Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 7 July 2022 [1]

Case C-404/21

WP
v
Istituto nazionale della previdenza sociale,
Repubblica italiana

(Request for a preliminary ruling
from the Tribunale ordinario di Asti (District Court, Asti, Italy))

(Reference for a preliminary ruling – ECB staff – Pension rights acquired in a national scheme before entering the service of the European Union – Transfer to the EU pension scheme – National legislation or administrative practice not permitting that transfer – Absence of national implementing legislation or a specific agreement between the Member State of the worker or the worker's social security institution and the EU institution)

I. Introduction

1. This request for a preliminary ruling from the Tribunale ordinario di Asti (District Court, Asti, Italy) under Article 267 TFEU concerns the interpretation of Article 4(3) TEU, Articles 45 and 48 TFEU, Article 11 of Annex VIII to the Staff Regulations of Officials of the European Union and Other Servants of the European Union ('the Staff Regulations') and Article 8 of Annex IIIa to the Conditions of employment for staff of the European Central Bank (ECB) ('the ECB Conditions of Employment ').

2. The request has been made in proceedings between, on the one hand, WP and, on the other hand, the Istituto nazionale della previdenza sociale (National Social Security Institute, Italy ('the INPS') and the Italian Republic concerning the transfer to the ECB's pension scheme of the amount of the actuarial equivalent corresponding to the pension rights which he had acquired in the Fondo Pensioni Lavoratori Dipendenti (Employees' Pension Fund) of the INPS.

3. The referring court asks the Court two questions concerning the possibility for a member of staff of the ECB to have pension rights which he acquired in the Italian pension scheme transferred to the ECB's pension scheme, in the absence of an agreement between the ECB and the Italian Republic providing for such a transfer. The present case provides the Court with an opportunity to clarify the obligations of Member States towards the ECB under EU law with regard to the adoption of the measures necessary to ensure such a transfer of pension rights.

[1] Original language: French.

II. Legal context

A. European Union law

1. The Protocol on the ESCB and the ECB

4. Article 36 of Protocol No 4 on the statute of the European System of Central Banks and of the European Central Bank, annexed to the EU and FEU Treaties [2] ('the Protocol on the ESCB and the ECB'), provides:

'36. 1 The Governing Council [of the ECB], on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

…'

2. The Protocol on privileges and immunities

5. Article 14 of Protocol No 7 on the privileges and immunities of the European Union, annexed to the EU and FEU Treaties [3] ('the PPI'), provides:

'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.'

6. Under the first paragraph of Article 22 thereof, the PPI is also to apply to the ECB, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the ESCB and the ECB.

3. The Staff Regulations

7. According to Article 1 thereof, the Staff Regulations are to apply to officials of the Union.

8. Article 1a(1) of the Staff Regulations provides:

'For the purposes of these Staff Regulations, "official of the Union" means any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Union by an instrument issued by the Appointing Authority of that institution.'

9. Article 11(2) of Annex VIII to the Staff Regulations provides:

'…

[2] OJ 2016 C 202, p. 230.

[3] OJ 2016 C 202, p. 266.

2. An official who enters the service of the Union after:

– leaving the service of a government administration or of a national or international organisation; or

– pursuing an activity in an employed or self-employed capacity;

shall be entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the Union the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

In such case the appointing authority of the institution in which the official serves shall, taking into account the official's basic salary, age and exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Union pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.

Officials may make use of this arrangement once only for each Member State and pension fund concerned.'

4. The CEOS

10. Article 1 of the Conditions of Employment of Other Servants of the Union ('the CEOS') states:

'These Conditions of Employment shall apply to servants engaged under contract by the Union. Such servants shall be:

– temporary staff;

– contract staff;

…'

11. Under Articles 39(2) and 109(2) of the CEOS respectively, Article 11(2) of Annex VIII to the Staff Regulations applies to temporary staff and contract staff.

5. The ECB Conditions of Employment

12. Acting, inter alia, on the basis of Article 36(1) of the Protocol on the ESCB and the ECB, the Governing Council of the ECB adopted the ECB Conditions of Employment, Article 9(c) of which provides:

'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 Union law, and (iii) the rules contained in Union regulations and directives concerning social policy which are addressed to Member States. Whenever necessary, these legal instruments will be implemented by

the ECB. Union recommendations in the area of social policy will be given due consideration. In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of other Union institutions.'

13. Article 8 of Annex IIIa to the ECB Conditions of Employment provides:

'(a) The ECB shall enter into agreements or make appropriate arrangements with such other employee benefit arrangements, organisations and governments as it determines to accept the transfer to the [ECB's pension scheme] of amounts of cash in respect of members of staff who have completed their probationary period with the ECB.

…'

B. Italian law

14. Article 1 of legge n. 29 – Ricongiunzione dei periodi assicurativi dei lavoratori ai fini previdenziali (Law No 29 on the merger of workers' insurance periods for the purposes of social security) of 7 February 1979[4] provides:

'Employees in the public or private sector who are or have been affiliated to compulsory forms of pension which are equivalent to the employees' compulsory general invalidity, old-age and survivors' insurance scheme managed by the INPS or which have given rise to exclusion or exemption from such affiliation, shall be entitled, for the purposes of the granting and determination of the amount of a single pension, to request, at any time, that all periods of compulsory, voluntary and notional contributions to the abovementioned social security schemes be aggregated in the compulsory general insurance scheme and that corresponding pension rights be granted under the latter. To that end, the manager or managers of the schemes of origin shall transfer to the manager of the compulsory general insurance scheme the amount of contributions which they hold …'

15. Article 18 of legge n. 115 – Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2014 (Law No 115 on provisions to comply with the obligations arising from Italy's membership of the European Union – European Law 2014) of 29 July 2015[5] provides:

'1. From 1 January 2016, citizens of the European Union … who are or have been affiliated to the compulsory general invalidity, old-age and survivors' insurance scheme for employed persons … shall have the possibility of aggregating periods of insurance completed under those insurance schemes with periods of insurance completed in international organisations.

2. The aggregation referred to in paragraph 1 may be requested, where this is necessary to obtain entitlement to an old-age, invalidity or survivor's pension, provided that the total duration of the periods of insurance completed under Italian legislation is at least 52 weeks and the periods to be aggregated do not overlap.

[4] GURI No 40, of 9 February 1979, p. 1317.

