OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 21 June 2011 [1]

I — Introduction

1. The reference for a preliminary ruling concerns the interpretation of Articles 3(1) and 72 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 (OJ 1971 L 149, p. 2) [2] and also the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed at Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6) ('the Agreement').

2. The application was made in the context of appeal proceedings between Försäkringskassan (social insurance office) ('the Office') and Elisabeth Bergström concerning the entitlement of a parent who worked in Switzerland and subsequently moved to Sweden to family benefits.

II — Legal context

A — *Union law*

3. Article 1 of the Agreement, entitled 'Objective', provides:

'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:

(a) to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and

1 — Original language: English.

2 — As last amended at the material time by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 amending Council Regulations (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 2001 L 187, p. 1).

the right to stay in the territory of the Contracting Parties;

…

(d) to accord the same living, employment and working conditions as those accorded to nationals.'

4. Article 2 of the Agreement, entitled 'Non-discrimination', provides:

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

5. Article 8 of the Agreement, entitled 'Coordination of social security systems', provides that:

'The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:

(a) securing equality of treatment;

…

(c) aggregation, for the purpose of acquiring and retaining the right to benefits, and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned; …'

6. Article 1 of Annex II [3] to the Agreement provides:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

7. Section A of Annex II to the Agreement, entitled 'Acts referred to', provides:

'1. 371 R 1408: 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 the members of their families moving within the Community, as updated by …'

3 — Annex II deals with the coordination of social security schemes.

8. Article 3(1) of Regulation No 1408/71, entitled 'Equality of treatment', provides:

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

9. Article 72 of Regulation No 1408/71, entitled 'Aggregation of periods of insurance, employment or self-employment' which is found in Chapter 7, entitled 'Family benefits', of that regulation, provides:

'Where the legislation of a Member State makes acquisition of the right to benefits conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that State shall take into account for this purpose, to the extent necessary, periods of insurance, employment or self-employment completed in any other Member State, as if they were periods completed under the legislation which it administers.'

10. Article 89 of Regulation No 1408/71, entitled 'Special procedures for implementing certain legislations', provides:

'Special procedures for implementing the legislations of certain Member States are set out in Annex VI.'

11. Point N of Annex VI to Regulation No 1408/71, entitled 'Sweden', provides:

'1. For the application of Article 72 of the Regulation, a person's entitlement to parental benefit shall be determined by regarding insurance periods completed in another Member State as being based on the same average income as the Swedish insurance periods with which they are aggregated.'

B — *National law*

12. The Socialförsäkringslagen (social insurance law) (1999:799) provides:

'Chapter 3. Social insurance protection

1. All persons resident in Sweden shall be insured for the following benefits as provided for in the Lagen om allmän försäkring (1962:381) [law on the general social security scheme]:

1. benefit for medical treatment, etc., under Chapter 2 in matters concerning benefits which are ruled on by the social insurance offices;

2. parental benefit at the lowest level and basic level;

3. benefit for illness and loss of activity in the form of guarantee benefit;

…

Article 4 – All persons employed in Sweden shall be insured for the following benefits as provided for in the Lagen om allmän försäkring (1962:381):

1. sick leave benefit and pregnancy benefit;

2. parental benefit over the lowest level and occasional parental benefit;

3. income-related sick leave benefit and income-related benefit for loss of activity; …'

13. According to the Lagen om allmän försäkring (1962:381):

'Chapter 3. Sick leave benefit

Article 2 – The income basis for sick leave benefit is the annual monetary income which the insured person can be expected to earn until further notice for his or her own work in Sweden …

Chapter 4. Parental benefit

Section 6 Full parental benefit shall be not less than SEK 60 per day (lowest level).

Parental benefit shall be paid for the first 180 days in an amount corresponding to the parents' sick leave benefit, calculated as set out in the fifth paragraph, if the parents have, for at least 240 consecutive days prior to the

child's birth, been insured for sick leave benefit over the lowest level, or should have been had the social insurance office been aware of all the circumstances. Parental benefit for the first 180 days shall, however, always be paid at least at the level of SEK 150 per day (basic level) for full parental benefit. ...'

III — Dispute in the main proceedings and questions referred

14. Elisabeth Bergström is a Swedish national. She resided in Switzerland as from January 1994 and was employed there until she gave birth to a daughter on 19 March 2002. The family moved to Sweden on 1 September 2002. Her husband immediately took up employment in Sweden. Ms Bergström did not take up employment in Sweden, and remained unemployed in order to care for their daughter. She applied for parental benefit at the sick leave benefit level as from 16 March 2003, calculated on the basis of the income she had had from her employment in Switzerland.

15. The Office considered that Ms Bergström was not entitled to parental benefit at sick leave benefit level and decided to grant parental benefit at the basic level, that is, SEK 150 per day. The Office stated that, under Regulation No 1408/71, insurance periods completed in other Member States are also to be included in the determination of whether the 240-day requirement has been fulfilled, but that the last day of the 240-day requirement must be completed in Sweden.

