JUDGMENT OF THE COURT (Second Chamber)

30 June 2011 *

In Case C-388/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundessozialgericht (Germany), made by decision of 22 April 2009, received at the Court on 2 October 2009, in the proceedings

Joao Filipe da Silva Martins

v

Bank Betriebskrankenkasse – Pflegekasse,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Lõhmus, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 14 October 2010,

after considering the observations submitted on behalf of:

— Mr da Silva Martins, by G. Krutzki, Rechtsanwalt,

— Bank Betriebskrankenkasse – Pflegekasse, by T. Henz, Rechtsanwalt, and S. Klein,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes and E. Silveira, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent, and T. Ward, Barrister,

— the European Commission, by V. Kreuschitz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 27 and 28 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 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1), ('Regulation No 1408/71') and of Articles 39 EC and 42 EC.

2 The reference has been made in proceedings between Mr da Silva Martins and Bank Betriebskrankenkasse – Pflegekasse ('Bank BKK') concerning his optional continued affiliation to the German care insurance scheme and his entitlement to a German care allowance.

Legal context

European Union law

3 Regulation No 1408/71 was adopted pursuant to Article 51 of the EEC Treaty (later Article 51 of the EC Treaty, subsequently, after amendment, Article 42 EC, now Article 48 TFEU).

4 As the second and fourth recitals in the preamble to Regulation No 1408/71 state, its aim is to ensure freedom of movement for employed and self-employed persons within the European Union while respecting the special characteristics of national social security legislations.

5 To that end, according to the fifth, sixth and tenth recitals in the preamble, Regulation No 1408/71 adopts the principle of equality of treatment of workers under the various national legislations and aims to guarantee as effectively as possible the equality of treatment of all workers occupied on the territory of a Member State and to avoid penalising workers who exercise their right to freedom of movement.

6 In order to avoid overlapping of national legislations applicable and the complications which could result, the eighth recital in the preamble to Regulation No 1408/71 states that the intention of the regulation is that the persons concerned should in principle be subject to the social security scheme of only one single Member State.

7 The general provisions of Regulation No 1408/71 may be found in Articles 1 to 12 of Title I.

8 Article 1 provides that, for the purposes of the regulation:

'(a) *employed person* and *self-employed person* mean respectively:

(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 or by a special scheme for civil servants;

…

(h) *residence* means habitual residence;

…

(o) *competent institution* means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; …

…

(p) *institution of the place of residence* and *institution of the place of stay* means respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) *competent State* means the Member State in whose territory the competent institution is situated;

…

(t) *benefits* and *pensions* mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

…'

9 Article 2(1) of Regulation No 1408/71 provides that the regulation is to apply inter alia to employed or self-employed persons residing within the territory of one of the Member States.

10 Article 4(1) of the regulation provides:

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

(a) sickness and maternity benefits;

(b) invalidity benefits, …

(c) old-age benefits;

…

(h) family benefits.'

11 Article 9 of the regulation, 'Admission to voluntary or optional continued insurance', provides in paragraph 1:

'The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons.'

12 Article 12 of the regulation, 'Prevention of overlapping of benefits', provides in paragraph 1:

'This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Articles 41, 43(2) and (3), 46, 50 and 51 or Article 60(1)(b).'

13 In Title II of Regulation No 1408/71, 'Determination of the legislation applicable', Article 13, 'General rules', provides:

'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 …

…

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

14 Also in Title II of the regulation, Article 15, 'Rules concerning voluntary insurance or optional continued insurance', provides:

'1. Articles 13 to 14d shall not apply to voluntary insurance or to optional continued insurance unless, in respect of one of the branches referred to in Article 4, there exists in any Member State only a voluntary scheme of insurance.

2. Where application of the legislations of two or more Member States entails overlapping of insurance:

— under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme;

…

3. However, in respect of invalidity, old age and death (pensions), the person concerned may join the voluntary or optional continued insurance scheme of a Member State, even if he is compulsorily subject to the legislation of another Member State, to the extent that such overlapping is explicitly or implicitly admitted in the first Member State.'

15 As may be seen from its heading, Title III of Regulation No 1408/71 lays down special provisions relating to the various categories of benefits. Chapter 1 of that title is headed 'Sickness and maternity'.

