Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

12 June 2012*

(Social security for migrant workers — Regulation (EEC) No 1408/71 — Articles 14(1)(a) and 14a(1)(a) — Articles 45 TFEU and 48 TFEU — Temporary work in a Member State other than that in which work is normally carried out — Family benefits — Applicable legislation — Possibility for child benefit to be granted by the Member State in which the temporary work is carried out but which is not the competent State — Application of a rule of national law against overlapping of benefits which excludes that benefit in the case where a comparable benefit is received in another State)

In Joined Cases C-611/10 and C-612/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decisions of 21 October 2010, received at the Court on 23 December 2010, in the proceedings

Waldemar Hudziński

v

Agentur für Arbeit Wesel — Familienkasse (C-611/10)

and

Jarosław Wawrzyniak

v

Agentur für Arbeit Mönchengladbach — Familienkasse (C-612/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, M. Safjan and A. Prechal (Rapporteur), Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič, J.-J. Kasel and D. Šváby, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2011,

after considering the observations submitted on behalf of:

— Mr Hudziński and Mr Wawrzyniak, by N. Lamprecht, Rechtsanwalt,

* Language of the cases: German.

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the Hungarian Government, by M. Fehér, K. Szíjjártó and K. Veres, acting as Agents,

— the European Commission, by V. Kreuschitz and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2012,

gives the following

Judgment

1 The present references for a preliminary ruling concern the interpretation of Article 14(1)(a) and 14a(1)(a) 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 the rules of the FEU Treaty on the free movement of workers and the principle of non-discrimination.

2 The references have been made in disputes between, first, Mr Hudziński and the Agentur für Arbeit Wesel — Familienkasse (Employment Agency Wesel — Department for family allowances) and, second, Mr Wawrzyniak and the Agentur für Arbeit Mönchengladbach — Familienkasse (Employment Agency Mönchengladbach — Department for family allowances) concerning the refusal to grant child benefit in Germany.

Legal context

European Union ('EU') law

3 The first and fifth recitals in the preamble to Regulation No 1408/71 read as follows:

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

…

… it is necessary, within the framework of that coordination, to guarantee within the Community equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors'.

4 The eighth, ninth and tenth recitals in the preamble to Regulation No 1408/71 state:

'… employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom;

… the instances in which a person should be subject simultaneously to the legislation of two Member States as an exception to the general rule should be as limited in number and scope as possible;

… with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment or self-employment'.

5 Article 13 of Regulation No 1408/71, entitled ‘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 even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…’

6 Article 14 of that regulation, entitled ‘Special rules applicable to persons, other than mariners, engaged in paid employment’, provides:

‘Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

1 (a) A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting;

…’

7 Article 14a of Regulation No 1408/71, entitled ‘Special rules applicable to persons, other than mariners, who are self-employed’, provides:

‘Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

1 (a) A person normally self-employed in the territory of a Member State and who performs work in the territory of another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of the work does not exceed 12 months;

…’

8 Under Title III, Chapter 7, of Regulation No 1408/71, Article 73 of the latter, entitled ‘Employed or self-employed persons the members of whose families reside in a Member State other than the competent State’, provides:

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

9 Also in that Chapter 7, Article 76 of Regulation No 1408/71, entitled ‘Rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family’, provides:

‘1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

2. If an application for benefits is not made in the Member State in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.'

10 Article 10 of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 647/2005 ('Regulation No 574/72'), entitled 'Rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons', provides:

'1.

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

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

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

…'

German law

11 In the German federal Law on income tax (Einkommensteuergesetz; 'the EStG'), point 1 of Paragraph 62, which bears the heading 'Persons entitled', provides:

'In respect of children within the meaning of Paragraph 63, a person shall be entitled to child benefit under this Law:

(1) if he has his permanent or habitual residence within the national territory, or

(2) if, having neither a permanent nor habitual residence within the national territory, he is

(a) subject to unlimited income tax liability in accordance with Paragraph 1(2); or

(b) treated as being subject to unlimited income tax liability in accordance with Paragraph 1(3).'