16. Ms Bergström appealed against that decision to the Länsrätten i Stockholms län (Stockholm district court). The Länsrätten dismissed the appeal, principally on the grounds that parental benefit at sick leave benefit level is an employment-related insurance.

17. Ms Bergström appealed to the Kammarrätten i Stockholm (Court of Appeal, Stockholm), which decided not to grant leave to appeal. Ms Bergström appealed against that decision to the Regeringsrätten, which overruled the decision and granted her leave to appeal before the Kammarrätten. That court upheld Ms Bergström's appeal holding that she should be deemed to have fulfilled the 240-day requirement through her insurance period in Switzerland, and that she should be granted leave above the basic level based on her previous employment in Switzerland. The Kammarrätten referred, inter alia, to Article 72 of Regulation No 1408/71 and to the judgments of the Court in *Rockler* [4] and *Öberg*. [5]

4 — Case C-137/04 [2006] ECR I-1441.
5 — Case C-185/04 [2006] ECR I-1453.

18. The Office appealed against the Kammarrätten's judgment and requested that the referring court set it aside and reinstate the Länsrätten's judgment and the Office's decision. Ms Bergström has opposed the appeal brought by the appellant.

19. According to the referring court, the Office now considers that the qualification period may be completed through employment in another Member State. However, the Office submitted that Ms Bergström is not entitled to a higher level of parental benefit than the basic level because she has no income basis for sick leave benefit. The income basis for sick leave benefit is based on the assumption that the social security scheme is financed through employment income in Sweden, for which statutorily-imposed charges are levied. Moreover, the Treaty provisions on free movement of workers do not apply in relation to Switzerland. The judgments in *Rockler* and *Öberg* may accordingly not be applied to the present case as the Kammarrätten has done.

20. Ms Bergström submitted that a parent who is employed in Sweden and, in connection with the birth of a child, terminates his or her employment, is entitled to parental benefit at the level of sick leave benefit. The same rule must also apply where a person moves to Sweden from another EU Member State or another country in respect of which Regulation No 1408/71 applies.

21. According to the referring court, Article 72 of Regulation No 1408/71, which concerns family benefits and provides for the aggregation of periods of insurance, employment or self-employment is unclear. The heading to Article 72 refers to 'aggregation' of insurance periods. The wording of the heading indicates that the article applies only when there is a domestic period which can be combined with a period abroad. However, Article 72 requires a Member State merely to 'take into account' periods of insurance in another Member State. The wording of the article thus indicates that periods abroad are to be included in the calculation but does not give any direct support for an assumption that there also must be a domestic period of insurance.

22. As regards the level of benefits, the referring court notes that Article 72 of Regulation No 1408/71 equates certain periods of time completed domestically and abroad but does not, however, regulate the extent to which income earned domestically and abroad is to be equated. Article 3(1) of Regulation No 1408/71 contains further provisions on entitlement to equal treatment together with Article 8 of the Agreement. According to the referring court it is unclear whether the right to equal treatment applies also in the case of migrant workers who are that Member State's

own nationals [6] and whether, under Article 3(1), income earned in another Member State is to be equated with income earned domestically in the calculation of income-related family benefits. If so, the question arises as to whether this is so also in relation to Switzerland, in respect of which the Treaty does not apply.

23. It was in those circumstances that the Regeringsrätten (Sweden) referred the following questions to the Court for a preliminary ruling:

'1. Under Union law, in particular the Agreement with Switzerland on the free movement of persons and Article 72 of Regulation No 1408/71, can a qualification period for family benefit in the form of income-related benefit for childcare be completed in its entirety through employment and insurance in Switzerland?

2. Under Union law, in particular the Agreement with Switzerland on the free movement of persons and Articles 3(1) and 72 of Regulation No 1408/71, is income earned in Switzerland to be equated with domestic income in the determination of entitlement to family benefit in the form of income-related benefit for childcare?'

IV — Procedure

24. Written pleadings were submitted by Ms Bergström, the Swedish and Finnish Governments and the Commission.

25. Pursuant to Article 54a of the Rules of Procedure of the Court, the Judge-Rapporteur and the Advocate General requested the parties to the main proceedings, the Member States, the Commission and the Council, to submit observations if they so wish, on whether they consider Ms Bergström's request for family benefits falls within the scope of the Agreement. In reasoning their observations the parties to the main proceedings, the Member States, the Commission and the Council were requested to take into consideration inter alia the facts or hypotheses that Ms Bergström is a Swedish national in Sweden who has made the relevant request in that Member State, Articles 1, 2, 8 and Annex II to the Agreement and the ruling of the Court in *Grimme*. [7]

6 — Case C-507/06 *Klöppel* [2008] ECR I-943, paragraphs 17 and 18.

7 — Case C-351/08 [2009] ECR I-10777.

26. A hearing was held on 4 May 2011 at which Ms Bergström, the Swedish and United Kingdom Governments and the Commission presented oral submissions.

