OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered 24 May 2012(1)

Case C-62/11

Land Hessen
v
Florence Feyerbacher

(Reference for a preliminary ruling from the Hessisches Landessozialgericht (Germany))

(Privileges and immunities of the European Union – Legal nature of the Headquarters Agreement of the European Central Bank – Public-law contract – No effect in relation to everyone – Statute of the European System of Central Banks – Article 36(1) – Conditions of employment of staff of the European Central Bank – Not exclusive – Applicability to European Central Bank staff of German social welfare law providing for social security benefits to such staff – Charter of Fundamental Rights of the European Union – Article 34 – Entitlement to social security benefits)

I – Introduction

1. Does the Federal Republic of Germany have power to grant social security benefits to employees of the European Central Bank? That, in essence, is the question which the Hessisches Landessozialgericht (Regional Social Court, Land Hessen) (Germany) has asked the Court.

2. More particularly, the referring court is uncertain, first, as to the legal nature of the Agreement of 18 September 1998 between the German Government and the European Central Bank (ECB) on the Headquarters of the ECB ('Headquarters Agreement'). (2) Secondly, the referring court points out that it is necessary to determine the scope of the conditions of employment of ECB staff, taking account of Article 36(1) of the Protocol to the Statute of the European System of Central Banks and the European Central Bank (ESCB). (3)

3. The questions referred have arisen in the context of a dispute between Ms Feyerbacher ('the applicant'), an employee of the European Central Bank who is a German national and resides in Germany, in Land Hessen, concerning the latter's refusal to grant her a parental allowance.

4. Consequently the reference for a preliminary ruling concerns, first, the legal nature of the Headquarters Agreement and, in particular, whether it forms part of Union law or not. Secondly, it raises the question of whether Article 15 of the Headquarters Agreement – which by virtue of the Article 36(1) of the Statute of the ESCB precludes the application of the substantive and procedural provisions of the employment and social welfare law of the Federal Republic of Germany to the conditions of employment for ECB staff, laid down by the Governing Council of the ECB (4) ('COE') – constitutes a rule of conflict of laws which prevents that Member State from granting ECB staff members residing in its territory, on the basis of the principle of territoriality, family allowances, such as the parental allowance, provided for by its national legislation.

5. In that connection, I would point out that the key to the case lies in the question of whether and, if so, to what extent, Germany remains free, by virtue of Article 36(1) of the Statute of the ESCB, to apply its national law for the purpose of granting social security benefits to ECB staff members to supplement those provided for in the COE.

II – The legal context

A – *Union law*

1. The Charter of Fundamental Rights of the European Union

6. The right to social security benefits is guaranteed in Article 34 of the Charter of Fundamental Rights of the European Union, (5) which provides as follows:

'1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

...'

2. The Statute of the ESCB

7. The external operations of the ECB are defined in Article 23. In particular, the ECB may 'establish relations with central banks and financial institutions in other countries and, where appropriate, with international organisations'.

8. Under Article 24, entitled 'Other operations', the ECB may, in addition to operations arising from its tasks, 'enter into operations for [its] administrative purposes or for [its] staff'.

9. Article 35(1) and 35(4) of the Statute of the ESCB provide as follows:

'35(1) The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice in the cases and under the conditions laid down in this treaty ...

...

‘35(4) The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.’

10. Under Article 36(1) of the Statute of the ESCB, ‘the Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB’.

11. Article 39 of the Statute provides as follows:

‘The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.’

3. The Protocol on the privileges and immunities of the European Union

12. Under Article 14 of the Protocol on the privileges and immunities of the European Union: (6)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned, shall lay down the scheme of social security benefits for officials and other servants of the Union.’

13. Article [22] of the Protocol provides that the Protocol is to apply to the ECB, the members of its organs and to its staff, without prejudice to the provisions of the Statute of the ESCB.

4. The Headquarters Agreement

14. According to the fifth paragraph of the preamble to the Headquarters Agreement, the objective of the Agreement is to define the privileges and immunities of the ECB in the Federal Republic of Germany as laid down in the Protocol on privileges and immunities. (7)

15. Article 15 of the Headquarters Agreement is headed ‘Non-applicability of German labour and social welfare law’ and reads follows:

‘Pursuant to Article 36 [of the Statute of the ESCB], the conditions of employment of the members of the Executive Board and the employees of the ECB shall not be subject to either the substantive or the procedural labour and social welfare law of the Federal Republic of Germany’.

16. Article 21 of the Headquarters Agreement provides that any differences of opinion between the Government of the Federal Republic of Germany and the ECB concerning the interpretation or application of this Agreement may be submitted in accordance with Article 35(4) of the ESCB Statute by either party to the European Court of Justice.

5. The provisions of the COE

17. The persons covered by the COE (8) are defined in Part 1 of the COE, entitled ‘General provisions’. Article 1 of the COE reads as follows:

'... "member of the staff" of the [ECB] shall mean any person who has countersigned an employment contract appointing him/her for an indefinite period or for a definite period of more than one year to a position within the ECB and who has taken up his/her appointment.'

18. Article 9, which is in Part 2, is entitled 'Employment relations' and provides as follows:

'(a) Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. ...

...