12 Subparagraph (1) of Paragraph 65 of the EStG, entitled 'Other child benefits', provides:

'1. Child allowance shall not be paid for a child who is in receipt of one of the following benefits or who would receive such a benefit if an application to that effect were made:

(1) child benefits provided for by the legislation on accidents or financial assistance granted by the legislation on retirement insurance;

(2) child benefits granted outside Germany and comparable to child allowance or to one of the benefits referred to in point 1;

…

2. If, in the cases mentioned in point 1 of subparagraph 1, the gross amount of the other benefit is lower than the amount of child allowance payable in accordance with Paragraph 66 [of the EStG] and the difference between those two amounts is equal to or in excess of EUR 5, that difference in amount shall be paid as child allowance.'

13 Paragraph 66 of the EStG lays down rules relating to the level of child benefits and to the arrangements governing payment of those benefits.

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

14 Mr Hudziński, a Polish national, lives in Poland and works there as a self-employed farmer. He is covered by the Polish social security system.

15 From 20 August to 7 December 2007, Mr Hudziński was employed as a seasonal worker in a horticultural business in Germany. Following his request to that effect, he was treated as being subject to unlimited income tax liability in Germany for 2007.

16 For the period during which he worked in Germany, Mr Hudziński applied for the payment of child benefit for his two children, who also reside in Poland, pursuant to Paragraph 62 et seq. of the EStG in the amount of EUR 154 per month and per child.

17 The Agentur für Arbeit Wesel — Familienkasse rejected that application and the administrative challenge brought against that negative decision. As the action brought against the decision to reject his administrative challenge was also dismissed, Mr Hudziński appealed on a point of law ('Revision') to the referring court against the decision given at first instance.

18 Mr Wawrzyniak is a Polish national and lives together with his wife and their daughter in Poland, where he is insured under the social security system.

19 From February to December 2006, Mr Wawrzyniak worked in Germany as a posted worker. For the year 2006, he was treated, together with his wife, as being subject to unlimited income tax liability in Germany.

20 In respect of the period during which he worked in Germany, Mr Wawrzyniak applied for payment of child benefit of EUR 154 per month, under Paragraph 62 et seq. of the EStG, for his daughter. During that period also, Mr Wawrzyniak's wife was covered by health insurance only in Poland. She there received for her daughter, inter alia during that period, child benefits in the monthly amount of approximately PLN 48 (approximately EUR 12).

21 The Agentur für Arbeit Mönchengladbach — Familienkasse rejected Mr Wawrzyniak's application and his administrative challenge brought against that negative decision. As the action brought against the decision rejecting his administrative challenge was also dismissed, he appealed on a point of law ('Revision') to the referring court against the decision given at first instance.

22 In their respective appeals before the Bundesfinanzhof (Federal Finance Court), Mr Hudziński and Mr Wawrzyniak submit that it follows from the judgment in Case C-352/06 *Bosmann* [2008] ECR I-3827 that Paragraph 62 et seq. of the EStG remain applicable even where, pursuant to Regulation No 1408/71, the Federal Republic of Germany is not the competent Member State under Article 14a(1)(a) of that regulation, in the case of Mr Hudziński, or under Article 14(1)(a) of that regulation, in the case of Mr Wawrzyniak.

23 Mr Wawrzyniak further submits that his entitlement to child benefit in Germany is also not excluded by the combined provisions of point 2 of the first sentence of subparagraph 1 and subparagraph 2 of Paragraph 65 of the EStG, since those provisions are contrary to EU law and, in any event, do not apply within the area covered by Regulation No 1408/71.

24 In that connection, the referring court expresses the view, first of all, that the dicta in *Bosmann* must be understood as meaning that a Member State, even if it is not competent under Article 13 et seq. of Regulation No 1408/71, has nonetheless the power to grant family allowances to a migrant worker under national law.

25 However, according to that court, it follows from that judgment that such a possibility should be authorised only in certain circumstances.

26 In the first place, a Member State which is not competent under Article 13 et seq. of Regulation No 1408/71 has that power only if, as was the case in *Bosmann*, a family benefit must be granted by that State in order to avoid a situation in which a worker suffers a legal disadvantage by reason of the fact that he has exercised his right of free movement.

27 The cases in the main proceedings do not, however, concern such a situation inasmuch as Mr Hudziński and Mr Wawrzyniak have not suffered any legal disadvantage by reason of their temporary work in Germany.