16 In Section 2 of Chapter 1, 'Employed or self-employed persons and members of their families', Article 19, 'Residence in a Member State other than the competent State – General rules', provides in paragraph 1:

'An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the

competent State for entitlement to benefits … shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. …'

17 In Section 5 of Chapter 1, 'Pensioners and members of their families', Article 27, 'Pensions payable under the legislation of several States where there is a right to benefits in the country of residence', reads as follows:

'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides, and who is entitled to benefits under the legislation of the latter Member State … shall … receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State.'

18 Under Article 28(1) of Regulation No 1408/71, also in Section 5, entitled 'Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence':

'A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits … in so far as he would … be entitled

thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

(a) benefits in kind shall be provided on behalf of the institution referred to in paragraph 2 by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the State in whose territory he resides and were entitled to such benefits;

(b) cash benefits shall, where appropriate, be provided by the competent institution as determined by the rules of paragraph 2, in accordance with the legislation which it administers. However, upon agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.'

German legislation

19 Paragraph 3(1) of Book IV of the Code of Social Security (Sozialgesetzbuch IV) provides:

'(1) The provisions on the insurance obligation and the insurance entitlement shall apply:

1. to the extent that they require employment or a self-employed activity, to all persons who are employed or self-employed within the area in which this code applies;

2. to the extent that they do not require employment or a self-employed activity, to all persons who are permanently or habitually resident within the area in which this code applies.'

20 Paragraph 26 of Book XI of the Code of Social Security (Sozialgesetzbuch XI; 'the SGB XI'), headed 'Continued insurance', reads as follows:

'(1) Persons who are no longer subject to the insurance obligation … and were insured for at least 24 months within the last five years before ceasing to be so subject or for 12 months immediately before so ceasing may, on application, continue to be insured under the social care insurance scheme, where no insurance obligation under Paragraph 23(1) commences for them. … The application must be made within three months of the end of affiliation, in the cases covered by the first sentence …

(2) Persons who are no longer subject to the insurance obligation because their permanent or habitual residence has been transferred abroad may, on application, continue to be insured. The application must be made one month at the latest after ceasing to be subject to the insurance obligation to the care fund with which the person was last insured. …'

21 Paragraph 34(1) of the SGB XI provides, subject to certain exceptions concerning temporary stays, that the right to benefits is suspended while the insured person is abroad.

Portuguese legislation

22 According to the order for reference, a retired person resident in Portugal who is reliant on care is in principle entitled to social security benefits such as, in particular, sickness insurance benefits, in a scheme financed by a social contribution charged on gross income. However, he is not entitled to a care allowance in Portugal, since the Portuguese social security system does not provide for specific benefits to cover the risk of reliance on care. Assistance for persons reliant on care is provided, if at all, in the form of benefits in kind as part of social welfare measures and sickness insurance. In the case of permanent reliance on care, the Portuguese system provides for the possibility of increasing the invalidity pension.

23 In its written observations, the Portuguese Government explains that Portuguese law does not provide for specific benefits for situations of reliance on care. The national health service does not depend on conditions of insurance and the cash benefits covered by that service are not designed to deal with such situations. Retired persons, invalids or survivors in a situation of reliance on care may, however, under Portuguese legislation, receive a supplement to their pension, depending on the degree of reliance.

The dispute in the main proceedings and the question referred for a preliminary ruling

24 Mr da Silva Martins, born in 1935, is a Portuguese national. After working for a short period in Portugal, he settled in Germany and worked there. He was insured with Bank BKK for sickness insurance from 1974 and for care insurance from the introduction of care insurance in Germany in January 1995. Since September 1996 he has drawn a German retirement pension of approximately EUR 700, and since May 2000 also a Portuguese retirement pension of approximately EUR 150.

25 From the time of drawing his retirement pension in Germany, Mr da Silva Martins was insured with Krankenversicherung der Rentner (Pensioners' Sickness Insurance Scheme). From August 2001 Bank BKK granted him care benefits in kind. On account of a stay in Portugal from mid-December 2001, which was initially described as temporary, by decision of 8 May 2002 Bank BKK granted Mr da Silva Martins a care allowance of EUR 205 from 1 January 2002, which was paid until 31 December 2002.

