

## RECOMMENDATION No H1

of 19 June 2013

**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)

(2013/C 279/07)

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<sup>(1)</sup>, 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<sup>(2)</sup>,

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,

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

Whereas:

- (1) The principle of non-discrimination on the grounds of nationality is an essential safeguard for the freedom of movement of persons, as provided for in Article 21(1) and 45(1) TFEU. This implies the abolition of all discrimination between nationals of Member States.
- (2) In the Gottardo<sup>(3)</sup> judgment, the Court of Justice acted on the principle as set out in Article 45 of the Treaty on the Functioning of the European Union (TFEU) in relation to a person resident in the European Union 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.
- (3) The Court ruled in this case that when a Member State concludes a bilateral international convention on social security with a third country which provides for account to be taken of periods of insurance completed in that third country for the acquisition of an entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of 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<sup>(4)</sup>.

- (4) In this connection, it follows from the Court's ruling that its interpretation of the term 'legislation' in 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 45(2) TFEU.
- (5) The Court considered that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a third country did not constitute an objective justification for the refusal by the Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention.
- (6) 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.
- (7) It is important that all appropriate conclusions be drawn from this judgment, which is crucial for EU nationals who have exercised their right to move freely to another Member State.
- (8) For this reason, it should be made clear that bilateral conventions on social security between a Member State and a third 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 nationals of another Member State who are in the same situation in objective terms.
- (9) Irrespective of the uniform application of the Gottardo ruling to individual cases, the existing bilateral conventions should in principle be reviewed. With regard to agreements concluded previously, Article 351 TFEU states: 'the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established', and Article 4(3), of the

<sup>(1)</sup> OJ L 166, 30.4.2004, p. 1.

<sup>(2)</sup> OJ L 284, 30.10.2009, p. 1.

<sup>(3)</sup> Judgment of 15 January 2002 in Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* (ECR 2002, p. I-00413 et seq.).

<sup>(4)</sup> Judgment of 15 January 2002 in Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* (ECR 2002, p. I-00413, paragraph 34).

Treaty on European Union requires that 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.'

- (10) With regard to new bilateral conventions on social security concluded between a Member State and a third 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.
- (11) The application of the Gottardo judgment to individual cases depends largely on the cooperation of third countries, especially since they must certify the periods of insurance completed there by the person concerned.
- (12) 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,

HEREBY RECOMMENDS to the competent services and institutions that:

1. In accordance with the principle of 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 21(1) and Article 45(1) of the Treaty on the Functioning of the European Union, the provisions under a

convention on social security with a third country shall in principle also apply to nationals of the other Member States who find themselves in the same situation as the State's own nationals.

2. New bilateral conventions on social security concluded between a Member State and a third country should in principle 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 to or from the Member State which is a party to the convention concerned.
3. The Member States should inform the institutions in the countries with which they have signed social security conventions, whose provisions apply only to their respective nationals, about the implications of this Recommendation. Member States which have concluded bilateral conventions with the same third countries may act jointly in requesting such cooperation. This cooperation is clearly essential if EU law is to be complied with.
4. Recommendation P1 shall be repealed from the day of application of this Recommendation.
5. This Recommendation shall be published in the *Official Journal of the European Union*. It shall apply from the first day of the second month after its publication.

*The Chair of the Administrative Commission*  
Anne McMANUS

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