Opinion of Advocate General Kokott delivered on 11 November 2010

Maurits Casteels v British Airways plc

Reference for a preliminary ruling: Arbeidshof te Brussel - Belgium

Freedom of movement for workers - Articles 45 TFEU and 48 TFEU - Social security for migrant workers - Protection of supplementary pension rights - Inaction on the part of the Council - Worker employed successively by the same employer in several Member States

Case C-379/09

European Court reports 2011 Page 00000

I – Introduction

1. In view of the demographic change in Europe and the associated challenges posed to State old-age insurance schemes the creation of supplementary private pension provision is becoming increasingly important for Union citizens.

2. Occupational old-age pension schemes play an invaluable role in this context. However, as a rule in order to acquire supplementary occupational pension entitlements the employment relationship must have existed for a minimum period or contributions in respect of the employee must have been paid into an occupational pension scheme for a minimum period. Only when such minimum periods have been completed is there a guarantee that the employee's pension rights will not be 'forfeited' wholly or partially upon his departure from the scheme or simply upon termination of his employment contract. The term *qualifying periods* has come into use to describe such minimum periods.

3. Such qualifying periods are also the focus of interest in the present case. Mr Casteels, a Belgian worker, was employed continuously for many years by the same employer, the airline company British Airways. However, he worked at a number of British Airways establishments in several Member States. This resulted in him being affiliated successively to several occupational old-age pension schemes. British Airways is now refusing to grant him a supplementary occupational pension in respect of his service of just under three years in Germany because he was not affiliated to the occupational old-age pension scheme which exists at its sites in Germany for the prescribed minimum period, and he also moved voluntarily to another British Airways establishment.

4. In the present case the Court will have to ascertain whether such an approach is consistent with the provisions of European Union law on freedom of movement for workers.

II – Legal framework

A – *European Union law*

5. The framework for this case in European Union law is determined by the provisions on freedom of movement for workers. (2)

6. Article 45 TFEU (ex Article 39 EC) reads, in extract, as follows:

'1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...'

7. Article 48(1) TFEU (ex Article 42 EC) establishes the following:

'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for

workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

B – *National law*

8. At the time material to this case, the legal framework in Germany was determined, firstly, by the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the enhancement of occupational old-age pensions; 'the BetrAVG') (3) and, secondly, by a collective agreement.

1. Gesetz zur Verbesserung der betrieblichen Altersversorgung

9. The version of Paragraph 1(1) of the BetrAVG relevant in the present case (4) was worded as follows:

'An employee who has been given an assurance of old-age, invalidity or survivor's pension benefits on grounds of his employment relationship (occupational old-age pension) shall retain his pension right where his employment relationship terminates prior to the operative event if, at that time, the employee has reached the age of at least 35 and

– either the assurance as to benefits has existed in respect of him for at least 10 years

– or the beginning of his employment was at least 12 years ago and the assurance as to benefits has existed in respect of him for at least three years. …' (5)

10. At that time Paragraph 17(3) of the BetrAVG read as follows:

'Derogations from the provisions of Paragraphs 2 to 5, 16, 27 and 28 may be effected by collective agreement. The derogating provisions shall apply between employers and employees not bound by a collective agreement if they agree that the relevant provisions of the collective agreement are applicable between them. As to the remainder, the provisions of this Law cannot be derogated from to the employee's disadvantage.'

2. Collective Pension Agreement No 3

11. 'Collective Pension Agreement No 3 for Ground Crew and Cabin Crew of British Airways plc in Germany' (6) applied to Mr Casteels' employment relationship while he was working in Germany. This collective agreement was concluded on 13 July 1989 between British Airways' Deutschland-Direktion and the trade union 'Öffentliche Dienste, Transport und Verkehr' (ÖTV) and applied with effect from 1 January 1988. It laid down the details of the additional occupational pension for British Airways employees in Germany. Clause 7 of this collective agreement was worded as follows:

'(1) Employees who entered service with BA after 31 December 1977 shall be entitled to repayment of their own contributions, without interest, where they leave the company before the statutory qualification periods have been completed.

(2) The following rules shall apply to employees who entered service with BA before 1 January 1978:

(a) Employees with non-forfeitable entitlements may, where they leave the company before reaching the relevant age, demand payment of the value of the pension entitlement guaranteed by their own contributions …

(b) Employees who leave service with BA of their own free will before the completion of 5 years of service shall be entitled only to benefits which are guaranteed by their own contributions.

Employees who, after the completion of 5 years of service, but before the completion of the statutory qualifying periods, leave service with BA of their own free will or for any another reason, shall be entitled to the pension benefits which are guaranteed up that time by BA's contributions. …

…'

III – Facts and main proceedings

12. Mr Maurits Casteels had worked for the airline company British Airways plc, a company incorporated under UK law which maintains a large number of establishments in the European Union, continuously since 1 July 1974. In the course of his working life Mr Casteels worked at British Airways establishments in various Member States, namely Belgium, France and Germany.

13. Under a contract between Mr Casteels and British Airways of 10 March 1988, the occupational old-age pension scheme in force at the relevant place of service was always to apply to his employment relationship. Corresponding adjustments to the contract were made each time Mr Casteels moved from one establishment to another. The aim was to subject his employment relationship to the relevant national occupational old-age pension schemes. The intention was also to prevent Mr Casteels from being affiliated simultaneously to several British Airways occupational old-age pension schemes.