[5] GURI No 178 of 3 August 2015, p. 1

3. The aggregation of periods of insurance may be made at the request of the person concerned, which request shall be submitted to the Italian social security institution with which he or she completed periods of insurance. Where a former employee of an international organisation acquires the right to benefits provided for under Italian legislation without there being any need to aggregate the periods of insurance completed with the international organisation, the Italian social security institution shall calculate the pension exclusively on the basis of the periods of insurance completed under the Italian pension scheme. Where a former employee of an international organisation acquires the right to benefits provided for under Italian legislation only by aggregating periods of insurance completed with the international organisation, the Italian social security institution shall take into account periods of insurance completed under the pension scheme of the international organisation – with the exception of those which have been reimbursed – as though they had been completed under Italian legislation, and shall calculate the amount of the benefit exclusively on the basis of the periods of insurance completed under Italian legislation.

4. Retirement benefits payable in accordance with this Article shall be regarded as pensions for all purposes arising from the application of Italian legislation.

5. Periods of employment with an international organisation may, in so far as they do not give rise to entitlement to a retirement benefit payable by the pension fund of that international organisation, be purchased under the Italian pension scheme in accordance with the legislation governing the purchase of periods of employment completed abroad. The right to purchase shall be exercised inter alia by the survivors of the employee of the international organisation, under the conditions laid down by the rules of the Italian social security institution from which the purchase is sought.

…'

16. INPS Circular No 14 of 23 January 2001 states that an agreement was concluded on 24 November 2000 between the INPS and the European Investment Bank (EIB) for the purpose of transferring the rights acquired by staff of the bank. Article 2 of that agreement provides:

'The request to transfer pension rights, with respect to validated periods of insurance with the INPS which have not given rise to the payment of a pension, may be made directly to the INPS and communicated for information purposes to the EIB by the member of staff in service at the time of the request.

The EIB shall request from the INPS the actuarial equivalent corresponding to the rights acquired under the relevant fund …, calculated in accordance with the rules governing pensions under the fund in question on the date when the request is made …

…

The INPS shall, within sixty days of receipt of the applicant's acceptance, notify the person concerned and the EIB of the amount to be transferred, after deduction of transfer expenses, and shall, within the following three months, carry out the transfer of the amounts, together with [interest] at the statutory rate applicable in Italy for the period between the date of receipt of the acceptance and the value [date] of the credit; the amounts transferred may not exceed the redemption value calculated by the EIB in accordance with the provisions of its own rules.'

III. The facts giving rise to the dispute, the main proceedings and the questions referred for a preliminary ruling

17. WP has been a member of staff of the ECB since 1 March 2012. Between 1 August 1982 and 24 February 2012, he worked in Italy as the employee of a private employer, which involved payment of compulsory contributions to the INPS employee pension fund on his behalf. On 12 December 2016 WP asked the INPS to transfer to the ECB's pension scheme the actuarial equivalent corresponding to the pension rights acquired by him under that pension fund or, alternatively, the updated capital resulting from the retirement contributions paid into the pension fund, calculated on the basis of the rules governing pensions under that fund.

18. The INPS refused WP's request, on the ground that it could not make the requested transfer in the absence of a specific legislative measure or bilateral agreement. WP's administrative action against the decision refusing his request, lodged on 28 November 2017, was declared inadmissible by decision of 11 April 2018.

19. WP then brought an action before the referring court seeking, by way of principle claim, a declaration that the INPS and/or the Italian Republic was obliged to take all necessary measures to transfer to the ECB's pension scheme a specific amount corresponding to the pension rights acquired by him and, consequently, an order that the INPS and/or the Italian Republic take all necessary measures to transfer that amount to the ECB's pension scheme. In the alternative, WP seeks a declaration that the INPS and/or the Italian Republic is obliged to transfer to the ECB's pension scheme a specific amount by way of compensation for the damage suffered and, consequently, an order that the INPS and/or the Italian Republic transfer that amount to the ECB's pension scheme by way of compensation for the damage suffered.

20. The referring court asks whether EU law confers on an ECB employee a right to transfer to the ECB's pension scheme pension rights acquired in a social security institution of a Member State and whether that right must also be recognised irrespective of whether a national transposition rule has been adopted or the Member State or national social security institution concerned and the ECB have concluded a specific agreement defining the detailed rules for implementing that right. The referring court refers to a number of provisions of EU law and related case-law, without reaching a clear conclusion.

21. Taking the view that the outcome of the dispute depends on an interpretation of EU law, the Tribunale ordinario di Asti (District Court, Asti) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

IV. Procedure before the Court

22. The order for reference, dated 13 January 2021, was received at the Court Registry on 30 June 2021.

23. The parties to the main proceedings, the Italian, Greek, Spanish, Polish and Portuguese Governments, the European Commission and the ECB lodged written observations within the prescribed period, in accordance with Article 23 of the Statute of the Court of Justice of the European Union.

24. Pursuant to Article 76(2) of the Rules of Procedure, the Court decided to proceed without a hearing.

V. Legal analysis

A. Preliminary comments

25. As stated in the introduction, by its request for a preliminary ruling the referring court is asking the Court to clarify the obligations of Member States under EU law with regard to the adoption of the measures necessary to ensure a transfer of the pension rights of an ECB staff member, acquired in a national pension scheme, to the ECB's pension scheme. In the context of the present case, I consider it necessary to provide clarification in the light of the particularly passive attitude of the Italian authorities towards the ECB's proposal to conclude an agreement specifically providing for such a transfer.

26. In the interests of a structured and coherent analysis of the legal issues raised by the referring court, I propose to reformulate the first question to the effect that it is necessary to determine whether Article 4(3) TEU, Articles 45 and 48 TFEU, Article 11(2) of Annex VIII to the Staff Regulations and Article 8 of Annex IIIa to the ECB Conditions of Employment must be interpreted as meaning that a Member State which has received a proposal from the ECB to conclude such an agreement is required to do so.

27. If so, in the context of the examination of the second question referred, it is necessary to establish whether the abovementioned provisions must be interpreted as allowing the court of a Member State, when seised by the person concerned, to order the transfer to the ECB's pension scheme of the pension rights which he or she has acquired in the pension scheme of that Member State, even in the absence of a provision of national law or an agreement, between the Member State concerned and the ECB, providing for such a transfer.

B. The first question referred

28. The referring court mentions a set of provisions which all form part of the EU legal order, but which are nevertheless distinct in terms of their legal standing and their legal force. I shall examine below whether those provisions impose on Member States obligations which may support the claims of an ECB staff member in WP's situation and, if that is the case, what type of obligations are imposed. I consider that it is appropriate to examine, first, the applicability of the civil service rules governing the transfer of pension rights and, secondly, the relevance of the Treaty provisions.