(c) No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law, and (iii) the rules contained in the regulations and directives concerning social policy ...'.

19. Part 3 of the COE is entitled 'Basic salary and allowances'. With regard to the allowances referred to in Articles 15 to 20 of the COE, namely household allowance, dependent child allowance, expatriation allowance, education allowance and pre-school allowance, Article 21 states that 'those allowances are complementary to any other allowances of the same nature provided by any other sources'. Members of staff of the ECB must claim and declare 'such allowances, which are to be deducted from those payable by the ECB'.

20. Part 4 of the COE, entitled 'Benefits on appointment and termination of service', contains in turn Article 24, which states that the benefits provided for by Articles 22 and 23 are complementary to 'any other benefits of the same nature provided by any other sources'. Members of staff of the ECB must likewise claim and declare 'such benefits, which shall be deducted from those payable by the ECB'.

21. According to Article 29 of the COE, which is in Part 5 of the COE, entitled 'Working hours and leave', members of staff are entitled to unpaid parental leave which must at least satisfy the provisions of Council Directive 96/43/EC. [(9)]

22. Part 6 of the COE is entitled 'Social security'. This part comprises the rules governing, inter alia, remuneration in the event of absence from work caused by illness or accident, disability benefit and sickness and accident insurance.

23. Part 6 also includes provisions on allowances, namely monthly unemployment allowance, household allowance and cover under the ECB medical scheme and accident insurance scheme, to which members of staff who are unemployed following termination of their contract with the ECB are entitled. However, it appears from Article 36 of the COE that those 'benefits are complementary to any other benefits of the same nature provided by any other sources'. Members of staff of the ECB must likewise claim and declare 'such benefits, which shall be deducted from those payable by the ECB'.

B – *National law*

24. Under Paragraph (1) of the Gesetz zum Elterngeld und zur Elternzeit (10) (Federal Law on parental allowance and parental leave, BEEG),

'(1) A person shall be entitled to parental allowance, if

1. he is permanently or ordinarily resident in Germany,

2. lives in the same household as his child,

3. looks after and raises that child himself, and

4. has no or no full-time employment.'

25. Paragraph 1(2), point 3, of the BEEG deals with employment in a country other than Germany:

'Even if the conditions of point 1 of subparagraph 1 above are not satisfied in full, a person shall be entitled to parental allowance also where

...

3. he is a German national and is employed only on a temporary basis for an international or supranational organisation, in particular public servants seconded in accordance with the Federal guidelines on secondment, or is temporarily assigned to perform duties abroad ...'

26. With regard to similar benefits, the first sentence of Paragraph 3(3) of the BEEG provides as follows:

'Benefits similar to parental allowance which a person with an entitlement under Paragraph 1 of the present law may claim in a country other than Germany or against an international or supranational organisation shall be set off against parental allowance to the extent that they are payable for the same period and regulations adopted on the basis of the Treaty establishing the European Community do not apply.'

III – The main proceedings, the questions referred and the procedure before the Court

27. The applicant is a German national and resides in Germany, where she was in employment before becoming a member of the staff of the ECB. On that basis she receives a salary which is subject to Community tax and she is covered by the scheme applying to ECB staff under the COE, without being insured under the German social security scheme.

28. As the COE do not provide for a parental allowance, following the birth of her child on 5 September 2008 the applicant applied to the German authorities for a parental allowance under Paragraph 1(1) BEEG on the basis of her salary from the ECB or, alternatively, the minimum parental allowance of EUR 300 per month.

29. In support of her application, she claimed that she fulfilled the conditions for entitlement, as laid down by Paragraph 1(1) BEEG, as she resided in Germany, was raising her child there and was not in full-time employment during the period covered by the allowance.

30. By decisions of 4 December 2008 and 8 January 2009, in response to the applicant's claim, the defendant refused the application on the ground that, under the provisions of the Protocol on privileges and immunities and Article 15 of the Headquarters Agreement, the applicant is subject to Union law and not to German employment and social welfare law. In principle, therefore, ECB staff are not entitled to the parental allowance. In addition, the authority in question observed that the applicant is no longer liable to tax in Germany.

31. Ms Feyerbacher lodged an appeal against the abovementioned decisions before the Sozialgericht (the court of first instance competent for social welfare matters), Frankfurt. In support of her appeal, she also submitted that the Headquarters Agreement was concluded

long before the BEEG entered into force and that therefore it could not lead to exclusion from the parental allowance. In addition, as her contract with the ECB was for a limited period, it was temporary employment within the meaning of point 3 of Paragraph 1(2) of the BEEG. According to the applicant, it is also necessary to take into account Paragraph 3(3) of the BEEG, which specifies the cases where similar benefits received abroad from an international or supranational organisation must be deducted from the German parental allowance.

32. By judgment of 30 September 2009, the Sozialgericht Frankfurt allowed the appeal and annulled the decisions of 4 December 2008 and 8 January 2009. According to that court, Ms Feyerbacher fulfils the conditions for receiving the allowance in question, as required by Paragraph 1(1) of the BEEG.