14. The contract of 10 March 1988 also makes it clear that the beginning of Mr Casteels' employment with British Airways was to be regarded as 1 July 1974 for all purposes. (7)

15. From 15 November 1988 to 1 October 1991 (8) Mr Casteels worked in Germany as an aircraft maintenance mechanic at British Airways' establishment in Düsseldorf. On the occasion of his move to Germany it was agreed between the parties on 19 October 1988 that Mr Casteels would be treated, in terms of his conditions of employment, as a German employee who had worked at British Airways' German establishment since 1 July 1974. The only exception was membership of the occupational old-age pension scheme applicable to British Airways employees in Germany under Collective Pension Agreement No 3. Mr Casteels was not to be included in that scheme until he actually started work in Germany on 15 November 1988. (9)

16. After accepting an offer from British Airways to work at its French establishment in Paris (Charles De Gaulle Airport), Mr Casteels moved from Germany to France on 1 October 1991. There he was subject to the occupational old-age pension rules applicable to British Airways employees in France. As of 1 April 1996 Mr Casteels returned to work for British Airways in Belgium, without having made any further moves abroad, and was again affiliated to the Belgium occupational old-age pension scheme.

17. The fact that Mr Casteels is entitled to a supplementary occupational pension in respect of the period following his definitive return to Belgium on 1 April 1996 is not at issue. What was at issue – and the subject-matter of the legal proceedings before the Belgian labour courts – was initially the treatment of the entire preceding period from 1 July 1974 to 31 March 1996. However, the main proceedings now concern only whether Mr Casteels is entitled to a supplementary occupational pension on the basis of his employment in Germany. British Airways is refusing to grant Mr Casteels this supplementary pension because he voluntarily left the establishment in Düsseldorf in 1991, before the end of the qualifying periods.

18. At present the main proceedings are pending in second instance before the Arbeidshof te Brussel, (10) as the court of appeal in employment-related cases.

IV – Reference for a preliminary ruling and proceedings before the Court of Justice

19. By judgment of 15 September 2009, received at the Court on 25 September 2009, the Arbeidshof te Brussel (also 'the referring court') stayed its proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Can Article 42 EC, in the absence of action on the part of the Council, be invoked by a private individual against his private-sector employer in a dispute before national courts?

(2) Do Article 39 EC, prior to the adoption of Directive 98/49/EC – of 29 June 1998 (OJ 1998 L 209, p. 46), and Article 42 EC, individually or in conjunction with each other, preclude the following situation:

In the case where an employee who is in the service of the same legal entity/employer, otherwise than in the context of postings, is employed successively in a number of operating units of that employer in various Member States and in each case is subject to the supplementary pension plans applicable to those operating units,

– for the determination of a period for the acquisition of definitive entitlements to supplementary pension benefits (based on the contributions of the employer and the employee) in a particular Member State, no account is taken of the years of service already completed with the same employer in another Member State or of the employee's membership of a supplementary pension scheme there, and

– the transfer of an employee, with his agreement, to an operating unit of the same employer in another Member State is treated as equivalent to the situation, as envisaged in the pension rules, of an employee voluntarily

leaving an operating unit, in which case entitlements to a supplementary pension are limited to the employee's own contributions,

and that situation has the unfavourable consequence that the employee loses his entitlements to supplementary pension benefits in relation to his employment in that Member State, which would not have been the case had he worked for his employer in only one Member State and remained a member of the supplementary pension scheme of that Member State?'

20. In the proceedings before the Court the German, Greek and United Kingdom Governments and the European Commission have submitted written observations in addition to Mr Casteels and British Airways. British Airways, the German Government and the Commission took part in the hearing of 6 October 2010.

V – Appraisal

21. Thus far the Court has considered occupational old-age pension provision primarily in connection with the principle of equal pay for men and women, (11) and recently occupational pensions have also been relevant with regard to the prohibition of discrimination against workers on the basis of their sexual orientation. (12) In the present case, however, the question is whether particular qualifying periods for the acquisition of a supplementary occupational pension, as raised by Mr Casteels against British Airways, are contrary to freedom of movement for workers.

22. Whilst in relation to statutory pension insurance schemes there have been, in EU legislation, rules of secondary law to support freedom of movement for workers, (13) there are no similar provisions on supplementary occupational pensions. (14) As the Court has already ruled, an application by analogy of the provisions applicable to statutory pension insurance schemes is not possible. (15)

23. Although the first steps towards safeguarding supplementary pension rights for migrant workers were taken by Directive 98/49/EC, (16) genuine portability, that is to say the comprehensive possibility for migrant workers to acquire and retain occupational pension entitlements, has not yet been achieved. (17) Furthermore, Directive 98/49 cannot apply *ratione temporis* to the facts in the main proceedings because it did not have to be transposed into national law until 25 July 2001, (18) that is to say long after Mr Casteels' period of employment at British Airways' German establishment in Düsseldorf.

24. Therefore, only the provisions of primary law on freedom of movement for workers are relevant in answering the questions referred by the Arbeidshof te Brussel.

25. Articles 39 and 42 EC, to which the referring court naturally still refers in its request for a preliminary ruling, have, however, been recast as Articles 45 and 48 TFEU since the Lisbon Treaty entered into force on 1 December 2009. In accordance with the general principle that a new legal situation is also to be applied to the present or future effects of existing situations, (19) in resolving the present case recourse should be had solely to Articles 45 and 48 TFEU. The issue here is not the assessment of the legality of an (administrative) decision in accordance with the legal situation applicable at the time of its adoption, (20) but the assessment of the present prospects of success of an entitlement asserted by a worker. (21)

26. The fact that in the present case the compatibility with European Union law of the legal situation applicable in Germany is in dispute before a Belgian court does not detract from the admissibility of the request for a preliminary ruling. (22)

A – *Question 1*

27. By its first question, the Arbeidshof te Brussel wishes in essence to know whether a private individual can invoke Article 42 EC (now Article 48 TFEU) against his employer. This question should be seen against the background that, as mentioned above, (23) there were no provisions of secondary law on the EU-wide coordination of supplementary occupational pensions in respect of the period between 1988 and 1991 which is relevant to this case.