1. The civil service rules governing the transfer of pension rights

29. The ECB enjoys a high degree of autonomy within the EU institutional framework because of its tasks relating to monetary policy,[6] which is reflected in its internal rules on the transfer of pension rights. However, before examining its specific characteristics, I shall briefly outline the general rules applicable to officials and other servants of the institutions, which will allow relevant conclusions to be drawn as regards the treatment of members of staff of the ECB. In that context, the question arises, in particular, whether those members of staff can rely on certain general principles relating to the transfer of pension contributions within the EU civil service in spite of the fact that Article 11(2) of Annex VIII to the Staff Regulations, at least from a formal point of view, does not apply to them.[7]

(a) The option of transferring pension contributions as a 'right' of officials and other servants of the Union

30. The right of officials and other servants of the European Union to opt to transfer pension contributions to the European Union is based on Article 14 of the PPI. That provision confers on the European Parliament and the Council the general power to lay down the scheme of social security benefits for officials and other servants of the Union. The EU legislature exercised that mandate by providing in Article 11(2) of Annex VIII to the Staff Regulations that officials leaving the service of the European Union are to be entitled to have the actuarial equivalent of the retirement pension rights that they acquired in the Union transferred to another pension fund and officials who enter the service of the Union are to be entitled to have the capital value of pension rights acquired by virtue of previous service or activities transferred to the EU pension scheme. A reading of Article 14 of the PPI together with Article 11(2) of Annex VIII to the Staff Regulations leaves no room for interpretation as to the fact that officials and other servants of the European Union have a free-standing right to transfer pension contributions.

31. The scope of those provisions is particularly relevant for identifying whether members of staff of the ECB have an 'equivalent' right. It is important to note in that regard that the PPI, including Article 14 thereof, applies to members of staff of the ECB pursuant to the first paragraph of Article 22 thereof, which provides that the PPI 'shall *also* apply to the European Central Bank, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on [the ESCB and the ECB]' (emphasis added). The first paragraph of Article 22 of the PPI clearly reflects the intention of the authors of the Treaties to ensure that members of staff of the ECB, as persons employed by an EU institution, are treated on an *equal footing* with any other official or servant of the Union, unless the Statute of the ESCB and of the ECB and the legal acts adopted thereunder provide otherwise.

6 Lenaerts, K. and Van Nuffel, P., *European Union Law*, third edition, London 2011, paragraph 13-097, p. 540, refer to Article 130 TFEU, from which it is apparent that the ECB, like national central banks, exercises its powers and performs its tasks and duties in a fully independent way. According to those authors, that independence does not mean that the ECB is entirely separate from the European Union but rather aims to protect the ECB from any political influence in the performance of its tasks.

7 It is true that the ECB enjoys functional autonomy in the context of which rules have been established that are distinct from those laid down by the Staff Regulations; however, since the ECB has established rules for its staff members which, in essence, reproduce those laid down for officials – even though the provisions of the Staff Regulations are not directly applicable to those staff members – the guidance in the case-law relating to the provisions of the Staff Regulations should remain relevant to the staff of the ECB, at least where that guidance concerns a rule of law or principle applicable to all the institutions and bodies of the European Union (see, to that effect, judgment of 30 June 2021, *BZ* v *ECB*, T-554/16, not published, EU:T:2021:387, paragraph 70).

32. Since neither Article 36 of those Statutes, on the basis of which the ECB Conditions of Employment were adopted, nor any other provision of those Statutes confers on the ECB the power to adopt regulations which are binding on third parties in the field of social security, the scope of the PPI concerning members of staff of the ECB includes matters relating to the social security benefits provided for in Article 14 thereof, and thereby also covers the possibility of transferring pension contributions from Member States to an EU institution or vice versa. The power to commit Member States in that area remains within the purview of the EU legislature, namely the European Parliament and the Council, as provided for in Article 14 of the PPI, which exercised that power by introducing the right to transfer pension contributions in the Regulations. Accordingly, it is appropriate to recognise that right in an 'equivalent' manner for members of staff of the ECB.

33. In that regard, it should be recalled that equal treatment is a fundamental principle of EU law and is enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'). According to settled case-law,[8] the general principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified. That principle applies to the ECB, as an EU institution, under Article 13 TEU, in the same way as it applies to the institutions and bodies subject to the Staff Regulations of Officials of the Union. As the Court recently recalled, the general principle of equal treatment now enshrined in Article 20 of the Charter applies, by virtue of Article 51(1) thereof, to all EU institutions and bodies, including the ECB.[9] Similarly, the provisions of the Charter apply to EU Member States, including the Italian Republic, when they transpose EU law.

34. So far as concerns social benefits and the rights attaching thereto, it seems to me that a member of staff of the ECB who seeks to transfer his or her pension contributions from the INPS to the ECB's pension scheme is in the same situation as any other official or servant of the Union who wishes to exercise the same right. In both cases, they are persons who enter the service of an EU institution, who wish to transfer contributions paid in the same Member States and to the same national social security scheme and who exercise the fundamental right to free movement. For that reason, a difference in treatment does not, in principle, appear to be justified, subject to the *practical arrangements and conditions laid down by the applicable rules* for carrying out such a transfer of pension contributions within the ECB. Equal treatment must also be ensured among members of staff of that institution who should have a right to transfer which they can exercise freely and irrespective of the Member State or Member States in which they acquired pension rights before being employed by the ECB itself.

35. As several interested parties have stated in their observations, the defence of such a right for officials and other servants of the Union is all the more necessary since Article 298 TFEU guarantees that 'in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration'. The Court expressly recognised that need in its case-law, in holding that the rationale for the transferability of pension rights lies in the need to 'facilitate transition from national, public or private employment to the EU administration and thus to ensure that the European Union has the best choice of qualified staff who already have appropriate professional experience'.[10]

[8] See judgment of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others* (C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 191).

[9] See judgment of 6 October 2021, *Veit* v *ECB* (C-272/20 P, EU:C:2021:814, paragraph 55).

[10] See judgments of 16 December 2004, *My* (C-293/03, EU:C:2004:821, paragraph 44), and of 4 February 2021, *Ministre de la Transition écologique et solidaire and Ministre de l'Action et des Comptes publics* (C-903/19, EU:C:2021:95, paragraph 23).

