

JUDGMENT OF THE COURT (First Chamber)

5 November 2014 (*)

(Reference for a preliminary ruling — Social security — Regulation (EEC) No 1408/71— Articles 12, 45, 46 and 94 — National legislation making the grant of a pension subject to a condition that old-age insurance contributions be discontinued — Purchase of missing periods of insurance in return for the payment of contributions — Overlapping of periods of insurance in several Member States — Possibility for the insured person to waive the rule relating to the aggregation of periods of contribution and insurance — Cancellation of the pension granted and recovery of any overpayment — Requirement to pay interest)

In Case C-103/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 12 February 2013, received at the Court on 4 March 2013, in the proceedings

Snezhana Somova

v

Glaven direktor na Stolichno upravlenie ‘Sotsialno osiguryavane’,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits, M. Berger (Rapporteur), S. Rodin and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2014,

after considering the observations submitted on behalf of:

- the Bulgarian Government, by E. Petranova and Y. Atanasov, acting as Agents,
- Ireland, by E. Creedon, acting as Agent,
- the European Commission, by M. Kellerbauer, D. Roussanov, V. Kreuzschitz and S. Petrova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2014,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of subparagraph (a) of the first paragraph of Article 48 TFEU, Article 49 TFEU and Articles 12(1) and (2), 46(1) and (2), and 94(2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71').
- 2 The request has been made in proceedings between Ms Somova and the Glaven direktor na Stolichno upravlenie 'Sotsialno osiguryavane' (the Director-General of the Sofia 'Social Security' office, 'the SUSO') in relation to the decision of the SUSO demanding repayment of the sums received in respect of a right to an individual old-age pension, together with interest, on the ground that that right was granted in breach of Article 94(1) of the Social Insurance Code (Kodeks za sotsialnoto osiguryavane) ('the KSO').

Legal context

EU legislation

- 3 Regulation No 1408/71, in force at the material time, was repealed by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).
- 4 Article 12(1) and (2) of Regulation No 1408/71, entitled 'Prevention of overlapping of benefits', provided that:
 1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Articles 41, 43(2) and (3), 46, 50 and 51 or Article 60(1)(b).
 2. Save as otherwise provided in this Regulation, the provisions of the legislation of a Member State governing the reduction, suspension or withdrawal of benefits in cases of overlapping with other social security benefits or any other

form of income may be invoked even where such benefits were acquired under the legislation of another Member State or where such income was acquired in the territory of another Member State.’

- 5 Article 44(1) and (2) of that regulation, entitled ‘General provisions for the award of benefits when a worker has been subject to the legislation of two or more Member States’, read as follows:

‘1. The rights to benefits of an employed or self-employed person who has been subject to the legislation of two or more Member States, or of his survivors, shall be determined in accordance with the provisions of this Chapter.

2. Save as otherwise provided in Article 49, the processing of a claim for an award submitted by the person concerned shall have regard to all the legislations to which the employed or self-employed person has been subject. Exception shall be made to this rule if the person concerned expressly asks for postponement of the award of old-age benefits to which he would be entitled under the legislation of one or more Member States.’

- 6 Article 45(1) of Regulation No 1408/71, entitled ‘Consideration of periods of insurance or of residence completed under the legislations to which an employed person or self-employed person was subject, for the acquisition, retention or recovery of the right to benefits’, provided as follows:

‘Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had completed under its own legislation.’

- 7 Article 46(1) and (2) of that regulation, entitled ‘Award of benefits’, provided as follows:

‘1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 or Article 40 (3), the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

- (ii) on the other hand, pursuant to paragraph 2;
- (b) the competent institution may, however, waive the calculation to be carried out in accordance with (a)(ii) if the result of this calculation, apart from differences arising from the use of round figures, is equal to or lower than the result of the calculation carried out in accordance with (a)(i), in so far as that institution does not apply any legislation containing rules against overlapping as referred to in Articles 46b and 46c or if the aforementioned institution applies a legislation containing rules against overlapping in the case referred to in Article 46c, provided that the said legislation lays down that benefits of a different kind shall be taken into consideration only on the basis of the relation of the periods of insurance or of residence completed under that legislation alone to the periods of insurance or of residence required by that legislation in order to qualify for full benefit entitlement.

