OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 29 November 2007 [1]

I — Introduction

1. By order of 10 August 2006, received at the Court on 25 August 2006, the Finanzgericht Köln (Finance Court, Cologne) (Germany), referred four questions to the Court of Justice for a preliminary ruling under Article 234 EC. Those questions concern the interpretation of Article 13(2)(a) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 [2] ('Regulation No 1408/71') [3] and Article 10 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended by Regulation (EC) No 647/2005 ('Regulation No 574/72'). [4]

2. The questions were raised in proceedings brought by Ms Brigitte Bosmann, a Belgian national residing in Germany and pursuing an occupation in the Netherlands, against the Bundesagentur für Arbeit (Federal Employment Agency, 'the Bundesagentur'), challenging its refusal to grant her German child benefit for her two dependent children on the grounds that her right to child benefit is governed exclusively by the legislation of the State of employment, in this case the Netherlands.

3. The referring court essentially wishes to ascertain whether in a situation where an employed person does not qualify for child benefit in the State of employment on the grounds of the children's ages, the law of the

1 — Original language: English.

2 — Regulation amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2005 L 117, p. 1).

3 — OJ English Special Edition 1971(II), p. 416.

4 — OJ English Special Edition 1972(I), p. 159.

State of residence, under which that person may be entitled to child benefit, may be applied.

II — Legal framework

A — *Community legislation*

1. Regulation No 1408/71

4. Article 13 of Regulation No 1408/71, entitled 'General rules', provides, so far as is relevant, as follows with respect to the determination of the legislation applicable:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…'

5. Article 73 of Regulation No 1408/71, entitled 'Employed or self-employed persons the members of whose families reside in a Member State other than the competent State', reads:

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

2. Regulation No 574/72

6. Article 10(1) of Regulation No 574/72, which lays down the rules applicable to employed or self-employed persons in cases where rights to family benefits or family allowances overlap, provides:

'(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

...'

B — *National legislation*

7. Entitlement to German child benefit is governed by Paragraphs 62 and 63 of the Einkommensteuergesetz ('EStG') (Law on Income Tax). The following provisions are relevant here.

8. Paragraph 62.1.1 reads:

'In respect of children within the meaning of Paragraph 63, a person shall be entitled to child benefit under this law if he has a residence in Germany or normally resides there.'

9. Paragraph 63.1.1 provides:

'Children shall mean: Children within the meaning of Paragraph 32.1.'

10. Paragraph 32.1.1 reads:

'Childen are children related in the first degree to the taxpayer.'

Paragraph 32.4.1.2.a provides:

'A child who has attained the age of 18 years shall be taken into account if he has not yet attained the age of 27 years and is being trained for a profession or occupation.'

III — Factual background, procedure and questions referred

11. Ms Bosmann is a Belgian national who has lived in Germany for many years. She is a single mother of two children, Caroline and Thomas, who live in her household in Germany and are currently studying in Germany. Their own income is beneath the threshold above which entitlement to child benefit in Germany is lost.

12. According to the order for reference, it is undisputed between the parties to the main proceedings that Ms Bosmann would in principle be entitled to German child benefit in accordance with the EStG, on the basis of which she was in fact initially granted child benefit in respect of both children.

13. On 1 September 2005, however, Ms Bosmann took up employment in the Netherlands, whereupon the Bundesagentur, by order of 18 October 2005, cancelled the benefit in respect of the children with effect from October 2005.

14. Ms Bosmann's objection to that order was rejected by the Bundesagentur as unfounded by determination of 10 November 2005 stating, in particular, that entitlement is excluded by Article 10 of Regulation No 574/72 and that Ms Bosmann, as an employee, is subject in this regard only to the legislation of the State of employment, in this case the Netherlands. According to the Bundesagentur, the fact that that State does not pay child benefit for children aged 18 and over is irrelevant.

15. In her action in the main proceedings, Ms Bosmann argues that the refusal of child benefit is a clear infringement of the right to freedom of movement and claims that the order of 18 October 2005 and the determination of 10 November 2005 should be set aside.

