Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

27 October 2016*

(Reference for a preliminary ruling — Articles 18 and 45 TFEU — Social security for migrant workers — Regulation (EEC) No 1408/71 — Articles 3 and 94 — Regulation (EC) No 859/2003 — Article 2(1) and (2) — Old-age and survivor's insurance — Former seafarers who are nationals of a third country which became a Member State of the European Union in 1995 — Excluded from entitlement to old-age benefit)

In Case C-465/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Higher Social Security Court, Netherlands), made by decision of 6 October 2014, received at the Court on 9 October 2014, in the proceedings

Raad van bestuur van de Sociale verzekeringsbank

v

F. Wieland,

H. Rothwangl,

THE COURT (First Chamber),

composed of A. Tizzano, vice-President of the Court, acting as President of the First Chamber, M. Berger (Rapporteur), A. Borg Barthet, S. Rodin, and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 September 2015,

after considering the observations submitted on behalf of:

— the Raad van bestuur van de Sociale verzekeringsbank, by H. van der Most and T. Theele, acting as Agents,

— the Spanish Government, by M. García-Valdecasas Dorrego, acting as Agent,

— the Netherlands Government, by M. Noort, M. Bulterman and H. Stergiou, acting as Agents,

— the European Commission, by D. Martin and G. Wils, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 4 February 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 and Article 45(2) TFEU, Articles 3 and 94 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 1408/71'), and Article 2(1) and (2) of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1).

2 The request was made in the context of two separate disputes between the Raad van bestuur van de Sociale verzekeringsbank (Board of the Social Insurance Bank, the 'SVB'), on the one hand, and F. Wieland and H. Rothwangl, on the other hand, concerning the SVB's refusal to grant them an old-age pension.

Legal context

EU law

Regulation No 1408/71

3 The first recital of Regulation No 1408/71 states:

'… the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should contribute towards the improvement of their standard of living and conditions of employment'.

4 Article 1 of that regulation is worded as follows:

'For the purposes of this Regulation:

(a) employed person … mean[s] …:
  (i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons …

...

(j) legislation means all the laws, regulations, and other provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2) …

...

(r) periods of insurance means periods of contribution or period of employment or self-employment as defined or recognized as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance; periods completed under a special scheme for civil servants are also considered as periods of insurance;

...

(sa) periods of residence means periods as defined or recognized as such by the legislation under which they were completed or considered as completed;

...'

5 Article 2 of Regulation No 1408/71, entitled 'Persons covered', provides in paragraph 1:

'This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

6 Article 3 of Regulation No 1408/71, entitled 'Equality of treatment', provides in paragraph 1:

'Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.'

7 Article 4 of Regulation No 1408/71, entitled 'Matters covered', provides:

'1. 'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

...'

8 Article 13 of that regulation, entitled 'General rules', provides in paragraph 2:

'Subject to Articles 14 to 17:

...

(c) a person employed onboard a vessel flying the flag of a Member State shall be subject to the legislation of the State;

...'

9 Article 44 of that regulation, entitled ‘General provisions for the award of benefits where an employed or self-employed person has been subject to the legislation of two or more Member States’, provides in paragraph 1:

‘The rights to benefits of an employed or self-employed person who has been subject to the legislation of two or more Member States, or of his survivors, shall be determined in accordance with the provisions of this Chapter.’

10 According to Article 45 of Regulation No 1408/71, the competent institution in a claimant’s Member State must take account of periods of insurance or residence completed under the legislation of other Member States. In cases where the competent institution is obliged to calculate benefits by reference to aggregated periods of insurance or residence pursuant to the rules laid down in Article 45, the old-age pension benefits awarded are calculated in accordance with Article 46(2) of that regulation.

11 Article 94 of Regulation No 1408/71, entitled ‘Transitional provisions for employed persons’, provides at paragraphs 1 and 2:

‘1. No right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.’

Regulation No 859/2003

12 Article 1 of Regulation No 859/2003 provides:

‘Subject to the provisions of the Annex to this Regulation, the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 shall apply to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.’

13 Under Article 2(1) to (2) of Regulation No 859/2003:

‘1. This Regulation shall not create any rights in respect of the period before 1 June 2003.

2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State before 1 June 2003 shall be taken into account for the determination of rights acquired in accordance with the provisions of this Regulation.’