Annex IV, part C, lists for each Member State concerned the cases where the two calculations would lead to a result of this kind.

2. Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and or Article 40(3), the following rules shall apply:

...'

8 Article 84a of the regulation, entitled 'Relations between the institutions and the persons covered by this Regulation', provided:

'1. The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation.

The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation.

The persons concerned shall inform the institutions of the competent State and of the State of residence as soon as possible of any changes in their personal or family situation which affect their right to benefits under this Regulation.

2. Failure to respect the obligation of information referred to in paragraph 1, third subparagraph, may result in the application of proportionate measures in accordance with national law. Nevertheless, these measures shall be equivalent to those applicable to similar situations under domestic law and shall not make it impossible or excessively difficult in practice for claimants to exercise the rights conferred on them by this Regulation.

3. In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent State or of the State of residence of the person involved shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.'

- 9 Article 94(2) of Regulation 1408/71, relating to transitional provisions for employed persons, provided:

'All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.'

- 10 Part C of Annex IV was entitled 'Cases referred to in Article 46 (1) (b) of the Regulation where the calculation of benefit in accordance with Article 46 (2) of the Regulation may be waived'. Letter B 'Bulgaria' covered:

'All applications for pensions for periods of insurance and old age, invalidity pensions because of general disease, and survivors' pensions derived from the above mentioned pensions.'

- 11 Annex VII of that regulation, entitled 'Instances in which a person shall be simultaneously subject to the legislation of two member states', provided in paragraph 2:

'Where a person is self-employed in Bulgaria and gainfully employed in any other Member State.'

Bulgarian law

- 12 Article 4(3) of the KSO provides:

'Insurance against invalidity by reason of illness and against old-age and death shall be compulsory for:

...

5. persons other than employees who receive monthly remuneration greater than or equal to the minimum wage, after the deduction of such expenses as are recognised by regulation, where they are not insured on any other basis during the month in question;
6. persons other than employees who are insured on another basis during the month in question irrespective of the amount of remuneration they receive.

...’

13 By judgment No 5 of 29 June 2000, the Konstitucionen sad (Constitutional Court) declared to be contrary to the Bulgarian constitution the obligation for pensioners who are self-employed to be insured and to pay contributions. Self-employed pensioners may, however, insure themselves voluntarily against the three risks set out in Article 4(3) of the KSO.

14 In the version applicable to self-employed persons during the period from 27 December 2005 to 31 December 2011, Article 94 of the KSO, entitled ‘Date of the grant of a pension’, provided in paragraph 1 thereof:

‘Pensions shall be awarded from the date on which entitlement is acquired and, in the case of old-age pensions, from the date on which insurance comes to an end, provided that an application accompanied by the requisite documents is lodged within six months of the acquisition of entitlement or, where appropriate, the date on which insurance comes to an end. In the event that the documents are lodged later than six months after the date on which entitlement is acquired or, where appropriate, the date on which insurance comes to an end, the pension shall be awarded from the date on which the documents are lodged.’

15 The obligation to cease insurance, imposed by Article 94 of the KSO, in order for entitlement to a pension to commence was repealed with effect from 1 January 2012 with regard to self-employed persons.

16 Article 114(1) of the KSO, entitled ‘Recovery of sums overpaid’, provides:

‘Sums which have been overpaid in respect of insurance benefits shall be recovered, with interest, from the recipient ...’

17 Article 9(3) and (5) of the transitional and final provisions of the KSO provides:

‘(3) In calculating the period of insurance for the purposes of retirement, account shall also be taken of the period during which the persons concerned were of the age referred to in Article 68(1) and (2) but during which a further five years’ contributions were still required in order for the right to a pension to be acquired and during which insurance contributions were paid, calculated on the basis of the minimum guaranteed remuneration of self-employed persons determined in accordance with the law on financing compulsory State insurance on the day on which such contributions were paid, provided that such period is not included as a period of insurance pursuant to any other provision of this Code.