26 When Bank BKK learnt that Mr da Silva Martins had made a declaration that he had definitively left Germany as from 31 July 2002, it cancelled his care insurance from that date, by decision of 5 February 2003. By a further decision of 12 February 2003, it ordered him to repay to it the care allowance already paid for the months of August to December 2002, amounting to EUR 1 025. By decision of 4 February 2004, it dismissed Mr da Silva Martins's objection, which it had received on 21 February 2003, as unfounded.

27 The Sozialgericht Frankfurt am Main (Social Court, Frankfurt am Main) allowed the action brought against that decision. Annulling the contested decisions, it found that Mr da Silva Martins was still insured, on the basis of optional continued affiliation, with Bank BKK, which consequently had to continue to grant him the statutory amount of care allowance, even after 1 January 2003.

28 By judgment of 13 September 2007, the Hessisches Landessozialgericht (Higher Social Court for the *Land* of Hesse) dismissed Bank BKK's appeal against that judgment in so far as it concerned reimbursement of the care allowance. As to the remainder, the Landessozialgericht amended the judgment of the Sozialgericht Frankfurt am Main and dismissed the application on the ground that optional continued affiliation in accordance with Paragraph 26(1) of the SGB XI was excluded because the application required for that purpose had not been made within the time-limit laid down by that provision.

29 In his appeal on a point of law to the Bundessozialgericht (Federal Social Court) Mr da Silva Martins claims that Articles 18 EC, 39 EC and 42 EC have been breached and Articles 19, 27 and 28 of Regulation No 1408/71 infringed. He argues that it must be possible to export care insurance benefits to another country of the European Union, in particular where, as in the present case, the cover has been financed by his own contributions and no comparable benefits exist in his country of origin, Portugal.

30 The Bundessozialgericht considers inter alia that, contrary to the view taken by the Hessisches Landessozialgericht, German law would in principle have allowed Mr da Silva Martins to continue to have care insurance with Bank BKK on the basis of optional continued affiliation for the period from 1 August 2002.

31 However, the Bundessozialgericht considers essentially that, at first sight, since care allowances come under sickness insurance, in accordance with the *Molenaar* line of the Court's case-law starting with *Molenaar* (Case C-160/96 [ECR] I-843, paragraphs 22 to 25), the conflict-of-law rules of Regulation No 1408/71 preclude the continued affiliation of Mr da Silva Martins to care insurance in Germany. First, Regulation No 1408/71 precludes him from being subject to compulsory care insurance after the definitive transfer of his residence to Portugal. Secondly, notwithstanding

the position of the German legislature, Article 15(2) of that regulation rules out the continuation of care insurance on the basis of optional continued affiliation.

32 The Bundessozialgericht is uncertain whether, having regard in particular to Article 42 EC, Article 28(1)(b) of Regulation No 1408/71 could be interpreted as applying to cases such as that at issue in the main proceedings, so as to enable Mr da Silva Martins to receive German care allowance in Portugal, or whether, on the other hand, as Bank BKK claims, under Article 27 of that regulation he can claim only the sickness insurance benefits provided for by Portuguese law, since in accordance with the *Molenaar* line of case-law German care allowance comes under sickness insurance within the meaning of that regulation.

33 The Bundessozialgericht wishes to know how the interpretation of Regulation No 1408/71, in particular Articles 27 and 28, should take account of the separate cover of reliance on care which exists in some Member States, such as Germany, but not – according to that court – in other States, such as Portugal.

34 In those circumstances, the Bundessozialgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it compatible with the primary and/or secondary law of the European Community on freedom of movement and social security for migrant workers (in particular Articles 39 EC and 42 EC and Articles 27 and 28 of Regulation (EEC) No 1408/71) for a former worker who receives pensions from both his former State of employment and his home State and acquired an entitlement to care allowance in his former State of employment because he is reliant on care to forfeit the entitlement to care allowance after returning to his home State?'

Consideration of the question referred

35 By its question the referring court essentially asks the Court whether Regulation No 1408/71, in particular Articles 27 and 28 of that regulation, or Articles 45 TFEU and 48 TFEU preclude a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a care insurance scheme in the Member State in which he spent most of his working life, to receive a benefit in kind corresponding to that affiliation, in particular where benefits relating to the specific risk of reliance on care do not exist in the Member State of residence.