Netherlands law

14 Article 2 of the Algemene Ouderdomswet (General Law on old-age insurance, Stb. 1956, No 281, ‘AOW’), in the version applicable to the facts in the main proceedings, provides:

‘A person who resides in the Netherlands is considered as a resident within the meaning of this Law.’

15 Article 3 of the AOW, in the version applicable until the entry into force of the Law of 30 July 1965 (Stb 347, No 882.), stated:

‘1. The place of residence of a person ... shall be determined according to the circumstances.

...

3. For the purposes of paragraph 1, vessels and aircraft with their home port in the territory of the Kingdom are considered to be part of the Kingdom as far as the crew is concerned.’

16 Article 3 of the AOW, in the version stemming from the law of 30 July 1965 reads as follows:

‘1. The place of residence of a person ... shall be determined according to the circumstances.

2. For the purposes of paragraph 1, vessels and aircraft with their home port in the territory of the Kingdom shall be considered to be part of the Kingdom as far as the crew is concerned.

…’

17 Article 6 of the AOW, in the version stemming from the law of 25 May 1962 (Stb 1962, p. 205) which entered into force retroactively as of 1 October 1959, provided:

‘1. A person aged over 15 and under 65 shall be insured under the provisions of this Law, if:

(a) he is a resident;

...

4. The first paragraph may be derogated from by or pursuant to a general administrative measure:

(a) in respect of foreign nationals;

(b) in respect of persons covered by a similar scheme outside the Kingdom;

(c) in respect of persons who reside only temporarily or who work only temporarily in the country;

(d) in respect of spouses and other household members ... of persons referred to in subparagraphs (b) and (c) above;

(e) in respect of spouses of nationals, [who are not covered by this Law] pursuant to an agreement or a social security scheme applicable between the Netherlands and one or more other states.’

18 Article 6 of the AOW, in the version in force from the Law of 30 July 1965, reads as follows:

‘1. A person aged over 15 and under 65 is insured under the provisions of this Law, if:

(a) he is resident;

...

3. The first paragraph may be derogated from by or pursuant to a general administrative measure:

(a) in respect of foreign nationals;

(b) in respect of persons covered by a similar system from another part of the Kingdom, another State or another international organisation;

(c) in respect of persons who reside only temporarily or who work only temporarily in the country;

(d) in respect of spouses and other members of the household referred to in subparagraphs (a),(b) and (c);

(e) in respect of spouses of nationals who are not covered by this Law pursuant to an agreement or a social security system concluded between the Netherlands and one or more other states.'

19 Under Article 7 of the AOW, in the version applicable to the main proceedings:

'Those persons:

(a) who have attained the age of 65 years, and

(b) who, in accordance with this Law, were insured in the period from the date of their 15th birthday to the day before the date of their 65th birthday shall be entitled to an old-age pension in accordance with the provisions of this Law.'

20 On the basis of Article 6 of the AOW, a number of general administrative measures were adopted thereafter, including, as regards the periods at issue, the Besluit uitbreiding en beperking kring verzekerden volksverzekeringen (Decree on the extension and restriction of the category of persons covered by national insurance) of 10 July 1959 (Stb.1959, No 230, 'Royal decree 230') and the Besluit uitbreiding en beperking kring verzekerden volksverzekeringen (Decree on the extension and restriction of the category of persons covered by national insurance), from 1 January 1963 (Stb. 1963, No 24, 'Royal decree 24').

21 The introductory phrase and paragraph (k) of Article 2 of Royal Decree 230 and the introductory phrase and paragraph (k) of Article 2 of Royal Decree 24 provided, in identical terms, as follows:

'... By derogation from Article 6(1) of the [AOW], Article 7 of the Law on general insurance for widows and orphans and Article 6 of the General law on family allowances, the following are not insured:

...

(k) a foreign national who is a member of the crew of a vessel whose home port is in the territory of the Kingdom, provided that he resides on board the vessel.'

22 As a result of Royal Decree 24 being amended by the Decree of 11 August 1965 (Stb. 373), Article 2(k) of that royal decree became Article 2(m).

23 Under Article 16(1) of the AOW, in the version applicable to the facts in the main proceedings, the old-age pension takes effect from the first day of the month in which the person concerned satisfied the conditions for entitlement to that pension.

The actions in the main proceedings and the questions referred for a preliminary ruling

24 Mr Wieland was born on 20 March 1943 in Austria and had Austrian citizenship by birth. From 11 October 1962 to 7 March 1966, he worked on ships owned by Holland-Amerika Lijn ('HAL'), a Netherlands company operating a maritime route between the Netherlands and the United States of America.