28. According to settled case-law, a provision of European Union law is directly applicable only if it is clear and unconditional and not contingent on any discretionary implementing measure. (24) Put more simply, a provision must therefore be, *as regards its content,unconditional and sufficiently precise* so that individuals can rely on it directly.

29. Article 48 TFEU does not satisfy these requirements. The provision contains the legal basis for the European Union legislature to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. It is, as regards its content, neither unconditional nor sufficiently precise.

30. Article 48 TFEU is not *unconditional as regards its content* because achievement of the objectives of this provision requires action on the part of the European Union legislature. The European Union legislature enjoys a wide discretion in regard to the choice of the measures to be adopted. (25)

31. Article 48 TFEU is not *precise as regards its content* because it merely sets general objectives for the extremely complex subject of social security, on the one hand on the aggregation of insurance periods (Article 48(1)(a) TFEU) and, on the other, the exportability of benefits (Article 48(1)(b) TFEU). However, it is not possible to deduce directly from Article 48 TFEU how far and on what conditions insurance periods are to be aggregated and the provision provides no guidance as to the insurance periods in respect of which, and on what conditions, exportability is to be established. Although Article 48 TFEU gives the Union legislature a mandate to lay down rules on the scheme to be created at EU level, (26) it does not set out specifically enough how this scheme is to be organised.

32. Consequently, the answer to the first question referred by the Arbeidshof te Brussel must be in the negative.

B – *Question 2*

33. By its second question, the referring court wishes in essence to know whether, in relation to the completion of qualifying periods for rights to supplementary occupational pensions, freedom of movement for workers requires that account be taken of the entire duration of a worker's employment with the same employer at his establishments in various Member States. The referring court also wishes to know whether freedom of movement for workers prohibits the transfer of such an employee from one establishment to another from being regarded, in relation to the completion of such qualifying periods, as voluntary departure from the relevant establishment, even if the employee agrees to the transfer.

34. Although the two parts to this question are posed in relation to both Article 39 EC and Article 42 EC (now Article 45 TFEU and Article 48(1) TFEU), they need be considered only in regard to Article 45 TFEU, (27) since Article 48 TFEU is not, as regards its content, sufficiently precise (28) for national rules to be measured against it.

1. Preliminary remark

35. The German Government takes the view that the statutory provisions on qualification periods laid down in Paragraph 1(1)(1) of the BetrAVG cannot infringe European Union law as they are merely minimum requirements. As part of their contractual freedom, employers and employees are free to agree more favourable rules – in particular shorter qualifying periods – (see also Paragraph 17(3) of the BetrAVG).

36. It should be noted in this regard that the minimum requirements for the protection of workers laid down by law can be measured against European Union law and must be compatible with it, (29) as they are an expression of the model developed by the legislature for laying down rules on the subject concerned. A statutory framework, which must be applied compulsorily unless employers and employees agree otherwise, must per se be compatible with European Union law. Thus, the national legislature cannot leave it to the contracting parties to create a state of affairs consistent with European Union law.

37. However, in the present case this issue need not be examined in greater depth. As is apparent from both the written and oral procedure before the Court, the pension entitlement asserted by Mr Casteels in respect of his periods of service in Düsseldorf is precluded not by the statutory qualifying periods applicable in Germany at that time, but by Clause 7 of Collective Pension Agreement No 3.

38. In essence, the referring court also places these collectively agreed rules at the heart of its considerations when it refers in its second question to 'the determination of a period for the acquisition of definitive entitlements to supplementary pension benefits' and in this connection takes particular interest in the account 'taken of the years of service already completed … in another Member State' and 'the situation, as envisaged in the pension rules, of an employee voluntarily leaving an [establishment]'.

2. Freedom of movement for workers

39. Article 45 TFEU covers not only legislative measures and the actions of public authorities, but also rules of any other nature aimed at regulating gainful employment in a collective manner, in particular collective agreements. (30) Accordingly, collectively agreed rules on supplementary occupational pensions, such as those at issue in the present case, can be measured against the criterion of freedom of movement for workers.

a) Restriction of freedom of movement

i) General remarks

40. Both the terms of Collective Pension Agreement No 3 and the legal provisions referred to therein (31) apply equally to all employees working at British Airways establishments in Germany. These rules do not differentiate by the nationality of the employee concerned and there is no evidence that they may, by their nature, operate to the detriment of foreigners more than nationals and thus result in indirect discrimination on the basis of nationality. (32)

41. However, it is settled case-law that Article 45 TFEU prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which impede (or 'restrict') the freedom of movement of the workers concerned, even where such rules are applicable irrespective of their nationality. (33) That is because Article 45 TFEU precludes any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Union citizens of the fundamental freedoms guaranteed by the Treaties. (34)

42. In quite general terms, the provisions of the TFEU relating to the freedom of movement are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place Union citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. (35)

43. Collectively agreed rules such as those contained in Clause 7 of Collective Pension Agreement No 3 make it less attractive for employees to leave their establishment and move to another which is affiliated to a different old-age pension scheme or no such scheme at all. Where departure from an establishment – and the associated departure from the occupational old-age pension scheme – results in the forfeiture of pension rights, the employee concerned suffers substantial financial losses in terms of his private pension provision. For example, Mr Casteels is now being refused the right to an occupational pension in respect of his period of service at the German establishment of British Airways in Düsseldorf and is not benefiting from the contributions which the employer paid into the occupational old-age pension scheme.