28 In accordance with Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71, the social security legislation which is applicable to them is, the referring court finds, unchanged, with the result that, as regards the period of temporary work in Germany, they remained subject to Polish legislation.

29 Therefore, in the view of the referring court, they could not have lost the benefit of the more advantageous child allowances provided for by German law as they were at no time entitled to those allowances.

30 In the second place, the referring court takes the view that the situations at issue in the main proceedings differ in another significant respect from that at issue in *Bosmann*. Unlike the situation in that case, the Federal Republic of Germany is not, in the cases in the main proceedings, the Member State in which the children are resident. Therefore, the question arises as to whether that factor constitutes a separate condition limiting the power of the Member State which lacks competence to grant family allowances to a migrant worker.

31 Thirdly, the referring court considers that the question also arises as to whether that power should not be limited to cases in which there is no entitlement to comparable family benefits under the law of the competent Member State, as was the situation in *Bosmann*, but unlike the cases in the main proceedings here, in which the workers receive such benefits in the competent Member State.

32 Next, even if it were to be supposed, contrary to the referring court's view, that the Member State which lacks competence has, in cases such as those at issue in the main proceedings, a power to grant family benefits which differ fundamentally from those that were at issue in *Bosmann*, the question arises whether EU law, and in particular the Treaty provisions on free movement of workers or the principle of non-discrimination, preclude a rule such as that resulting from Paragraph 65 of the EStG, under which child benefits are granted only if the person concerned is not entitled to comparable benefits in the competent Member State.

33 Finally, the referring court observes that if, contrary to the view that it takes, the latter question should also be answered in the affirmative, the further question would then arise as to how the resulting overlap of entitlements ought to be resolved.

34 In those circumstances, in Case C-611/10, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 14a(1)(a) of Regulation No 1408/71 to be interpreted as meaning that a Member State which lacks competence under that provision is in any event deprived of the power to grant family benefit under national law to a worker who is employed only temporarily in its territory, if neither the worker himself nor his children are domiciled or habitually resident in that Member State?'

35 In Case C-612/10, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 14(1)(a) of Regulation No 1408/71 be interpreted as depriving a Member State, which, under that provision, is not the competent Member State and on whose territory a worker is posted but which is also not the Member State of residence of the worker's children, of the power to grant family benefits to the posted worker, at any rate where that worker does not suffer any legal disadvantage as a result of his posting to that Member State?

(2) If the answer to Question 1 is in the negative:

must Article 14(1)(a) of Regulation No 1408/71 be interpreted as meaning that, in all circumstances, a State on whose territory a worker is posted but which is not the competent Member State has the power to grant family benefits only where it has been established that, in the other Member State, no entitlement to comparable family benefits exists?

(3) If the answer to that question is also in the negative:

do provisions of … EU law preclude a provision of national law such as the first part of point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, which excludes entitlement to family benefits where a comparable benefit is paid in another country or would be due if an application to that effect were made?

(4) If the answer to that question is in the affirmative:

how should the overlap thus arising between, on the one hand, the entitlement in the competent State, which is also the Member State of residence of the children, and, on the other, the entitlement in the State which is neither the competent State nor the State of residence of the children, be resolved?'

36 By order of the President of the Court of 14 February 2011, Cases C-611/10 and C-612/10 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The single question in Case C-611/10 and the first two questions in Case C-612/10

37 By its single question in Case C-611/10 and the first two questions in Case C-612/10, which it is appropriate to examine together, the referring court asks, essentially, whether Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 must be interpreted as precluding a Member State, which is not designated under those provisions as the competent Member State, from granting child benefits in accordance with its national law to a migrant worker engaged in carrying out temporary work within its territory in circumstances such as those at issue in the main proceedings, including in the case where it is found, first, that the worker concerned has not suffered any legal disadvantage by reason of

the fact that he has exercised his right to freedom of movement since he remains entitled to family benefits of the same kind in the competent Member State and, second, that neither that worker nor the child for whom that benefit is claimed habitually reside within the territory of the Member State in which the temporary work was carried out.

38 In that connection, it must be held, as the national court correctly stated, that the legislation applicable to the circumstances of the appellants in the main proceedings, as regards their entitlement to family benefits, is determined, respectively, by Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71.