33. The Sozialgericht Frankfurt took the view that only the law can, by a specific provision, exclude a category of persons from the benefit of BEEG allowances. It nevertheless found that Article 15 of the Headquarters Agreement is not a provision of that kind because the right to the parental allowance does not concern the conditions of employment of ECB staff governed by Article 15. In addition, the rejection of the applicant's claim is not justified in the present case either because ECB staff are not entitled to social insurance benefits, social allowances or support in the same category as the contested parental allowance. Consequently there are no concurrent benefits.

34. On appeal against that judgment, the Hessisches Landessozialgericht considers that the applicant fulfils the conditions laid down by Paragraph 1(1) of the BEEG and should therefore be entitled to the parental allowance unless it is excluded by a specific provision conforming with the statutory requirements. That court does not rule out the possibility that Article 15 of the Headquarters Agreement may constitute legislation of that kind.

35. In those circumstances the Hessisches Landessozialgericht, by decision received by the Court Registry on 10 February 2011, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1) Is the [Headquarters Agreement] part of European Union law which takes precedence over national law or does it constitute an international treaty?

2) Must Article 15 of the Headquarters Agreement in conjunction with Article 36 of the ESCB and the ECB be interpreted restrictively with the result that the applicability of German social security law conferring the benefit in question is excluded only where pursuant to the 'Conditions of Employment' the ECB confers a similar social benefit on its staff?

3) If Question 2 is answered in the negative:

(a) Must the abovementioned provisions be interpreted as meaning that they preclude the application of a national provision which grants family benefits only on the basis of the territorial principle?

(b) Is the reasoning of the Court of Justice in Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraphs 31 to 33, relevant to the application of the abovementioned provisions? Does Article 15 of the Headquarters Agreement in conjunction with Article 36 of the Statute of the ESCB and ECB not deprive the Federal Republic of Germany of the power to grant family benefits to employees of the ECB resident in Germany?'

36. Written observations were submitted by the applicant, the German Government, the European Commission and the ECB. None of the parties applied for a hearing.

IV – Discussion

A – *The Headquarters Agreement*

1. The legal nature of the Headquarters Agreement

37. I would point out straightaway that the categorisation of the Headquarters Agreement as a legal act is not an easy matter. As shown by the observations submitted to the Court, it could fall into two categories namely, first, an international agreement upon which the national law ratifying it confers the same status as national laws in the formal sense or, secondly, an act forming part of Union law and which, as such, takes precedence over national law. I prefer the latter category.

38. First of all, regarding the independence of the ECB, it must be observed that its independence is guaranteed by Article 130 TFEU and Article 7 of the Statute of the ESCB. However, as the Court has made clear, the independence of the ECB which aims to ensure the fulfilment of its tasks does not have the consequence of separating it entirely from the European Union and exempting it from every rule of European Union law. (11) Therefore the ECB cannot be considered an inter-governmental organisation with a so-called 'functional' competence in international law. On the contrary, it was originally a *sui generis* entity (12) and, as Union law stands at present, it is a Union institution by virtue of Article 13 (13) TEU and derives its powers from primary law.

39. Therefore the ECB's independence is not an end in itself, but serves a specific purpose. The principle of independence aims in particular to enable the ECB to pursue effectively the aim of price stability and, without prejudice to that aim, to support the economic policies of the Union as required by Article 127 TFEU. (14)

40. It must also be borne in mind that the ECB has legal personality in accordance with Article 282(3) TFEU and Article 9(1) of the Statute of the ESCB. Its powers to carry out external operations and other operations not arising from its tasks are however set out in Articles 23 and 24 of the Statute of the ESCB. (15) Taking account of its legal personality, the ECB seems to me to have power to conclude international agreements connected with its tasks in the context of monetary policy. (16) On the other hand, as the Commission points out, the ECB has no power at all to conclude international agreements on behalf of the Union by reason of the fact that there is no basis for powers in that respect and the only procedures that apply are those laid down in Article 218 TFEU.

41. Apart from operations connected with monetary policy, which are governed by Article 23 of the Statute of the ESCB, the ECB may, under Article 24, carry out other operations necessary from the viewpoint of its functioning, such as the conclusion of the Headquarters Agreement. However, the wording of that Article does not specify the nature of the measures that the ECB may take in connection with such operations. That is why, in order to determine the legal nature of the Headquarters Agreement, it must be examined in its particular legal context, namely that of the Protocol on privileges and immunities.

42. According to the fifth paragraph of the preamble to the Headquarters Agreement, it was concluded in order to define the privileges and immunities of the ECB in the Federal Republic of Germany as laid down in the Protocol on privileges and immunities. (17) The Headquarters Agreement is therefore supplementary to the Protocol and is intended to implement the provisions of the Protocol in relation specifically to the ECB. (18) Article 15 of

the Agreement attaches in particular to Article 14 of the Protocol, which provides for the procedure applicable to laying down the scheme of social security benefits for officials and other servants of the Union.

43. In the context of Union primary law, Article 21 of the Headquarters Agreement, concerning the settlement of disputes, refers to Article 35.4. of the Statute of the ESCB, which provides for the Court to have jurisdiction on the basis of an arbitration clause in the same terms as Article 272 TFEU, that is to say, 'any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'. In view of the status of the parties and the purpose of the Headquarters Agreement, therefore, the arbitration clause in that Agreement can relate only to a public-law contract. (19)

44. That conclusion was implicitly confirmed by the Court in *ECB* v *Germany*, cited above. In that case the Court based its jurisdiction on a combined reading of Article 21 of the Headquarters Agreement, Article 35.4. of the Statute of the ESBC and Article 272 TFEU. (20)

45. Contrary to the German Government's submission, I consider that it is not an international agreement within the meaning of public international law, but a public-law agreement between the ECB and the Federal Republic of Germany.