...

(5) In respect of periods of insurance acquired under the provisions of paragraph 3, the right to a pension shall arise on the date on which the relevant

social contributions are paid or on the day on which the schedule for the payment of the relevant social contributions by instalments is approved.’

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

- 18 On 18 January 2007, Ms Somova applied for the grant of an old-age pension, declaring that she had worked in Bulgaria from 18 January 1957 until 31 May 1996 and that she had not been insured since 4 June 1996. That application was rejected by decision of 6 February 2007 on the ground that Ms Somova, who had paid contributions in Bulgaria over a total contribution period of 33 years, 11 months and 17 days, did not meet the requirements relating to age and the length of the contribution period laid down by Bulgarian law.
- 19 On 22 June 2007, Ms Somova applied for the award of an old-age pension on the basis of Article 9 of the transitional and final provisions of the KSO, in the version then in force. Pursuant to that article, that award was subject to the payment of contributions corresponding to a residual missing period of insurance of 2 years, 6 months and 17 days. By decision of 5 July 2007, Ms Somova was provided, at her request, with a schedule for the payment in instalments of the missing contributions.
- 20 On the same day, Ms Somova’s daughter, acting as her representative, certified in writing that her mother had not worked after 4 June 1996 and that she was not insured.
- 21 By decision of 11 July 2007, an old-age pension at the minimum rate was granted to Ms Somova, with effect from 5 July 2007. That rate was adjusted on several occasions.
- 22 Following an application for an old-age pension which Ms Somova made in 2011 to the competent Austrian social security body, the SUSO received on 20 September 2011 forms E 001/AT and E 205/AT. Those forms indicated that Ms Somova had been affiliated, under the Austrian Federal Law on Social Insurance, to the social security scheme for self-employed persons from October 1995 to December 2000 and from January 2001 to July 2011. During those periods, Ms Somova had been working as a farmer in Austria.
- 23 The SUSO inferred from the forms that, on 5 July 2007, the date on which she had been granted her old-age pension, Ms Somova had not ceased paying social security contributions. In three decisions made on that basis, the SUSO annulled (i) the decision granting Ms Somova an old-age pension and (ii) the notices increasing the amount thereof, and demanded the repayment, together with interest, of the sums paid to her.

24 The appeal brought against those decisions by Ms Somova was rejected by decision of the SUSO of 2 December 2011. The SUSO took the view that the certificate of 5 July 2007 drawn up by Ms Somova's representative did not relate only to the discontinuance of her social insurance in Bulgaria since, under Article 84a of Regulation No 1408/71, Ms Somova was required to inform the Bulgarian social security body of any affiliation in another Member State. In addition, account should have been taken, pursuant to Articles 44(2) and 45 of that regulation, of Ms Somova's period of insurance in Austria, without, however, applying Article 9 of the transitional and final provisions of the KSO.

25 According to Ms Somova, the fact that she was affiliated in Austria at the time when she applied for a pension in Bulgaria is irrelevant, since that affiliation related to a social security scheme of another Member State.

26 In those circumstances, the Administrativen sad Sofia-grad (Administrative Court, Sofia) stayed proceedings pending a preliminary ruling from the Court on the following questions:

- '1. In the circumstances [of the case in the main proceedings], should the first paragraph of Article 48 [TFEU] and Article 49 [TFEU] be interpreted as permitting a provision of national legislation, such as [that at issue in the main proceedings], [namely] Article 94(1) of the [KSO], whereby insurance is required to have come to an end in order to grant an old age pension to a national of a Member State who at the time of applying for a pension is working as a self-employed person in another Member State and falls within the scope of application of [Regulation No 1408/71]?
2. Should Article 94(2) of Regulation No 1408/71, in conjunction with subparagraph (a) of the first paragraph of Article 48 TFEU, be interpreted as permitting an exception to the rule on aggregating periods of insurance in relation to periods completed in another Member State before the regulation was applied by the Member State to which the application for a pension is made, where the said provision affords the person insured the right to choose whether he or she specifies such periods for aggregation purposes and to assess the need for aggregation if, purely according to the law of the State to which the application is made, the period completed is insufficient to create entitlement to a pension and a sufficient period of time can only be achieved by paying insurance contributions?