39 It is common ground that, under Article 14(1)(a) of Regulation No 1408/71, Mr Wawrzyniak, during the period of less than 12 months in which he was posted to Germany, remained subject to the legislation of the Member State within the territory of which the company for which he normally works has its registered office, that is to say, Polish legislation.

40 Likewise, it is not disputed that, under Article 14a(1)(a) of Regulation No 1408/71, Mr Hudziński, with regard to the period not exceeding 12 months during which he worked in Germany, continued to be subject to the legislation of the Member State in which he normally pursues his activities as a self-employed person, that is to say, Polish legislation.

41 That being so, it should be recalled that, according to settled case-law, the objective of the provisions of Title II of Regulation No 1408/71, which determine the legislation applicable to workers moving within the European Union, is to ensure, in particular, that the persons concerned are, in principle, subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid the complications which may result from that situation. That principle is expressed, in particular, in Article 13(1) of Regulation No 1408/71 (see, inter alia, Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 40 and the case-law cited.

42 Furthermore, since Article 48 TFEU provides for the coordination, and not the harmonisation, of the legislation of the Member States, 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 EU law, the conditions pursuant to which benefits may be granted under a social security scheme (see, inter alia, Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraph 71 and the case-law cited).

43 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. 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 EU law on freedom of movement for persons (see, inter alia, by analogy, *da Silva Martins*, paragraph 72).

44 It follows from those principles that the appellants in the main proceedings, who moved from one Member State to another, in this case to the Federal Republic of Germany, in order to work there, are, in principle, entitled only to the family benefits provided for by the legislation of the first Member State, which is the only legislation applicable pursuant to Regulation No 1408/71, even if, as is the position in the present cases, those benefits are less favourable than the benefits of the same kind provided for by German legislation.

45 Although the German authorities are thus not required under EU law to grant the child benefit at issue in the main proceedings, the question arises, however, as to whether that law precludes the potential grant of such benefits, especially because, as is clear from the file submitted to the Court, it appears

that under German law the appellants in the main proceedings may receive that benefit solely because they are subject to unlimited income tax liability or treated as such, this being a matter for the referring court to ascertain.

46 In that regard, as the Court stated in paragraph 29 of *Bosmann*, the provisions of Regulation No 1408/71 must be interpreted in the light of Article 48 TFEU, which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty.

47 Likewise, in paragraph 30 of that judgment, the Court held that the first recital in the preamble to Regulation No 1408/71 states that the provisions which that regulation contains 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.

48 It is in the light of those factors that the Court held, in paragraph 31 of *Bosmann*, that, in circumstances such as those of the case which gave rise to that judgment, the Member State of residence cannot be deprived of the right to grant child benefit to those who reside within its territory. While, under Article 13(2)(a) of Regulation No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State, even if he resides in the territory of another Member State, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting child benefit to that person under its legislation.

49 The Court added, in paragraph 32 of that judgment, that the principle of the exclusive applicability of the legislation designated under the provisions of Title II of Regulation No 1408/71, set out in paragraph 41 of the present judgment, cannot serve as a basis for precluding a Member State, which is not the competent State but which does not subject the right to child benefit to conditions of employment or insurance, from being able to grant such a benefit to one of its residents since the possibility of such a grant arises, in actual fact, from its legislation.

50 In the present cases, the referring court asks the Court of Justice whether the possibility thus accorded, in circumstances such as those in *Bosmann*, to a Member State, which is not the competent State under Title II of Regulation No 1408/71, to grant a family benefit to a person residing within its territory must also be recognised in situations such as those at issue in the main proceedings, notwithstanding the fact that they differ in several respects from the situation obtaining in *Bosmann*.

51 In the first place, as regards the relevance of the fact that the appellants in the main proceedings have neither lost entitlement to social security benefits nor suffered a reduction in the amount thereof by reason of the fact that they exercised their right of free movement, as they have retained their entitlement to family benefits in the competent Member State, that fact cannot, by itself, prevent a Member State which lacks competence from having the possibility of granting such benefits.