46. I would add that the legal system to which that agreement attaches can be none other than that of the Union. As I have already indicated, a reading of the preamble to that agreement reveals a special connection with Union law due to the fact that the Headquarters Agreement constitutes the implementation of the Protocol on privileges and immunities in the present specific context. (21) Notwithstanding the connections which the agreement has with Germany, it clearly attaches to Union law because it aims to set out the privileges and immunities granted in German territory to the ECB by the Protocol. (22)

47. It follows that the Headquarters Agreement is part of the legal context created by the Protocol on privileges and immunities and, more generally, part of Union law, which constitutes the legal framework of reference for the purpose of interpreting its provisions.

2. The effects for individuals of the Headquarters Agreement as a public-law contract

48. Having shown that the Headquarters Agreement is a public-law contract for the purpose of Union law, it is now necessary to determine whether and, if so, to what extent, such a contract can have effects for individuals such as the applicant.

49. As a general rule, a public-law contract, like a private-law contract, has a binding effect only for the parties to the contract. As a public-law contract with binding effect for the parties to the contract, the Headquarters Agreement must be deemed to express the intention of the ECB and of Germany to specify their respective rights and obligations in accordance with the provisions of the Protocol on privileges and immunities. For that reason, the Headquarters Agreement cannot be regarded as having effect in relation to everyone in the context of Union law. (23)

50. The fact that the Agreement does not have effect in relation to everyone may be inferred from the limited competence of the ECB, which is laid down by Article 132(1) TFEU and Article 34(1) of the Statute of the ESBC by virtue of which the ECB is empowered to make regulations, take decisions, make recommendations and deliver opinions. In addition, the Governing Council may adopt guidelines and give instructions under Article 12(1) of the Statute of the ESBC. Consequently the ECB may exercise the power to make regulations

with regard to its staff under Article 36(1) of the Statute. However, it cannot change the meaning or scope of the Conditions of employment by means of a contract concluded with another Member State

51. It follows that a public-law contract such as the Headquarters Agreement in the present case cannot have a binding effect as against third parties, namely other Member States, other institutions of the Union and individuals. In other words, to have effect in relation to everyone, the Headquarters Agreement would have to have been adopted in the form of a regulation or decision. (24)

52. However, it seems appropriate to compare the effects of the Headquarters Agreement with those of directives as far as individuals are concerned. Like a directive, which cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, (25) the Headquarters Agreement cannot adversely affect the rights of individuals under Union law or national legislation. (26)

53. With regard in particular to Article 15 of the Headquarters Agreement, I think that provision must be considered to refer to Article 36(1) of the Statute of the ESBC, which states that the Governing Council is to lay down the conditions of employment (27) of the staff of the ECB.

54. Therefore, first, that provision of primary law must be applied in priority to German national law. Secondly, taking into account its effect as between the parties, Article 15 of the Headquarters Agreement relieves Germany of any obligation to apply the provisions of German labour and social welfare law in relation to ECB staff.

55. In the judgments in *Commission* v *Germany* and *Commission* v *Belgium,* cited above, which concerned the interpretation of the Staff Regulations of European Officials laid down by regulation, the Court found that the supplementary effect of family allowances payable under staff regulations, by comparison with allowances of like nature paid from other sources, is binding on the Member States and cannot be disregarded by national legislation.

56. The Court found, first, that the staff regulations preclude a Member State from excluding the payment of family allowances for dependent children under national legislation where the person entitled to such allowances is married to a serving official, a retired official or another servant and is or has been employed in that Member State. (28)

57. Secondly, the Court has held that the same provisions also prevent a Member State from providing for family benefits payable under national legislation to be reduced by the amount of similar benefits provided for by staff regulations where either the spouse of a serving official, a retired official or another servant is or has been employed in that Member State or that official himself has part-time paid employment outside the Community institutions. (29)

58. Therefore, in order to give a useful reply to the questions referred, those questions must be reworded. Taking the questions together, it appears that the referring court is asking, in essence, whether Article 36(1) of the Statute of the ESCB, which is mentioned only on an alternative basis in the questions referred, precludes Germany from granting social security benefits, such as the parental allowance at issue in the main proceedings, to ECB staff in general under its national legislation on the basis of the principle of territoriality or, alternatively, where the ECB makes no provision for such an allowance.

59. Therefore I consider that it is necessary to reply to the question as reworded in order to determine the dispute in the main proceedings. As the question concerns the interpretation

and application of Union law, the Court has jurisdiction to reply. Consequently the German Government's submission that the reference for a preliminary ruling is inadmissible because of the nature of the Headquarters Agreement as an act of international law, which means that the Court has no jurisdiction to interpret it by way of the preliminary ruling procedure laid down by Article 267 TFEU cannot succeed.

