Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 16 February 2012 [1]

Joined Cases C-611/10 and C-612/10Waldemar Hudzinskiv

Agentur für Arbeit Wesel — Familienkasse
andJaroslaw Wawrzyniakv
Agentur für Arbeit Mönchengladbach — Familienkasse

(References for a preliminary ruling
from the Bundesfinanzhof (Germany))

(Social security — Child benefit — Articles 14(1)(a) and 14a(1)(a) of Regulation (EEC) No 1408/71 — Temporary work in another Member State — Legislation applicable — Right of a Member State other than the competent State to grant child benefit)

I – Introduction

1. By two separate orders of 21 October 2010, received at the Court on 23 December 2010, the Bundesfinanzhof (Federal Finance Court, Germany) referred questions to the Court of Justice for a preliminary ruling under Article 267 TFEU on the interpretation of 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, in the version resulting from Council Regulation (EC) No 118/97 of 2 December 1996, [2] as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 [3] ('Regulation No 1408/71').

2. The references have been made in two sets of proceedings, both concerning entitlement to child benefits in Germany: as regards Case C-611/10, in proceedings between Mr Hudzinski, a Polish national who worked as a seasonal worker in Germany, and the Agentur für Arbeit Wesel — Familienkasse (Wesel Agency for Employment and Family Allowances) and, as regards Case C-612/10, in proceedings between Mr Wawrzyniak, a Polish national who worked in Germany as a 'posted worker', and the Agentur für Arbeit Mönchengladbach — Familienkasse (Mönchengladbach Agency for Employment and Family Allowances).

1 — Original language: English.
2 — OJ 1997 L 28, p. 1.
3 — OJ 2005 L 117, p. 1.

3. The referring court essentially wishes to ascertain to what extent a Member State which is not the competent State and whose legislation, pursuant to Regulation No 1408/71, is not the legislation applicable in respect of a worker, nevertheless remains free to award a family benefit to the worker concerned, such as the child benefit at issue. Accordingly, it seeks clarification of certain aspects of the ruling in *Bosmann* in which the Court, while holding that in the circumstances of that case Germany was not required to grant child benefit, noted that the Member State of residence cannot be deprived of the right to grant such a benefit to persons resident within its territory. [4]

II – Legal framework

A – *European Union ('EU') legislation*

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

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

2. Subject to Articles 14 to 17:

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

…'

5. Article 14 of Regulation No 1408/71, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', reads:

'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;

…'

4 — Case C-352/06 [2008] ECR I-3827, paragraphs 27 to 32.

6. 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;

…'

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

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

B – *National legislation*

8. In the Einkommensteuergesetz (German federal law on income tax) ('the EStG'), point 1 of Paragraph 62, which is entitled '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).'

9. So far as is relevant for present purposes, Paragraph 65 of the EStG provides as follows:

'(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. …

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

3. …

(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 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.'

III – The actions before the Bundesfinanzhof and the questions referred

A – *Case C-611/10*

10. Mr Hudzinski, a Polish national, works in Poland as a self-employed farmer and is covered by the Polish social security system.

11. From 20 August to 7 December 2007, he worked as a seasonal worker for a horticultural business in Germany.

12. Following his request to that effect, the applicant was treated as being liable to unlimited taxation of income in Germany, under Paragraph 1(3) of the EStG, for the year 2007.

13. Mr Hudzinski made a request under Paragraph 62 et seq. of the EStG for child benefit to be granted in respect of each of his two children in the amount of EUR 154.00 per month for the period during which he worked as a seasonal worker in Germany.

14. The request was refused by the Agentur für Arbeit Wesel — Familienkasse, as was a subsequent complaint. An action contesting that refusal before the Finanzgericht (Finance Court) was dismissed.

15. Mr Hudzinski therefore appealed to the referring court against the judgment of the Finanzgericht.

16. In the main action, Mr Hudzinski argues, in particular, that it follows from *Bosmann*[5] that, under Article 13 et seq. of Regulation No 1408/71, a Member State which is not the competent State under that regulation must nevertheless grant family benefit if the corresponding conditions under national law — in this case, Paragraph 62 et seq. of the EStG — are met.

