

Anonymised version

Summary

C-404/21 – 1

Case C-404/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 June 2021

Referring court:

Tribunale Ordinario di Asti (Italy)

Date of the decision to refer:

13 January 2021

Applicant:

WP

Defendants:

Istituto nazionale della previdenza sociale

Repubblica italiana

Subject matter of the main proceedings

Action seeking to establish the right of a member of staff of the European Central Bank (ECB) to transfer to the ECB's pension scheme pension rights acquired with the Istituto nazionale della previdenza sociale (National Social Security Institute, Italy) ('the INPS') and/or the right of that member of staff to the same transfer as compensation for failure to implement European legislation.

Subject matter and legal basis of the reference

Request for a preliminary ruling pursuant to Article 267 TFEU on whether a set of national rules or a national practice which does not allow the transfer to the ECB's

pension scheme of capital corresponding to pension rights acquired under the national pension scheme is compatible with Articles 45 and 48 TFEU, Article 4 TEU, Article 11 of Annex VIII to the Staff Regulations of Officials of the European Union and Article 8 of Annex IIIa to the Conditions of Employment for Staff of the European Central Bank. Recognition of the right to such a transfer even in the absence of an implementing act or an agreement between the Member State or the national social security institution and the ECB.

Questions referred for a preliminary ruling

‘Must Articles 45 and 48 TFEU, Article 4 TEU, Article 11 of Annex VIII to the Staff Regulations of Officials [of the European Union] and Article 8 of Annex IIIa to the Conditions of Employment for Staff of the European Central Bank be interpreted as precluding a set of national rules or a national administrative practice which does not allow a worker who is a national of a Member State who has paid contributions to the national social security institution and who currently works for an EU institution, such as the ECB, to transfer to the pension scheme of that institution the pension contributions credited to the social security scheme of his or her own State?’

Based on the answer to the question set out above, must it be possible to exercise the right to transfer contributions even in the absence of national implementing legislation or a specific agreement between the Member State of which the worker is a national or the worker’s pension institution, on the one hand, and the EU institution, on the other?’

Provisions of European Union law relied on

Articles 45 and 48 TFEU

Article 4(3) TEU

Article 11 of Annex VIII to the Staff Regulations of Officials of the European Union

Article 8 of Annex IIIa to the Conditions of Employment for Staff of the European Central Bank:

‘The ECB shall enter into agreements and make appropriate arrangements with such other employee benefit arrangements, organisations and governments as it determines to accept the transfer to the Scheme of amounts of cash in respect of members following completion of their probationary period with the ECB.’

Provisions of national law relied on

Article 18 of legge n. 115 del 29 luglio 2015 (Law No 115 of 29 July 2015)

Pursuant to this article, from 1 January 2016, citizens of the European Union who are enrolled or who have been enrolled in the compulsory general disability and retirement insurance scheme for employees have the right to combine the insurance periods completed under that scheme with those completed with international organisations. Insurance periods may be combined at the request of the interested party; such request must be submitted to the Italian social security institution with which the insurance periods were completed.

Article 1 of legge n. 29 del 7 febbraio 2015 (Law No 29 of 7 February 1979)

This article entitles employees in the public or private sector, who are or have been enrolled in compulsory pension schemes instead of the compulsory general disability and retirement insurance scheme for employees managed by the INPS, to request that all periods in which they contributed to the abovementioned social security schemes be aggregated in the compulsory general insurance scheme, so that they receive a single pension, and that he or she be granted corresponding insurance entitlements with that scheme. To that end, the pension fund transfers the relevant amount of contributions to said compulsory general insurance scheme. However, this applies only to national social security institutions.