36. Similarly, the Court has stated that in order to have a greater choice among staff with adequate professional experience, there is a need for 'greater flexibility in relation to the portability of [rights to EU pension schemes and vice versa] putting an end [also] to the uncertainties which certain members of the contract staff had to face as regards the possibility of ending their employment relationship and the impossibility of obtaining equivalent length-of-service pension rights'.[11] The possibility of transferring pension contributions therefore plays a key role in ensuring that no obstacle relating to the enjoyment of pension benefits affects a person's choice of whether and how to work for an EU institution.

37. It is clear that all those considerations, which reflect the requirements of an open, efficient and independent European administration within the meaning of Article 298 TFEU, apply to members of staff of the ECB, who are members of staff of an EU institution, in the same way as they apply to officials and other servants of the EU institutions covered by the Staff Regulations. Accordingly, there is, in my view, no objective reason not to recognise that ECB staff have an 'equivalent' right in principle, subject, of course, to the *practical arrangements and conditions referred to in the relevant rules*, a topic which I shall address in more detail in this Opinion. In that regard, it should be noted that, like social rights, the realisation of which often requires a specific embodiment in law,[12] the right to transfer pension contributions requires specific rules for its implementation. As I shall explain below, the ECB's rules governing the transfer of pension rights differ in some important respects from the rules of the rest of the EU civil service, in particular as regards their implementation.

(b) The differences between the general civil service rules and the rules of the ECB concerning the transfer of pension rights

38. It should be noted at the outset that the option referred to in Article 11(2) of Annex VIII to the Staff Regulations is intended to give officials a right the exercise of which depends solely on their own choice. The exercise of that right is made possible by the fact that the Staff Regulations, as a regulation under Article 288 TFEU, have general application, are binding in their entirety and are directly applicable in all Member States.[13] It follows that, even though Article 11(2) of Annex VIII to the Staff Regulations does not lead to the harmonisation of national pension rules, the fact remains that the Staff Regulations, quite apart from their effects within the internal order of the EU administration, are also binding on the Member States in so far as the assistance of the Member States is necessary for their implementation. In its case-law on that provision, the Court has held that, where a provision of the Staff Regulations requires national measures for its application, the Member States are bound under Article 5 of the EEC Treaty, which corresponds to Article 4(3) TEU, to adopt all appropriate measures, whether they be general or particular.[14] According to the Court, in the light of the aim pursued by Article 11(2) of Annex VIII to the Staff

[11] See judgment of 4 February 2021, *Ministre de la Transition écologique et solidaire and Ministre de l'Action et des Comptes publics* (C-903/19, EU:C:2021:95, paragraph 24).

[12] As Advocate General Trstenjak points out in her Opinion in *Dominguez* (C-282/10, EU:C:2011:559, point 78), rules on fundamental rights can basically be worded in a legally abstract fashion, particularly in order to take account of political and social changes. This certainly applies to social rights, which are often designed to be fleshed out, not least of all because of the associated costs that can ultimately make realisation of such rights contingent upon the de facto economic possibilities of the State. See, on the implementation of social rights by legislation, Frenz, W., *Handbuch Europarecht*, Vol. 4 (Europäische Grundrechte), Vienna 2009, p. 135, point 444, and Tridimas, T., 'On Constitutional Rights and Political Choices', *European Papers – A Journal on Law and Integration*, 2019, No 2, p. 568.

[13] See judgments of 20 October 1981, *Commission* v *Belgium* (137/80, EU:C:1981:237, paragraph 7), and of 4 February 2021, *Ministre de la Transition écologique et solidaire and Ministre de l'Action et des Comptes publics* (C-903/19, EU:C:2021:95, points 36 and 37).

[14] See judgment of 20 October 1981, *Commission* v *Belgium* (137/80, EU:C:1981:237, paragraph 9).

Regulations, the Member States are under an obligation to take practical steps to enable officials to exercise the option conferred upon them of transferring the rights acquired under a national scheme to the EU pension scheme. [15]

39. Although Article 8 of Annex IIIa to the ECB Conditions of Employment is clearly intended to ensure that members of staff of the ECB are able to transfer pension rights, the fact remains that it does not make that right available in the same way as Article 11(2) of Annex VIII to the Staff Regulations, since *its exercise is subject to certain detailed implementing rules and conditions* which must be explained. In that regard, it is important to emphasise that the ECB Conditions of Employment have only purely internal effects, in so far as they govern only relationships between the ECB and its staff. In other words, the Conditions of Employment themselves do not produce legal effects vis-à-vis Member States by imposing obligations on them. Moreover, the ECB does not have competence to adopt regulations in that field, unlike the Parliament and the Council. The ECB's power to lay down rules is limited to very specific cases relating to the exercise of its tasks under its statute, exhaustively listed in the first indent of Article 132(1) TFEU. Consequently, realisation of that right in an 'equivalent' manner for members of its staff requires the use of a different legal mechanism.

40. In order to remedy the non-binding effect of the Conditions of Employment, the aforementioned provision provides that the ECB 'shall enter into agreements or make appropriate arrangements with such other employee benefit arrangements, organisations and governments as it determines to accept the transfer to the [ECB's pension scheme] of amounts of cash in respect of members of staff [of] the ECB'. The conclusion of agreements with Member States, that is to say the bilateral approach, is therefore the method chosen by the EU legislature in this instance. This is evident from the express requirement that the transfer be 'accepted'. The fact that the ECB has legal personality under the first sentence of Article 282(3) TFEU enables it to conclude such agreements in its own name and on its own behalf with Member States.

41. Seen in that light, it is logical to infer that, in the absence of such an agreement governing the conditions for the transfer of pension rights, a member of staff of the ECB will be unable to exercise a right 'equivalent' to that provided for by Article 11(2) of Annex VIII to the Staff Regulations. In so far as Article 8 of Annex IIIa to the ECB Conditions of Employment, first, makes reference only to the ECB's power to conclude those agreements, remaining silent as regards the role of Member States, and, secondly, does not produce legal effects vis-à-vis third parties, it must be considered at this stage of the analysis, as an interim conclusion, that that provision does not, in itself, constitute a sufficient legal basis for imposing on a Member State the obligation to conclude an agreement with the ECB. However, the participation of that Member State is essential, since a bilateral agreement by definition requires two corresponding declarations of intent.

42. For the same reasons, it is necessary to reject any reliance on Article 9(c) of the ECB Conditions of Employment as a legal basis. Although that provision states that 'in *interpreting the rights and obligations* under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of other Union institutions' (emphasis added), the fact remains that that provision, as a mere interpretative rule for those (internal) Conditions of Employment, is not capable of having a legally binding

[15] See judgment of 17 December 1987, *Commission* v *Luxembourg* (315/85, EU:C:1987:569, paragraph 19).

effect on Member States. A fortiori, it cannot be assumed that that provision is in itself capable of remedying the absence of a bilateral agreement between the ECB and a Member State. That provision therefore seems to me to be irrelevant in the present context.