B – *The power of the Federal Republic of Germany to grant social security benefits to ECB staff*

1. The legal nature of the conditions of employment

60. It must be borne in mind that the employment relationship between the ECB and its staff is defined by the Conditions of Employment, adopted by the Governing Council, on a proposal from the Executive Board of the ECB, on the basis of Article 36(1) of the ESCB Statute. Article 9(a) of the COE provides that 'employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment'. Therefore, as the Court has found, the conditions of employment adopted for employment relationships between the ECB and its staff are contractual rather than governed by public service regulations. (30)

61. Furthermore, the conditions of employment were not adopted by means of a regulation but by means of an act described as a decision, so that they have no binding effect for the Member States which are not addressees of the decision. However, like the European staff regulations, which are intended only to regulate the legal relations between the European institutions and their officials, the COE are binding on the ECB and its staff and lay down, like the staff regulations of European officials with regard to the European public service, the rights and obligations of members of the staff of the ECB. (31)

62. Article 36(1) of the Statute of the SEBC confers functional autonomy on the ECB as regards the arrangements applying to its own staff. Those arrangements, defined in the Conditions of Employment and the Staff Rules (Article 21 of the ECB Internal Regulations) are not the same as the rules applying to officials and the rules applying to other servants of the European Union. They are also not dependent on the laws of the Member States. (32)

63. Under Article 36(1) of the Statute of the ESCB, the ECB remains free to regulate the conditions of employment of its own staff, which must be understood as including not only conditions of employment, but also the social security benefits to which a person (or a person claiming under him) is entitled as a servant of the ECB. (33) However, contrary to what the Commission says in its observations, the functional competence which the ECB derives from the Statute of the ESCB to lay down the arrangements applicable to its own staff do not constitute a rule of conflict of laws which, as such, would exclude the applicability of other arrangements concerning social security. I consider that Article 36(1) of the Statute of the ESCB is a provision permitting the ECB regulate, whether expressly or by implication, the applicability of different social security schemes to its staff. (34)

64. It follows that the problem found by the national court concerning the relationship between the system established by the COE and other schemes, such as that established by German social welfare law, cannot be resolved globally. On the contrary, an adequate response will entail successive examination of each category of benefit concerned. (35)

2. The scope of the COE

65. The persons covered by the COE are specified Article 1 of the COE, which defines 'member of the staff" as any person who has signed an employment contract with the ECB

for an indefinite period or for a definite period of more than one year who has taken up his/her appointment with the ECB. Annexes IIa and IIb of the COE provide in addition for specific conditions applying to short-term contracts (less than one year) and to persons taking part in what is known as the Graduate Programme.

66. Unlike persons taking part in the Graduate Programme, to whom the COE apply, unless otherwise provided by Annex IIa, persons with a short-term contract (so called 'temporary' staff) with the ECB, to whom the specific conditions laid down by Annex IIb apply, seem to be excluded from the scope of the COE by virtue of Article 1 thereof. I conclude from this that temporary staff are not included in the category of ECB employees to whom Article 4c of Regulation No 549/69 (36) applies. That provision states that staff of the ECB are also to have the privileges and immunities laid down for European officials and servants by the Protocol on Privileges and Immunities.

67. With regard to the substantive scope of the COE, first of all, the ECB, in accordance with its power to lay down its own rules, provides in Article 9(c) of the COE that no national law governs the conditions of employment. By virtue of that provision, national social insurance legislation based on a contract of employment cannot therefore be applied either in relation to the ECB as an employer or in relation to its employees. Consequently the provisions of national compulsory social insurance schemes cannot be applied to employees of the ECB.

68. Nevertheless, it remains to determine the status of benefits which are granted on a basis other than the employment relationship. They include benefits granted on the basis of schemes of which the ECB employee is a voluntary member, benefits granted to the employee otherwise than as an employee of the ECB (37) and benefits granted to the employee on the basis of the principle of territoriality

3. The different categories of benefits provided for by the COE

69. It appears from the COE that ECB employees must join the ECB sickness and accident insurance scheme. The fact that joining the scheme is compulsory therefore excludes the application of equivalent national compulsory schemes.

70. A reading of the COE, however, reveals numerous links between the ECB scheme and the scheme provided for by national law. Under the COE, the family allowance and unemployment allowance provided for in Parts 4 and 6 of the COE are paid by the ECB as complementary to any other benefits of the same nature provided by other sources.

71. According to the COE, the abovementioned allowances are granted on the assumption that the ECB employee has previously applied to the appropriate authority or body for such allowances from other sources and that the employee has informed the ECB of the amount. Consequently the equivalent allowances are paid by the ECB only on a complementary basis.

72. In my opinion, the choice of those rules shows that the ECB scheme has certain features which suggest that it is not an exclusive, or even primary scheme, at least with regard to family allowances, but a scheme which complements other social security schemes. This applies also to social security benefits granted to the employee himself, and not only to benefits granted to other family members or to persons claiming under the employee.