Agreement of 24 January 2000 between the INPS and the European Investment Bank for the transfer of insurance entitlements applicable to staff of the European Investment Bank and INPS Circular No 14 of 23 January 2001 illustrating the key features of the agreement

In addition to the possibility of transferring to the INPS the capital value of the pension rights acquired with the EIB, this agreement also provides for the opposite situation of transferring to the EIB the capital value of the pension rights acquired with the INPS. In the latter case, the request to transfer the insurance entitlements may be sent directly to the INPS, and to the EIB for information, by serving staff at the time of the request and for insurance periods credited to the INPS that have not given rise to the payment of a pension. The EIB requests the actuarial equivalent from the INPS corresponding to the position in the relevant fund. The INPS informs the person concerned and the EIB of the amount to be transferred within 60 days of receiving the applicant's consent, then transfers the amount within three months.

Succinct presentation of the facts and the procedure in the main proceedings

- 1 The applicant is currently a member of staff of the ECB, where he has worked since 1 March 2012. From 1 August 1982 to 24 February 2012, he worked in Italy as the employee of a private employer. During that period, a compulsory contribution was paid into the INPS employee pension fund.
- 2 On 12 December 2016, the applicant asked the INPS to transfer to the ECB's pension scheme – potentially subject to any agreement signed between the INPS and the ECB and, if necessary, by way of compensation – the actuarial equivalent

corresponding to the insurance entitlements he had established with the INPS employee pension fund, calculated on the basis of the rules governing pension payments under that fund, as of the date of submission of the request.

- 3 In the alternative, the applicant asked the INPS to transfer to the ECB's pension scheme the updated capital resulting from the social security contributions paid into the INPS employee pension fund.
- 4 The INPS refused the applicant's request, stating that it could not make the requested transfer in the absence of a specific legislative measure or bilateral agreement.
- 5 The subsequent administrative action brought by the applicant against the decision refusing his request was declared inadmissible.
- 6 The applicant then brought an action before the referring court, in which he claimed that that court should:
 - principally, find and declare that the INPS and/or the Italian Republic is obliged to take all necessary measures to transfer to the ECB's pension scheme the sum of EUR 714 924.79, which is equal to the actuarial equivalent corresponding to the pension rights acquired by the applicant with the INPS employee pension fund, and consequently order the INPS and/or the Italian Republic to take all necessary measures to transfer said amount to the ECB's pension scheme;
 - in the alternative, find and declare that the INPS and/or the Italian Republic is obliged to transfer to the ECB's pension scheme the sum of EUR 714 924.79 by way of compensation, and consequently order the INPS and/or the Italian Republic to transfer said amount to the ECB's pension scheme by way of compensation.
- 7 The INPS raised an objection of inadmissibility in respect of the action and submitted, in essence, that the applicant had no claim.
- 8 The Italian Republic contests the substance of the action.

The essential arguments of the parties to the main proceedings

- 9 According to the applicant, Article 11 of Annex VIII to the Staff Regulations and Article 8 of Annex IIIa to the Conditions of Employment for Staff of the ECB directly entitle the ECB employee to transfer the pension rights acquired with a national pension fund. Under Article 11 of Annex VIII to the Staff Regulations, an official who enters the service of the Union after leaving the service of a national administration is to be entitled to have paid to the Union the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities. The appointing authority of the institution in which the

official serves is to determine by means of general implementing provisions the number of years of pensionable service with which he or she is to be credited under the Union pension scheme in respect of the former period of service. Article 8 of [Annex IIIa to] the Conditions of Employment for Staff of the ECB also provides that the ECB is to enter into arrangements with national pension funds to ensure the transfer of capital representing pension rights from national funds to the ECB's scheme for staff who have completed their probationary period with the ECB.