16. In the order for reference, the Finanzgericht Köln points out that if the German EStG alone were to be applied, leaving Community law aside, the applicant would be entitled in Germany to child benefit for her two children. As it is, Ms Bosmann's entitlement to child benefit is in principle excluded by Community law, in particular by Article 13(1) and (2)(a) of Regulation No 1408/71 and Article 10 of Regulation No 574/72, under which, according to the view expressed by the referring court, [5] Ms Bosmann is subject only to the law of the Netherlands, where, however, because of the children's ages, she has no entitlement to child benefit or to comparable social benefits.

17. The Finanzgericht Köln questions whether that legal position is compatible with the right to freedom of movement as laid down in Article 39 EC or, indeed, with the general principles of Community law, in particular the principles of non-discrimination and the prohibition of discrimination on grounds of sex. [6]

18. In that regard, the referring court emphasises, inter alia, that, since the question whether a harmonisation measure such as Regulation No 1408/71 is in conformity with primary law falls, as a matter of principle, outside the scope of the preliminary

5 — Reference is made in that regard to the judgment of the Bundesfinanzhof of 13 August 2002, VIII R 61/00, BStBl-II 2002, 869, and the judgment of the Court of Justice in Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049.

6 — The referring court discusses in this context Case 60/85 *Luijten* [1986] ECR 2365; Case 203/86 *Spain* v *Council* [1988] ECR 4563; Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961; and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897.

rulings procedure, it is not seeking review of the legality of Regulation No 1408/71, but asking whether it may be narrowly construed in the light of the basic freedoms.

19. Against that background, the Finanzgericht Köln decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 13(2)(a) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community to be interpreted restrictively, so as not to preclude entitlement to child benefit in the case of a mother bringing up children on her own in the State of residence (Federal Republic of Germany), who does not receive child benefit in the State of employment (Kingdom of the Netherlands) because of the age of the children?

(2) If Question 1 is answered in the negative:

Is Article 10 of Council Regulation (EEC) No 574/72 of 21 March 1972 concerning the implementation of Regulation (EEC) No 1408/71 to be interpreted restrictively, so as not to preclude entitlement to child benefit in the case of a mother bringing up children on her own in the State of residence (Federal Republic of Germany), who does not receive child benefit in the State of employment (Kingdom of the Netherlands) because of the age of the children?

(3) If the answers to Question 1 and Question 2 are also in the negative:

Does a mother in employment, who brings up children on her own, have a right to the application of the more favourable rules of her State of residence in relation to the granting of child benefit arising directly from the EC Treaty and/or from general legal principles?

(4) Is it relevant to the answers to the above questions whether the employee returns to the family residence at the end of each working day?'

IV — Legal analysis

A — *Main submissions of the parties*

20. In the present proceedings, written observations have been submitted by the Governments of Germany and Spain, by the Commission and by Ms Bosmann.

21. The German Government takes the view that Article 13(2)(a) of Regulation No 1408/71 is to be interpreted as preventing entitlement to child benefit in a situation such as that at issue. The German child benefit constitutes a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71. According to the clear wording of Article 13(1) of that regulation, persons to whom it applies are to be subject to the legislation of a single Member State only.

22. In the view of the German Government, a different interpretation would run counter to the aim of Regulation No 1408/71, as defined in the case-law of the Court, [7] which is to ensure that the persons concerned are subject to the social security scheme of only one Member State. Moreover, pursuant to the case-law of the Court, the principle that the application of Regulation No 1408/71 cannot entail the loss of rights acquired exclusively under national legislation does not apply to the rules for determining the applicable legislation as laid down under Title II of that regulation. [8]

23. Given the clear wording of Article 10 of Regulation No 574/72, Question 2 should also be answered in the negative. According to the German Government, that article does not apply in the present case: since the employee pursues an occupation in only one Member State and lives in another Member State, there can be no overlapping of family benefits.