36 The Portuguese Government and the Commission agree in essence with the outcome sought by Mr da Silva Martins, namely the payment in his Member State of origin, in which he is now resident again, of a care allowance under the social security scheme of the other Member State concerned. Bank BKK and the German, Czech and United Kingdom Governments take the opposite view.

Preliminary observations

37 It should be recalled that persons entitled to draw pensions under the legislations of one or more Member States, even if they are not in gainful occupation, are covered by the provisions concerning workers of Regulation No 1408/71 by virtue of their insurance under a social security scheme, unless they are subject to special provisions (see, to that effect, Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 24, and Joined

Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 57).

38 It is also settled case-law that a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case 122/84 *Scrivner and Cole* [1985] ECR 1027, paragraphs 19 to 21; Case C-356/89 *Newton* [1991] ECR I-3017; and Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15).

39 It is widely acknowledged that a growing number of persons in the European Union, following a reduction in their independence, often because of their advanced age, are in a situation of reliance on others to carry out the basic routines of everyday life.

40 It is only comparatively recently that the risk of such reliance ('the risk of reliance on care') has been covered specifically by the social security schemes of several Member States. That risk does not appear expressly in the list in Article 4(1) of Regulation No 1408/71 as one of the kinds of benefits which fall within the scope of that regulation.

41 As can be seen from paragraph 38 above, that list is exhaustive, so that a branch of social security not mentioned in it does not fall within that category even if it confers upon recipients a legally defined position entitling them to benefits (see, inter alia, Case C-25/95 *Otte* [1996] ECR I-3745, paragraph 22, and *Molenaar*, paragraph 20).

42 In those circumstances, the Court, applying the case-law cited in paragraph 38 above and taking into account the constituent elements of German care insurance benefits, held essentially in paragraphs 22 to 25 of *Molenaar* that benefits such as those provided under the German care insurance scheme, even if they have their particular characteristics, must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71.

43 The Court observed in particular that benefits such as the German care allowance were essentially intended to supplement sickness insurance benefits, to which they are moreover linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care (*Molenaar*, paragraph 24). The Court also held that the German care allowance, which takes the form of financial aid enabling the standard of living of persons reliant on care to be improved as a whole, so as to compensate for the additional expense brought about by their condition, were to be regarded as 'cash benefits' referred to inter alia in Article 28(1)(b) of Regulation No 1408/71 (see *Molenaar*, paragraphs 35 and 36).

44 That analysis was followed in other cases relating to German care insurance (see Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, paragraphs 19 to 23, 25 and 26, and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 40).

45 Similarly, as regards certain social security benefits under national schemes other than the German care insurance scheme, the Court has held in essence that benefits that are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71 (see,

to that effect, Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 28; Case C-286/03 *Hosse* [2006] ECR I-1771, paragraphs 38 to 44; and Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, paragraphs 10, 61 and 70).

46 The Court has also stated in this respect that it is of no importance that the benefit in question is intended to provide a financial supplement, having regard to a person's reliance on care, to a pension paid on a basis other than sickness (see *Jauch*, paragraph 28) or that the grant of the benefit is not necessarily linked to the provision of a sickness insurance benefit (see, to that effect, *Hosse*, paragraph 43). It is also irrelevant that a particular benefit, unlike the benefits at issue in some of the Court's judgments in this field cited above, does not have the essential object of supplementing sickness insurance benefits (see, to that effect, *Commission* v *Parliament and Council*, paragraph 70).

47 Accordingly, although, in the absence of provisions in Regulation No 1408/71 referring specifically to the risk of reliance on care, the Court has treated certain benefits relating to that risk as 'sickness benefits' within the meaning of Article 4(1)(a) of the regulation, it has nevertheless always acknowledged that benefits relating to the risk of reliance on care are at most supplementary to the 'classic' sickness benefits that fall within that provision *stricto sensu* ('sickness benefits *stricto sensu*') and are not necessarily an integral part of them.