25 In 1966 Mr Wieland moved to the United States and on 29 August 1969 he acquired American nationality and consequently lost his Austrian nationality.

26 In April 2008, Mr Wieland asked the SVB to grant him an old-age pension from the date of his sixty-fifth birthday.

27 On 15 April 2008 the SVB rejected that request on the ground that during the period from his fifteenth to his sixty-fifth birthday, Mr Wieland was not insured under the AOW. On 3 October 2008, he informed the SVB that, from that date, his residence was now in Austria.

28 Mr Rothwangl was born on 7 December 1943 and has Austrian nationality. From 6 November 1962 to 23 April 1963, he worked on vessels owned by HAL.

29 On 12 January 2009, Mr Rothwangl asked the SVB to grant him an old-age pension. At that time, he resided in Austria, a country where, according to data from the SVB, he had lawful old-age insurance for a total period of 496 months from April 1958 to July 1998.

30 Mr Rothwangl was entitled, with effect from 1 March 1998, to an Austrian occupational disability pension (*Erwerbsunfähigkeitspension*) and, as of 1 September 1998, a Swiss invalidity pension. In addition, from 29 November 1998 to 1 December 2008, he was in receipt of a benefit under the Wet op de arbeidsongeschiktheidsverzekering (Law on occupational disability insurance) in the amount of EUR 1.08 gross per day.

31 By decision of 26 May 2009, the SVB refused to grant Mr Rothwangl the old-age pension sought on the ground that during the period from his fifteenth to his sixty-fifth birthday he had not been insured under the AOW.

32 Both Mr Wieland and Mr Rothwangl challenged the decisions of the SVB before the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), which ruled in their favour. The SVB appealed against that ruling to the referring court.

33 In the order for reference, the Centrale Raad van Beroep (Higher Social Security Court, Netherlands) refers to the judgment of the European Court of Human Rights of 4 June 2002, *Wessels-Bergervoet v. Netherlands* (CE:ECHR:2002:0604JUD003446297) in which that court held that the decision of the Netherlands institution to pay a married woman, on the basis of the AOW, only a reduced pension had constituted a violation of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR), read in conjunction with the Article 1 of the Protocol to the ECHR, signed in Paris on 20 March 1952.

34 The referring court explains that, although the Netherlands courts, in cases involving old-age pension rights of seafarers, applied the reasoning of the European Court of Human Rights in its judgment of 4 June 2002, *Wessels-Bergervoet v. Netherlands* (CE:ECHR:2002:0604JUD003446297), it nevertheless considers that the situation of Messrs Wieland and Rothwangl differs from those cases and that the difference in treatment based on nationality which the competent Netherlands authorities carried out in the main proceedings is justified under Article 14 of the ECHR. It wonders whether Regulation No 1408/71, read in conjunction with Regulation No 859/2003 and with Articles 18 and 45 TFEU, could be relevant in those cases.

35 As regards Mr Rothwangl, that court considers that, due to his professional activities during the 1960s, he must now be regarded as a worker within the meaning not only of the FEU Treaty but also of Regulation No 1408/71. It also believes that the fact that the person concerned was not a national of a Member State between 6 November 1962 and 23 April 1963, during which time he was employed by

HAL, does not preclude that regulation applying to professional activities carried out during this period, since Mr Rothwangl meets the nationality requirement imposed by that regulation as a result of the Republic of Austria's accession to the European Union, which took effect on 1 January 1995.

36 The referring court asks whether the period during which Mr Rothwangl was employed as a seafarer by HAL should be regarded as a period of insurance within the meaning of Article 94(2) of Regulation No 1408/71. It considers, in that regard, that account should be taken of Articles 18 and 45 TFEU and Article 3 of Regulation No 1408/71.

37 With regard to Mr Wieland, the referring court asks whether the answer to the question of the applicability of Regulation No 1408/71 must be the same as that given in the case of Mr Rothwangl, given that the free movement of workers does not apply to third-country nationals and that Mr Wieland has no longer possessed, since 29 August 1969, Austrian nationality.