24. As regards Question 3, the German Government asserts that, contrary to the view expressed by the Finanzgericht Köln in the order for reference, it is perfectly possible, under the preliminary rulings procedure, to determine whether an act such as Regulation No 1408/71 is in conformity with primary Community law. The German Government contends, however, that Article 13 of that regulation infringes neither the right to freedom of movement laid down

7 — It refers, in particular, to Case 302/84 *Ten Holder* [1986] ECR 1821, paragraphs 19 to 21.

8 — *Luijten*, cited in footnote 6, paragraph 15.

in Article 39 EC nor the general principles of equal treatment or the prohibition of discrimination on grounds of sex, as referred to in the order for reference.

25. Finally, as regards Question 4, the German Government considers it irrelevant, in the light of Article 13 of Regulation No 1408/71, which refers to the State of employment, whether the employee returns to the family residence at the end of each working day.

26. The Spanish Government submits that the key point at issue is not the interpretation of Article 13 of Regulation No 1408/71, but rather the question whether that article is contrary to Article 39 EC and the principles of equal treatment and non-discrimination on grounds of sex.

27. It argues that the provisions of the German legislation on entitlement to family benefits, which are based on a literal interpretation of Regulation No 1408/71 and pursuant to which Ms Bosmann lost the benefits for her children, clearly place her at a disadvantage likely to deter her from exercising her right to freedom of movement. Those provisions are not justified and are not appropriate for securing the attainment of the objective which they pursue.

28. The Spanish Government therefore concludes, on the basis of the case-law of the Court on the free movement of persons, [9] that, in so far as the relevant provisions of Regulation No 1408/71 and Regulation No 574/72 lead the employed person, in circumstances such as those of the case before the referring court, to lose family benefits, they are contrary to Article 39 EC.

29. According to the Commission, the reply to Questions 1 and 2 should be that Article 13(2)(a) of Regulation No 1408/71, read in conjunction with Article 10(1)(a) of Regulation No 574/72, does not, in a case such as that before the referring court, preclude entitlement to child benefit in the State of residence.

30. Relying mainly on the judgment in *McMenamin* and the Opinion of Advocate General Darmon in that case, [10] the Commission submits that not only is Article 13 of Regulation No 1408/71 applicable here, but also Article 10(1)(a) of Regulation No 574/72.

9 — It refers in that regard, in particular, to Case C-10/05 *Cynthia Mattern* [2006] ECR I-3145; Case C-109/04 *Kranemann* [2005] ECR I-2421; and Case C-185/04 *Öberg* [2006] ECR I-1453.

10 — Case C-119/91 [1992] ECR I-6393 and the corresponding Opinion of Advocate General Darmon.

Article 73 of Regulation No 1408/71 merely provides that the legislation of the State of employment is to apply: it does not establish whether benefit is payable and, if so, by whom. Viewed in that light, Article 10(1)(a) of Regulation No 574/72 should be understood as meaning that, although the State of employment is competent, entitlement to benefit under the legislation of the State of residence may continue to exist. Since, in the case before the referring court, the 'benefit due' in the State of employment is zero, the entitlement to German child benefit becomes *de facto* operative and fully payable. The Commission further points out that, if Article 10(1)(a) of Regulation No 574/72 were not applicable to a situation such as that in issue because there is no overlapping of benefits, the same would be true of Articles 13 and 73 of Regulation No 1408/71.

31. If followed, the view held by the German Government would run counter to the principle that the application of Regulation No 1408/71 cannot entail the loss of rights acquired exclusively under national legislation and would lead to unjustifiable contradictions.

32. In that regard, the Commission agrees with the arguments set out by the referring court in the order for reference to the effect that a parent bringing up children alone, who lives in one Member State and works in another, would be treated less favourably than one who is employed both in his State of residence and in another Member State and that, more generally, a single mother would be treated less favourably than a mother forming part of a couple.

33. Ms Bosmann essentially concurs with the Commission and contends that the refusal by the German authorities to grant the child benefit is in breach of Article 39 EC and the principle of equal treatment.