52 Although the Court, in paragraph 29 of *Bosmann*, stated that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty, that statement is expressly formulated as an example of the possible implications of Article 48 TFEU and of the purpose of that provision for the interpretation of Regulation No 1408/71.

53 Furthermore, that statement, which must be understood in the light of the particular nature of the case in the main proceedings which gave rise to the *Bosmann* judgment, is of secondary importance in comparison with the principle, which is set out in the first place in that paragraph of the judgment and is settled case-law, according to which the provisions of Regulation No 1408/71 must be

interpreted in the light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers (see, inter alia, *da Silva Martins*, paragraph 70 and the case-law cited).

54 In that connection, it must also be recalled that it is clear from the first recital in the preamble to Regulation No 1408/71 that the latter seeks to contribute to the improvement of the standard of living and conditions of employment of migrant workers.

55 In that context, the Court has held that it would both go beyond the objective of Regulation No 1408/71 and exceed the purpose and scope of Article 48 TFEU to interpret that regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that regulation (Case C-208/07 *Chamier-Glisczinski* [2009] ECR I-6095, paragraph 56).

56 The EU legislation on the coordination of national social security legislation, 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, *da Silva Martins*, paragraph 75).

57 In the light of those factors, it must be held that an interpretation of Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 permitting a Member State to grant family benefits in a situation such as that in the main proceedings, in which the migrant worker has not lost the benefit of social security benefits or suffered a reduction in the amount thereof by reason of the fact that he has exercised his right of freedom of movement, since he has retained his entitlement to family benefits of the same kind in the competent Member State, cannot be excluded because it is liable to contribute to the improvement of living standards and conditions of employment of migrant workers by affording them greater social protection than that resulting from application of that regulation, and thereby contributes to the objective of those provisions, which is to facilitate the free movement of workers.

58 In the second place, as regards the references in *Bosmann* to the residence of the migrant worker within the territory of the Member State lacking competence from which the family benefit is claimed, these are explained by the fact that, in the case which gave rise to that judgment, the applicant in the main proceedings was entitled to that benefit solely by virtue of her residence in that State pursuant to Paragraph 62(1) of the EStG, which does not make that entitlement subject to conditions of employment or insurance.

59 Therefore, those references are to the basis of the entitlement to the relevant family benefit in the national legislation of the Member State concerned and, in particular, to the connecting factor relating to residence which appears therein.

60 However, Paragraph 62(1) of the EStG provides that entitlement to child benefit also exists for any person who, not having his permanent or habitual residence within national territory, has been made subject to unlimited income tax liability or has been treated as being so subject.

61 It is this second connecting factor which is at issue in the present cases in the main proceedings.

62 In so far as, under national law, the two connecting factors set out in Paragraph 62(1) of the EStG provide, as such, the basis for entitlement to child benefit, which is for the referring court to ascertain, the reference in *Bosmann* to the connecting factor relating to the residence of the migrant worker cannot mean that a Member State which is not the competent State under the provisions of Title II of Regulation No 1408/71 may grant a family benefit only if that entitlement is claimed on the basis of that connecting factor, and that that possibility is, by contrast, excluded in a situation in which it is the alternative connecting factor which is applicable.

63 In that context, the referring court also expresses uncertainty as to the relevance of the fact that, in the situations in the main proceedings, contrary to the situation at issue in *Bosmann*, the child is not resident within the territory of the Member State lacking competence in which a benefit for that child is claimed.

64 In this regard, it must be held that, in *Bosmann*, the Court does not refer to the existence, in the situation at issue, of that factor of connection with the territory of the Member State lacking competence in order to justify the conclusion that that State may grant family benefits.

65 Finally, it is true that, in a situation such as that in *Bosmann*, the residence of the migrant worker and that of the child within the territory of the Member State which lacks competence were specific and particularly close connecting factors, particularly when account is taken of the nature of the benefit at issue.

66 In the present cases in the main proceedings, the connection of the situations at issue with the territory of the Member State which lacks competence and from which family benefits are claimed is the fact of subjection to unlimited income tax liability in respect of the income earned from the temporary work in that Member State. Such a connection is based on a precise criterion and may be regarded as being sufficiently close, when account is also taken of the fact that the family benefit claimed is financed by tax revenue.