38 It is in those circumstances that the Centrale Raad van Beroep (Higher Social Security Court) decided to stay proceedings and refer to the Court the following questions:

'(1) Must Article 3 and Article 94(1) and (2) of Regulation No 1408/71 be interpreted as meaning that a former seafarer who belonged to the crew of a vessel with a home port in a Member State, who had no place of residence on shore and who was not a national of a Member State cannot be denied (in part) an old-age pension, after the State of which that seafarer is a national acceded to the European Union or after Regulation No 1408/71 entered into force for that State, solely on the ground that that former seafarer was not a national of the (first-mentioned) Member State during the period of the (claimed) insurance cover?

(2) Must Articles 18 TFEU and 45 TFEU be interpreted as precluding a rule of a Member State under which a seafarer who belonged to the crew of a vessel with a home port in that Member State, who had no place of residence on shore and who is not a national of any Member State, was excluded from insurance cover for purposes of an old-age pension, whereas, under that rule, a seafarer who is a national of the Member State in which the vessel has its home port and who is otherwise in the same situation is deemed to be insured, if the State of which the first-named seafarer is a national has in the meanwhile, by the time of the determination of the pension, acceded to [a legal predecessor of] the European Union or Regulation No 1408/71 has in the meanwhile entered into force for that State?

(3) Must Questions 1 and 2 be answered in the same way in the case of a (former) seafarer who, at the time of his employment, was a national of a State which at a later date accedes to [a legal predecessor of] the European Union, but who, at the time of that accession or the entry into force of Regulation No 1408/71 for that State, and at the time of submitting his claim to entitlement to an old-age pension, was not a national of any Member State, but to whom Regulation No 1408/71 nevertheless applies pursuant to Article 1 of Regulation No 859/2003?'

Consideration of the questions referred

Preliminary observations

39 It should be noted that, at the time when Messrs Wieland and Rothwangl were employed by HAL, the coordination of social security schemes of the Member States, with regard to migrant workers in the European Economic Community, was governed by Council Regulation No 3 of 25 September 1958 on social security for migrant workers (OJ, English Special Edition 1952-1958(I), p. 63). That regulation did not however apply to seafarers.

40 This was not inconsistent with international rules applicable to seafarers in force at the time, since, according to Article 2 of Convention No 71 of the International Labour Organisation, of 28 June 1946, on seafarers' pensions, which was ratified by the Kingdom of the Netherlands on 27 August 1957 and entered into force on 10 October 1962, each Member of the International Labour Organisation was under the obligation, in accordance with national laws or regulations, to establish or secure the establishment of a scheme for the payment of pensions to seafarers on retirement from sea service, provided that persons not resident in the territory of the Member State concerned and those who were not nationals of that Member State could however be excluded from this scheme.

41 From 1 April 1967, Règlement No 47/67/CEE du Conseil, du 7 mars 1967, modifiant et complétant certaines dispositions des règlements No 3 et 4 concernant la sécurité sociale des travailleurs migrants (gens de mer) (Council Regulation No 47/67/EEC of 7 March 1967, amending and supplementing certain provisions of Regulations Nos 3 and 4 concerning social security for migrant workers (Seafarers)) (JO 1967 44, p. 641) introduced specific rules for seafarers, which focused in particular on the determination of the applicable law and the old age pension. Those rules were incorporated subsequently into Regulation No 1408/71.

42 It follows that during the periods in which Messrs Wieland and Rothwangl were employed by HAL, the affiliation of seafarers to social security schemes was governed exclusively by national legislation.

43 By contrast, Messrs Wieland and Rothwangl introduced their old-age pension claims at a time when Regulation No 1408/71 was applicable.

44 According to the first recital of that regulation, its main aim is to coordinate national social security systems so as to implement the principle of free movement of persons within the territory of the European Union.

45 In that regard, although Member States retain the power to organise the conditions of affiliation to their social security schemes, they must nonetheless, when exercising that power, comply with EU law and, in particular, the Treaty provisions on freedom of movement for workers (judgment of 17 January 2012, *Salemink*, C-347/10, EU:C:2012:17, paragraph 39 and the case-law cited).

46 Consequently, those conditions may not have the effect of excluding from the scope of national legislation, such as that at issue in the main proceedings, persons to whom that legislation applies by virtue of Regulation No 1408/71; moreover, the compulsory insurance schemes must be compatible with the provisions of Articles 18 and 45 TFEU (judgment of 17 January 2012, *Salemink*, C-347/10, EU:C:2012:17, paragraph 40).