73. Therefore I differ from the Commission and the ECB in so far as I consider that there is no serious reason of an institutional nature, connected with the ECB's independence, for

interpreting the COE as meaning that a parental allowance, such as that at issue in the main proceedings, cannot be granted on the basis of the relevant national law. I stress that the schemes covering ECB and Union staff allow them to be covered by other social security schemes. (38)

74. As the foregoing observations show that the scheme established by the COE is in principle of a complementary nature, I am not persuaded by the ECB's argument that it is necessary to safeguard the independence of the ECB and to enable it to function without impediments at its headquarters in Frankfurt-am-Main and that this justifies the systematic exclusion of ECB staff from [the application of] German employment and social welfare law. In actual fact, it is the ECB itself that obliges employees to apply to other sources in order to able to receive the allowances which the ECB pays only on a complementary basis.

75. Furthermore, because the allowances provided for by the ECB, such as the parental allowance, are subsidiary to the allowances from other sources, I consider that interpreting the COE as meaning that they systematically exclude the application of national social security law cannot be justified by the need to ensure the equality of European Union officials and employees of different nationalities.

76. Although one of the objectives underlying the provisions of the Protocol on Privileges and Immunities is to ensure equal pay for Union officials and servants, who are not liable for national income tax nor, as a rule, subject to national social security law, that objective, like equality of the Member States, cannot be attained in view of the complementary nature of the allowances paid by the ECB in the special context of the scheme applying to ECB staff. (39)

77. Therefore it must be found that the COE do not globally exclude the applicability of national social security systems. Consequently the COE scheme has a dual impact. On the one hand, the COE exclude the application of national social insurance law concerning pension and sickness and accident insurance for ECB staff. (40) On the other hand, as I have already said, they constitute a complementary and subsidiary scheme in relation to the allowances and benefits covered by Parts 4 and 6 of the COE.

4. The effect of Article 34 of the Charter of Fundamental Rights of the European Union on the interpretation of the COE

78. For the sake of completeness, I wish finally to consider situations in which, because of the ECB's inaction, ECB employees can obtain certain benefits either by joining a particular scheme on a voluntary basis (41) or on the basis of the principle of territoriality, as in the present case with regard to the parental allowance. In that context it is essential to take into account the provisions of the Charter of Fundamental Rights of the European Union.

79. It is important to have regard to Article 34(1) of the Charter, which states that the entitlement to social security benefits providing protection in the cases specified by that provision must be respected. (42) In conformity with that provision, and taking account of the wording of Article 9(c) of the COE, which expressly recognises the applicability of the general principles of Union law in the context of the COE, the latter cannot be interpreted as precluding the applicability, in relation to employees or former employees of the ECB, of social welfare benefits based on national legislation where no similar benefit is paid by the ECB. (43)

80. This interpretation is confirmed by the Court's reasoning in the case-law resulting from the *Bosmann* judgment cited above. It is true that that case-law concerns cross-border situations in a totally different legal context, (44) but the principle of complementarity developed by the Court in the field of social security, by virtue of which the Member State of

residence cannot be deprived of the right to grant family allowances to persons residing in its territory seems to me relevant in the present case. (45) The Court's reasoning shows clearly that the Member State in question does not lose its right to grant social welfare allowances on the basis of the principle of territoriality merely because another social security scheme is applicable to the person concerned.

81. Regarding the parental allowance at issue in the main proceedings, it must also be observed that, under Article 29 of the COE, unpaid parental leave must satisfy the provisions of Council Directive 96/34/EC on the framework agreement on parental leave. However, this cannot lead to the conclusion that the fact that the COE make no provision for a parental allowance, although no doubt it would go beyond the minimum requirement of the Directive, means that the Member State concerned has no power to grant such an allowance on the basis of the principle of territoriality.

82. On the contrary, as appears from Clause 4(1) of the agreement set out in the Directive, the Member States may apply or introduce more favourable provisions than those set out in that agreement. Therefore I consider that the COE cannot be regarded as prohibiting the grant of a parental allowance to an ECB employee on the ground that the COE do not provide for an allowance of that kind.

83. I would add that it is also contrary to Article 34 of the Charter to interpret the COE as establishing an exclusive scheme which would preclude the application of national social welfare law to ECB staff. In particular, according to the Conditions of short-term employment, such an interpretation, based on the mere existence of an employment relationship between the person concerned and the ECB, would result in the loss of all social security cover, except cover based on sickness and accident insurance and cover for the risks of accidents at work and occupational disease. (46)

84. In those circumstances, I consider that Germany remains free to grant social welfare benefits to ECB employees provided that the grant of such benefits is not linked to the existence of employment in national legislation and that a similar benefit is not granted exclusively by the ECB.

85. However, I should point out that, under Article 15 of the Headquarters Agreement, Germany has no obligation at all to apply its legislation on the subject to ECB employees. It follows that the applicability of the provisions of national law, provided that the conditions for granting a benefit are fulfilled, and the amount of benefit granted fall within the scope of national law.

V – Conclusion

86. Consequently I propose that the Court reply as follows to the questions referred by the Hessisches Landessozialgericht:

'Article 36(1) of the Statute of the European System of Central Banks and the European Central Bank must be interpreted as meaning that it does not preclude Germany from granting social welfare benefits, such as the parental allowance at issue in the main proceedings, to employees of the European Central Bank in accordance with national law, on the basis of the principle of territoriality, unless such benefit is exclusively provided for by the Conditions of employment of the staff of the European Central Bank.'

1– Original language: French.