B — *Appraisal*

1. Preliminary remarks

34. Before embarking on the analysis, some preliminary remarks appear appropriate in order to determine the issues which arise from the questions referred.

35. It should be noted, first of all, that it has not been disputed in the present case that the situation at issue falls *ratione personae* and *ratione materiae* within the scope of Regulation No 1408/71, that is to say, more specifically, that Ms Bosmann can be con-

sidered as an 'employed person' within the meaning of Article 2(1) of that regulation, read in conjunction with Article 1(a) thereof, and that the German child benefit fulfils the conditions for being regarded as 'family benefits' within the meaning of Article 4(1)(h) of that regulation.

36. As regards, next, the context of the present case, it should be noted that the dispute in the main proceedings concerns the refusal by the authorities of Ms Bosmann's State of residence — in this case, the Bundesagentur — to grant child benefit in respect of her children, on the ground that, in accordance with Regulations No 1408/71 and No 574/72, Ms Bosmann is in that regard subject to the legislation of her State of employment, namely the Netherlands. That view is challenged by Ms Bosmann in the main proceedings, mainly on the ground that it amounts to an infringement of her right to freedom of movement and of the principle of equal treatment.

37. Apparently sharing Ms Bosmann's view, the referring court questions whether the legal position according to which the application of Regulation No 1408/71 and Regulation No 574/72 in a situation such as that in issue precludes entitlement to child benefit in Germany, the State of residence, is compatible with the right to freedom of movement as well as with the general principles of Community law of equal treatment and the prohibition of discrimination on grounds of sex. The referring court takes as its starting point in that regard, however, the erroneous [11] assumption that the validity of a Community act such as Regulation No 1408/71 cannot, in the framework of the preliminary rulings procedure, be examined in the light of those rules and principles of primary law, and is therefore asking whether Regulations No 1408/71 and No 574/72 may be given a 'restrictive interpretation' so as not to exclude entitlement to child benefit in the State of residence, or whether such a right may directly arise from the Treaty or from those principles.

38. Against that background, it appears that the first three questions, which it is appropriate to examine together, are essentially designed to determine whether, under Regulation No 1408/71 and Regulation No 574/72 and account being taken of the right to freedom of movement and equal treatment, the legislation of the State of residence — under which the person concerned would be entitled to child benefit — may be applied in a situation such as that in the case before the referring court.

39. In order to propose an answer to that question, I will first examine the entitlement to child benefit in a case such as that before the referring court in the light of the provisions of Regulation No 1408/71 and Regulation No 574/72 taken, so to speak, at face value. It should be noted in that regard that, according to settled case-law, in order

11 — See only, as regards Regulation No 1408/71, for example Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829.

to provide a useful reply to the national court which has referred a question for a preliminary ruling, rules of Community law other than those to which the national court has referred in its questions — in this case Article 13(2)(a) of Regulation No 1408/71 and Article 10 of Regulation No 574/72 — may be taken into consideration. [12]

40. I will then, more specifically, address the issues which are raised in the present case in respect of Article 39 EC and the general principles of equal treatment and non-discrimination.

41. Finally I will address Question 4, concerning the relevance of the return to the family residence at the end of each working day, which can be answered separately.

2. Applicable legislation

42. To begin with, it should be recalled that Title II of Regulation No 1408/71 — of which Article 13 forms part — contains the general rules in accordance with which the legislation applicable to an employed person who makes use, under various circumstances, of his right to freedom of movement, is to be determined. [13]

43. Those rules are intended in particular to prevent the concurrent application of provisions deriving from more than one national legislative system and the complications which might ensue. [14] Thus, Article 13(1) of Regulation No 1408/71 lays down the principle that a person is to be subject to the legislation of a single Member State only, [15] which is to be determined in accordance with the provisions of Title II of that regulation.

44. In that regard, Article 13(2)(a) of the regulation makes it clear that in a situation where the person concerned is engaged in paid employment in one Member State and resides in the territory of another Member State, it is the legislation of the State where he is employed that is applicable (rule of *lex loci laboris*).