In those circumstances, does subparagraph (a) of the first paragraph of Article 48 TFEU permit the application of Article 46(2) of Regulation No 1408/71 on the aggregation of periods of insurance following commencement of the application of the regulation to be waived at the discretion of the party insured where that party does not specify periods of insurance completed in another Member State in his or her application for a pension?

3. Should Article 12(1) of Regulation No 1408/71 be interpreted as permitting recognition of periods of insurance as a result of paying insurance contributions as provided for under Bulgarian law in Article 9(3) [of the transitional and final provisions of the KSO], where, as in the circumstances appertaining in the main proceedings, such recognised periods of insurance overlap with periods of insurance completed under the law of another Member State?
4. Should Article 12(2) of Regulation No 1408/71 be interpreted as permitting a Member State to stop payments and demand the refunding of all payments of an old age pension granted to a national of that Member State under national law if the conditions laid down in the regulation only existed at the time that the pension was granted and, as a result of considerations based solely on national law according to which the insurance of the party concerned in another member State had not come to an end by the time that the pension was granted, a period of insurance was recognised under national law due to payment of insurance contributions without taking into account periods of insurance which were being completed in another Member State at the time that the pension was granted and without considering whether a different amount of the pension should have been assessed?

If the refunding of pension payments is permissible, does it then follow from the principles of equivalence and effectiveness derived from EU law ('EU law') that interest is due even where the national law of the Member State does not make provision for payment of interest in the case of repayment of a pension granted pursuant to an international treaty?

Consideration of the questions referred

Admissibility of the questions

- 27 Ireland submits that the request for a preliminary ruling is inadmissible on the ground that the case in the main proceedings is wholly internal in nature and that the resolution of the case requires neither the application nor the interpretation of EU law. In those circumstances, that Member State takes the view that the order for reference does not set out sufficient information in relation to the factual and legal circumstances of the case in the main proceedings so as to clearly establish how EU law has a bearing on the resolution thereof.
- 28 That argument cannot be accepted. It must be borne in mind that, according to the Court's settled case-law, the rules of the FEU Treaty governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State (see judgment in *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 60 and the case-law cited).

29 Here, however, even if the case in the main proceedings relates in essence to the condition laid down in Article 94(1) of the KSO which makes the entitlement to an old-age pension subject to the discontinuance of the affiliation to social insurance, the circumstances under consideration cannot be classified as wholly internal to a Member State. On the date of her application for a pension, Ms Somova was self-employed in Austria, thereby exercising her right to freedom of establishment pursuant to Article 49 TFEU.

30 Moreover, the referring court found that some of Ms Somova's periods of insurance under the old-age pension scheme in Austria overlapped with similar periods of insurance in Bulgaria, in particular that of 2 years, 6 months and 17 days purchased by Ms Somova in return for the payment of additional contributions under Article 9(3) of the transitional and final provisions of the KSO. Such a situation is in principle governed by the provisions of Regulation No 1408/71.

31 Therefore, the questions referred are admissible.

The first question

32 By its first question, the referring court is essentially asking whether Articles 48 TFEU and 49 TFEU preclude national legislation, such as Article 94(1) of the KSO, which makes the award of an old-age pension subject to the prior condition of the discontinuance of the payment of social security contributions relating to an activity carried out in another Member State.

The existence of restrictions

33 With respect to whether national legislation such as that at issue in the main proceedings is an unlawful restriction on the freedom of movement of workers, it should be pointed out that the Court has consistently held that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist; its sole objective is to ensure the coordination of those schemes. Thus, Member States retain the power to organise their social security schemes (see judgment in *Salgado González*, C-282/11, EU:C:2013:86, paragraph 35 and the case-law cited).

34 Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, in particular, the conditions for entitlement to benefits (judgment in *Salgado González*, EU:C:2013:86, paragraph 36 and the case-law cited).