44. It is true that such rules and the associated losses are not to be measured against Article 45 TFEU where they merely hinder or render less attractive a move between establishments *within the same Member State*. The primary-law provisions concerning freedom of movement for workers do not apply to purely internal situations. (36) However, those rules do constitute an obstacle to freedom of movement for workers where – as in this case – they can adversely affect *cross-border* moves to establishments in other Member States. Provisions which deter a Union citizen from leaving one Member State in order to pursue his employment as a worker in another Member State constitute an obstacle to freedom of movement for workers. (37)

45. It could be different only if the collectively agreed rules at issue were too uncertain or indirect to be capable of constituting a restriction of freedom of movement for workers. (38) However, there is no evidence for that in this case. A worker in the position of Mr Casteels, who after almost three years of service can rely only on his own pension contributions (39) without, however, benefiting from the sums paid in by the employer, sustains a considerable financial loss in comparison with his colleagues who remain at the establishment. Furthermore, his right to a supplementary occupational pension in respect of the periods of service concerned is not retained, (40) thus giving rise to significant losses in terms of his private old-age pension provision. Such financial losses, coupled with losses in terms of private old-age pension provision, are capable of deterring a worker from moving to another establishment situated abroad.

ii) Arguments put forward by British Airways

46. The objections raised by British Airways in no way alter the fact that freedom of movement for workers is restricted. For the sake of completeness I will examine them briefly below.

– Comparison with a purely national change of establishment

47. Firstly, British Airways considers that there is no restriction, because Mr Casteels' pension right would also have been forfeited had he moved to another establishment in the same Member State. The Greek Government takes a similar view.

48. This argument is erroneous.

49. The notion of restriction of freedom of movement for workers does not necessarily require that there must be unequal or less favourable treatment of cross-border situations in comparison with purely national situations. On several occasions the Court has held that restrictions exist even in cases in which the rules at issue affected both national and cross-border situations equally. (41)

50. Moreover, it is clear from a glance at Collective Pension Agreement No 3 that, contrary to the assertion made by British Airways, in the present case there was in fact less favourable treatment of a cross-border change of establishment in comparison with a purely national change. As the files show, geographically Collective

Pension Agreement No 3 covered the entire territory of the Federal Republic of Germany; it applied to British Airways ground crew 'in Germany'. (42)

51. Therefore, if, when he left Düsseldorf in 1991, Mr Casteels had merely moved to another British Airways establishment within Germany, that move would, under Collective Pension Agreement No 3, have had no impact at all on his pension right. On the other hand, the cross-border move to a French British Airways establishment – at least on the present interpretation by British Airways – brought about the forfeiture of his pension right under Collective Pension Agreement No 3.

– Impeding access to the labour market in other Member States

52. Secondly, British Airways argues that Mr Casteels' freedom of movement was not restricted since the collectively agreed rules had not specifically deterred him in any way from moving, across borders, from one establishment of the airline to another. In fact, over the years Mr Casteels had pursued his activities at several British Airways establishments in various Member States. Therefore, his 'access to the labour market' in other Member States had not been adversely affected.

53. However, this argument too does not hold water.

54. According to settled case-law there is always a restriction where a measure *is capable* of hindering or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaty. (43) That is so in this case because the collectively agreed rules and the associated prospect of financial losses in terms of private old-age pension provision have a deterrent effect on workers who are considering a change of establishment. (44) At any rate, in view of demographic change and the increasing need for supplementary private old-age pension provision it cannot be ruled out that workers will also take account of the possible forfeiture of their rights to supplementary occupational pensions in deciding whether to exercise their right to freedom of movement. (45)

55. Moreover, it is beyond doubt that as a result of his move in 1991 from the German establishment of British Airways in Düsseldorf to its French establishment Mr Casteels in fact sustains financial losses in terms of his private old-age pension provision if the collectively agreed rules are applied as British Airways envisages.

56**. Although the right to freedom of movement arising from Article 45 TFEU offers no guarantee to a worker** that he will find the same labour, social and tax arrangements in every country to which he moves, (46) the provisions of European Union law are intended to protect workers from specific disadvantages resulting from exercise of freedom of movement; (47) in particular, exercise of freedom of movement may not result in the payment of social security contributions on which there is no return. (48) However, that is precisely the result of collectively agreed rules such as those at issue in this case if they are interpreted and applied in the manner advocated by British Airways: a worker who, before completing the qualifying periods, moves to another Member State loses – partially or wholly – his right, acquired by contribution payments, to a pension under Collective Pension Agreement No 3.

– Comparison with the case of *Graf*

57. Thirdly, British Airways seeks to draw a comparison between the present case and the case of *Graf*. (49) It contends that both cases relate to the loss of financial benefits as a result of the worker concerned voluntarily changing his place of work. Therefore, if in *Graf* it had to be held that there was no restriction of freedom of movement of workers, the Court should also rule that there was likewise no restriction in the present case.

58. This argument does not convince me either.

59. *Graf* related to compensation on termination of employment, known as *'Abfertigung'*, provided for in Austrian law. As the Court pointed out at that time, entitlement to compensation on termination of employment is dependent 'on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him'. (50) By contrast, the present case centres on a pension right whose acquisition under Collective Pension Agreement No 3 depends by no means on a 'future and hypothetical event', but rather on a circumstance linked, *ex hypothesi*, to the exercise of the right to freedom of movement, namely, the choice of place of work. (51)

60. It should further be borne in mind that British Airways' guarantee as to benefits in respect of Mr Casteels came into effect when he entered service in Düsseldorf on 15 November 1988 and Mr Casteels acquired, through his own pension contributions and those of his employer, a right to a supplementary occupational pension from the first day. Now to regard this right as 'forfeited' would ultimately result in a loss of the savings which had been built up for Mr Casteels during his almost three years' service in Düsseldorf to provide him with a private old-age pension. In this respect too this case differs fundamentally from*Graf*.