V — Preliminary matter – applicability of the Agreement

27. Ms Bergström and the Commission consider in response to the question posed pursuant to Article 54a of the Rules of Procedure of the Court that the Agreement is applicable to the facts and dispute in the main proceedings. The Swedish Government stated in its response that Ms Bergström's situation does not fall within the scope of the Agreement. According to that government, Articles 1 and 2 of the Agreement seek to protect migrant workers from discrimination in the State where they work. However, the situation of a worker in his State of origin and his situation on return to that State is not regulated by the Agreement. This is confirmed by Article 9 of Annex I to the Agreement which states that an employed person who is a national of a contracting party may not, by reason of his nationality, be treated differently in the territory of the other contracting party from national employed persons. Moreover, the Court in *Grimme* [8] stated that the equality of treatment provided by Article 9 of Annex I to the Agreement does not apply to the treatment of a national of a contracting party by the authorities of that State.

28. I consider that in assessing whether the Agreement is applicable to the circumstances in the main proceedings, it is imperative to examine that agreement as a whole including the annexes and protocols to the Agreement which form an integral part thereof [9] and which are by no means of secondary value. That being said, the Agreement does however specify and therefore curtail the specific scope of application of its Annexes. Thus, for example, Article 6 of the Agreement provides that the right of residence in the territory of a Contracting Party shall be guaranteed to persons not pursuing an economic activity in accordance with the provisions of Annex I relating to non-active people. [10]

29. I consider that Article 9 of Annex I to the Agreement, which guarantees equal treatment of employed persons who are nationals of a Contracting Party in the territory of another Contracting Party, and the ruling of the Court in *Grimme* [11] which referred in part to that provision are not applicable to the facts and circumstances of the main proceedings. It is clear from Article 8 of the Agreement that it is Annex II and not Annex I which is applicable to the question of the coordination

8 — Cited in footnote 7.

9 — See Article 15 of the Agreement.

10 — See also, for example, Article 4 of the Agreement on the right of residence and access to an economic activity and Article 7 on other rights.

11 — Cited in footnote 7.

of social security systems of the Contracting Parties of that agreement. In accordance with Article 8(a) of the Agreement, the Contracting Parties are required to make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of securing equality of treatment.

30. Moreover, unlike Ms Bergström, Mr Grimme did not in fact exercise the rights granted under the Agreement to nationals of Member States to inter alia work and reside in the Swiss Confederation. [12]

31. It is settled case-law that Article 1(1) of Annex II to the Agreement, concerning the coordination of social security schemes, requires the contracting parties to apply among themselves the Union acts to which reference is made, as in force at the date of signature of that agreement and as amended by section A of that annex. Moreover, according to Article 1(2) of that annex, '[t]he term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts'. Regulation No 1408/71 is mentioned in section A of Annex II to the Agreement, entitled 'Acts referred to'. It follows that the provisions of that regulation cover, in addition to the Member States of the EU, also the Swiss Confederation. [13]

32. Regulation No 1408/71 was adopted to contribute to the establishment of the greatest possible freedom of movement for migrant workers. That aim would not be attained 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. [14]

33. In my view, the Contracting Parties of the Agreement by expressly referring

12 — The question referred to the Court in the *Grimme* case centred on whether Mr Grimme, a German national and managing director of a German branch of a Swiss company, was obliged to be a member of the German statutory pension insurance scheme. The German Social Security Code establishes an exemption from the obligation to join the statutory pension insurance scheme for members of the managing board of a company limited by shares. The ratio of the case is largely based on the limited right of establishment of legal persons and the freedom to provide services laid down by the Agreement. However, Mr Grimme also claimed that, as an employed worker, compulsory membership of the statutory scheme constituted a breach of the principle of equal treatment of employees guaranteed in Article 9 of Annex I to the Agreement when members of the managing boards of companies limited by shares governed by German law are exempted. The Court found that Article 9 of Annex I to the Agreement, which guarantees equal treatment of employed persons who are nationals of a Contracting Party in the territory of another Contracting Party, only concerns the case of discrimination by reason of nationality against a national of a Contracting Party in the territory of another Contracting Party. Thus, the Court found Mr Grimme's position as a member of the managing board of a company limited by shares governed by Swiss law was of no relevance concerning the question of discrimination. See paragraphs 46 to 49 (case cited in footnote 7).

13 — See Case C-247/09 *Xhymshiti* [2010] ECR I-11845, paragraphs 31 to 33. See also Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 32.

14 — See, to that effect, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19.

to Regulation No 1408/71 in section A of Annex II to the Agreement also intended to effectively secure the freedom of movement for migrant workers within the territories of the Contracting Parties. In addition, I consider that the objectives of the Agreement, in particular those set out in Article 1(a) of that agreement on the right, inter alia, of entry, residence, access to work as employed persons and the right to stay in the territory of the Contracting Parties and indeed Article 1(d) of that agreement, particularly the objective concerning equal living conditions would be severely hampered if rights granted under the Agreement merely applied in a limited and truncated manner when a national of one Contracting Party is situated in another Contracting Party. The objectives in question and the principle of non-discrimination laid down in Article 2 of the Agreement would be compromised if EU citizens, having exercised their right to free movement under the Agreement, could not invoke its provisions on their return to their Member State.