48 Thus, unlike sickness benefits *stricto sensu*, benefits relating to the risk of reliance on care – being generally long-term benefits – are not in principle intended to be paid on a short-term basis. Moreover, as follows in particular from the circumstances of the case-law mentioned in paragraphs 45 and 46 above, it cannot be ruled out that, although benefits relating to the risk of reliance on care must be regarded as 'sickness

benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71, they may, particularly as regards the details of their application, display characteristics which in practice also resemble to a certain extent the invalidity and old-age branches referred to in Article 4(1)(b) and (c), without being strictly identifiable with either of them.

49 It is in the light of those considerations that the referring court's question must be answered.

The possibility in a situation such as that at issue in the main proceedings of continuing to be insured in the German care insurance scheme on the basis of optional continued affiliation

50 In the present case, as can be seen in particular from paragraph 30 above, the Bundessozialgericht considers that German law would on its own in principle allow a person in a situation such as that of Mr da Silva Martins to continue to be insured in the German care insurance scheme on the basis of optional continued affiliation for the period from 1 August 2002, even though compulsory insurance with the German sickness insurance fund is ruled out after his declaration of departure from Germany.

51 The referring court nevertheless appears to consider that Regulation No 1408/71 precludes, at least prima facie, the continued insurance of a person in a situation such as that at issue in the main proceedings in that care insurance scheme on the basis of optional continued insurance.

52 It must therefore be examined, first, whether, as the national court appears to consider, the conflict-of-law rules in Article 15(2) of Regulation No 1408/71 preclude

a person in a situation such as that of Mr da Silva Martins from continuing to be insured in the German care insurance scheme on the basis of optional continued insurance where, following a change of his State of residence, he is now covered in principle, in accordance with Article 13(2)(f) of the regulation, by the social security scheme of the new Member State of residence (see, on the latter point, Case C-302/02 *Laurin Effing* [2005] ECR I-553, paragraph 41).

53 It is true that the intention of the provisions of Regulation No 1408/71 determining the legislation applicable to employed and self-employed persons moving within the European Union is that those persons should in principle be subject to the social security scheme of one Member State only, so as to avoid the application of more than one national legislation and the complications that might ensue (see, inter alia, Case 302/84 *Ten Holder* [1986] ECR 1821, paragraphs 19 and 20, and Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 40). That principle of a single social security scheme finds expression in particular in Article 13(1) of Regulation No 1408/71 (see, to that effect, Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 38, and Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraph 16).

54 That principle of a single social security scheme is also expressed in Article 15(2) of Regulation No 1408/71. According to the first indent of that provision, where the application of the legislations of two or more Member States entails overlapping of insurance under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned is to be subject exclusively to the compulsory scheme.

55 However, that provision does not apply in a situation such as that at issue in the main proceedings.

56 In accordance with Article 15(1) of Regulation No 1408/71, the provisions mentioned there, which include Article 13 expressing the principle stated in paragraph 53 above, are not to apply to voluntary or optional continued insurance unless, in respect of one of the branches referred to in Article 4 of the regulation, there exists in any Member State only a voluntary scheme of insurance. As follows from paragraphs 19 to 23 above, that qualification does not appear to be relevant in a situation such as that at issue in the main proceedings, since German care insurance is generally a compulsory insurance scheme. It follows that, in accordance with Article 15(1) of the regulation, the principle of a single social security scheme does not apply to a situation such as that at issue in the main proceedings.

57 Moreover, in the light of the eighth recital in the preamble to Regulation No 1408/71, Article 15(2) of that regulation must be interpreted as intended to avoid a person contributing to two social security schemes, one compulsory and one optional, for the same risk, with all the complications that might ensue. The provision is not intended, on the other hand, to apply to a situation such as that at issue in the main proceedings in which the optional continued and compulsory contributions relate to risks which, although – pursuant to the case-law cited in paragraphs 42 to 46 above – they may be equated with each other for the purposes of Regulation No 1408/71, are not – as follows from paragraphs 39, 40, 47 and 48 above – identical, namely the risk of reliance on care and the risk of sickness within the strict sense of Article 4(1)(a) of that regulation.

58 In the light of the foregoing, it must be concluded that in circumstances such as those at issue in the main proceedings Regulation No 1408/71 does not preclude optional continued affiliation to the German care insurance scheme.

59 It follows that Regulation No 1408/71 does not preclude a person in a situation such as that of Mr da Silva Martins from being able, in principle, to continue to be optionally insured under German law with the German care insurance scheme, even if he

is also compulsorily insured, pursuant to Article 13(2)(f) of that regulation, with the Portuguese social security scheme during the same period.