47 The questions referred must be examined in the light of those considerations.

The first question

48 By its first question, the referring court asks whether Article 94(1) and (2) of Regulation No 1408/71 must be interpreted as precluding legislation of a Member State that does not take into account, when determining rights to an old-age pension, a period of insurance claimed to have been completed under its own legislation by a foreign worker when, as in the main proceedings involving Mr Rothwangl, the State of which that worker is a national acceded to the European Union after the completion of that period.

49 In order to answer this question, it is important to determine whether, and, if so, under what conditions, a person who was a national of a Member State when he claimed an old-age pension, but who was not a national of a Member State during the period of employment completed abroad before

the entry into force of Regulation No 1408/71, acquires the right to have periods of insurance completed during this period in the territory of another Member State taken into account for the purposes of establishment of a retirement pension.

50 In the present case, it is necessary to examine whether the person concerned acquired, under Article 94(1) and (2) of Regulation No 1408/71, in respect of old-age pension schemes, rights which are to be added to those he can already claim in Austria.

51 In that regard, with respect to Article 94(1) of that regulation, which provides that no right is to be acquired under that regulation in respect of a period prior to 1 October 1972 or the date of its application in the territory of the Member State concerned, or in a part of that territory, it should be borne in mind that, according to the Court's settled case-law, that provision is fully in line with the principle of legal certainty, which precludes a regulation from being applied retroactively, regardless of whether such application might produce favourable or unfavourable effects for the person concerned, unless a sufficiently clear indication can be found, either in the terms of the regulation or its stated objectives, which allows the conclusion to be drawn that the regulation was not merely providing for the future. Although the new law is thus valid only for the future, it also applies, according to a generally recognised principle, in the absence of a provision to the contrary, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, judgment of 18 April 2002, *Duchon*, C-290/00, EU:C:2002:234, paragraphs 21 and 22 and the case-law cited).

52 Equally, in order to enable Regulation No 1408/71 to apply to the future effects of situations arising under the period of validity of the old law, Article 94(2) imposes the obligation to take into consideration, for the purposes of determining rights to benefit, all periods of insurance, employment or residence completed under the legislation of any Member State 'before 1 October 1972 or before the date of its application in the territory of that Member State'. It follows, therefore, from that provision that a Member State is not entitled to refuse to take into account periods of insurance completed in the territory of another Member State, for the purposes of establishing a claimant's retirement pension, for the sole reason that such periods were completed before the entry into force of that regulation with respect to him (judgments of 18 April 2002, *Duchon*, C-290/00, EU:C:2002:234, paragraph 23 and the case-law cited, and of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraph 52).

53 In that regard, it must be ascertained whether the periods during which Mr Rothwangl was employed by HAL constitute periods of insurance completed under the legislation of a Member State before the date of application of Regulation No 1408/71 in the territory of that Member State within the meaning of Article 94(2) of that regulation.

54 Since the time from which a person can claim any rights to a retirement pension under the AOW, based on periods of insurance completed, is the first day of the month in which the person reaches the age of 65, Mr Rothwangl's claim cannot be regarded as relating to a right acquired in respect of a period prior to the entry into force of Regulation No 1408/71 or the date of application of that regulation in the territory of the Member State within the meaning of Article 94(1) of that regulation.

55 However, the question arises whether Mr Rothwangl may acquire a right stemming from periods of insurance and, as the case may be, periods of employment or residence completed pursuant to the legislation of a Member State before 1 October 1972 or before the date of application of Regulation No 1408/71 in the territory of that Member State.

56 In order to be able to rely legitimately on Article 94(2) of Regulation No 1408/71, a claimant must be able to identify a period of insurance and, as the case may be, periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or in the case of Member

States which acceded to the European Union after that date, before the date of application of that regulation in the territory of the Member State concerned. In the case of the Republic of Austria, that date is 1 January 1995.

57 As regards the condition relating to the existence of periods of employment or residence completed under the legislation of a Member State, it is clear from the documents before the Court that Mr Rothwangl unquestionably fulfils this condition.

58 By contrast, regarding the existence of the condition concerning a period of insurance completed under the legislation of a Member State, it should be noted, first, that the national legislation at issue in the main proceedings constitutes legislation within the meaning of Article 1(j) of Regulation No 1408/71.

59 Second, the expression 'period of insurance', which appears in Article 94(2) of Regulation No 1408/71 is defined in Article 1(r) of Regulation No 1408/71 as meaning 'periods of contribution or periods of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance' (judgment of 7 February 2002, *Kauer*, C-28/00, EU:C:2002:82, paragraph 25).