43. For the sake of completeness, it is important to state that any application by analogy seems to me to be ruled out by the absence of any lacuna duly to be filled by such an analogy, since, like Article 11(2) of Annex VIII to the Staff Regulations, the relevant provision in this case, namely Article 8 of Annex IIIa to the ECB Conditions of Employment, also provides for the transfer of pension rights. The difference between the two provisions consists, first and foremost, as I have just explained, in the reference to the necessity for an agreement with the Member State concerned, which is laid down in Article 8 of Annex IIIa as a requirement for making the transfer in question, in contrast to the provision in the Staff Regulations.

44. Accordingly, reliance on Article 11(2) of Annex VIII to the Staff Regulations, either directly or by analogy, as suggested by some interested parties, so as to circumvent the express requirement for an agreement between the ECB and the Member State concerned, governing the conditions for ensuring the transfer of pension rights, seems to me to be unacceptable on the ground that such an approach would be tantamount to disregarding the express intention of the EU legislature. [16] Notwithstanding the legitimate interest in ensuring the transfer of pension rights for the whole of the European civil service, it seems clear to me that there are nonetheless differences as regards the realisation of that right which are inherent in the institutional structure of the European Union at the present stage of its development.

45. The principle of a single EU administration, introduced by Article 9(3) of the Treaty of Amsterdam, and under which all the officials of all the institutions are subject to a single body of Staff Regulations and thus to the same provisions, [17] does not in principle prevent the adoption and thus the application of separate rules for members of staff where the institution in question is granted regulatory autonomy, [18] as is the case with the ECB under Article 36 of Protocol No 4 on the Statute of the ESCB and the ECB.

46. Although the considerations set out in this Opinion relating to the principle of equal treatment under Article 20 of the Charter and to the public interest in having an 'open, efficient and independent European administration', within the meaning of Article 298 TFEU, may be relevant when establishing the specific rules for the transfer of pension rights in the context of negotiations to conclude an agreement between the ECB and a Member State, in particular in support of the non-discriminatory treatment of members of staff of the ECB and in the interests of allowing the ECB to benefit from qualified staff recruited from all Member States, it must nevertheless be recognised that the abovementioned provisions cannot serve, in themselves, as a legal basis for obliging a Member State to conclude such an agreement.

[16] As I explained in my Opinion in *Commission* v *Hansol Paper* (C-260/20 P, EU:C:2022:13, paragraph 127), the use of analogies in legal interpretation is generally subject to certain conditions, namely that it is necessary to fill a legal lacuna by applying a legal standard to a situation which is different, but which resembles the situation not envisaged at the level of the 'ratio' or 'essential nature'. Clearly, this only applies where the legislature has not formally indicated that it should not.

[17] See judgment of 14 December 2017, *RL* v *Court of Justice of the European Union* (T-21/17, EU:T:2017:907, paragraph 51).

[18] See judgment of 16 September 1997, *Gimenez* v *Committee of the Regions* (T-220/95, EU:T:1997:130, paragraph 73), and Order of 11 October 2012, *Cervelli* v *Commission* (T-622/11 P, EU:T:2012:538, paragraph 25).

(c) Interim conclusion

47. It follows from this analysis of the civil service rules governing the transfer of pension rights that Article 11(2) of Annex VIII to the Staff Regulations is not applicable – either directly or by analogy – to members of staff of the ECB. Accordingly, no obligation for a Member State to conclude an agreement with the ECB can be derived from that provision. Nor is Article 8 of Annex IIIa to the ECB Conditions of Employment a sufficient legal basis for imposing such an obligation on a Member State.

2. The provisions on the free movement of workers

48. It must next be examined whether Articles 45 and 48 TFEU on the free movement of workers can constitute an adequate legal basis for imposing on a Member State an obligation to ensure realisation of the right to transfer pension rights, as suggested by the referring court. In that context, it is necessary to refer to the *Gardella* judgment,[19] in which the Court ruled on the compatibility with the abovementioned provisions of the impossibility for an official of an international organisation to obtain the transfer to that organisation of pension rights acquired in the context of occupational activities previously carried out in his Member State of origin.

49. In that judgment, the Court recalled its case-law according to which a Union national working in a Member State other than his or her State of origin and who has accepted a post in an international organisation comes within the scope of Article 45 TFEU.[20] Consequently, that national may not be refused the rights and social advantages which that provision affords him or her.[21] This entails inter alia the prohibition of any obstacle to the free movement of workers within the EU, that is to say any measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of that fundamental freedom guaranteed by the FEU Treaty.[22]

50. Since WP, as a member of staff of the ECB, is not subject to the Staff Regulations, on the ground that the ECB has autonomous rules for its staff which were adopted on the basis of Article 36 of Protocol No 4 on the Statute of the ESCB and the ECB, I consider that he should be regarded as a 'worker' within the meaning of Article 45 TFEU. However, it still remains to be determined whether the absence of an agreement between the ECB and a Member State, as in the circumstances of the present case, can be regarded as an 'obstacle' within the meaning of the definition reproduced in the preceding point of this Opinion. The Court must clearly answer that question in the negative, since in the abovementioned judgment it held that Article 45 TFEU does not oblige Member States to allow the transfer of pension rights acquired in the Member State of origin to the pension scheme of another employer, whether of another Member State or an international organisation.[23]

51. The Court has held that that provision does not impose an obligation to conclude an international agreement to that effect,[24] which I consider important to note in the context of the examination of the first question referred, in the light of the requirement, referred to in Article 8

[19] Judgment of 4 July 2013 (C-233/12, EU:C:2013:449).

[20] Judgment of 4 July 2013 (C-233/12, EU:C:2013:449, paragraph 25).

[21] See judgment of 6 October 2016, *Adrien and Others* (C-466/15, EU:C:2016:749, paragraph 25).

[22] See judgment of 6 October 2016, *Adrien and Others* (C-466/15, EU:C:2016:749, paragraph 26).

[23] Judgment of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraphs 35 and 36).

[24] Judgment of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraph 35).

of Annex IIIa to the ECB Conditions of Employment, to conclude a bilateral agreement in order to make such a transfer of pension rights to the ECB's pension scheme possible. That conclusion follows from an interpretation of the obligations arising from Article 45 TFEU as well as from Article 48 TFEU and the regulations adopted thereunder, which do not provide for a right to carry out that transfer.