45. It should be noted, however, that certain benefits are governed by the more specific

12 — See, to that effect, inter alia Case C-153/03 *Weide* [2005] ECR I-6017, paragraph 25.

13 — See to that effect, inter alia, *Hervein and Others*, cited in footnote 11, paragraph 52.

14 — See Case C-302/02 *Effing* [2005] ECR I-553, paragraph 38, and order in Case C-242/99 *Vogler* [2000] ECR I-9083, paragraph 26.

15 — See as to that, inter alia, *Vogler*, cited in footnote 14, paragraph 19.

rules laid down in Title III of Regulation No 1408/71. With respect to family benefits such as those at issue in the present case, which are covered by Chapter 7 of that regulation, Article 73 provides that a worker subject to the legislation of a Member State is to be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State.

46. Thus, Article 73 of Regulation No 1408/71 confirms that, in accordance with the rule laid down in Article 13(2)(a) of that regulation, entitlement to family benefits in respect of members of the family is governed by the legislation of the Member State of employment of the worker. [16]

47. It is therefore clear from Article 13 of Regulation No 1408/71, read in conjunction with Article 73 thereof, that under the system of coordination set up by that regulation, in a situation such as that in issue, in which the employed person and the members of his family are residing in a Member State other than the Member State of employment, the legislation applicable as regards entitlement to family benefits is the legislation of that latter State.

48. It is true that, as the Commission and Ms Bosmann have pointed out, the application of the legislation of another Member State, in particular the State of residence, is not always precluded under Regulation No 1408/71, since the rule laid down in Article 13 of that regulation — that an employed person is subject to the legislation of the Member State of employment — does not rule out certain benefits governed by the more specific rules of that regulation. [17]

49. Thus, the application of the provisions against overlapping, as laid down in Article 10 of Regulation No 574/72, cited in the questions referred, or in Article 76 of Regulation No 1408/71, may lead to a reversal of priorities in favour of the competence of the Member State of residence (*lex loci domicilii*), with the result that there may be entitlement to allowances in that State, and the benefits payable by the Member State of employment may be suspended. [18]

50. Such was the case in *McMenamin*, relied upon by the Commission. [19] That case concerned a situation where two spouses worked in two different Member States, under whose legislation provision was made for the payment of similar benefits. The

16 — See, to that effect, *Dodl and Oberhollenzer*, cited in footnote 5, paragraphs 47 and 48.

17 — See for example *McMenamin*, cited in footnote 10, paragraph 14. For similar reasoning with regard to Article 73 of Regulation No 1408/71 see *Dodl and Oberhollenzer*, cited in footnote 5, paragraph 49.

18 — See to that effect *Weide*, cited in footnote 12, paragraph 28.

19 — Cited in footnote 10.

Court therefore assessed the case in the light of the provisions against overlapping, laid down in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72, and held that the exercise by a person having the care of children — and, in particular, by the spouse of the person entitled in pursuance of Article 73 of Regulation No 1408/71 — of a professional or trade activity in the Member State of residence of the children suspends the right to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the allowances of the same kind actually paid by the Member State of residence. [20]

51. It should be emphasised, however, that in such a case a reversal of priorities in favour of the competence of the Member State of residence on the basis of the rule laid down in Article 10(1)(b)(i) of Regulation No 574/72 is triggered by the fact that a professional or trade activity is exercised or pursued in the Member State of residence, in *McMenamin* by the spouse of the person entitled in pursuance of Article 73 of Regulation No 1408/71. [21]

52. The same can also be said of *Dodl and Oberhollenzer* [22] and *Weide*. [23]

53. By contrast, there is in my view nothing in the situation described by the referring court in the present case which would trigger the application of the legislation of the State of residence on the basis of the provisions against overlapping laid down in Regulation No 1408/71 and Regulation No 574/72.