60 That *reference* to domestic legislation clearly shows that Regulation No 1408/71, particularly for the purposes of the aggregation of periods of insurance, refers to the conditions to which domestic law subjects the recognition of a specific period as equivalent to periods of insurance properly so called. However, such recognition of periods must be consistent with the provisions of the FEU Treaty on the free movement of persons (judgment of 7 February 2002, *Kauer*, C-28/00, EU:C:2002:82, paragraph 26 and the case-law cited).

61 In the present case, the referring court found that Mr Rothwangl was not insured against old age during his employment in HAL, in so far as, in accordance with national legislation applicable to the main proceedings, third-country nationals forming part of the crew of a vessel and residing aboard that vessel were excluded from insurance relating to old-age benefits.

62 Given that this exclusion was, inter alia, based on Mr Rothwangl's nationality, it is necessary to examine whether he can, pursuant to the prohibition of discrimination on grounds of nationality in Article 3 of Regulation 1408/71, claim to be treated as if he had completed a period of insurance in the Netherlands, even if, in reality, he does not satisfy this essential requirement set out Article 94(2) of that regulation.

63 In that regard, it is true that the Court has held that, in order to give effect to the transitional rules in Article 94(1) to (3) of Regulation No 1408/71, it was necessary to take account of periods of insurance completed before that regulation came into effect (see, to that effect, judgments of 7 February 2002, *Kauer*, C-28/00, EU:C:2002:82, paragraph 52, and of 18 April 2002, *Duchon*, C-290/00, EU:C:2002:234, paragraph 23). In the cases giving rise to those two judgments, the parties concerned who had requested that they be granted an Austrian pension had been insured under the relevant national legislation. The Court therefore found it appropriate to assess the legality of the national measures in question in light of the EU law which applied following the accession of the Republic of Austria to the European Union (judgment of 18 April 2002, *Duchon*, C-290/00, EU:C:2002:234, paragraph 28) and that, consequently, the competent institution had to apply the principles relating to the freedom of movement for workers and the transitional rules in Article 94(1) to (3) of that regulation (see, to that effect, judgments of 7 February 2002, *Kauer*, C-28/00, EU:C:2002:82, paragraphs 45 and 50, and of 18 April 2002, *Duchon*, C-290/00, EU:C:2002:234, paragraph 32).

64 However, as noted by the Advocate General in point 52 of her Opinion, the fact that Mr Rothwangl has, even before the accession of the Republic of Austria to the European Union, exercised free movement rights when he worked for HAL is not sufficient for him to be treated as if he had completed an old-age insurance period in the Netherlands. Unlike the situation of the applicants in the cases giving rise to the judgments of 7 February 2002, *Kauer* (C-28/00, EU:C:2002:82), and of 18 April 2002, *Duchon* (C-290/00, EU:C:2002:234), the Netherlands legislation excluded Mr Rothwangl from benefiting from that insurance whilst working for HAL, on the ground that he was a third-country national and resided aboard vessels for which he was a crew member. Such exclusion, although based on nationality, was not prohibited by the law of the European Union at the time of the facts at issue, since the Republic of Austria had not yet acceded to the Union.

65 Furthermore, the documents before the Court do not resolve the question whether Mr Rothwangl was affiliated to the Austrian social security system during his periods of employment for HAL. It is only in the case of an affirmative answer to that question that those periods should be taken into account by the competent Austrian authority.

66 In view of the foregoing, the answer to the first question is that Article 94(1) and (2) of Regulation No 1408/71 must be interpreted as not precluding legislation of a Member State that does not take into account, when determining rights to old-age pension, an insurance period claimed to have been completed under its own legislation by a foreign worker when, as in the main proceedings involving Mr Rothwangl, the State of which that worker is a national acceded to the European Union after the completion of that period.

The second question

67 By its second question, the referring court asks whether Article 18 TFEU, which enshrines the principle of the prohibition of discrimination, and Article 45 TFEU, which guarantees the free movement of workers, must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a seafarer who, over a specified period, was part of the crew of a vessel which had its home port in the territory of that Member State and who resided aboard that vessel, is excluded from benefiting from old-age insurance in respect of that period on the ground that he was not a national of a Member State during that period.

68 It must be observed, in that regard, that, according to the Court's settled case-law, the Act of Accession of a new Member State is based essentially on the general principle that the provisions of EU law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions (judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 56 and the case-law cited).

