable to members of the group placed at an advantage remain, for want of the correct application of EU law, the only valid point of reference (see, to this effect, judgments of 26 January 1999 in *Terhoeve*, C-18/95, EU:C:1999:22, paragraph 57; of 22 June 2011 in *Landtová*, C-399/09, EU:C:2011:415, paragraph 51; and of 19 June 2014 in *Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 95).

47 As is apparent from the order for reference and as has already been noted in paragraph 36 of the present judgment, in the event of a change in public-sector employer in Germany, for example from one *Land* to another or from a *Land* to the federal administration, the persons concerned have retirement pension rights comparable to the rights which they acquired with their initial public-sector employer. It is therefore this legal framework which constitutes a valid point of reference of that kind.

48 Consequently, German civil servants who have given up their status with a view to engaging in similar employment in a Member State other than the Federal Republic of Germany must also have retirement pension rights comparable to the rights which they acquired with their initial public-sector employer.

49 In the light of the foregoing considerations, the answer to the second question is that Article 45 TFEU must be interpreted as meaning that is incumbent on the national court to give full effect to that article and to grant workers, in a situation such as that at issue in the main proceedings, retirement pension rights which are comparable to those of the civil servants who retain retirement pension rights corresponding, despite a change in public-sector employer, to the years of pensionable service that they have completed, by interpreting domestic law in conformity with that article or, if such an interpretation is not possible, by disapplying any contrary provision of domestic law in order to apply the same arrangements as those applicable to those civil servants.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

1. **Article 45 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a person having the status of civil servant in a Member State who leaves his post voluntarily in order to be employed in another Member State loses his retirement pension rights under the retirement pension scheme for civil servants and is insured retrospectively under the general old-age insurance scheme, conferring entitlement to a retirement pension lower than the retirement pension that would result from those rights.**

2. **Article 45 TFEU must be interpreted as meaning that is incumbent on the national court to give full effect to that article and to grant workers, in a situation such as that at issue in the main proceedings, retirement pension rights which are comparable to those of the civil servants who retain retirement pension rights corresponding, despite a change in public-sector employer, to the years of pensionable service that they have completed, by interpreting domestic law in conformity with that article or, if such an interpretation is not possible, by**

disapplying any contrary provision of domestic law in order to apply the same arrangements as those applicable to those civil servants.

[Signatures]

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* Language of the case: German.