17. The referring court observes in that regard that, even following *Bosmann*,[6] a Member State other than the competent State under Article 14a(1)(a) of Regulation No 1408/71 does not have the power to grant a person a family benefit under national law, unless that person would otherwise suffer a legal disadvantage as a result of exercising his right to freedom of movement — which is not, however, the position as regards Mr Hudzinski.

18. If a Member State other than the competent State did indeed have the power to grant family benefits irrespective of whether exercise of the right to freedom of movement would lead to a legal disadvantage, the referring court asks whether such power could arise even in the circumstances of the case before it, where — by contrast with the situation in *Bosmann*[7] — neither the affected worker nor even his children are domiciled or habitually resident in the territory of a Member State other than the competent State.

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

‘Is Article 14a(1)(a) of Regulation (EC) 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?’

5 — Cited in footnote 4.

6 — Cited in footnote 4.

7 — Cited in footnote 4.

B – *Case C-612/10*

20. Mr Wawrzyniak is a Polish national who lives, together with his wife and their daughter, in Poland, where he is insured for social security purposes.

21. From February to December 2006, Mr Wawrzyniak worked in Germany as a 'posted worker'. For the year 2006, he was assessed, together with his wife, as liable to pay income tax in Germany.

22. In respect of the period during which he worked in Germany, Mr Wawrzyniak requested payment of child benefit in the amount of EUR 154.00 per month, under Paragraph 62 et seq. of the EStG, for his daughter, who had been born in 2005. During that period, Mr Wawrzyniak's wife was covered in Poland by health insurance only and received child benefits in that country for their daughter at the monthly rate of PLN 48 (approximately EUR 12).

23. The Agentur für Arbeit Mönchengladbach — Familienkasse refused Mr Wawrzyniak's request for payment of child benefit under Paragraph 62 et seq. of the EStG and also the complaint made against that refusal. An action brought before the Finanzgericht (Finance Court) was likewise unsuccessful.

24. In the main proceedings, the referring court must decide on Mr Wawrzyniak's appeal on a point of law against the judgment of the Finanzgericht.

25. Like Mr Hudzinski, Mr Wawrzyniak argues in the main proceedings that, in accordance with *Bosmann*, the provisions of national law laid down in Paragraph 62 et seq. of the EStG apply to his case notwithstanding the fact that, under Article 14(1)(a) of Regulation No 1408/71, the German legislation is not the legislation applicable to him for the purposes of that regulation.

26. As in its order for reference in Case C-611/10, the Bundesfinanzhof takes the view that, according to the settled case-law of the Court of Justice, a Member State other than the competent State under Article 13 et seq. of Regulation No 1408/71 has no power to grant German child benefit even if the requirements under Paragraph 62 et seq. of the EStG are met.

27. The Bundesfinanzhof points out, in particular, that, in contrast to Mrs Bosmann's case,[8] the exercise of the right to freedom of movement by Mr Wawrzyniak did not cause him any loss of legal entitlements, as he simply remained subject to Polish legislation. In addition, Mr Wawrzyniak's place of residence, where he lives with his wife and their daughter, is in Poland.

28. The Bundesfinanzhof observes, furthermore, that if, in such circumstances, a Member State other than the competent State is not precluded from granting family benefits under national law, the question then arises as to how far recognition of that power is conditional on a finding that there is no entitlement in the competent Member State to comparable family benefits, since it has been established in the present case that, during the relevant period, an entitlement to family benefits for Mr Wawrzyniak's daughter existed under Polish law and that the relevant benefits were actually paid.

29. Moreover, if it is to be presumed that a Member State other than the competent State within the meaning of Article 13 et seq. of Regulation No 1408/71 has the power to grant family benefits in accordance with its national law, the question arises as to whether EU law precludes a provision such as that laid down in point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, whereby child allowance is not to be paid for a child where comparable child benefits are granted outside Germany. According to the Bundesfinanzhof, this question should be answered in the negative, as there is neither an infringement of the right to freedom of movement for workers nor of any prohibition of discrimination.

8 — Cited in footnote 4.

30. Lastly, if EU law should nevertheless preclude application of the provisions of the EStG referred to above, then the issue of overlapping entitlements must be resolved.