35 In exercising those powers, Member States must nonetheless comply with EU law and, in particular, with the provisions of the Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States (judgment in *Salgado González*, EU:C:2013:86, paragraph 37 and the case-law cited).

- 36 It should also be recalled that all the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by European Union 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 another Member State (see, inter alia, judgments in *Bosman*, C-415/93, EU:C:1995:463, paragraph 94, and *ITC*, C-208/05, EU:C:2007:16, paragraph 31 and the case-law cited).
- 37 Provisions of national legislation which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute obstacles to that freedom even if they apply without regard to the nationality of the workers concerned (see, inter alia, judgments in *Bosman*, EU:C:1995:463, paragraph 96; *ITC*, EU:C:2007:16, paragraph 33, and *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 30 and the case-law cited).
- 38 Consequently, the provisions of the Treaty relating to freedom of movement of persons preclude any measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty (see, to that effect, judgments in *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 45, and *Casteels*, C-379/09, EU:C:2011:131, paragraph 22).
- 39 It follows that the Bulgarian legislature has the power to determine, under its national law, the conditions for the grant of an old-age pension in so far as they are not discriminatory on the grounds of the nationality of the applicants and do not prevent or dissuade persons who are entitled to an old-age pension from exercising the fundamental freedoms guaranteed by the Treaty.
- 40 In the case in the main proceedings, Article 94(1) of the KSO applies without distinction to all employees who have worked in Bulgaria and therefore does not constitute discrimination on the basis of the nationality of the workers concerned.
- 41 With respect to a possible restriction of the fundamental freedoms, it must be noted that that provision requires, in order for an old-age pension to be awarded, a formal discontinuance of the payment of contributions which results in a termination of occupational activities. The Bulgarian Government confirmed, at the hearing, that a very brief discontinuance lasting one day was sufficient to fulfil that condition. Moreover, the insured person was not denied the right to exercise an occupational activity after the award of an old-age pension and could aggregate that pension with a gainful occupational activity.
- 42 Such a discontinuance in the payment of contributions, as easy as it may be for a worker carrying out his activities in Bulgaria, may be difficult, even impossible, for a worker exercising his freedom of movement or of establishment by carrying out

an occupational activity as an employee or as a self-employed worker in another Member State. In particular, the administrative steps liable to flow from that discontinuance in another Member State could lead or even require a worker placed in a situation similar to that of Ms Somova to cease his occupational activity for an unpredictable period of time, longer than the minimum one day required by Bulgarian legislation, in order to be granted an old-age pension pursuant to that legislation.

- 43 That discontinuance could call into question the pursuit, by a self-employed person, of his occupational activity and make his professional circumstances precarious given that, following the discontinuance, he would have no guarantee of pursuing his employment or finding another.
- 44 As noted by the Advocate General in point 49 of his opinion, that discontinuance could also have, following that worker's return to work, negative consequences on pay, career progression and prospects of promotion, such as for example, a loss of the rights to paid leave and a reduction in grade or seniority.
- 45 It follows that a provision of national law, such as Article 94(1) of the KSO, is liable to prevent or dissuade people who are entitled to an old-age pension under Bulgarian legislation from carrying out an occupational activity in another Member State and therefore constitutes an obstacle to freedom of movement and in particular the freedom of establishment referred to in Article 49 TFEU.

Justification for the restriction

- 46 A restriction on the fundamental freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest. However, in such a case, the application of such a measure must also be suitable for securing the attainment of that objective and must not go beyond what is necessary in order to achieve it (see, *inter alia*, judgments in *ITC*, EU:C:2007:16, paragraph 37, and *Wencel*, C-589/10, EU:C:2013:303, paragraph 70 and the case-law cited).
- 47 As a preliminary point, it should be noted that the Bulgarian Government confirmed at the hearing that an insured person retained the right to carry out an activity after the award of an old-age pension and could aggregate that old-age pension with a gainful occupational activity. There is therefore no direct and necessary link between the payment of such a pension under Bulgarian law and the termination of gainful occupational activities.
- 48 Moreover, the Bulgarian Government stated at the hearing that the purpose of the mere formal requirement of discontinuance of that activity was unknown, even non-existent. That Government stated that the requirement was irrelevant and illogical, that the provision from which it flowed had been repealed with respect to

self-employed workers from 1 January 2012, and that the desirability of repealing the provision with respect to employees was currently being examined in Bulgaria.