54. In particular, neither Ms Bosmann herself [24] nor a spouse exercises a professional or trade activity in the State of residence and there is no other indication that her circumstances should not be governed solely by Article 73 of Regulation No 1408/71. In consequence, contrary to the somewhat contrived view taken by the Commission, there is to my mind no overlapping of entitlements within the meaning of Regulation No 1408/71 and Regulation No 574/72 which would lead to a reversal of priorities in favour of the Member State of residence and, in application of Article 10(1)(a) of the latter regulation, to payment of the full amount of German child benefit (the Commission's argument on the latter point being that the sum of benefits paid in the State of employment is zero in the present case and, under that provision, the allowances are to be suspended only up to that amount).

55. It follows that, in this case, Ms Bosmann is subject exclusively to the social security scheme established by the Netherlands legislation.

20 — See as to that *McMenamin*, cited in footnote 10, paragraphs 15 and 27.

21 — See *McMenamin*, cited in footnote 10, paragraphs 18, 24 and 25.

22 — See *Dodl and Oberhollenzer*, cited in footnote 5, paragraph 60.

23 — See *Weide*, cited in footnote 12, paragraph 33.

24 — For an example of a case where a (self-employed) person is subject to the legislation of the Member State of residence on account of the fact that he pursues a part of his activity in the territory of that State, see order in *Vogler*, cited in footnote 14, paragraph 19.

3. Applicability of the Netherlands legislation — Question of competence

56. Moreover, it appears to me that the key to a proper understanding of the present case lies in the distinction between the question of the competence of a Member State with regard to a particular benefit and the question of the actual entitlement to a benefit.

57. The question of competence is governed by Regulation No 1408/71. According to established case-law, that regulation merely puts in place a system of coordination, which simply determines which legislation is applicable to various situations. [25] As the Court has pointed out on several occasions, its provisions do not themselves, as such, confer any entitlement to benefits. [26]

58. Such benefits are in fact granted on the basis of the relevant provisions of national law. [27] It is for the Member States to define the content of the social security system and, in particular, to lay down the substantive conditions for entitlement to benefits. [28]

59. Once the legislation applicable to an employed person (the question of the applicable legislation logically precedes the question of entitlement) is determined in accordance with Regulation No 1408/71, that person's entitlement to benefit is subject to that legislation, which can naturally vary from Member State to Member State due to the fact that under Community law, the social security systems are only coordinated, not harmonised. [29]

60. Of course, the result of the determination of the legislation applicable in accordance with Regulation No 1408/71 may be that a migrant worker is found to have no right to a particular benefit, because he does not meet the conditions specified by that scheme. It should be emphasised in that regard, however, that that regulation is not intended to ensure as a general rule that employed persons to whom it applies are entitled to benefits, but rather to ensure that persons are not left without social security cover on the grounds that 'there is no legislation applicable'. [30]

61. Seen in that light, it should be noted with regard to the situation at issue in the main proceedings that, on closer inspection, there is no (negative) conflict of competence.

25 — See to that effect, for example, *Hervein and Others*, cited in footnote 11, paragraph 52.

26 — See, for example, Case C-266/95 *García* [1997] ECR I-3279, paragraph 29, and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 29.

27 — See *García*, cited in footnote 26, paragraph 29.

28 — See in that regard *Hervein and Others*, cited in footnote 11, paragraph 53, and *Kuusijärvi*, cited in footnote 26, paragraph 29.

29 — See *Hervein and Others*, cited in footnote 11, paragraph 52.

30 — See *Kuusijärvi*, cited in footnote 26, paragraph 28.

62. In other words, in conformity with Articles 13 and 73 of Regulation No 1408/71, the applicability of Netherlands legislation (the legislation of the State of employment) has not been denied in the present case; nor has it been made dependent on a criterion of residence.

63. Plainly, therefore, the problem here is not that there is no applicable legislation, nor that the legislation of several Member States could simultaneously and legitimately be regarded as applicable.

64. The root of the problem is, rather, a matter of substantive law and entitlement, in that Ms Bosmann does not qualify for child benefit in her Member State of employment on account of the fact that one of the conditions for entitlement to child benefit under Netherlands law (the age-requirement relating to the children) is not fulfilled, whereas, in that regard, the German legislation would be more favourable in that child benefit is payable thereunder for children aged 18 and over.