The interpretation of Articles 27 and 28 of Regulation No 1408/71

60 The referring court stresses that in Portugal, unlike Germany, there is no separate social security scheme specifically aimed at the risk of reliance on care. It raises the question whether Article 28 of Regulation No 1408/71 should therefore be interpreted as applying, in place of Article 27 of that regulation, to a situation such as that at issue in the main proceedings, albeit only as regards benefits relating to the risk of reliance on care as opposed to sickness benefits *stricto sensu*.

61 It should be noted that Article 28 of that regulation concerns, in particular, situations in which a person entitled to pensions under the legislations of two or more Member States is not entitled to sickness benefits under the legislation of the Member State in which he resides.

62 It follows that the referring court appears to consider that, under the Portuguese legislation on social security, persons in a situation such as that of Mr da Silva Martins cannot claim cash benefits relating to the risk of reliance on care.

63 However, as appears in particular from paragraphs 22 and 23 above, it cannot be ruled out from the outset that, although the Portuguese social security system, unlike

the German one, does not have a separate scheme aimed exclusively at the risk of reliance on care, it may none the less provide for certain cash benefits relating to the risk of reliance on care, such as pension supplements related to the degree of reliance.

64 In those circumstances, it is for the referring court to verify, having regard to the case-law cited in paragraphs 42 to 46 above, the proposition that there is no social security scheme in Portugal relating to the risk of reliance on care (see also, by analogy, *Jauch*, paragraph 26).

65 In any event, having regard to that case-law under which social security benefits relating to the risk of reliance on care are, subject to the criteria laid down in that case-law, to be treated as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71, the conclusion must be that Article 28 of that regulation cannot apply to a situation such as that at issue in the main proceedings, in which a person who is entitled to a retirement pension under the legislation of his Member State of residence is entitled to sickness benefits *stricto sensu* under that legislation.

66 Under Article 27 of Regulation No 1408/71, a pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides, and who is entitled to sickness benefits under the legislation of the latter Member State is to receive those benefits from the institution of the place of residence and at the expense of that institution as though he were a pensioner whose pension was payable solely under the legislation of the latter Member State.

67 So in the situation at issue in the main proceedings it is for the Portuguese Republic – one of the States from which a retirement pension is due to Mr da Silva Martins – as his Member State of residence to ensure payment of sickness benefits *stricto sensu* (see, by analogy, Case C-50/05 *Nikula* [2006] ECR I-7029, paragraphs 22 and 23).

68 As stated in paragraphs 39 to 46 above, benefits relating to the risk of reliance on care are to be treated as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71. It follows that, where a former migrant worker is entitled to pensions under the legislations of two or more Member States, including that of his Member State of residence, it is in principle for the latter State, in accordance with Article 27 of that regulation, to provide, if necessary, benefits relating to the risk of reliance on care.

69 Having regard to the considerations set out in paragraphs 40 to 48 above, in the absence of provisions in Regulation No 1408/71 concerning specifically the risk of reliance on care, Article 27 of that regulation must, in circumstances such as those at issue in the main proceedings, be interpreted in the light of the objectives underlying the regulation, taking into account the particular features of benefits relating to the risk of reliance on care as opposed to sickness benefits *stricto sensu* (see, inter alia, by analogy, Case 100/78 *Rossi* [1979] ECR 831, paragraph 12, and Case C-168/88 *Dammer* [1989] ECR 4553, paragraph 20).

70 In this respect it should be noted that the provisions of Regulation No 1408/71 enacted to give effect to Article 48 TFEU must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers (see, inter alia, Case 10/78 *Belbouab* [1978] ECR 1915, paragraph 5; *Jauch*, paragraph 20; *Hosse*, paragraph 24; and Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 52).

71 Since Article 48 TFEU provides for the coordination, not the harmonisation, of the legislations of the Member States (see, inter alia, Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23), substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions for granting benefits under a social security scheme (see, to that effect, *von Chamier-Glisczinski*, paragraph 84, and Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 99).