- 49 Accordingly, it must be held that the requirement is not justified by an objective of public interest whose achievement it is capable of ensuring.
- 50 In the light of all the foregoing considerations, the answer to the first question is that Article 49 TFEU precludes legislation of a Member State, such as Article 94(1) of the KSO, which makes the award of an old-age pension subject to the prior condition of discontinuing the payment of social security contributions relating to activities carried out in another Member State.

The second question

- 51 By its second question, the referring court is essentially asking whether Articles 45, 46(2) and 94(2) of Regulation No 1408/71 must be interpreted as meaning that they are mandatory or as meaning that they permit insured persons to choose that, for the purposes of determining rights acquired in a Member State, periods of insurance completed in another Member State prior to the date of application of the regulation in the first Member State are not taken into account.
- 52 Concerning first of all Article 94(2) of Regulation No 1408/71, it should be noted that it provides that all periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of application of the regulation in the territory of that Member State or in a part of the territory of that State are to be taken into consideration for the determination of the rights acquired under the provisions of that regulation.
- 53 Its unequivocal wording, in particular the use of the words ‘shall be taken into consideration’ in the English version, clearly shows the mandatory nature of that provision. That is also apparent from the other language versions of Regulation No 1408/71, which do not give any grounds to doubt the binding nature of that provision.
- 54 That literal interpretation of Article 94(2) of the regulation is corroborated by the settled case-law of the Court according to which the provisions of Regulation No 1408/71 determining the applicable legislation form a complete system of conflict rules the effect of which is to divest the national legislatures of the power to determine the ambit and the conditions for the application of their national legislation on the subject so far as concerns the persons who are subject thereto and the territory within which the national provisions take effect (see, inter alia, judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 51 and the case-law cited).

- 55 Since the conflict rules laid down by Regulation No 1408/71 are thus mandatory for the Member States, a fortiori it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to elect to withdraw from their application. The application of the system of conflict rules established by the regulation depends solely on the objective situation of the worker concerned (judgment in *van Delft and Others*, EU:C:2010:610, paragraph 52 and the case-law cited).
- 56 In this context, the Court has held with reference to migrant workers that neither the FEU Treaty, in particular Article 45 TFEU, nor Regulation No 1408/71 gives those workers the option to waive in advance the benefit of the mechanism introduced inter alia by Article 28(1) of that regulation (judgment in *van Delft and Others*, EU:C:2010:610, paragraph 53 and the case-law cited).
- 57 Moreover, where Regulation No 1408/71 gives insured persons within its scope a right to choose the legislation applicable, it does so expressly (judgment in *van Delft and Others*, EU:C:2010:610, paragraph 54 and the case-law cited).
- 58 Article 94(2) of the regulation is therefore mandatory. Neither the Member States, nor the competent authorities, nor the insured persons falling within its scope may derogate therefrom.
- 59 Articles 45 and 46(2) of that regulation are also mandatory, since their wording does not confer any right to choose on an insured person who falls within the scope of those provisions (see, by analogy, judgment in *van Delft and Others*, EU:C:2010:610, paragraph 57). Consequently, the insured person cannot waive the application of those articles by not declaring, in the application for the award of the old-age pension to which he is entitled under the legislation of a Member State, the periods of insurance completed in another Member State.
- 60 That finding is supported by Article 84a(1) of Regulation No 1408/71, according to which the institutions and persons covered by that regulation have a duty of mutual information and cooperation to ensure the correct implementation of the regulation. In that regard, the persons concerned are to inform as soon as possible the institutions of the competent State and of the State of residence of any changes in their personal or family situation which affect their right to benefits under that regulation.
- 61 It follows, as Ireland argued in its written observations, that the applicant for social security benefits is not entitled to present a fragmentary narrative of his employment or insurance history so as to secure financial advantage.
- 62 Consequently, the mandatory nature of Articles 45 and 46(2) of Regulation No 1408/71 prevents the insured person from waiving the application, by the competent institution of the Member State in which the application for the old-age pension is made, of the rules on the aggregation of all periods of insurance and on