65. As is apparent from the foregoing considerations, however, that situation is not in principle such as to run counter to the system of conflict rules [31] provided for under Regulation No 1408/71 or to deprive it of its practical effect. In particular, the system of coordination under Regulation No 1408/71 does not determine the law applicable on the basis of the principle that persons who live or work in two or more countries should be subject to the legislation most favourable to them. [32]

66. It appears, therefore, that the refusal by the State of residence to grant entitlement to child benefit in circumstances such as those in issue is in conformity both with Regulation No 1408/71 and with Regulation No 574/72. It now remains to be examined, more specifically, whether that approach is, as submitted by Ms Bosmann, in breach of Article 39 EC and the principle of equal treatment.

4. Free movement and non-discrimination

67. As the Spanish Government, in particular, has emphasised in the present case, a person who, like Ms Bosmann, has exercised the right to freedom of movement for workers and has been employed in a Member State other than that of residence falls within the scope of Article 39 EC. [33]

31 — See, for example, *Ten Holder*, cited in footnote 7, paragraph 21.

32 — See to that effect *Hervein and Others*, cited in footnote 11, paragraph 51.

33 — See, inter alia, *Öberg*, cited in footnote 9, paragraph 11.

68. Article 39 EC — implemented, as far as concerns social security for migrant workers, by Article 3(1) of Regulation No 1408/71 — prohibits, first, overt discrimination based on the nationality of the beneficiaries of social security schemes, as well as all covert forms of discrimination which, through the application of other distinguishing criteria, lead in practice to the same result. [34]

69. Second, it is clear from well-established case-law that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [35]

70. It should be noted in that regard that it is the objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, to ensure free movement of employed and self-employed persons within the European Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the fifth, sixth and tenth recitals, that regulation upholds the principle of equality of treatment of workers under the national legislation of the various Member States and seeks to guarantee equality of treatment for all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. [36]

71. However, as I have already noted above, it is only by drawing up, as provided for by Article 42 EC, a system of coordination that Regulation No 1408/71 contributes to facilitating the exercise of the free movement of persons and the guarantee of equal treatment. [37] Substantive and procedural differences between the social security systems of individual Member States, hence in the rights of persons working there, are left unaffected by the Treaty. [38]

72. Accordingly, as the Court has repeatedly held, the Treaty offers no guarantee to a worker that extending or transferring his activities to another Member State will have

34 — See, inter alia, Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 24, and Case C-332/05 *Celozzi* [2007] ECR I-569, paragraph 23.

35 — See, inter alia, Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraph 114; *Öberg*, cited in footnote 9, paragraph 14; and *Bosman*, cited in footnote 6, paragraph 94.

36 — See, inter alia, Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 19 and the case-law cited.

37 — See Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraphs 22 and 23.

38 — See, for example, Case 41/84 *Pinna* [1986] ECR 1, paragraph 20.

neutral consequences as regards social security. Given the disparities between the social security regime of the various Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstances. [39]

73. It follows that, in the absence of harmonisation of social security legislation, certain restrictions on the freedom of movement — that is to say, restrictions which result from the persisting disparities between the social security schemes of the Member States and which are inherent in a system aimed merely at coordination — are not precluded by the provisions on the free movement of persons under the EC Treaty. [40]

74. The same considerations must in fact apply to differences in treatment which arise merely on account of permissible differences between the social security legislation of the Member States, and in consequence they cannot be regarded as contrary to the principle of equality. [41]

75. In that light it must be noted, first, that taking up employment in the Netherlands was indeed to the disadvantage of Ms Bosmann in so far as it entailed, in accordance with the State of employment principle enshrined in Regulation No 1408/71, the application of Netherlands legislation, which does not provide for child benefit in respect of children of the ages in question, whereas she would be entitled to German child benefit if she were employed in that State.