52. In so far as that conclusion emerges from an interpretation of the relevant provisions of primary law and does not follow from the fact that, in that particular case, the organisation concerned – namely the European Patent Office (EPO) – was an entity outside the EU institutions, it is not possible to accept WP's argument that, in view of the fact that in this case the ECB is, on the contrary, an EU institution, a simple reading *a contrario* of the judgment of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449) suggests that the refusal of the INPS to grant him the transfer at issue is contrary to the free movement of workers. The absence of any obligation to agree to the transfer of pension rights under the Treaty provisions on the free movement of workers also therefore applies in the case of EU institutions to which Article 11(2) of Annex VIII to the Staff Regulations does not apply, as subsequent case-law concerning the civil service has made clear. [25]

53. For the reasons set out above, the interim conclusion must be that the provisions referred to in Articles 45 and 48 TFEU, relating to the free movement of workers, do not impose an obligation on a Member State to ensure a transfer of pension rights to the ECB's pension scheme by means of a bilateral agreement to be concluded to that effect.

3. The duty of sincere cooperation

54. The considerations set out in the preceding points show that several provisions may be relied upon to require recognition of an 'equivalent' right of a member of staff of the ECB to request the transfer of pension rights acquired in a social security institution of a Member State to the ECB's pension scheme. However, there can be no doubt that the conclusion of an agreement with that Member State is absolutely necessary in order to ensure implementation of that right. In other words, the agreement to be concluded is an 'essential precondition' for achieving that objective.

55. Although Article 8 of Annex IIIa to the ECB Conditions of Employment appears to entrust ECB bodies with the task of entering into agreements with Member States, [26] the role of the latter in performing that task is nevertheless essential. Indeed, in so far as an 'agreement' within the meaning of that provision requires, from a legal standpoint, two corresponding declarations of intent, creating a mutual commitment, it is logical to suppose that the *active participation* of the Member State in question, in the context of negotiating and concluding that agreement, is essential. In the light of that observation, the question arises as to the *precise obligations* which EU law imposes on the Member State in the circumstances referred to in the abovementioned provision.

[25] See judgment of 16 January 2014, *Guinet* v *EIB* (F-107/12, EU:F:2014:1, paragraph 77), in which the Civil Service Tribunal held that it is not apparent from Article 45 TFEU that there is an obligation for a Member State to provide for the option for a member of staff of the EIB to transfer the capital value representing previously acquired pension rights to the EIB's pension scheme, or that there is an obligation to conclude an agreement to that effect.

[26] In the French version ('La BCE *conclut* des accords') and in the English version ('The ECB *shall enter* into agreements') (emphasis added).

56. According to settled case-law, pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to take all necessary measures to enable the EU institutions to carry out their tasks. In particular, as the Court has established in its case-law, that principle precludes conduct of Member States relating to the transfer of pension rights which has the effect of making it more difficult for the EU institutions to recruit staff. [27]

57. With specific regard to potential officials of the EU institutions who already have some professional experience, the Court recently held that, in accordance with the principle of sincere cooperation, Member States may not make 'the recruitment by the European Union of national officials with a certain length of service' more difficult. [28] I consider that the principles arising from that judgment, delivered in a case concerning a former member of a national administration, should also apply to persons who, like WP, have professional experience in the private sector, since the requirement not to deprive the EU institutions of the assistance of experienced staff is of a general nature and applies irrespective of the specific nature of the experience of the person concerned.

58. Moreover, it is important to note that the cooperation of the Member State in the present context is essential in order to avoid a situation that is difficult to reconcile with the principal of equal treatment, to which I have already drawn attention in this Opinion, [29] namely the risk that members of staff of the ECB who are nationals of one Member State will be treated less favourably than those of other, more diligent, Member States which have already concluded such an agreement and which thus allow their nationals employed by the ECB to benefit in practice from the option referred to in Article 8 of Annex IIIa to the ECB Conditions of Employment.

59. It is clear that such a situation would not only undermine the objective referred to in Article 298 TFEU of having 'an open, efficient and independent European administration', as well as the principle of a single administration, already referred to in this Opinion, [30] but would also run counter to the shared interest of the European Union and the Member State in facilitating the recruitment of future staff members from that Member State, thereby ensuring recruitment on the broadest possible geographical basis, as required, moreover, by Article 27 of the Staff Regulations. I would like to point out that those considerations, which are linked to the European Union's recruitment policy, apply without exception to all its institutions, bodies, offices and agencies, including the ECB. Since the conclusion of such an agreement with the ECB is in the interest of the Member State itself, it is reasonable to expect that that Member State would offer its cooperation without reservation.

60. Although the principle of sincere cooperation cannot be interpreted as requiring the Member State to accept any draft agreement prepared by the ECB, which might raise difficulties when implemented at national level, the fact remains that the Member State must nevertheless *cooperate actively and in good faith* in negotiations, so as to remove existing obstacles. As the Court has noted, the cooperation of the Member State is above all necessary when resolving practical issues, such as the determination of a calculation method to make it possible to transfer pension rights to the pension scheme of the EU institutions. [31]

[27] See judgment of 16 December 2004, *My* (C-293/03, EU:C:2004:821, paragraph 48), and Order of the President of the Court of 18 September 2009, *Ricci and Pisaneschi* (C-286/09 and C-287/09, not published, EU:C:2009:566, paragraph 33).

[28] Judgment of 4 February 2021, *Ministre de la Transition écologique et solidaire and Ministre de l'Action et des Comptes publics* (C-903/19, EU:C:2021:95, paragraph 34).

[29] See point 34 et seq. of this Opinion.

[30] See points 36 and 46 of this Opinion.

[31] See judgment of 5 December 2013, *Časta* (C-166/12, EU:C:2013:792, paragraph 37).

61. Although Member States retain their power to organise their social security systems, in particular by determining the conditions for the grant of social security benefits, they must nevertheless, when exercising that power, comply with EU law.[32] A simple refusal to enter into negotiations or seriously to consider a specific proposal submitted by the ECB does not seem to me to be an attitude which is consistent with the spirit of sincere cooperation called for by Article 4(3) TEU. Indeed, such an attitude would undermine the performance of the tasks entrusted to the ECB bodies.