72 In that context, the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned. Thus, the application, possibly under the provisions of Regulation No 1408/71, following a change of Member State of residence, of national legislation that is less favourable as regards social security benefits may in principle be compatible with the requirements of primary European Union law on freedom of movement for persons (see, inter alia, by analogy, *von Chamier-Glisczinski*, paragraphs 85 and 87).

73 However, according to settled case-law, such compatibility would exist only to the extent that, in particular, the national legislation concerned does not place the worker at a disadvantage compared to those who pursue all their activities in the Member State where it applies and does not purely and simply result in the payment of social security contributions on which there is no return (see, to that effect, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51; Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34; Case C-3/08 *Leyman* [2009] ECR I-9085, paragraph 45; and *van Delft and Others*, paragraph 101).

74 As the Court has repeatedly held, the aim of Articles 45 TFEU and 48 TFEU would not be achieved if, as a consequence of the exercise of their right to freedom of

movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid (see, inter alia, to that effect, Case 24/75 *Petroni* [1975] ECR 1149, paragraph 13; Case 284/84 *Spruyt* [1986] ECR 685, paragraph 19; Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071, paragraph 17; *Jauch*, paragraph 20; and *Bosmann*, paragraph 29).

75 The European Union legislation on the coordination of national social security legislations, taking account in particular of its underlying objectives, cannot, except in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker or those claiming under him of benefits granted solely by virtue of the legislation of a single Member State (see, inter alia, Case 9/67 *Colditz* [1967] ECR 227, 234; *Rossi*, paragraph 14; and *Schwemmer*, paragraph 58 and the case-law cited).

76 Moreover, the Court has also held that Articles 45 TFEU to 48 TFEU and Regulation No 1408/71 adopted to implement them are intended in particular to prevent a worker who, by exercising his right of freedom of movement, has been employed in more than one Member State from being treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (see, inter alia, to that effect, Case 104/76 *Jansen* [1977] ECR 829, paragraph 12; Case C-10/90 *Masgio* [1991] ECR I-1119, paragraphs 17, 19 and 23; Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraphs 41 and 42; Case C-322/95 *Iurlaro* [1997] ECR I-4881, paragraphs 23 and 30; and *Leyman*, paragraph 45).

77 Where, in a situation such as that at issue in the main proceedings, national law on its own permits, and Regulation No 1408/71 does not oppose, the optional continued insurance of a person in a situation such as that of Mr da Silva Martins with a separate social security scheme relating to the risk of reliance on care, and that person has completed the minimum contribution period required for him to be able to claim benefits in the event of being reliant on care, the automatic suspension of the

provision of all benefits linked to that scheme in the event of a transfer of that person's residence to another Member State of the European Union is such as to entail – as the referring court observes in substance, and contrary to the arguments of the German and United Kingdom Governments – contributions on which there is no return, at least as regards contributions paid on the basis of such continued affiliation after the transfer of residence.

78 It would thus be inconsistent with the aim pursued by Article 48 TFEU, as explained in particular in paragraphs 70, 71 and 74 above, if a former migrant worker in a position such as that of Mr da Silva Martins were to lose, simply because he is entitled pursuant to Article 27 of Regulation No 1408/71 to sickness benefits *stricto sensu* under the legislation of his Member State of residence, all advantages representing the counterpart of contributions paid by him in a former Member State of employment in respect of a separate insurance scheme relating not to the risk of sickness within the strict sense of Article 4(1)(a) of Regulation No 1408/71 but to the risk of reliance on care. It would be all the more so in the situation referred to in paragraph 64 above – the existence of which is for the referring court to ascertain – where cash social security benefits relating to the risk of reliance on care do not exist in that Member State of residence.

79 Furthermore, in such a situation, such a former migrant worker, residing again in his Member State of origin after the end of his professional career, would be placed at a disadvantage compared to persons entitled to a retirement pension in a single Member State who have spent their entire working life in a single Member State before transferring their residence to another Member State on their retirement.

80 For the latter category of persons, the effect of the relevant provisions of Regulation No 1408/71, in particular Article 28(1)(a) of the regulation, read in the light of the

case-law cited in paragraphs 42 to 46 above, would be that any cash benefits relating to the risk of reliance on care provided for by the former Member State of employment, because they are treated as sickness benefits *stricto sensu*, would in principle have to be provided outside the competent State (see, inter alia, by analogy, *Molenaar*, paragraph 43, and *Jauch*, paragraphs 10, 11 and 35).