76. To my mind, however, that disadvantage is to be ascribed to the substantive differences with regard to child benefit as between the social security schemes in Germany and the Netherlands concerning, in particular, the age of the children as a condition of entitlement. Accordingly, it cannot as such give rise to an infringement of freedom of movement under the Treaty.

77. Second, as regards the question of discrimination raised by Ms Bosmann and the referring court, it is also clear that the coordination system established by Regulation No 1408/71 does not — and indeed cannot — guarantee equal treatment in all respects. As Advocate General Sharpston has pointed out in her Opinion in Case C-212/06, in so far as Article 13(2)(a)

39 — See, to that effect, *Piatkowski*, cited in footnote 36, paragraph 34, and *Hervein and Others*, cited in footnote 11, paragraph 51.

40 — It appears, however, from case-law that this holds true only to the extent that the Community rules pursuant to Article 42 EC do not add to the disparities which already stem from the absence of harmonisation of national legislation: see in that regard, inter alia, *Pinna*, cited in footnote 38, paragraphs 20 and 21.

41 — For a similar reasoning of the Court with regard to direct taxation, see Case C-427/05 *Porto Antico di Genova* [2007] ECR I-9303, paragraph 20.

provides that, as a general rule, the applicable legislation is to be the *lex loci laboris*, the Member State in whose territory equality is to be achieved would normally be the State of employment. [42]

78. Thus, the migrant worker must, when, as in the present case, that rule is brought to bear, be treated equally as compared with all other workers employed on the territory of that State.

79. Here, that is apparently the case, as Netherlands legislation does not in general recognise entitlement to child benefit in respect of children of the ages in issue, so that Ms Bosmann is being treated in that regard in exactly the same way as persons employed and residing in the Netherlands.

80. Ms Bosmann cannot claim that a person in her situation, who resides in one Member State and merely pursues employment in another Member State, is discriminated against as compared with persons who also pursue a professional or trade activity in the Member State of residence or as compared with persons whose spouse is employed in that State. In my view, in a system of coordination based on the principle of *lex loci laboris* and the criterion of employment, the situations compared in that argument are objectively different. [43] Accordingly, they may also lead to different results in terms of the applicability of the law of the State of residence and hence in terms of entitlement to child-benefit in that State.

81. It follows that the application of Article 13 of Regulation No 1408/71 and, in particular, of the principles reflected therein (*lex loci laboris* and applicability of the legislation of a single Member State only), with the result that an employed person in a situation such as that in issue in the main proceedings is not entitled to child benefit in the Member State of residence and cannot receive child benefit in the State of employment because of the age of the children, is compatible with the freedom of movement and the principle of equality.

82. In the light of all the foregoing, it is clear that, under Regulation No 1408/71 and Regulation No 574/72 and account being taken of the right to freedom of movement and equal treatment, a person in a situation such as that in issue in the main proceedings is not entitled to application of the legislation of the State of residence so as to receive child benefit as provided for under that legislation.

42 — Opinion in *Gouvernement de la Communauté française and Gouvernement wallon*, point 77.

43 — The principle of non-discrimination requires that *comparable situations* must not be treated differently and different situations must not be treated in the same way. See to that effect, inter alia, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 31.

5. Relevance of the daily return of the employee to the family residence

83. As regards Question 4, it suffices to note, as the German Government has submitted, that Article 13(2)(a) of Regulation No 1408/71 provides that the legislation of the State of employment is to apply where a person resides in one Member State and is engaged in paid employment in the territory of another Member State. The *lex loci laboris* principle thus applies regardless of whether the employed person concerned returns to the family residence at the end of each working day, which is in fact a random circumstance with no legal relevance in the present context.

V — Conclusions

84. For the reasons given above, I propose that the questions referred by the Finanzgericht Köln should be answered as follows:

'Under Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, and Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, also as amended by Regulation No 647/2005, and account being taken of the right to freedom of movement and equal treatment, a person in a situation such as that under examination by the referring court is not entitled to application of the legislation of the State of residence so as to receive child benefit as provided for under that legislation, regardless of the fact that that person returns to the family residence at the end of each working day.'