34. I therefore consider that Ms Bergström's request for family benefits falls within the scope of the Agreement. Moreover, in accordance with Article 16(1) of the Agreement, the rights and obligations laid down in Regulation No 1408/71 must be given equivalent effect in relations between the Swiss Confederation and the Member States of the EU.

VI — Assessment

A — *Question 1 – qualification period*

35. It would appear from the file before the Court that, in accordance with Swedish law, in order to be eligible for parental benefit at the level of sick leave benefit, the completion of a minimum period of insurance or employment is required. By its first question the referring court requests the Court to rule on whether, pursuant to Article 72 of Regulation No 1408/71, the period in question may be completed in its entirety through employment and insurance in Switzerland or whether a period of insurance or employment must also have been completed in Sweden. The referring court considers in particular that Article 72 of Regulation No 1408/71 is unclear in the light of its title and Point N(1) of Annex VI to that regulation.

36. In her pleadings before the Court, Ms Bergström stated that pursuant to Article 72 of Regulation No 1408/71, the period in question may be completed in its entirety through employment and insurance in Switzerland. A direct application of Article 72 of Regulation No 1408/71 and an application by analogy of the judgments of the Court in *Öberg* [15] and *Rockler* [16] ensures that national legislation which fails to take into consideration periods which a worker was covered by the sickness insurance of another Member State or national legislation which requires a period of national insurance in addition to a period of insurance abroad, will dissuade citizens of that Member State from leaving and exercising a professional activity in another Member State. The Swedish Government considered in its written submissions that in accordance with the principle of equality, Article 72 of Regulation No 1408/71 should be interpreted as meaning that a period of insurance may be completed in its entirety in another Member State or Switzerland. However, in its response to the question put in accordance with Article 54a of the Rules of Procedure of the Court and its oral submissions, the Swedish Government amended its written submissions concerning the first question referred and stated that it considered that a requirement imposed by national law that a period of insurance must also be completed in the Member State of the competent institution is compatible with the Agreement and Article 72 of Regulation No 1408/71. The Finnish Government considers that the wording and the title of Article 72 of Regulation No 1408/71 require the aggregation of periods of insurance, employment or self-employment and must be interpreted as not precluding a Member State's legislation which requires the completion of a certain period of insurance or employment in accordance with that legislation in order for the right to benefits to arise. In its request for a hearing in this case, the United Kingdom Government stated that Article 72 of Regulation No 1408/71 does not require a period of employment or insurance in the State in which the application for benefit is made. At the hearing, that government stated that the first question by the referring court should be answered in the negative and that Member States have the right to impose a period of domestic insurance or employment pursuant to Article 72 of Regulation No 1408/71.

37. The Commission considers that Article 72 of Regulation No 1408/71 should be interpreted in the light of its objective which is to give effect to the free movement of persons. Such an interpretation complies with the judgments of the Court in *Öberg* and *Rockler*. Article 8(c) of the Agreement provides that the contracting parties should establish rules in accordance with Annex II to that agreement for the coordination of social security systems with the aim of ensuring the

15 — Cited in footnote 5.
16 — Cited in footnote 4.

aggregation of all periods taken into account by different national legislations which, inter alia, give rise to a right to benefits. In accordance with Article 1 of Annex II to the Agreement, the parties agree to apply certain EU acts including Regulation No 1408/71. The Commission considers that the relevant provisions of the Agreement are express provisions which in accordance with the case-law of the Court [17] must be interpreted by analogy in accordance with the corresponding rules of Union law. The Commission thus considers, in accordance with the *Öberg* and *Rockler* judgments, that Article 72 of Regulation No 1408/71 should be interpreted as meaning that periods completed in another Member State do not necessarily have to be added to periods completed in the Member State in which the benefit is requested, otherwise EU citizens would be dissuaded from exercising a professional activity in another Member State. In the event that the Court considers that a period of insurance or employment is required in Sweden, the Commission notes that Ms Bergström's husband started working in Sweden from 1 September 2002 and that he completed the necessary period in accordance with the judgment of the Court in *Hoever and Zachow*. [18] That judgment provides that family benefits by their nature cannot be regarded as payable to an individual in isolation from his family circumstances. Where the grant of a benefit is intended to meet family expenses, the choice of the parent who is to receive the allowance is not of importance.

38. It is undisputed that the benefits provided by Swedish law at issue in the main proceedings are 'family benefits' within the meaning of Article 4(1) of Regulation No 1408/71. [19]

39. While a Member State is entitled, in accordance with the principle that Member States remain competent to define the conditions for granting social security benefits, to lay down a qualifying period for the acquisition of a right to a family benefit, Article 48(a) TFEU states the principle of aggregation of certain periods to be taken into consideration by Member States. That principle is implemented in the present context by Article 72

17 — *Grimme*, cited in footnote 7; Case C-541/08 *Fokus Invest* [2010] ECR I-1025; and Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233.