31. Against that background, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court of Justice 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 Community law or European Union 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?'

IV – Joinder of the cases

32. In view of the close connection between Case C-611/10 and Case C-612/10, those cases were joined by Order of the President of the Court of 14 February 2011 for the purposes of the written procedure, the oral procedure and the judgment.

V – Legal analysis

A – *The single question in Case C-611/10 and Questions 1 and 2 in Case C-612/10, concerning the right of a Member State other than the competent State to grant child benefit*

33. By the single question in Case C-611/10 and Questions 1 and 2 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 respectively be interpreted as precluding a Member State whose legislation is not the applicable legislation for the purposes of those provisions from granting family benefits under its national law to a worker who is only temporarily employed or posted on its territory, in circumstances such as those of the cases before the referring court, where neither the worker nor his children are habitually resident in that Member State, where the worker does not suffer any legal disadvantage as a result of exercising his right to freedom of movement and where there is, or may be, entitlement to child benefit in the competent State.

1. Main submissions of the parties

34. Written observations have been submitted by Mr Hudzinski and by Mr Wawrzyniak, and also by the Hungarian and German Governments and by the Commission. Those parties were also represented at the hearing on 6 December 2011.

35. Mr Hudzinski and Mr Wawrzyniak argue, in essence, that it follows from *Bosmann*[9] that Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 are to be interpreted as not having the effect of depriving a Member State other than the competent State of the right to provide child benefit in situations such as those in the cases before the referring court.

36. Mr Hudzinski and Mr Wawrzyniak argue that the determination of the applicable legislation under Regulation No 1408/71 does not rule out application of the domestic legislation of another Member State if the conditions laid down by its national legislation are satisfied. They point out that, according to the case-law of the Court, those coordination rules must not have the effect of depriving migrant workers of their right to social security benefits or of reducing the amount of those benefits. The coordination rules under Regulation No 1408/71 merely guarantee that the legislation of a single Member State will be designated as the applicable legislation, but are neutral as to whether in addition, above and beyond the scope of Regulation No 1408/71, a Member State may grant family benefit in accordance with its domestic law. That right of a Member State other than the competent State to grant family benefit is, moreover, not conditional upon the worker having suffered a legal disadvantage; nor is it necessary that the worker's children be habitually resident there. A different interpretation would be contrary to the principle of the freedom of movement for workers.

37. As regards the existence of an entitlement to comparable family benefits in the competent Member State, it does not appear from *Bosmann*,[10] according to Mr Hudzinski and Mr Wawrzyniak, that the Court considered the absence of such corresponding entitlements as a precondition for a Member State other than the competent State to have the right to grant family benefits. Only the national legislature would be competent to adopt rules governing such an overlap of entitlements.

38. The Hungarian Government concurs essentially with the view taken by Mr Hudzinski and Mr Wawrzyniak. It submits that even if, under Regulation No 1408/71, the German authorities are not obliged to provide family benefit to the workers concerned, it must be concluded from *Bosmann*[11] and from the objective and broad logic of Regulation No 1408/71 that those authorities are not prevented from granting such benefits in accordance with their domestic legislation. A Member State other than the competent State is, however, not required to do so under EU law.

39. By contrast, the German Government contends that those questions should be answered in the negative, that is to say, to the effect that, by virtue of Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 respectively, Germany — being the Member State which is not the competent State — is in any event prevented from granting family benefits in such situations.

40. In support of that argument, the German Government makes essentially three points. First, it refers to the wording of Article 13(1) of Regulation No 1408/71, under which persons to whom that regulation applies are to be subject to the legislation of a single Member State only. Secondly, according to the German Government, that is a fundamental principle which underlies Regulation No 1408/71 and which has been confirmed by settled case-law of the Court.

9 — Cited in footnote 4.

10 — Cited in footnote 4.

11 — Cited in footnote 4.