the calculation of the actual amount of that benefit, pro rata in relation to the length of the periods of insurance completed in another Member State prior to the date of the application of that regulation in the territory of the first Member State.

63 It follows from all of the foregoing that the answer to the second question is that Articles 45, 46(2) and 94(2) of Regulation No 1408/71 must be interpreted as not permitting insured persons to choose that, for the purposes of determining rights acquired in a Member State, periods of insurance completed in another Member State prior to the date of application of the regulation in the first Member State are not taken into account.

The third question

64 By its third question, the referring court is essentially asking whether Article 12(1) of Regulation No 1408/71 must be interpreted as precluding a provision of national law such as Article 9(3) of the transitional and final provisions of the KSO, in so far as that provision provides for the purchase of missing periods of insurance in return for the payment of contributions, where, as in the case in the main proceedings, the period thus purchased overlaps with periods of insurance completed under the law of another Member State.

65 In that regard, it is apparent from the answer to the second question that Articles 45, 46(2) and 94(2) of Regulation No 1408/71 are mandatory.

66 Accordingly, pursuant to Article 45 of that regulation, the competent Bulgarian authorities were required to take into account, at the time of the grant of an old-age pension to Ms Somova under Bulgarian legislation, periods of insurance completed in Bulgaria and in Austria.

67 As is apparent from the file before the Court, the periods of insurance completed by Ms Somova in Austria were sufficient to offset those during which Ms Somova was not insured under Bulgarian law. Given that the aggregation of Ms Somova's periods of insurance in Bulgaria and Austria under Article 45 of Regulation No 1408/71 was sufficient to ensure that she was entitled to an old-age pension under Bulgarian legislation, the Bulgarian authorities were not entitled to require her to purchase a period of insurance under Article 9(3) of the transitional and final provisions of the KSO.

68 In view of the foregoing and in the light of the answer to the second question, there is no need to give a separate answer to the third question.

The fourth question

69 By its fourth question, the referring court asks, in essence, whether, in a case such as that in the main proceedings, Article 12(2) of Regulation No 1408/71 precludes legislation of a Member State which allows that Member State to discontinue paying an old-age pension and to recover all the payments made. Furthermore, that

court asks whether those payments must be recovered together with interest in the light of the principles of equivalence and of effectiveness of EU law where national legislation does not provide for interest to be paid in respect of the recovery of a pension granted under an international treaty.

- 70 It is apparent from Article 12(2) of that regulation that the provisions of the legislation of a Member State governing the reduction of benefits in cases of overlapping with other social security benefits or any other form of income may in principle be invoked against persons who receive a benefit from that Member State.
- 71 In addition, it should be recalled that it is permissible, under Bulgarian law, to aggregate a gainful occupational activity and an old-age pension.
- 72 In those circumstances, it must be held that Article 12(2) of Regulation No 1408/71 is not applicable to the aggregation of occupational income and social security benefits at issue in the main proceedings.
- 73 Accordingly, there is no need to answer the fourth question.

Costs

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

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

- 1. Article 49 TFEU precludes legislation of a Member State, such as Article 94(1) of the Social Insurance Code (Kodeks za sotsialno osiguryavane), which makes the award of an old-age pension subject to the prior condition of discontinuing the payment of social security contributions relating to activities carried out in another Member State.**
- 2. Articles 45, 46(2) and 94(2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, must be interpreted as not permitting insured persons to choose that, for the purposes of determining rights acquired in a Member State, periods of insurance completed in another Member State prior to the date of application of that regulation in the first Member State are not taken into account.**

[Signatures]

* Language of the case: Bulgarian.