18 — Joined Cases C-245/94 and C-312/94 [1996] ECR I-4895, paragraph 37.

19 — In Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 57, the Court restated its settled case-law that a benefit may be regarded as a social security benefit for the purposes of Regulation No 1408/71 where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71. In that case the Court found that the provisions of Swedish law concerning the grant of parental benefits confers a legally defined right on recipients and that that benefit is awarded to persons who satisfy certain objective criteria, without any individual and discretionary assessment of their personal needs. Moreover, the Court found that the benefit in question is intended to enable one of the parents to devote himself or herself to the raising of a young child, and designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity. The benefit was thus treated as a family benefit within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71. See also paragraphs 58 to 60.

of Regulation No 1408/71 in relation to family benefits. The principle of aggregation is one of the basic principles governing Union coordination of social security schemes in the Member States, its purpose being to ensure that exercise of the right, conferred by the Treaty, to freedom of movement does not have the effect of depriving a worker of social security advantages to which he would have been entitled if he had spent his working life in only one Member State. Such a consequence might discourage Union workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. [20]

40. Article 72 of Regulation No 1408/71, which is entitled '[a]ggregation of periods of insurance, employment or self-employment', provides that where a Member State makes the acquisition of a right to a benefit conditional upon the completion of periods of insurance, employment or self-employment, such periods completed in another Member State must be treated as if they were completed in the former Member State. In my view, while the use of the word 'aggregation' [21] in the title of Article 72 of Regulation No 1408/71 may in the abstract give rise to ambiguity by possibly inferring, as noted by the referring court, a requirement of the summation of two or more relevant periods in different Member States thereby excluding a single period completed solely in a Member State other than the Member State of the competent institution, the clear wording of Article 72 of Regulation No 1408/71 itself leaves no scope for ambiguity and does not in any manner support the interpretation of that provision advanced by the Swedish, Finnish and United Kingdom Governments.

41. A literal interpretation of Article 72 of Regulation No 1408/71 itself clearly supports a finding that where the relevant period is wholly completed in a Member State other than that of the competent institution, it must be treated as equivalent to a period completed in the Member State of the competent institution [22] and that the completion of that period alone may give rise to rights in the latter Member State. The clear wording of Article 72 does not support the imposition of any further, additional conditions by the Member

20 — See by analogy, Case C-306/03 *Salgado Alonso* [2005] ECR I-705, paragraphs 28 and 29. See also Case C-440/09 *Tomaszewska* [2011] ECR I-1033, paragraphs 30 and 31.

21 — In French 'totalisation', the same word as contained in Article 48(a) TFEU.

22 — See by contrast merely for the purposes of comparison of drafting technique, Article 67(1) to (3) of Regulation No 1408/71.

State of the competent institution requiring a domestic period of insurance.

42. I also consider that Point N(1) of Annex VI to Regulation No 1408/71 concerning Sweden which provides, in relation to the application of Article 72 of that regulation, that a person's entitlement to parental benefit shall be determined by regarding insurance periods completed in another Member State as being based on the same average income as the Swedish insurance periods with which they are aggregated, may not be interpreted as meaning that a period of insurance or employment in Sweden could be required by Swedish law in order to acquire a right to family benefits. In my view, it is clear from the wording of Point N(1) of Annex VI to Regulation No 1408/71 that it applies in conjunction with Article 72 of that regulation. Moreover, I consider that Point N(1) of Annex VI to Regulation No 1408/71 does not provide or even suggest that a period of insurance in Sweden is mandatory. Indeed, in my view, Point N(1) of Annex VI to Regulation No 1408/71 is only relevant where there are in fact two relevant insurance periods in relation to a person, one in Sweden and one in another Member State. In those circumstances, Point N(1) of Annex VI to Regulation No 1408/71 provides specific rules for Sweden in relation to the income on the basis of which a person's entitlement to parental benefit is determined. I therefore consider that Point N(1) of Annex VI to Regulation No 1408/71 is not relevant to the facts in the main proceedings.

43. Moreover, in addition to a literal interpretation of the relevant provisions of Regulation No 1408/71, I consider that the above approach is supported by the Court's case-law and by the objectives and the provisions of the Agreement. The Court in the *Öberg* [23] and *Rockler* [24] cases held that national legislation which does not take into account, for the calculation of the amount of parental benefit, periods of employment completed under the Joint Sickness Insurance Scheme of the European Communities is likely to dissuade citizens of a Member State from working within an institution of the European Union situated in another Member State since, by accepting employment with such an institution, they lose the right to benefit under the national sickness insurance scheme from family benefits to which they would have been entitled had they not accepted that employment. Consequently, the Swedish legislation on parental benefits in dispute in the proceedings in *Öberg* [25] and *Rockler* [26] was found to constitute a barrier to the free movement of workers pursuant to Article 39 EC (now Article 45 TFEU). In my view, the underlying reasoning of the Court in those cases cannot be limited, as advocated by the United Kingdom Government at the hearing, to their specific