- 10 Accordingly, the practice of the INPS, which refuses to make such a transfer in the absence of national implementing legislation or an agreement between the INPS or the Italian State and the ECB, is contrary to the abovementioned provisions, as well as Articles 45 and 48 TFEU and the duty of sincere cooperation laid down in Article 4 TEU, and therefore constitutes a barrier to the free movement of workers recognised by the Treaty and infringes the rights of those who, having worked in a Member State, then go on to work for a European institution such as the ECB. The INPS is obliged therefore to transfer the acquired pension rights to that institution. As for the methods for calculating those rights, the INPS might refer, if necessary, to the criteria laid down in the agreement between the INPS and the EIB, referred to in INPS Circular No 14 of 23 January 2001.
- 11 The applicant further notes that failure to enact national legislation, or the absence of an agreement between the INPS and the ECB on how to implement the transfer at issue, constitutes a breach of EU law and, in particular, of the duty of sincere cooperation, which gives rise to an obligation to pay compensation to the applicant.
- 12 According to the INPS, the abovementioned provisions of EU law cannot be applied directly. Thus, in the absence of transposing rules or an agreement, the INPS cannot arrange the transfer at issue.
- 13 In the present case, the Italian Republic denies that the conditions for recognising the right to compensation for failure to implement EU law are met.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 The referring court considers it necessary to determine whether Articles 45 and 48 TFEU, Article 4 TEU, Article 11 of Annex VIII to the Staff Regulations and Article 8 of Annex IIIa to the Conditions of Employment for Staff of the ECB must be interpreted as meaning that they recognise the right of an employee of an EU institution, and of the ECB in particular, to transfer to the ECB's pension scheme pension rights acquired with the national social security institution and whether that right must still be recognised in the absence of the adoption of national implementing rules or a specific agreement between the Member State or the national pension institution and the ECB defining the procedures for exercising that right. Alternatively, in the opinion of the referring court, reference

could be made to the criteria laid down in Law No 29 of 7 February 1979 on the aggregation of contributions between national social security institutions.

- 15 In view of this uncertainty, the referring court cites two judgments of the Court of Justice.
- 16 In its judgment of 4 July 2013 in *Gardella* (C-233/12, paragraphs 28 to 30), the Court, in the case of an employee of the European Patent Office ('the EPO'), found that the latter had no right to transfer pension rights acquired by that employee for periods of work carried out in Italy since, on the one hand, the EPO is not an EU institution or body, and therefore its employees are excluded from the subjective scope of the Staff Regulations, and on the other hand, the EPO's rules on pensions – which are not a legal act of the European Union and do not produce the same direct effects in the Member States as the Staff Regulations – provide, as a condition for the transfer of the capital value representing pension rights, for specific permission from the body which manages the national pension scheme.
- 17 The referring court considers that an '*a contrario*' argument – in other words, an argument that an ECB employee has the right to transfer the pension rights acquired by him or her to a national authority – is also tenable, given that the ECB is an institution of the European Union and that Article 8 of Annex IIIa to the Conditions of Employment for Staff of the European Central Bank does not require authorisation by the national social security institution.
- 18 In its judgment of 5 December 2013, following a request for a preliminary ruling from the Krajský soud v Praze (Regional Court, Prague, Czech Republic), the Court held that the European Union legislator did not intend, by Article 11(2) of Annex VIII to the Staff Regulations, to harmonise the various national provisions in the field of pensions and that the right of the Member States to define the fundamental principles of their social security systems is recognised by EU law (C-166/12, paragraphs 30 to 32). The Member States enjoy broad discretion in adopting their national rules implementing Article 11(2) of Annex VIII to the Staff Regulations, particularly in the case of the Member States' method for determining the amount of the capital value of pension rights acquired in the national scheme and intended to be taken into account by the EU pension scheme.
- 19 The referring court takes the view that that judgment seems to require the adoption of specific national rules for determining the capital value of pension rights acquired in the national scheme to be transferred to the EU pension scheme, and appears to conclude that it is impossible, in the absence of such an implementing measure, to use the calculation criteria laid down in national legislation for similar transfers of insurance entitlements between different national pension schemes, or laid down in agreements between the INPS and other EU bodies, such as that between the INPS and the EIB.

- 20 In the light of those considerations, the referring court refers the above questions to the Court of Justice for a preliminary ruling.

WORKING DOCUMENT