67 In those circumstances, it does not appear that, in the situations in the main proceedings, the grant of that benefit, which is not subject to conditions of employment or insurance, is liable to affect disproportionately the predictability and effectiveness of the application of the coordination rules of Regulation No 1408/71, requirements relating to legal certainty which also protect the interests of migrant workers and to which the principle, set out in paragraph 41 of the present judgment, consisting in the exclusive applicability in principle of the legislation of the Member State designated under those rules as the competent State also contributes.

68 Having regard to the foregoing, the answer to the single question in Case C-611/10 and to the first two questions in Case C-612/10 is that Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 must be interpreted as not precluding a Member State, which is not designated under those provisions as being the competent State, from granting child benefits in accordance with its national law to a migrant worker who is working temporarily within its territory in circumstances such as those in the main proceedings, including in the case where it is established, first, that the worker concerned has not suffered any legal disadvantage by reason of the fact that he has exercised his freedom of movement, since he has retained his entitlement to family benefits of the same kind in the competent Member State, and, second, that neither that worker nor the child for whom that benefit is claimed habitually resides within the territory of the Member State in which the temporary work was carried out.

The third and fourth questions in Case C-612/10

69 By its third and fourth questions in Case C-612/10, which it is appropriate to examine together, the referring court asks essentially whether EU law, in particular the rules against overlapping set out in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 547/72, the Treaty rules on the free movement of workers and the principle of non-discrimination, must be interpreted as precluding, in a situation such as that at issue in the main proceedings, the application of a rule of national law, such as that resulting from Paragraph 65 of the EStG, which excludes entitlement to child benefits in the case where a comparable benefit must be paid in another State or would have to be paid if a claim to that effect were to be made.

70 In that connection, since it is clear from the examination of the first two questions in Case C-612/10 that Article 14(1)(a) of Regulation No 1408/71 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the Federal Republic of Germany, which is not the competent State under

that provision, has the power, but not the obligation, to grant child benefits in accordance with its national law to a posted worker who works temporarily within its territory, that State must in principle also be able to decide, as the referring court stated, whether and, if appropriate, how it intends to take account of the fact that there exists in the State which is competent under that provision, in this case the Republic of Poland, entitlement to a comparable benefit.

71 However, if, in a situation such as that at issue in the main proceedings, the legislation of a Member State which lacks competence provides for entitlement to a family benefit which confers additional social protection on the migrant worker by virtue of the fact that he was subject to unlimited income tax liability in that State or has been treated as such for the period in which he worked there, any rules against overlapping laid down by that legislation, such as those resulting from Paragraph 65 of the EStG, cannot be applied if the application thereof is found to be contrary to EU law.

72 Thus, in *Schwemmer*, to which the appellants in the main proceedings refer, the Court held that, in the situation at issue in the main proceedings in that case, the rule against overlapping laid down in Article 10 of Regulation No 574/72 had to be interpreted as meaning that the entitlement to child benefit payable under German law could not be partially suspended, by applying Paragraph 65(1) of the EStG, up to the amount which could be received in Switzerland.

73 It must, however, be held that the situation at issue in the main proceedings is not covered by that rule against overlapping or, moreover, by that laid down by Article 76 of Regulation No 1408/71 since it does not concern a hypothetical overlapping of entitlements laid down by the legislation of the Member State of residence of the child concerned and of those resulting from the legislation of the Member State of employment designated as the competent State under that regulation (see, to that effect, *Bosmann*, paragraph 24, and *Schwemmer*, paragraphs 43 and 51)

74 In the cases in the main proceedings, the Republic of Poland is both the Member State of residence of the child concerned and the Member State of employment of the posted worker which is designated as the competent State pursuant to Article 14(1)(a) of Regulation No 1408/71, that is to say, the Member State within the territory of which the company for which he normally works has its registered office.

75 It follows that the rules against overlapping laid down in Article 76 of Regulation No 1408/71 and in Article 10 of Regulation No 574/72 cannot preclude exclusion, in the present instance, from entitlement to child benefit pursuant to a national rule against overlapping such as that resulting from Paragraph 65 of the EStG.