23 — See paragraph 16 (case cited in footnote 5).
24 — See paragraph 19 (case cited in footnote 4).
25 — See paragraph 17.
26 — See paragraph 20.

narrow facts and thus to situations concerning former members of staff of institutions of the European Union. The rulings in those cases underscore the principle of aggregation laid down in Article 48(a) TFEU [27] which requires that, in principle, for the purpose inter alia of acquiring the right to a social security benefit provided by a Member State, periods of insurance, employment or self-employment completed by a migrant worker in another Member State must be treated as entirely equivalent to periods completed in the Member State of the competent institution. In my view, exceptions to that principle in the context of social security benefits must be expressly and clearly provided for by the European Union legislator. [28] In the event of ambiguity, I consider the principle of aggregation should prevail.

44. It would appear therefore, in accordance with Articles 45 and 48(a) TFEU and the reasoning of the Court in the *Öberg* and *Rockler* cases, that the relevant periods of insurance and employment pursuant to Article 72 of Regulation No 1408/71 may be completed in their entirety through employment and insurance in a Member State other than the Member State of the competent institution. A requirement that a period of insurance or employment be completed in the Member State of the competent institution [29] could deter a national of that Member State from leaving her country of origin to exercise her freedom of movement. [30]

45. However, as noted by the referring court, the interpretation given to the provisions of Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself. [31] The dispute in the main proceedings must therefore be analysed in the light of the specific provisions of the Agreement.

46. It is settled case-law that, for the purposes of the application of Regulation No 1408/71, the Swiss Confederation is to be equated with a Member State of the European Union. [32] Therefore Article 72 of Regulation No 1408/71 cover the Swiss Confederation.

47. In my view, while the rulings in the *Öberg* and *Rockler* cases are based on Article 39 EC

27 — Which was adopted in order to secure the principle of freedom of movement of workers laid down in Article 45 TFEU.

28 — See, for example, Article 67(3) of Regulation No 1408/71 concerning the specific case of unemployment benefits.

29 — If such a requirement were implied, contrary to the clear wording of the provision in question and thus, in my view, the express and unambiguous will of the European Union legislator, this begs the question as to the minimum duration of the relevant period of insurance in the Member State of the competent institution. It would appear from the order for reference that the Office considered that insurance periods completed in other Members States could be included in assessing whether the 240-day requirement for parental benefit in Sweden had been completed, provided that *the last day* of that 240-day requirement was completed in Sweden.

30 — See *Öberg* (cited in footnote 5), paragraph 15, and *Rockler* (cited in footnote 4), paragraph 18.

31 — See *Grimme* (cited in footnote 7), and *Fokus Invest* (cited in footnote 17).

32 — See points 31 to 33 above.

(now Article 45 TFEU) and are thus not directly applicable in the context of the proceedings before the referring court, I consider that the reasoning of the Court in those cases together with the principle of aggregation as provided inter alia by Article 48(a) TFEU and the case-law thereon should be applied mutatis mutandis to the dispute in the main proceedings. Such an application is necessary in order to give concrete effect to the objectives of the Agreement on the free movement of persons, in particular those set out in Article 1(a) and (d) thereof. Moreover, it must be stressed that the principle of aggregation in the context of securing and retaining social security benefits is explicitly referred to in Article 8(c) of the Agreement.

48. In the context of the main proceedings, I consider that objectives of the Agreement would be greatly compromised if periods of insurance, employment or self-employment completed in Switzerland, which in this case appears to have been rather lengthy, [33] could not be taken into consideration upon an individual's return to the EU in order to acquire the right to family benefits unless the relevant periods completed in Switzerland were added to some hypothetical minimum period of insurance, employment or self-employment in the Member State of the competent institution.

49. I therefore consider that pursuant to Articles 1 and 8 of the Agreement and Article 72 of Regulation No 1408/71 where, in accordance with the legislation of a Member State, the acquisition of a right to family benefits is conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that Member State shall take into account for this purpose a period of insurance, employment or self-employment completed in its entirety in Switzerland.

33 — See point 14 above.

B — *Question 2 – level of benefits*

50. By its second question the referring court asks whether, pursuant to the Agreement and Articles 3(1) and 72 of Regulation No 1408/71, a person who, before taking parental leave, was employed in Switzerland and therefore had no income basis for sick leave benefit in Sweden, may still be entitled to parental leave benefit at the level of sick leave benefit on the basis of his income in Switzerland.