61. Overall, I therefore abide by my conclusion that collectively agreed rules such as those at issue in this case impede freedom of movement for workers within the meaning of Article 45 TFEU and accordingly constitute a restriction of this fundamental freedom.

b) Justification

62. A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaties and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose. (52)

63. At the hearing the parties to the proceedings agreed that collectively agreed rules on qualifying periods such as those at issue in this case serve primarily to bind employees to their employer; they are intended both to promote and reward an employee's loyalty to the company. I should add that such rules also increase certainty of planning with regard to the occupational old-age pension scheme and can save the institution responsible for operating that scheme the costs which may be involved in administering and fulfilling particularly minor pension rights.

64. All these aims are based on legitimate considerations relating to labour and social law, (53) which are attributable to the field of overriding reasons in the public interest.

65. There is no doubt that collectively agreed rules such as those at issue in this case are also *such as to* achieve the abovementioned objectives.

66. On the other hand, a closer examination is required of whether or not the application of such collectively agreed rules – as interpreted in the manner envisaged by British Airways – goes beyond what is*necessary* to achieve the legitimate objectives of labour and social law.

67. British Airways considers, first, that in applying the qualification periods Mr Casteels' move from Germany to France on 1 October 1991 must be regarded as a voluntary termination of his employment relationship in Germany and, secondly, his periods of service at other British Airways sites must not be taken into account.

68. Such an approach, which obviously results in an employee such as Mr Casteels losing his pension right, (54) does not appear to be necessary to achieve the objectives of labour and social law.

69. First, as regards binding employees to their employer, this objective is clearly not jeopardised if an employee moves from one establishment of his employer to another establishment of the same employer. Rather, the relevant employee actually continues to prove his loyalty to his employer if, at his employer's invitation, he transfers to one of the employer's establishments in another Member State and consequently accepts a move abroad in the interests of the service.

70. It would go beyond what was necessary to ensure the loyalty of an employee if collectively agreed rules, which could result in the loss of his right to a supplementary occupational pension, were to be invoked against him when making such a move.

71. The situation may be theoretically different as regards the second of the abovementioned objectives, namely the objective of safeguarding certainty of planning and avoiding the administrative expenditure connected with particularly minor pension rights. With regard to this objective, an 'internal move' by an employee from one establishment to another establishment of the same employer could also theoretically justify the loss of pension rights if that move were made after a particularly brief period of service. However, an 'internal move' after almost three year's continuous employment at the same establishment is not made after a particularly brief period of service, especially where an employment relationship such as Mr Casteels' is concerned in which frequent cross-border change of establishments in the interests of the service is common or even contractually required. (55)

72. All in all, therefore, the application of collectively agreed rules such as those at issue in this case cannot be regarded as justified with regard to freedom of movement for workers.

3. Consequences for the main proceedings

73. According to established case-law, it is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of European Union law. (56)

74. The application of European Union law to the main proceedings is a matter for the referring court. (57) However, in order to give it a meaningful answer to its second question the following should be noted in brief.

75. According to the spirit and purpose of Article 45 TFEU to provide the greatest possible freedom for workers, it is necessary to prevent an employee from losing possible rights to a supplementary occupational pension when he moves from one establishment of his employer to another establishment of the same employer situated in another Member State.

76. To this end, Article 45 TFEU requires, with regard to the completion of qualification periods, that the entire duration of the employee's employment with the same employer at his establishments in various Member States be taken into account. Furthermore, Article 45 TFEU prohibits the transfer of an employee between establishments of the same employer in various Member States from being regarded, with respect to the completion of qualifying periods, as voluntary departure from the establishment, even if the employee has agreed to the transfer.

77. In the present case the possibility of an interpretation and application, in conformity with European Union law and guided by the requirements of freedom of movement for workers, of the qualification periods under Clause 7 of Collective Pension Agreement No 3, in conjunction with Paragraph 1(1)(1) of the BetrAVG, would not appear to be excluded in any way. It would be sufficient to take as the basis for Mr Casteels' 'period of service' with British Airways the entire duration of his employment relationship since 1 July 1974. (58)

78. The need to view Mr Casteels' period of service since 1 July 1974 as a whole is clear when one considers that on 10 March 1988 the parties expressly agreed to regard 1 July 1974 as the beginning of Mr Casteels' employment with British Airways 'for all purposes'.

79. Although, in the common view of the parties to the main proceedings, Mr Casteels should not be affiliated to several occupational old-age pension schemes at once, as far as is relevant for present purposes there is no fear at all of the employee being unjustly enriched (through the acquisition of several entitlements to a supplementary occupational pension in respect of the same period) but rather of him being placed at an unjustified disadvantage (through the loss of occupational pension entitlements in respect of a period of almost three years). This indicates that with regard to the completion of possible qualifying periods the entire duration of his employment relationship with British Airways should be taken into consideration.

80. If 1 July 1974 is taken as the beginning of his employment with British Airways, Mr Casteels falls within the scope of Clause 7(2) of Collective Pension Agreement No 3. This provision applies to employees 'who entered service with [British Airways] before 1 January 1978'. (59)

81. Furthermore, Mr Casteels can be regarded as an employee within the meaning of the second subparagraph of Clause 7(2)(b) of Collective Pension Agreement No 3 who 'left' service with British Airways before the completion of the statutory qualifying periods laid down in Paragraph 1(1)(1) of the BetrAVG but 'after the completion of 5 years of service'. (60)

82. The effect of this would be that under the second subparagraph of Clause 7(2)(b) of Collective Pension Agreement No 3 Mr Casteels would be entitled not only to pension benefits arising from his own contributions, but also those based on the employer contributions up until his move to France. Therefore, Mr Casteels would have a full entitlement in respect of his periods of service completed in Germany in relation to which both his own contributions and those of his employer would be taken into account.