76 However, the application of such a rule of national law against overlapping in a case such as that in the main proceedings, in so far as it appears to require, as is clear from the file submitted to the Court, not a reduction in the amount of the benefit by the amount of that of a comparable benefit received in another State, but exclusion from that benefit, is such as to constitute a substantial disadvantage affecting in reality a greater number of migrant workers than settled workers who have worked exclusively in the Member State concerned, this being a matter for the referring court to ascertain.

77 It is in particular migrant workers who are liable to receive, in, moreover, potentially highly divergent amounts, comparable benefits in another State, in particular in their Member State of origin.

78 Such a disadvantage appears even less justifiable in light of the fact that the benefit at issue in the main proceedings is financed by tax revenue and that, according to the national legislation concerned, the appellants in the main proceedings are entitled to that benefit by reason of the fact that they were subject to unlimited income tax liability in Germany.

79 In that connection, it should be recalled that the Court has already ruled that the aim of Articles 45 TFEU and 48 TFEU would not be achieved if, as a result of the exercise of their freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the legislation of one Member State (see, to that effect, *da Silva Martins*, paragraph 76 and the case-law cited).

80 It is also clear from the case-law of the Court that Articles 45 TFEU to 48 TFEU, and Regulation No 1408/71, adopted to implement them, are intended in particular to prevent the situation in which a worker who has exercised his right of free movement is treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (see, to that effect, *da Silva Martins*, paragraph 76 and the case-law cited).

81 Therefore, even if it can be explained by the disparities in the social security legislation of the Member States which subsist despite the existence of the coordinating rules laid down by EU law, the disadvantage mentioned in paragraph 76 of the present judgment is contrary to the requirements of the primary law of the European Union on the free movement of workers (see, inter alia, by analogy, *da Silva Martins*, paragraphs 72 and 73 and the case-law cited).

82 That finding cannot be called into question by the objective of Article 14(1)(a) of Regulation No 1408/71, which, according to the case-law of the Court, and as the referring court has stated, consists in encouraging the freedom to provide services by preventing an undertaking established in one Member State from being obliged to register its workers, who are normally subject to the social security legislation of that State, with the social security system of another Member State to which they are sent to perform work of short duration, which would complicate exercise by such an undertaking of that fundamental freedom (see, to that effect, inter alia, Case C-202/97 *FTS* [2000] ECR I-883, paragraphs 28 and 29).

83 In that connection, it must be held that the exclusion from receipt of child benefit which results from the application in the situation at issue in the main proceedings of a national rule against overlapping such as that resulting from Paragraph 65 of the EStG is not designed to avoid the costs and administrative complications which might arise for undertakings from other Member States posting workers in Germany as the result of a change in the applicable national legislation.

84 It is common ground that the benefit at issue in the main proceedings is granted without the undertakings which employ those workers being obliged to contribute to the financing of that benefit or having any administrative formalities imposed on them in that context.

85 Consequently, the answer to the third and fourth questions in Case C-612/10 is that the Treaty rules on the free movement of workers must be interpreted as precluding the application, in a situation such as that at issue in the main proceedings, of a rule of national law, such as that resulting from Paragraph 65 of the EStG, in so far as it involves, not a reduction in the amount of the benefit corresponding to the amount of a comparable benefit received in another State, but exclusion from that benefit.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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 (Grand Chamber) hereby rules:

1. **Articles 14(1)(a) and 14a(1)(a) 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 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as not precluding a Member State, which is not designated under those provisions as being the competent State, from granting child benefits in accordance with its**

national law to a migrant worker who is working temporarily within its territory in circumstances such as those in the main proceedings, including in the case where it is established, first, that the worker concerned has not suffered any legal disadvantage by reason of the fact that he has exercised his freedom of movement, since he has retained his entitlement to family benefits of the same kind in the competent Member State, and, second, that neither that worker nor the child for whom the benefit is claimed habitually resides within the territory of the Member State in which the temporary work was carried out.

2. **The rules of the FEU Treaty on the free movement of workers must be interpreted as precluding the application, in a situation such as that at issue in the main proceedings, of a rule of national law, such as that resulting from Paragraph 65 of the Law on income tax (Einkommensteuergesetz), in so far as it involves, not a reduction in the amount of the benefit corresponding to the amount of a comparable benefit received in another State, but exclusion from that benefit.**

[Signatures]