41. Thirdly, the circumstances of the cases before the referring court must be distinguished from those in *Bosmann*.[12] In that regard, in particular, Mrs Bosmann was resident in Germany and was accordingly entitled in principle to receive child benefit in that Member State — an entitlement which was then lost, however, when she took up employment in the Netherlands. In the present cases, Mr Hudzinski and Mr Wawrzyniak have not lost any right or entitlement owing to their temporary working activity in Germany, but have simply failed to obtain additional rights; moreover, the applicable legislation has not changed. In any event, it follows at most from *Bosmann* that Germany may grant child benefit if it chooses to do so; in the circumstances of the cases before the referring court, however, there is no entitlement under national law, as is clear from Paragraph 65(1) of the EStG.

42. The German Government emphasises, lastly, that the right to grant family benefits cannot be extended beyond what is required under the rules on the fundamental freedoms. If it were, the coordination system as established under Title II of Regulation No 1408/71 would be deprived of useful effect. That system entails neither discrimination nor restrictions for the purposes of Articles 45 and 56 TFEU. Above all, the provisions on the fundamental freedoms do not lay down a rule requiring 'application of the most favourable legislation', under which EU citizens would be free to select the legislation which is most advantageous for them. Rather, the rules laid down in Title II of Regulation No 1408/71 are designed to determine, in accordance with objective criteria, the legislation applicable, as regards social security, to an employed person who has made use of his right to freedom of movement.

43. The Commission suggests that the questions referred be answered to the effect that Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 do not require a Member State other than the competent State to provide family benefits in situations such as those under consideration.

44. The Commission points out, in particular, that the circumstances of Mr Hudzinski and Mr Wawrzyniak are substantially different from those on the basis of which the Court made its ruling in *Bosmann*.[13] Thus, by contrast with Mrs Bosmann, neither Mr Hudzinski nor Mr Wawrzyniak has lost his entitlement to child benefit in Poland; nor has either of them suffered a disadvantage because of exercising his right to freedom of movement.

45. According to the Commission, it is not wholly inconceivable that the Court might find, by analogy with specific situations envisaged by Regulation No 1408/71, that there is more than one competent State in a case such as those before the referring court and that there may also be a cumulation of benefits. However, the Commission cautions against such an approach, as this would not reflect the current legal situation under Regulation No 1408/71, or under the new Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,[14] and might thus be misleading for EU citizens.

2. Appraisal

46. It should be recalled at the outset that Title II of Regulation No 1408/71, of which Articles 14(1)(a) and 14a(1)(a) form part, contains the general rules in accordance with which the legislation applicable to an employed person who makes use, under various circumstances, of his right to freedom of movement, is to be determined.[15]

12 — Cited in footnote 4.

13 — Cited in footnote 4.

14 — OJ 2004 L 166, p. 1.

15 — See to that effect, inter alia, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 52.

47. In that regard, Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71 both constitute exceptions to the rule laid down in Article 13(2)(a) thereof, under which a worker is to be subject to the legislation of the Member State in the territory of which he is employed (rule of *lex loci laboris*), in that they provide that persons who are posted to carry out work in the territory of another Member State or who perform on a temporary basis work in the territory of another Member State are to continue to be subject to the social security legislation, respectively, of the Member State where the undertaking to which they are normally attached is established or where they are normally self-employed, instead of the corresponding legislation of the Member State in which those workers actually work during the period concerned. [16]

48. It should be noted that the premiss on which the questions referred are predicated has in essence not been disputed, namely that Mr Hudzinski comes under Article 14(1)(a) of Regulation No 1408/71 and Mr Wawrzyniak under Article 14a(1)(a) thereof, which means that the legislation of Poland is determined to be the legislation applicable, as regards the provision of child benefit, in both situations and that, consequently, Poland — not Germany — is the competent Member State for the purposes of the coordination system set up under Title II of Regulation No 1408/71.

49. The object of the single question in Case C-611/10 and of Questions 1 and 2 in Case C-612/10 is therefore limited to ascertaining whether, notwithstanding the fact that Germany is not the competent Member State, it is nevertheless — as a consequence of *Bosmann* [17] — not prevented from granting child benefit in the circumstances under consideration here.