69 To that effect, Article 2 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, 'the Act of Accession') provides that, from the date of accession, the provisions of the original Treaties are to be binding on the new Member States and are to apply in those States under the conditions laid down in those Treaties and in the Act of Accession.

70 Since the Act of Accession does not include transitional provisions relating to the application of Articles 7 and 48 of the EC Treaty (which became Articles 12 and 39 EC, which in turn became Articles 18 and 45 TFEU), those articles must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, namely 1 January 1995. The corollary is that, with effect from that date, other Member States had to treat Austrian nationals as EU citizens.

71 However, nothing in the Act of Accession requires the existing Member States to treat Austrian nationals in the same way as they treated nationals of the other Member States prior to accession of Austria to the European Union (see, by analogy, judgment of 26 May 1993, *Tsiotras*, C-171/91, EU:C:1993:215, paragraph 12, and of 15 June 1999, *Andersson and Wåkerås-Andersson*, C-321/97, EU:C:1999:307, paragraph 46).

72 Thus, Mr Rothwangl could insist that the Kingdom of the Netherlands treat him as though he had been insured for old-age benefits only if he had been entitled to the rights flowing from the provisions governing the free movement of workers during his periods of employment with HAL. As has been found in paragraphs 70 and 71 above, this was not the case.

73 In the light of the foregoing, the answer to the second question is that Articles 18 and 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a seafarer who, over a specified period, was part of the crew of a vessel which had its home port in the territory of that Member State and who resided aboard that vessel, is excluded from benefiting from old-age insurance in respect of that period on the ground that he was not a national of a Member State during that period.

The third question

74 By its third question, the referring court asks whether Article 2(1) and (2) of Regulation No 859/2003 must be interpreted as precluding legislation of a Member State which provides that a period of employment — completed pursuant to the legislation of that Member State by an employed worker who, as in the main proceedings involving Mr Wieland, was not a national of a Member State during that period but who, when he requests the payment of an old-age pension, falls within the scope of Article 1 of that regulation — is not to be taken into consideration by that Member State for the determination of that worker's pension rights.

75 In that regard, it should be recalled that, according to Article 1 of Regulation No 859/2003, the provisions of Regulation No 1408/71 are to apply to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.

76 In this case, Mr Wieland satisfies the conditions set out in Article 1 of Regulation No 859/2003 in so far as he is a US national residing lawfully in Austria, the elements of the situation in which he finds himself are not confined within a single Member State and he is not already covered by the provisions of Regulation No 1408/71 solely on account of his nationality. Therefore, he falls within the scope of Regulation No 859/2003.

77 It must be held that Article 2(1) and (2) of Regulation No 859/2003 is framed in similar terms to those used in Article 94(1) and (2) of Regulation No 1408/71.

78 It follows that, given the answer to the first question asked by the referring court, Mr Wieland, notwithstanding the fact that he resided in the Netherlands during the period that he was employed by HAL, was not, for the same reasons as Mr Rothwangl, insured for an old-age pension under the Netherlands legislation.

79 Having regard to the foregoing, the answer to the third question is that Article 2(1) and (2) of Regulation No 859/2003 must be interpreted as not precluding legislation of a Member State which provides that a period of employment — completed pursuant to the legislation of that Member State by an employed worker who, as in the main proceedings involving Mr Wieland, was not a national of

a Member State during that period but who, when he requests the payment of an old-age pension, falls within the scope of Article 1 of that regulation — is not to be taken into consideration by the Member State for the determination of that worker's pension rights.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 94(1) and (2) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as not precluding legislation of a Member State that does not take into account, when determining rights to old-age pension, an insurance period claimed to have been completed under its own legislation by a foreign worker when the State of which that worker is a national acceded to the European Union after the completion of that period.**

2. **Articles 18 and 45 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a seafarer who, over a specified period, was part of the crew of a vessel which had its home port in the territory of that Member State and who resided aboard that vessel, is excluded from benefiting from old-age insurance in respect of that period on the ground that he was not a national of a Member State during that period.**

3. **Article 2(1) and (2) of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, must be interpreted as not precluding legislation of a Member State which provides that a period of employment — completed pursuant to the legislation of that Member State by an employed worker who was not a national of a Member State during that period but who, when he requests the payment of an old-age pension, falls within the scope of Article 1 of that regulation — is not to be taken into consideration by that Member State for the determination of that worker's pension rights.**

[Signatures]