

RECOMMENDATION No P1

of 12 June 2009

concerning the Gottardo judgment, according to which the advantages enjoyed by a State's own nationals under a bilateral convention on social security with a non-member country must also be granted to workers who are nationals of other Member States

(Text of relevance to the EEA and to the EC/Switzerland Agreement)

(2010/C 106/14)

THE ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS,

Having regard to Article 72(a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ⁽¹⁾, under which the Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising from the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems ⁽²⁾,

Having regard to Article 72(c) of Regulation (EC) No 883/2004, under which it shall foster and develop cooperation between Member States and their institutions in social security matters,

Whereas:

- (1) Regulation (EC) No 883/2004, adopted on the basis of Articles 42 and 308 of the Treaty, is an essential instrument for exercising the fundamental freedoms provided for by the Treaty.
- (2) The principle of non-discrimination on the grounds of nationality is an essential safeguard for the freedom of movement of employed persons, as provided for in Article 39 of the Treaty. This implies the abolition of all discrimination between the settled workers in the Member States and migrant workers with respect to employment, pay and other working conditions.
- (3) In *Gottardo* ⁽³⁾, the Court of Justice acted on this principle as set out in Article 39 of the Treaty in relation to a person resident in the Community who had worked in France, Italy and Switzerland. This person did not have sufficient entitlement for a pension in Italy and asked for her periods of insurance completed in Switzerland and Italy to be aggregated, as provided for under the bilateral convention between Italy and Switzerland for the benefit of their nationals.

⁽¹⁾ OJ L 166, 30.4.2004, p. 1.

⁽²⁾ OJ L 284, 30.10.2009, p. 1.

⁽³⁾ Judgment of 15 January 2002 in case C-55/00 *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)*, ECR [2002], p. I-413.

- (4) The Court ruled in this case that when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of the other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so (paragraph 34).
- (5) In this connection, the Court stated that its interpretation of the term 'legislation' in Article 1(j) of Council Regulation (EEC) No 1408/71 ⁽⁴⁾ (the present Article 1(l) of Regulation (EC) No 883/2004) cannot affect the obligation of every Member State to comply with the principle of equal treatment laid down in Article 39 of the Treaty.
- (6) The Court considered that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a non-member country did not constitute an objective justification for the refusal by the Member State party to that convention to extend to nationals of the other Member States the advantages which its own nationals derive from that convention.
- (7) Nor did the Court accept the objections to the effect that a possible increase in the financial burden and administrative difficulties in liaising with the competent authorities of the non-member country in question could justify the Member State which is party to the bilateral convention failing to comply with its Treaty obligations.
- (8) It is important that all appropriate conclusions be drawn from this judgment, which is crucial for Community nationals who have exercised their right to move freely to another Member State.

⁽⁴⁾ OJ L 149, 5.7.1971, p. 2.

- (9) For this reason, it should be made clear that bilateral conventions on social security between a Member State and a non-member country must be interpreted to the effect that the advantages enjoyed by nationals of the Member State which is party to the convention should in principle also be granted to a Community national who is in the same situation in objective terms.
- (10) Irrespective of the uniform application of the Gottardo ruling to individual cases, the existing bilateral conventions should be reviewed. With regard to agreements concluded previously, Article 307 of the Treaty states: 'the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established', and with regard to agreements concluded after 1 January 1958, or after the date of a Member State's accession to the European Community, Article 10 of the Treaty requires that these same Member States 'abstain from any measure which could jeopardise the attainment of the objectives of the Treaty'.
- (11) With regard to new bilateral conventions on social security concluded between a Member State and a non-member country, it is important to bear in mind that these should include a specific reference to the principle of non-discrimination on the grounds of nationality in relation to nationals of other Member States who have exercised their right to move freely in the Member State which is a party to the convention concerned.
- (12) The application of the Gottardo judgment to individual cases depends largely on the cooperation of non-member countries, since they must certify the periods of insurance completed there by the person concerned.
- (13) The Administrative Commission should deal with this question, given that the ruling in Gottardo is concerned with the application of the principle of equal treatment in the field of social security.

Acting in accordance with the conditions laid down in Article 71(2) of Regulation (EC) No 883/2004,

HEREBY RECOMMENDS TO THE COMPETENT SERVICES AND INSTITUTIONS THAT:

1. In accordance with the principle of equal treatment and non-discrimination between a State's own nationals and the nationals of other Member States who have exercised their right to move freely pursuant to Article 39 of the Treaty, the advantages as regards pensions which are enjoyed by a State's own workers (employed and self-employed persons) under a convention on social security with a non-member country are also, in principle granted to workers (employed and self-employed persons) who are nationals of the other Member States and are in the same situation in objective terms.
2. New bilateral conventions on social security concluded between a Member State and a non-member country should make specific reference to the principle of non-discrimination, on the grounds of nationality, against nationals of another Member State who have exercised their right of free movement in the Member State which is a party to the convention concerned.
3. The Member States should inform the institutions in countries with which they have signed social security conventions whose provisions apply only to their respective nationals about the implications of the Gottardo ruling and should ask them to cooperate in applying the ruling of the Court. Member States which have concluded bilateral conventions with the same non-member countries may act jointly in requesting such cooperation. This cooperation is clearly essential if the ruling is to be complied with.
4. This recommendation shall be published in the *Official Journal of the European Union*. It shall apply from the date of entry into force of Regulation (EC) No 987/2009.

The Chair of the Administrative Commission
Gabriela PIKOROVÁ