81 In those circumstances, having regard in particular to the case-law cited in paragraphs 73 to 76 above, Article 27 of Regulation No 1408/71 must, as regards cash benefits relating to the risk of reliance on care in a situation such as that at issue in the main proceedings, be interpreted as meaning that an entitlement to sickness benefits *stricto sensu* in the Member State of residence does not entail the loss of an entitlement previously enjoyed against another Member State solely under its legislation relating to the risk of reliance on care on the sole basis of the periods of insurance completed under that legislation (see, inter alia, by analogy, *Dammer*, paragraphs 21 to 23 and the case-law cited, and *Bastos Moriana and Others*, paragraph 17).

82 However, having regard in particular to the requirements that follow from Article 12 of Regulation No 1408/71, such an interpretation must in the present case take account of the possibility that, once the referring court has ascertained the facts in accordance with paragraphs 63 and 64 above, it concludes that, in circumstances such as those at issue in the main proceedings, cash benefits relating to the risk of reliance on care provided for under Portuguese legislation do exist in Portugal.

83 In such circumstances, Article 27 of Regulation No 1408/71 would have to be interpreted as meaning that, where in the Member State of residence cash benefits relating to the risk of reliance on care are provided for only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, the principles underlying Regulation No 1408/71 require that a person in a situation such as that of Mr da Silva Martins should be entitled, at the expense of the competent

institution of the latter State, to additional benefits equal to the difference between the two amounts (see, inter alia, by analogy, Case 733/79 *Laterza* [1980] ECR 1915, paragraph 9; Case 807/79 *Gravina* [1980] ECR 2205, paragraph 8; Case 320/82 *D'Amario* [1983] ECR 3811, paragraph 7; *Dammer*, paragraphs 23 and 24; Case C-251/89 *Athanasopoulos and Others* [1991] ECR I-2797, paragraph 17; and *Bastos Moriana and Others*, paragraph 16).

84 That interpretation is not ruled out by the fact, underlined by the German Government, that under Paragraph 34 of the SGB XI the right of a person in a situation of reliance on care, on the basis of the optional continued insurance provided for in Paragraph 26 of the SGB XI, to the care allowance at issue in the main proceedings is in principle suspended while the insured person is abroad.

85 The Court has previously held in essence that payment of contributions to a social security insurance scheme in principle confers an entitlement on the insured worker to receive the corresponding benefits when he satisfies the conditions laid down by the legislation of the competent State, with the exception, however, of those conditions that are not in accordance with the applicable social security provisions of European Union law (see, to that effect, *Molenaar*, paragraph 43).

86 As follows from the case-law cited in paragraphs 73 to 76 above, the aim pursued by Article 48 TFEU would not be achieved if, apart from the cases expressly laid down by European Union legislation in accordance with the objectives of the FEU Treaty, the legislation of a Member State made the grant of the social security advantages due

under that legislation subject to the condition that the worker should be resident in that Member State (see also, to that effect, *Athanasopoulos and Others*, paragraph 20).

87 Although it is true, as the German and United Kingdom Governments submit, that the concurrent grant of benefits from different Member States might, in the case of cash benefits relating to the risk of reliance on care, give rise to difficulties of a practical nature which, in the present state of European Union law, have not been fully addressed by the provisions on the coordination of social security schemes, that fact cannot in itself justify an interpretation of Regulation No 1408/71 to the effect that a former migrant worker, entitled solely by virtue of the legislation of a former Member State of employment to optional continued insurance against the risk of reliance on care, should have to make contributions on which there is no return in respect of that insurance and thus be treated less favourably than a person who has spent all his working life in a single Member State (see, by analogy, *D'Amario*, paragraph 8).

88 In the light of all the foregoing, the answer to the referring court's question is that Articles 15 and 27 of Regulation No 1408/71 must be interpreted as not precluding a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain. If, contrary to that hypothesis, cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, Article 27 of Regulation No 1408/71 must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.

Costs

89 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 (Second Chamber) hereby rules:

Articles 15 and 27 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, as amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, must be interpreted as not precluding a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain.

If, contrary to that hypothesis, cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other

pension-paying Member State, Article 27 of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.

[Signatures]