51. The objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, is to ensure free movement of employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation. To that end, as is clear from the 5th, 6th and 10th recitals, that regulation upholds the principle of equality of treatment of workers under the various national

legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. [34]

52. As indicated by the referring court and the Commission, Regulation No 1408/71 contains specific rules for the calculation of certain types of benefits. However, unlike for example Articles 23, 47, 58 and 68 of Regulation No 1408/71 concerning the calculation of respectively sickness and maternity, old-age and invalidity pensions, accidents at work and occupational diseases and unemployment benefits, there is no specific provision of that regulation governing the calculation of family benefits which is applicable to the facts of the dispute in the main proceedings. [35]

53. The Swedish and Finnish Governments and the Commission consider that the benefits in question in the main proceedings should be calculated by analogy with Article 23 of Regulation No 1408/71 which deals with the calculation of cash benefits in relation to sickness and maternity on the basis of average earnings. The Swedish and Finnish Governments consider that only revenue earned in the Member State of the competent institution may be taken into consideration for that purpose. The Commission considers that there is a general principle that income earned in another Member State is not taken into consideration when calculating benefits. However, if the Swedish authorities were to pay Ms Bergström parental benefits only at the basic level they would treat unequally migrant workers and those who stayed in Sweden. In order to eliminate that discrimination the average earnings of a person exercising the same profession and with the same qualifications as Ms Bergström should be used as a basis for the calculation in question.

54. In my view, in the absence of a specific provision in Chapter 7 of Regulation No 1408/71 governing the calculation of family benefits and thus any coordinating rule thereon, the family benefits in question which fall within the scope of that regulation must be calculated on the basis of the law of the competent Member State, provided that the conditions adopted do not give rise to overt or disguised discrimination between Union workers. Thus the provisions of national law governing the calculation of the benefit are applicable, provided they comply with Article 3(1) of Regulation No 1408/71.

55. The referring court and the Swedish Government consider that Article 3(1) of

34 — Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 19.

35 — In the order for reference, the referring court stated that it is undisputed that Elisabeth Bergström is not covered by Articles 71(1)(a)(ii), 71(1)(b)(ii) and 72a of Regulation No 1408/71.

Regulation No 1408/71 merely aims to ensure that foreign nationals in respect of whom the regulation applies have the same rights and obligations as a Member State's own nationals. According to the referring court, it is unclear whether the right to equal treatment applies also in the case of migrant workers who are a Member State's own nationals [36] and whether, under Article 3(1), income earned in another Member State is to be equated with income earned domestically in the calculation of income-related family benefits. If so, the question arises as to whether this is so also in relation to Switzerland, in respect of which the Treaty does not apply. The Swedish Government considers that Member States can apply less favourable treatment to their own nationals than to other EU citizens.

56. The Court in its judgment in *Petit* [37] stated that the rules on free movement and Regulation No 1408/71, in particular Article 3 thereof, do not apply to situations which are confined in all respects within a single Member State. In my view, it is clear from the file before the Court, that the circumstances in the main proceedings do not constitute a purely internal situation with no factor linking them with any situation governed by Union law and which are confined in all relevant aspects to a single Member State. [38]

57. The principle of non-discrimination, as implemented as concerns social security by Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result. [39]

58. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority

36 — See *Klöppel* (cited in footnote 6), paragraphs 17 and 18.

37 — Case C-153/91 [1992] ECR I-4973, paragraph 10.

38 — Case C-212/06 *Gouvernement de la Communauté française and gouvernement wallon* [2008] ECR I-1683, paragraph 33. It is settled case-law that any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of Article 45 TFEU. See in particular, to that effect, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9, and Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17.

39 — See to that effect, Case C-332/05 *Celozzi* [2007] ECR I-563, paragraphs 13 and 23, and *Klöppel* (cited in footnote 6), paragraph 17.

of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter.[40] It is not necessary in this respect to establish that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.[41]

59. It is otherwise only if those provisions are both justified by objective considerations independent of the nationality of the workers concerned and proportionate to the legitimate aim pursued by the national law.[42]

60. In my view, it is clear from the ruling of the Court in *Borawitz*[43] that the fact that an applicant for social security benefits is a national of the Member State of the competent institution does not necessarily preclude the application of Article 3(1) of Regulation No 1408/71 to his circumstances provided it is established that nationals of other Member States, or in this case also Switzerland, are more likely to be affected or are more likely to be affected to a greater extent than nationals of the Member State of the competent institution.[44]

61. I consider that national legislation such as that at issue in the main proceedings, which provides effectively that in order to acquire parental benefits corresponding to the level of sick leave benefit and above the level of the basic amount only income earned in the Member State of the competent institution (Sweden) may be taken into account, risks placing at a disadvantage primarily nationals of other Member States and Switzerland as the requirement of earning income in the Member State of the competent institution (Sweden) and being insured for sick leave benefit over the lowest level in question is likely to be more easily satisfied by nationals of the latter State (Swedish nationals).

40 — *Celozzi* (cited in footnote 39), paragraph 24, and *Klöppel* (cited in footnote 6), paragraph 18.

41 — Case C-373/02 *Öztürk* [2004] ECR I-3605, paragraph 57.

42 — *Celozzi* (cited in footnote 39), paragraph 25.

43 — Case C-124/99 [2000] ECR I-7293.