83. The fact that in 1991 British Airways terminated its group insurance agreement in so far as Mr Casteels was concerned (61) is irrelevant in this respect. If necessary, British Airways must pay Mr Casteels compensation corresponding to his supplementary occupational pension in respect of the periods of service completed in Germany.

84. If, contrary to expectations, an interpretation and application in conformity with European Union law is not possible, the referring court would have to disapply Collective Pension Agreement No 3 in so far as it precludes exercise of Mr Casteel's pension entitlement. According to established case-law, direct recourse to freedom of movement for workers is permitted in relation to collective agreements, including in 'horizontal' legal relationships between private persons. (62)

4. Limitation of the effects of the judgment

85. In the event that the questions referred by the Arbeidshof te Brussel are answered as I am proposing here, the Greek Government is requesting a limitation of the temporal effects of the judgment.

86. It should be noted in this regard that the interpretation the Court gives to a rule of European Union law is limited to clarifying and defining the meaning and scope of that rule as it ought to have been understood and

applied from the time of its coming into force. (63) Therefore, a limitation of the temporal effects of preliminary rulings is possible only very exceptionally, (64) and where thus required by overriding considerations of legal certainty. (65) For there to be such a limitation, two essential criteria must be fulfilled, namely that those concerned acted in good faith and there is a risk of serious difficulties. (66)

87. Neither of these criteria is fulfilled in the present case.

88. As regards the criterion relating to good faith, it should be noted that collectively agreed rules have long been measured against the provisions of European Union law. (67) Therefore, management and labour in the various Member States could not, in good faith, rely on the expectation that the rules on qualifying periods agreed by them in collective agreements would generally remain outside the scope of European Union law.

89. Furthermore, as the German Government stated at the hearing before the Court, it is in any case compulsory, at least under German law, to take account of periods of services completed at foreign establishments of the same employer.

90. As regards the criterion relating to serious difficulties, neither of the parties to the proceedings argued that the solution proposed in this case could present a real threat to the financial balance of occupational old-age pension schemes. (68) This is also difficult to imagine since the present case relates merely to the retention of pension entitlements in respect of which employers and employees have already paid contributions.

91. Therefore, I do not consider that a limitation of the temporal effects of the Court's preliminary ruling is necessary.

VI – Conclusion

92. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Arbeidshof te Brussel as follows:

(1) Article 48 TFEU does not have direct effect.

(2) Where an employee has worked for the same employer at several establishments in various Member States, and, at each establishment, was affiliated to the occupational pension scheme applicable there, the rules of the relevant occupational pension scheme are to be interpreted and applied as far as possible in conformity with Article 45 TFEU. In particular:

– in calculating the periods of service which such an employee must have completed for his employer in order to acquire a non-forfeitable entitlement, account must be taken of the entire duration of his employment at all establishments of the same employer;

– the transfer of such an employee from one establishment to another may not be regarded as voluntary departure from the relevant occupational pension scheme, even if the employee has agreed to his transfer.

---

1 – Original language: German.

2 – On the applicable version of these provisions, see below (point 24 of this Opinion).

3 – BGBl. I, 1974, p. 3610.

4 – The version of the BetrAVG relevant in the present case is that of 19 December 1974, which was in force from 22 December 1974 to 31 December 2001.

5 – Since 2001, according to the information provided by the German Government, the qualifying period may amount to a maximum of five years. Paragraph 1b(1) of the BetrAVG now reads: 'An employee who has been given an assurance of occupational old-age pension benefits shall retain his pension right where his employment relationship terminates before the operative event occurs, but after he reaches the age of 25, and the assurance as to benefits has, at that time, existed for at least five years (non-forfeitable pension right). …' (BGBl. I, 2001, p. 1328, and BGBl. I, 2007, p. 2838).

6 – Also: 'Collective Pension Agreement No 3' or the 'collective agreement'.

7 – The original English wording of this contract reads, in extract, as follows: '… your employment with British Airways for all purposes will count from 01.07.1974'.

8 – It would be presumably more accurate to refer to 30 September 1991 as the termination date since Mr Casteels was working at the French establishment with effect from 1 October 1991 (see point 16 of this Opinion immediately below).

9 – The original English wording of the relevant contract, on which a British Airways offer of 19 October 1988 is based, reads as follows: 'We will effect a transfer from your present employment with British Airways at Brussels which means that your conditions of employment will be those for German Staff having started with British Airways on 1st July 1974. … The exception to this will be the membership of the British Airways pension scheme in Germany. You will become a member of this scheme after joining British Airways at Düsseldorf.'

10 – Labour Court, Brussels.

11 – See for example Case C-262/88 *Barber* [1990] ECR I-1889; Case C-109/91 *Ten Oever* [1993] ECR I-4879; Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389; and Case C-379/99 *Menauer* [2001] ECR I-7275.

12 – Case C-267/06 *Maruko* [2008] ECR I-1757; see also the Opinion of Advocate General Jääskinen in Case C-147/08 *Römer* [2010] ECR I-0000.

13 – Regulation (EEC) 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 (OJ, English Special Edition 1971 (II), p. 416), subsequently replaced 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, and corrigenda OJ 2004 L 200, p. 1).

14 – Regulation No 1408/71 is not applicable to occupational old-age pensions; see Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraphs 34 and 35.