62. In that regard, it should be noted that the observations submitted to the Court show that the ECB's formal request aimed at reaching an agreement dates from 22 December 2005. To that end, it seems that the ECB prepared and communicated a draft bilateral agreement to be signed with the INPS, which was largely based on the agreement in force between the INPS and the EIB. The ECB has therefore been asking the Italian Republic to conclude an agreement under Article 8 of Annex IIIa to the ECB Conditions of Employment for 16 years, without receiving a response, because, according to the Italian authorities, the transfer of pension rights in the present case could not take place without a 'legislative initiative'.

63. However, quite apart from the fact that the Italian authorities have been unable to find a solution in that respect, such a response is difficult to explain, given that, first, the conclusion of an agreement with the INPS for staff working at the EIB does not seem to have raised any particular difficulty, to the extent that it was obtained and implemented simply by means of an administrative circular.[33] Secondly, it should be noted that, according to the information provided to the Court, almost all Member States of the Monetary Union have long since concluded agreements with the ECB to allow the transfer of pension rights. Thirdly, it must be pointed out that neither the Italian Government nor the INPS has provided any explanation in its written observations for that delay in reaching an agreement with the ECB. Nor did they propose a specific way of breaking the deadlock. All those elements seem to indicate a lack of cooperation on the part of the Italian Republic.

64. As several interested parties have stated in their observations, the ECB's current situation with regard to the Italian Republic, characterised by a long period of legal uncertainty as to the possibility of ensuring the transfer of pension rights, is likely to deter individuals who already have some professional experience from accepting employment with the ECB. That deterrent effect is particularly significant given that other EU institutions, bodies, offices or agencies to which the Staff Regulations and the CEOS apply, and with which the ECB is to some extent in competition as regards the recruitment of experienced staff, are in a position to ensure such a transfer. It is also difficult to reconcile that situation with the principle of equal treatment, since the ECB's Italian staff members are treated less favourably than members of staff from other Member States who are employed by the ECB itself or members of staff working for other EU institutions. I would like to note at this stage of the analysis that the risks to the ECB and the members of its staff which have been referred to in this Opinion seem to have materialised in this specific case.

65. It follows from the foregoing that the principle of sincere cooperation enshrined in Article 4(3) TEU constitutes an appropriate legal basis, since it makes it possible to require the Member State concerned to take all necessary measures to support the ECB in the performance

[32] See judgments of 7 March 2018, *DW* (C-651/16, EU:C:2018:162, paragraph 16), and of 13 February 2019, *Rohart* (C-179/18, EU:C:2019:111, paragraph 14).

[33] See point 16 of this Opinion.

of its tasks. This applies in particular to measures which require the active participation of the Member State concerned, such as the conclusion of bilateral agreements to ensure the transfer of pension rights.

66. In the light of the above considerations, I consider that the principle of sincere cooperation must be interpreted as meaning that, on a proposal from the ECB, a Member State is required to participate actively and in good faith in negotiations aimed at concluding an agreement with the ECB on the transfer to its pension scheme of pension rights acquired by its staff in the scheme of that Member State.

4. The answer to the first question referred

67. In the light of the foregoing, I propose that the answer to the first question should be that Article 4(3) TEU must be interpreted as meaning that a Member State which has received a proposal from the ECB to enter into an agreement, pursuant to Article 8 of Annex IIIa to the ECB Conditions of Employment, for the transfer to the ECB's pension scheme of pension rights acquired by ECB staff members in the scheme of that Member State must participate actively and in good faith in negotiations aimed at concluding such an agreement with the ECB.

C. The second question referred

1. General considerations

68. By its second question, the referring court asks, in essence, whether Article 4(3) TEU, Articles 45 and 48 TFEU, Article 11 of Annex VIII to the Staff Regulations and Article 8 of Annex IIIa to the ECB Conditions of Employment must be interpreted as allowing the court of a Member State, when seised by the person concerned, to order the transfer to the ECB's pension scheme of pension rights acquired by that person in the pension scheme of that Member State, even in the absence of a provision of national law or an agreement, between the Member State concerned and the ECB, providing for such a transfer.

69. As has been stated in point 54 of this Opinion, the signing of such an agreement between the ECB and the Member State concerned is an 'essential precondition' for the exercise of the right to transfer pension rights. The clear wording of Article 8 of Annex IIIa to the ECB Conditions of Employment already leaves no doubt in that regard. None of the various provisions which have been examined in the context of this analysis can, in itself, remedy the absence of such an agreement. However, reliance on the principle of sincere cooperation makes it possible to require the Member State to undertake to contribute to the success of negotiations aimed at concluding such an agreement.

70. That said, account should nevertheless be taken of the fact that the second question referred concerns a specific situation, namely that in which the failure to conclude such an agreement results from the failure of the Member State concerned to accept a proposal to that effect from the ECB. I therefore consider that it would be appropriate, in response to that question, to provide the referring court with clarification as to the measures which it might adopt when faced with such a failure, which is contrary to EU law.

2. The obligation of the Member States to ensure judicial protection of an individual's rights under EU law

71. In that regard, I would like to note at the outset that, according to the settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure judicial protection of an individual's rights under EU law. In addition, Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. [34]

72. Similarly, it should be recalled that, according to settled case-law, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. Those detailed rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). As regards the latter principle, it should be recalled that the right to an effective remedy and to a fair trial is enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection. [35]

3. The possibility of asking the competent court to compel the administrative authorities to negotiate in good faith and to conclude an agreement

73. In my view, it is clear that the considerations set out in the preceding points support the inference that where a court of a Member State considers that the competent authorities of that Member State have failed, contrary to EU law, to conclude with the ECB an agreement proposed by the latter with a view to the transfer to its pension scheme of pension rights acquired by members of its staff in the pension scheme of that Member State or, at least, to *participate actively and in good faith in negotiations* aimed at concluding such an agreement with the ECB, that court must *establish that that failure is unlawful* and, where appropriate, take the measures provided for by the applicable national procedural rules, in order to *compel those authorities to enter into negotiations with the ECB with a view to reaching an agreement and subsequently making the requested transfer*.

74. An interpretation of EU law requiring the court of a Member State to impose on administrative authorities specific obligations towards the ECB would ensure that that Member State acts in accordance with the principle of sincere cooperation. The traditional system of the division and balance of powers in Member States is, in my view, a guarantee of the effective fulfilment of the State's obligations under EU law. Since the applicable procedural rules may vary from one legal system to another, it is for the competent court to take the most effective measures available to it under national law, including the possibility of adopting an order to conclude the agreement and to make the required transfer within a specified period, subject to penalties. [36]

[34] See judgments of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382, paragraph 52), and of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 50).

[35] See judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 54).