2 – BGBl.1998 II, p. 2745. The German version, which alone is authentic, is also available on the ECB internet site, together with an English translation.

3 – This is Protocol No 4 annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union (OJ 2010, C 83, p. 230).

4 – On the basis of Article 36(1) of the Statute of the ESCB, the Governing Council of the ECB adopted the conditions of employment for staff of the ECB on June1998 (OJ 1999 L 125, p. 32), which have been amended several times.

5 – For the sake of clarity and even though the Headquarters Agreement was concluded before, and the allowance at issue in the main proceedings covers a period entirely prior to, the entry into force of the Treaty of Lisbon, the legal context relates to primary-law provisions in their wording subsequent to that date. Apart from the Charter, which acquired binding force after the entry into force of the Treaty, the provisions which are relevant to my discussion have remained largely identical to those in force before that date.

6 – Protocol No 7 annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union ('Protocol on privileges and immunities' (OJ 2010 C 83, p. 266).

7 – At the time when the Agreement was signed, the Protocol in question was the Protocol on the privileges and immunities of the European Communities of 8 April 1065 (OJ 1967, 152, p. 13) in the version annexed to the EC and Euratom Treaties.

8 – Unofficial translation of the English version available on the ECB internet site.

9 – Council Directive of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996, L 145, p. 4).

10 – BGBl. 2006, I p. 2748.

11 – Case C-11/00 *Commission* v *ECB* [2003] ECR I-7147, paragraph 135. For a discussion of the different aspects of the ECB's independence, see the opinion of Advocate General Jacobs in *Commission* v *ECB*, cited above, paragraphs 150 to 155, and also Gaitanides, C., *Das Recht der Europäischen Zentralbank. Unabhängigkeit und Kooperation in der Europäischen Währungsunion.* Mohr Siebeck, Tübingen, 2005, p. 55 ff. See also, by analogy, Case C-15/00 *Commission* v *EIB* [2003] ECR I-7281, and the case-law cited there.

12 – Theorists have expressed different views regarding the status of the ECB in the European construct. For a summary, see Gaitanides, C., *op. cit*., pp. 51 to 55.

13 – When the Headquarters Agreement was concluded on 1 September 1998, the ECB was not among the more limited circle of Community institutions listed in Article 7 EC. Under the EC Treaty, the ESCB and the ECB had in effect a special position in the institutional architecture.

14 – See the opinion of Advocate General Jacobs in *Commission* v *ECB*, cited above, paragraph 150.

15 – See Ott, J., 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield between European and International Law', *European Foreign Affairs Review*, 2008, no.13, p. 527.

16 – See, to that effect, Horng, D.-C., 'The European Central Bank's External Relations with Third Countries and the IMF', *European Foreign Affairs Review*, 2004, no, 3, p. 326.

17 – Order of 17 December 1968 in Case 2/68 *Ufficio Imposte di Consumo di Ispra* v *Commission* [1968] ECR 6356. In that case the Court did not take the approach proposed by Advocate General Roemer in his opinion, which consisted in applying, by analogy, the principles governing the UNO headquarters agreement to the agreement between the Commission and the Italian Government concerning the headquarters of the Nuclear Research Centre at Ispra. The Court found that, even if the Commission could conclude a headquarters agreement with the Member State concerned in order to ensure the application of the Protocol on privileges and immunities, that agreement could not diminish the rights and safeguards arising directly from the Protocol in favour of the Member States and their organs, the Community institutions and individuals. With regard to the European schools, for a contrary inference, see Case 44/84 *Hurd* [1986] ECR 29, paragraphs 20 to 22, and Case C-132/09 *Commission* v *Belgium* [2010] ECR I-0000, paragraph 44.

18 – Case C-220/03 *ECB* v *Germany* [2005] ECR I-10595, paragraph 24.

19 – See Schwarze, J. (ed.) *EU-Kommentar,* Article 238 EC, 2nd ed., Nomos, Baden-Baden, 2009, pp.1839 to 1843.

20 – *ECB* v *Germany*, cited above, paragraph 27. See also the opinion of Advocate General Stix-Hackl in that case, paragraph 29.

21 – *ECB* v *Germany*, cited above, paragraph 24.

22 – According to doctrine, a public-law contract within the meaning of Article 272 TFEU, the wording of which corresponds to that of Article 35(4) of the Statute of the ESCB, may be governed either by the law of a Member State or by Union law. Regarding the first possibility, the Headquarters Agreement is connected only with the legal system of Germany which, however, cannot be applicable in view of the purpose of the Agreement, which is to implement the provisions of the Protocol on privileges and immunities. See Schwarze, J., *op. cit.,* p.1842.

23 – With regard to the Headquarters Agreement not having effect in relation to everyone, see the Court's observations in the order in *Ufficio Imposte di Consumo di Ispra* v *Commission*, cited above, p. 640.

24 – See, to that effect, Case 189/85 *Commission* v *Germany* [1987] ECR 2061, paragraph 14, and Case 186/85 *Commission* v *Belgium* [1987] 2029, paragraph 21. The Court expressly found that the relevant version of the staff regulations of officials and conditions of employment of other servants of the European Communities were adopted; by means of Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 (OJ 1968 L 56, p. 1, 'Staff Regulations of European Officials') and that the Regulation therefore has general application, is binding in its entirety and directly applicable in all Member States.