50. In that regard, it should be recalled first of all that, according to established case-law, it is the aim of Title II of Regulation No 1408/71 to ensure that the persons concerned are 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 thus to avoid the attendant complications. That principle is expressed in Article 13(1) of Regulation No 1408/71, which provides that a worker to whom that legislation applies is to be subject to the legislation of a single Member State only. [18]

51. In *Bosmann*, reiterating the aforementioned case-law, the Court identified, on the basis of the rule of *lex loci laboris* laid down in Article 13(2)(a) of Regulation No 1408/71, the legislation of the Member State where Mrs Bosmann had taken up employment — that is to say, the Netherlands legislation — as the legislation applicable to her situation. [19]

52. Consequently, the Court concluded, in accordance with my Opinion in that case, [20] that the authorities of Germany, as the (non-competent) Member State of residence, were not required to grant Mrs Bosmann the family benefit in question. [21]

53. While stating thus clearly that, pursuant to EU law, the non-competent Member State of residence is under No obligation to grant the child benefit at issue, the Court held in the subsequent part of its judgment in *Bosmann* that that State was not prevented, however, from granting the child benefit in question pursuant to its national legislation. [22]

16 — See, to that effect, Case C-404/98 *Plum* [2002] ECR I-9379, paragraphs 14 and 15; Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraph 16; and Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 48.

17 — Cited in footnote 4.

18 — See, inter alia, *Bosmann*, cited in footnote 4, paragraph 16; Case 302/84 *Ten Holder* [1986] ECR 1821, paragraphs 19 and 20; and Case C-444/98 *de Laat* [2001] ECR I-2229, paragraph 31.

19 — See, in particular, paragraphs 16 to 19 of the judgment (cited in footnote 4).

20 — Opinion delivered on 29 November 2007 in *Bosmann*, in particular point 66 (cited in footnote 4).

21 — See paragraph 27 of the judgment.

22 — See paragraphs 28 to 33 of the judgment (cited in footnote 4).

54. That finding, implying that it is permissible to grant such a benefit, must be read — and indeed reveals its meaning — against the background of the principle enshrined in Article 13(1) of Regulation No 1408/71, mentioned above,[23] under which the system of conflict rules laid down in Title II of that regulation is intended to ensure that, as a rule, a worker is subject to the social security scheme of only one Member State, and also in the light of the effect attached, under the *Ten Holder* case-law, to the determination of the legislation of a given Member State as the legislation applicable to a worker under those rules of conflict, namely 'that only the legislation of that Member State is applicable to him'.[24]

55. In *Bosmann*, the Court apparently took the view — in light, in particular, of the general aim of Article 42 EC, on which Regulation No 1408/71 is based, namely to facilitate freedom of movement for workers, and of the objective of the coordination system established by that regulation, namely to contribute towards the improvement of the standard of living and conditions of employment of workers[25] — that the 'exclusive effect' of the rules laid down in Article 13 et seq. of Regulation No 1408/71, deriving from the 'single Member State rule' and as interpreted in the *Ten Holder* case-law, must be narrowly construed in terms of scope and meaning so that, in any event, a Member State other than the competent State cannot be prevented from granting a benefit in so far as the possibility of doing so arises under its legislation.[26]

56. The implication seems therefore to be, as Mr Hudzinski and Mr Wawrzyniak have submitted, that the provisions of Regulation No 1408/71 on the determination of the legislation applicable to workers moving within the European Union seek to guarantee that, under that system of coordination, the legislation of only one Member State is determined as being applicable to the situation of a worker, subject to specific exceptions,[27] and that, accordingly, so far as the competent Member State is concerned, competence is mandatory, although that does not imply — as the Court has also confirmed more recently in *Chamier-Glisczinski* — that Member States other than the competent State are precluded from granting 'workers and members of their family broader social protection than that arising from the application of that regulation'.[28]

57. Admittedly, however, as the referring court has correctly observed, it is not entirely clear from *Bosmann*[29] to what extent that ruling — to the effect that a Member State other than the competent State remains free to grant the family benefit in question — turned on the specific circumstances which underlay that case but which are absent from the present cases, that is to say: (i) the fact that Mrs Bosmann suffered a disadvantage as a result of the application of the Netherlands legislation (the legislation of the competent Member State of employment), under which the substantive conditions governing the grant of child benefit were less favourable than those applying under German law (the legislation of the non-competent Member State of residence); (ii) the fact that there was no entitlement at all to a comparable family benefit in the competent Member State; and, lastly, (iii) the fact that Mrs Bosmann and, in any event, her children were domiciled or habitually resident in the non-competent Member State concerned.