[36] See judgments of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382, paragraph 58), and of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 56), in which the Court imposed an obligation on national courts to take, with regard to the competent administrative authorities, any necessary measure, such as an order, with a view to ensuring compliance with EU environmental law. The purpose of the order to be adopted by the national courts was to compel the administrative authorities to adopt specific measures provided for by EU legislation, namely to draw up an air quality plan and to install sampling stations for measuring air quality.

75. A power of injunction enables a court to order a party to act or refrain from acting in a manner determined by that court, possibly subject to a periodic penalty payment.[37] The court before which a dispute has been brought may thus order an individual or the administration to take specific action where the judgment necessarily requires one of the parties to the dispute to take such action. The principle that a national court may grant an injunction is not, at present, subject to any EU rules. Moreover, that principle is not applied in a uniform way throughout the Member States, in particular where an injunction is addressed to the administration.

76. However, the courts have an established power to address injunctions to the administration in several Member States.[38] Depending on the national legal system concerned, the courts have either a general power to address injunctions to the administration or a more limited power which excludes the government and those directly associated with it. As regards the main proceedings, it seems appropriate to entrust the national court with the task of determining the necessity and, where appropriate, the conditions under which the power of injunction may be exercised within the framework of its domestic legal system and in accordance with the principles of effectiveness and equivalence. In the context of that assessment, the national court must make an effort to ensure that its decisions are enforced in full.

4. The possibility of the Member State concerned being held liable for a breach of EU law on account of a failure to negotiate in good faith

77. Moreover, it is not possible to rule out the possibility, raised by certain interested parties, of the Member State concerned being held liable for a breach of EU law if that Member State fails, contrary to EU law, to conclude an agreement and to consent to the requested transfer, provided that the relevant conditions are met. In that regard, it must be recalled that, according to the Court's established case-law, individuals who have been harmed have a right to compensation for damage caused by breaches of EU law attributable to a Member State when three conditions are met, namely, the rule of EU law infringed must be intended to confer rights on individuals, the breach of that rule must be sufficiently serious, and there must be a direct causal link between the breach and the loss or damage sustained by those individuals.[39] It is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for the application of those criteria.[40]

78. I have doubts as to the effectiveness of this approach in the present case, however, for the following reasons. First, although the possibility of transferring pension rights acquired in a Member State's pension scheme to the ECB's pension scheme is a right 'equivalent' to the right conferred on officials and other servants of the Union under the Staff Regulations and the CEOS, the fact remains that that right requires implementation by means of an agreement which must determine, inter alia, the amount equivalent to the pension rights to be transferred to the ECB's pension scheme.[41] Should it prove impossible to determine such an amount with the necessary certainty, any claim for compensation would necessarily be limited to a general assertion that the Member State concerned is liable for a breach of EU law. The consequence of this would be that

[37] See, in that regard, the Opinion of Advocate General Bot in *Wall* (C-91/08, EU:C:2009:659, points 132 and 133).

[38] See the Opinion of Advocate General Bot in *Wall* (C-91/08, EU:C:2009:659, point 134).

[39] See judgments of 16 July 2020, *Presidenza del Consiglio dei Ministri* (C-129/19, EU:C:2020:566, paragraph 34), and of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 113).

[40] See judgment of 16 July 2020, *Presidenza del Consiglio dei Ministri* (C-129/19, EU:C:2020:566, paragraph 35).

[41] See point 61 of this Opinion.

an essential requirement for the recognition of a right to compensation, namely the existence of damage, would not be satisfied in that specific situation. Secondly, since it cannot be ruled out that the damage suffered by the person concerned will not actually occur until he or she decides to retire, there is a risk that an action seeking to establish such a right to compensation, brought by him or her before that date, might be dismissed by the competent court on the ground that the conditions laid down in the case-law have not been met.

79. Without excluding in advance that a court hearing a claim for compensation against the infringing Member State may be able to overcome the abovementioned obstacles, for example by setting a certain amount equivalent to the damage suffered on the basis of specific criteria recognised by the parties to the dispute, I consider that the first approach proposed in this Opinion best serves the interests of the ECB members of staff concerned. Such an approach offers a long-term solution for all members of staff, providing the necessary legal certainty. Moreover, negotiations on an agreement also allow provision to be made for a transfer of pension rights in the opposite direction, that is to say from the ECB's pension scheme to the national pension scheme, which may be of interest to all members of staff of the ECB wishing to return to their Member State of origin. Finally, that approach has the advantage of allowing the administrative authorities of the Member State concerned to fulfil – subsequently at least – their obligations arising under the principle of sincere cooperation.

80. However, it is for the competent court to consider which approach seems viable under its national legal system and with the aim of achieving the objective pursued, that is to say ensuring a transfer to the ECB's pension scheme of pension rights acquired in the pension scheme of the Member State concerned.

5. The answer to the second question referred

81. In the light of the foregoing considerations, I propose that the answer to the second question referred should be that Article 4(3) TEU must be interpreted as meaning that, where the court of a Member State is seised by the person concerned with a request for the transfer to the ECB's pension scheme of pension rights which he or she has acquired in the pension scheme of that Member State, that court must take all measures provided for by the applicable national procedural rules in order to compel the administrative authorities, first, to participate actively and in good faith in negotiations aimed at concluding an agreement under Article 8 of Annex IIIa to the ECB Conditions of Employment and, secondly, to carry out the requested transfer. That court must also assess the possibility of the Member State concerned being held liable for breach of the principle of sincere cooperation on account of a failure to comply with those obligations.

VI. Conclusion

82. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Tribunale ordinario di Asti (District Court, Asti, Italy):

(1) Article 4(3) TEU must be interpreted as meaning that a Member State which has received a proposal from the European Central Bank (ECB) to enter into an agreement, pursuant to Article 8 of Annex IIIa to the Conditions of Employment for staff of the ECB, for the transfer to the ECB's pension scheme of pension rights acquired by ECB staff members in the pension scheme of that Member State must participate actively and in good faith in negotiations aimed at concluding such an agreement with the ECB.

(2) Article 4(3) TEU must be interpreted as meaning that where the court of a Member State is seised by the person concerned with a request for the transfer to the ECB's pension scheme of pension rights which he or she has acquired in the pension scheme of that Member State, that court must take all measures provided for by the applicable national procedural rules in order to compel the administrative authorities, first, to participate actively and in good faith in negotiations aimed at concluding an agreement with the ECB and, secondly, to carry out the requested transfer. That court must also assess the possibility of the Member State concerned being held liable for breach of the principle of sincere cooperation on account of a failure to comply with those obligations.