25 – Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108, and case-law cited.

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26 – A different conclusion might be reached in relation to the Headquarters Agreement in the light of German law. The Agreement was ratified in Germany by the Assenting Law of 19 December 1998 (BGBl. II, 1998, no. 51, 29 December 1998, p. 2996).

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27 – It should be noted that the term used in the German version of Article 36(1) is 'Beschäftigungsbedingungen' which is the same as the terminology of Article 15 of the Headquarters Agreement.

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28 – *Commission* v *Germany,* cited above, paragraph 30.

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29 – *Commission* v *Belgium,* cited above, paragraph 35.

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30 – Case C-409/02 *Pflugradt* v *ECB* [2004] ECR I-9873, paragraphs 31 to 33 and case-law cited. However, it must be added that the ECB, as an institution, has discretion with regard to the organisation of its services, notwithstanding the legal instrument of a contractual nature on which the employment relationship between it and its staff is based: opinion of Advocate General Léger in the case cited above, paragraph 36, and the case-law cited.

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31 – See, by analogy, the order of 18 April 2002 in Case T-238/00 *IPSO and USE* v *ECB* [2002] ECR II-2237, paragraphs 48 to 50, and case-law cited. See also Case C-430/97 *Johannes* [1999] ECR I-3475, paragraph 19.

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32 – Joined Cases T-178/00 and T-341/00 *Pflugradt* v *ECB* [2003] ECR II-4035, paragraph 48. See also Order in *IPSO and USE* v *ECB*, cited above, paragraphs 48 and 49. In the event of a gap in the rules, the ECB conditions of employment and staff rules must be interpreted in accordance with the case-law on the Staff Regulations of European officials See, to that effect, Case T-63/02 *Cerafogli and Poloni* v *ECB* [2003] ECR II-4929,paragraph 51.

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33 – The Court has taken the view that family allowances, in so far as they are components of remuneration, must be regarded as linked to an employment relationship, *Commission* v *Germany,* paragraph 26, and *Commission* v*Belgium*, paragraph 29, both cited above.

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34 – The judgments in *Commission* v *Germany* and *Commission* v *Belgium*, cited above, and the links between the different social security schemes applicable to servants of the ECB are based on the principle that officials and servants of the European Union, like those of the ECB, may fall within the scope of other social security schemes.

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35 – The same principle underlies the application of the scheme established by Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and their families, moving within the Community (OJ 1971 L 149, p. 2, in the version modified and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997, L 28, p.1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998, L 209, p. 1) and 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). See, in particular, Chapters 1 to 8 on the different categories of benefits.

36 – Council Regulation (Euratom, ECSC, EEC) of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply (OJ 1969 L 74, p.1), as amended by Council Regulation (EC, ECSC, Euratom) No 1198/98 of 5 June 1998 (OJ 1998 L 166, p, 3). It should be added that, as Union law stands at present, the relevant provisions are Article 11, the second paragraph of Article 12, and Article 13 of the Protocol on Privileges and Immunities.

37 – In particular, benefits which may be received as a former member of a social insurance scheme or as a person claiming under a former member.

38 – See Articles 67 and 68 of the Staff Regulations of European officials.

39 – Case 6/60 *Humblet* v *Belgium* [1960] ECR 1125, 1157. See also the opinion of Advocate General Cruz Villalón in Case C-558/10 *Bourges-Maunoury and Heintz*, pending before the Court, paragraph 30, and case-law cited.

40 – The COE provisions concerning the invalidity allowance seem to me rather unclear.

41 – For example, it appears from the file submitted to the Court that the care insurance provided for by German law is such a scheme which ECB employees may join voluntarily. For details, see Joined Cases C-502/01 and C-31/02*Gaumann-Cerri and Barth* [2004] ECR I-6483, paragraphs 3 to 7.

42 – Under Article 51 of the Charter, its provisions are addressed to the Union and to the Member States when they are implementing Union law. In addition, as the preamble makes clear, it does not create new rights but reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States. In that context, therefore, the provisions of Union law must be interpreted in conformity with the provisions of the Charter.

43 – Such an interpretation would lead to an unsatisfactory situation in so far as ECB employees taking part in the Graduate Programme would not be entitled to the unemployment benefits granted on the basis of the relevant national social security scheme even if they were not entitled to benefits of that kind paid by the ECB under the provisions of Annex IIA of the COE.

44 – Unlike the present case, the judgments in Case C-293/03 *My* [2004] ECR I-12013, and Case C-185/04 *Oeberg* [2006] ECR I-1453, cited by the referring court, concerned situations where the person concerned had left employment in a Union institution.

45 – See *Bosmann*, cited above, paragraph 31, and, with regard to social security legislation, Case 302/84 *Ten Holder* [1986] ECR 1821, paragraphs 19 to 21; Case C-372/02 *Adanez Vega* [2004] ECR I-I0761, paragraph 18 See also Case C-208/07 *Chamier-Glisczinski* [2009] ECR I-6095. See also the opinion of Advocate General Mazák in Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, pending before the Court.

46 – The Conditions of short- term employment are governed by Annex IIb of the COE, which provide only for such limited cover in the part entitled ‘Social security’.