15 – Case C-360/97 *Nijhuis* [1999] ECR I-1919, paragraph 30.

16 – Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ 1998 L 209, p. 46).

17 – A Commission proposal to that effect of 20 October 2005, which is intended in particular to restrict the possibility of applying qualifying periods and to guarantee the transferability of additional pension rights, has not yet been adopted [Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights, COM(2005) 507 final, since amended on 9 October 2007, see document COM(2007) 603 final].

18 – Under Article 10(1) of Directive 98/49, the time-limit for transposing the directive expired 36 months after it entered into force. Article 11 of the directive lays down the day of its publication in the *Official Journal of the European Communities* as the time of its entry into force; that was 25 July 1998. Consequently, the time-limit for transposing the directive expired on 25 July 2001.

19 – Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50; and Case C-428/08 *Monsanto Technology* [2010] ECR I-0000, paragraph 66; see to the same effect, most recently, Case C-162/09 *Lassal* [2010] ECR I-0000, paragraph 39.

20 – At the time Mr Casteels was employed in Germany (15 November 1988 to 1 October 1991) Articles 48 to 51 of the Single European Act version of the EC Treaty were relevant to freedom of movement for workers.

21 – Also in Case C-325/08 *Olympique Lyonnais* [2010] ECR I-0000, the Court answered the questions referred to it for a preliminary ruling having regard to Article 45 TFEU.

22 – See to this effect Case C-150/88 *Eau de Cologne & Parfümerie-Fabrik 4711* [1989] ECR 3891, paragraph 12, in conjunction with paragraph 1.

23 – See above (points 22 and 23 of this Opinion).

24 – Case 26/62 *Gend & Loos* [1963] ECR 1, and Case 44/84 *Hurd* [1986] ECR 29, paragraph 47.

25 – *Nijhuis* (cited in footnote 15, paragraph 30) and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 64.

26 – Article 48 TFEU 'confers on the Council the task of instituting a scheme allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security' (Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraph 30; Case C-293/03 *My* [2004] ECR I-2013, paragraph 34; and *von Chamier-Glisczinski*, cited in footnote 25, paragraph 64). In this regard the establishment of the greatest possible freedom of movement for migrant workers is to be sought as the 'primary aim' (Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 5).

27 – The fact that national rules concerning supplementary occupational pensions can be measured against the provisions on freedom of movement for workers is demonstrated, for example, by Case C-302/98 *Sehrer* [2000] ECR I-4585, in particular paragraph 36.

28 – See in this regard my comments on Question 1 (points 27 to 32 of this Opinion).

29 – In a large number of cases the Court has already considered whether European Union law precludes national rules on minimum protection for workers. See, for example on working time, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, and Case C-313/02 *Wippel* [2004] ECR I-9483, and on parental leave, Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067). In all these cases it would have been possible to agree in an employment contract more favourable rules than those provided for in national law. Nevertheless, the minimum protection contained in national law had to be compatible with European Union law.

30 – Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 16 and 17; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 82 to 84; Case C-400/02 *Merida* [2004] I-8471; and *Olympique Lyonnais* (cited in footnote 21, paragraphs 30 and 31).

31 – See Paragraph 7 of the Collective Pension Agreement No 3 which attaches at several points to the 'completion of the statutory qualifying periods' (see point 11 of this Opinion).

32 – On the definition of indirect discrimination on grounds of nationality, see inter alia Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 30, and Case C-73/08 *Bressol and Othersand Chaverot and Others* ('Bressol') [2010] ECR I-0000, paragraph 41.

33 – Case C-190/98 *Graf* [2000] ECR I-493, paragraph 18; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraphs 50 and 51; Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 45; and Case C-269/07 *Commission* v*Germany* [2009] ECR I-7811, paragraph 107.

34 – Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 46, in conjunction with paragraphs 35 and 45; and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* ('Flemish care insurance') [2008] ECR I-1683, paragraph 45.

35 – *Bosman* (cited in footnote 30, paragraph 94); Case C-464/02 *Commission* v *Denmark* (cited in footnote 33, paragraph 34); *Flemish care insurance* (cited in footnote 34, paragraph 44); and *Olympique Lyonnais* (cited in footnote 21, paragraph 33).

36 – Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 26, and *Flemish care insurance* (cited in footnote 34, paragraphs 33 to 38).

37 – See to this effect *Bosman* (cited in footnote 30, paragraph 96); Case C-464/02 *Commission* v *Denmark* (cited in footnote 33, paragraph 35); *Flemish care insurance* (cited in footnote 34, paragraph 44 *(in fine)* and 48); and *Olympique Lyonnais* (cited in footnote 21, paragraph 34).

38 – Case C-190/98 *Graf* [2000] ECR I-493, paragraph 25, and *Flemish care insurance* (cited in footnote 34, paragraph 51).

39 – In the proceedings before the Court it was unclear whether the employee contributions which Mr Casteels paid from 1988 to 1991 were actually repaid to him.

40 – Annex 9 to British Airways' written observations shows that British Airways terminated its group insurance agreement with Victoria Lebensversicherung AG in November 1991 in so far as it concerned Mr Casteels.

41 – See, for example, *Bosman* (cited in footnote 30) and *Olympique Lyonnais* (cited in footnote 21), in which the rules of the relevant football clubs on the transfer of football players to other clubs applied equally to national and cross-border transfers. Similarly – in relation to freedom of establishment – Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, which concerned the German rule excluding non-pharmacists; this applies both to national and foreign undertakings which wish to operate a pharmacy in Germany.

42 – See Paragraph 1 of Collective Pension Agreement No 3 which British Airways itself submitted to the Court as Annex 7 to its written observations.