44 — See also *Klöppel* (cited in footnote 6), paragraphs 17 to 22.

62. In addition, such legislation undermines the very objectives of free movement of persons and equality of living conditions set out in Article 1(a) and (d) of the Agreement together with the specific rule of securing equality of treatment in the context of the social security systems provided by Article 8(a) of that agreement. In my view, Article 8(a) of the Agreement seeks to ensure that persons who avail themselves of the right to free movement should not be discriminated against as compared to other workers in comparable situations who have not exercised such rights. [45]

63. In accordance with the Swedish legislation in question, a migrant worker such as Ms Bergström risks receiving a lower amount of family benefit than she would have received had she not exercised her right to free movement under the Agreement. It would appear from the order for reference that Ms Bergström receives parental benefit at the basic level, whereas workers in equivalent circumstances who work in Sweden are entitled to such benefit calculated according to their income basis for sick leave benefit.

64. I consider that in order to remedy the discrimination in question it is not necessary, in the absence of a specific Union legislative provision thereon, to grant Ms Bergström family benefits at the level of sick benefits calculated on the basis of her income in Switzerland. The obligation to remedy the discrimination merely implies that Ms Bergström's family benefits must be the same as they would have been if she had not availed herself of her right to free movement and stayed in Sweden. [46] I therefore consider that income levels in Sweden should be taken as a comparator or a point of reference. [47] In circumstances such as those at issue in the main proceedings, the amount of family benefit at the level of sick leave benefit should be calculated by reference to the income of a worker in Sweden in a comparable profession, with comparable professional experience and qualifications.

65. At the hearing the Swedish Government stated that unless parental benefits at sick leave level were related to actual insurance contributions, the balance in the Swedish social security system would be seriously

45 — I would note in that regard that the wording of Article 8(a) of the Agreement in expressing the objective of securing equality of treatment in the context of the coordination of social security systems is very broad and is not directly aimed at discrimination on the basis of nationality.

46 — See by analogy Case C-251/94 *Lafuente Nieto* [1996] ECR I-4187, paragraph 39; Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* [1997] ECR I-5501, paragraph 21; Case C-153/97 *Grajera Rodríguez* [1998] ECR I-8645, paragraph 18; and Case C-205/05 *Nemec* [2006] ECR I-10745, paragraph 41. The cases cited above are based on Article 58 of Regulation No 1408/71. I would note that the provisions of Article 23(1) of Regulation No 1408/71 are largely similar to those of Article 58(1) thereof.

47 — See by analogy Advocate General Kokott's Opinion in *Nemec* (cited in footnote 46).

upset. [48] Aside from the fact that such an assertion is overly general and is completely lacking in any evidence that there is a risk of seriously undermining the financial balance of the Swedish social security system, the existence of such a risk would in my view be difficult to establish since it is clear from the order for reference that the amount of parental benefits payable to a family in such circumstances is subject to a statutory ceiling and is payable for a limited period of time only.

66. I would note that the United Kingdom Government and the Commission have briefly suggested before this Court that Ms Bergström's spouse's income may be used as the basis of assessment of the amount of parental benefit in question. [49] While I consider that such a possibility may not be excluded, in my view, the Court should not examine this hypothetical point as the issue was not clearly raised in the order for reference and, in the absence of sufficient information on the matter, indications by the Court in that regard would be rather speculative.

67. I therefore consider that the Agreement and Articles 3(1) and 72 of Regulation No 1408/71 do not require income earned in Switzerland to be equated with domestic income in the determination of entitlement to family benefit in the form of income-related benefit for childcare, rather income levels in the Member State of the competent institution should be taken as a comparator or a point of reference. The national court, in calculating the amount of the family benefit at the level of sick leave benefit should use as a reference the income of a worker in that Member State in a comparable profession, with comparable professional experience and qualifications.

48 — It is clear from the order for reference that the Office claimed in the main proceedings that basing the benefit on income from employment in another country for which social charges are not levied in Sweden would undermine the financing of the social security system.

49 — See also point 37 above concerning the alternative submissions of the Commission in relations to Ms Bergström's spouse.

VII — Conclusion

68. Accordingly, I propose that the Court should answer the questions referred by the Regeringsrätten (Sweden) as follows:

1. Pursuant to Articles 1 and 8 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed at Luxembourg on 21 June 1999 ('the Agreement') and Article 72 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 by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, where, in accordance with the legislation of a Member State, the acquisition of a right to family benefits is conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that Member State shall take into account for this purpose a period of insurance, employment or self-employment completed in its entirety in Switzerland.

2. The Agreement and Articles 3(1) and 72 of Regulation No 1408/71 do not require income earned in Switzerland to be equated with domestic income in the determination of entitlement to family benefit in the form of income-related benefit for childcare, rather income levels in the Member State of the competent institution should be taken as a comparator or a point of reference. The national court, in calculating the amount of the family benefit at the level of sick leave benefit should use as a reference the income of a worker in that Member State in a comparable profession, with comparable professional experience and qualifications.