43 – *Kraus* (cited in footnote 34, paragraph 32) and *Flemish care insurance* (cited in footnote 34, paragraph 48 *(in fine)* and paragraph 55); to the same effect – in relation to freedom of establishment – *Apothekerkammer des Saarlandes and Others* (cited in footnote 41, paragraph 22).

44 – Similarly in *Flemish care insurance* (judgement cited in footnote 34, paragraph 48) the Court held that freedom of movement for workers is impeded, where, on account of national provisions concerning social security, they 'find themselves in a situation in which they suffer either the loss of eligibility [for] care insurance or a limitation of the place to which they transfer their residence'.

45 – To the same effect *Flemish care insurance* (cited in footnote 34, paragraph 53).

46 – On social law, see Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51; Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34; Case C-3/08 *Leyman* [2009] ECR I-9085, paragraph 45; Case C-211/08 *Commission* v *Spain* [2010] ECR I-0000, paragraph 61; and Case C-345/09 *Van Delft and Others* [2010] ECR I-0000, paragraph 100.

47 – To this effect Case 24/75 *Petroni* [1975] ECR 1149, paragraph 13; Case C-10/90 *Masgio* [1991] ECR I-1119, paragraph 18; Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 43; and *Leyman* (cited in footnote 46, paragraph 41).

48 – *Hervein* (paragraph 51, *in fine*), *Piatkowski* (paragraph 34, *in fine*), *Leyman* (paragraph 45, *in fine*) and *Van Delft and Others* (paragraph 101), all cited in footnote 46.

49 – Judgment cited in footnote 38.

50 – *Graf* (cited in footnote 38, paragraph 24).

51 – See to the same effect *Flemish care insurance* (cited in footnote 34, paragraph 51).

52 – *Kraus* (cited in footnote 34, paragraph 32); *Bosman* (cited in footnote 30, paragraph 104); *Flemish insurance care* (cited in footnote 34, paragraph 55); and *Olympique Lyonnais* (cited in footnote 21, paragraph 38).

53 – The Court has acknowledged that an employer may reward his employees' company loyalty by particular measures, for example in Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 28, and Case C-196/02 *Nikoloudi* [2005] I-1789, paragraph 63. In connection with Article 51 of Regulation No 1408/71, for example, the Court has also acknowledged that the administrative expense in calculating social security benefits may have some bearing: see Case 7/81*Sinatra* [1982] ECR 137, paragraph 9, and Case C-85/89 *Ravida* [1990] ECR I-1063, paragraph 20.

54 – The guarantee as to benefits in respect of Mr Casteels under Collective Pension Agreement No 3 did not take effect until he entered into service in Düsseldorf on 15 November 1988. Accordingly, that guarantee had existed for less than three years at the time of his move to France. His employment at the Düsseldorf site also amounted to less than three years. Consequently, Mr Casteels would not have completed the qualifying period under the first or second indent of Paragraph 1(1) of the BetrAVG by which Paragraph 7(1) of Collective Pension Agreement No 3 is guided.

55 – See in this regard the agreement of 10 March 1988 concluded between the parties in the main proceedings (see point 13 of this Opinion).

56 – Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11; Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 68.

57 – Settled case-law, see only Case 100/63 *Van der Veen* [1964] ECR 565, 572, and Case C-54/07 *Feryn* [2008] ECR I-5187, paragraph 19.

58 – As the German Government stated at the hearing before the Court, German labour law, as interpreted by the case-law of the highest courts, actually requires that the employment relationship be viewed as a whole.

59 – At the hearing before the Court British Airways' legal representative expressly acknowledged, when asked, that Paragraph 7(2) of Collective Pension Agreement No 3 can be applied to Mr Casteels.

60 – Strictly speaking, Mr Casteels never left service with British Airways because his move to France in 1991 was also made on the instructions of British Airways and his ongoing employment relationship with British Airways since 1 July 1974 continued to exist.

61 – This is clear from a letter from Victoria Lebensversicherung AG which British Airways submitted to the court as Annex 9 to its written observations.

62 – See to this effect *Bosman* (cited in footnote 30) and *Olympique Lyonnais* (cited in footnote 21) in which the effects of collective agreements on individual employment relationships with individual football clubs as employers were at issue; to the same effect *Walrave and Koch* (cited in footnote 30, paragraphs 17 and 31 to 34). The Court went even further in Case C-281/98 *Angonese* [2000] ECR I-4139, paragraphs 30 to 36, and Case C-94/07 *Raccanelli* [2008] ECR I-5939, paragraphs 41 to 48, and attributed, in employment relationships governed by private law, direct effect to freedom of movement for workers – or at any rate the prohibition of discrimination contained therein – irrespective of the existence of collectively agreed rules.

63 – Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 16; *Bosman* (cited in footnote 30, paragraph 141); Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 66; and *Bressol* (cited in footnote 32), paragraph 90.

64 – *Denkavit italiana* (cited in footnote 63, paragraph 17); *Bosman* (cited in footnote 30, paragraph 142); and *Bressol* (cited in footnote 32, paragraph 91).

65 – *Barber* (cited in footnote 11, paragraph 44); *Bidar* (cited in footnote 63, paragraph 67); and *Bressol* (cited in footnote 32, paragraph 91); to the same effect Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 122.

66 – Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51; Case C-2/09 *Kalinchev* [2010] ECR I-0000, paragraph 50; and *Bressol* (cited in footnote 32, paragraph 91).

67 – See, by way of first precedent, the judgment in *Walrave and Koch* (cited in footnote 30, paragraph 17).

68 – On this criterion, see *Barber* (cited in footnote 11, paragraph 44); similar to Case 43/75 *Defrenne* [1976] ECR 455, paragraph 70, previously.