23 — See at point 50 above.

24 — See, in particular, *Ten Holder*, cited in footnote 18, paragraph 23; Case 60/85 *Luijten* [1986] ECR 2365, paragraph 16; see also *Bosmann*, cited in footnote 4, paragraph 17; and Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 18.

25 — See *Bosmann*, cited in footnote 4, paragraphs 29 to 31.

26 — See, to that effect, *Bosmann*, cited in footnote 4, paragraphs 32 and 33; see also Case C-208/07 *Chamier-Glisczinski* [2009] ECR I-6095, paragraphs 55 and 56.

27 — Such as in the situations envisaged by the rules on the overlapping of rights to benefits as laid down in Article 76 of Regulation No 1408/71 and Article 10 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 ('Regulation No 574/72'); see in this context also *Bosmann*, cited in footnote 4, paragraphs 20 to 22; Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraphs 43 to 48; and Case C-302/02 *Laurin Effing* [2005] ECR I-553, paragraph 39.

28 — See *Chamier-Glisczinski*, cited in footnote 26, paragraph 56.

29 — Cited in footnote 4.

58. To my mind, although the Court had to give judgment on the basis of the specific circumstances of the case, which arguably means that a different reading of the judgment is not excluded, the rationale of *Bosmann*[30] transcends those factors or conditions and clarifies in a more general fashion the relationship — as characterised above[31] — between, on the one hand, the provisions of Regulation No 1408/71 on the determination of the applicable legislation and, on the other, the possibility arising for a Member State other than the competent State to make such a grant through the application of its own legislation.

59. In that regard, I should like to underline, first of all, that — even after *Bosmann*[32] — there is nothing to suggest that the established case-law no longer represents 'good law', according to which, as a consequence of the fact that, as provided for under Article 42 EC (now Article 48 TFEU), Regulation No 1408/71 merely draws up a system of coordination, while leaving substantive and procedural differences between the social security systems unaffected, there is no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security. Rather, according to that case-law, given the disparities between the social security regimes of the various Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to the circumstances.[33]

60. In other words, as the German Government has correctly pointed out, the system put in place by Regulation No 1408/71 does not determine the law applicable on the basis of the principle that persons who live or work in two or more countries should be subject to the legislation which is most favourable to them, but by reference to objective factors such as the place of employment or residence.[34]

61. By the same token, just as the obligation of a Member State to apply its social security legislation to the situation of a particular worker, in accordance with the coordination rules under Title II of Regulation No 1408/71, is not determined by reference to an advantage or disadvantage, in terms of a right to benefits which might thereby accrue to the worker as compared with his situation if the legislation of another Member State were to apply, there is no sound reason in my opinion why, by contrast, the right of a Member State other than the competent State to grant a benefit on the basis of its own legislation should be conditional upon the fact that otherwise a disadvantage would arise — such as the disadvantage actually suffered *in casu* by Mrs Bosmann (loss of entitlement to child benefit) — as a result of the legislation of the competent Member State being applied.

62. That view is not put in question by the series of cases, to which reference was also made in the grounds of *Bosmann*,[35] in which the Court ruled that, in light of the objectives underlying Regulation No 1408/71, migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced simply because they have exercised the right to freedom of movement conferred on them by the Treaty.[36]

30 — Cited in footnote 4.

31 — See points 55 and 56 above.

32 — Cited in footnote 4.

33 — See, to that effect, inter alia, Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34, and *Hervein and Others*, cited in footnote 15, paragraphs 50 and 51.

34 — See already my Opinion in *Bosmann* (cited in footnote 4), point 65.

35 — See the reference to Case C-205/05 *Nemec* [2006] ECR I-10745 in *Bosmann* (cited in footnote 4), paragraph 29.

36 — See also as part of that line of cases, inter alia, Case C-225/10 *Perez Garcia and Others* [2011] ECR I-10111, paragraph 51; Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraph 75; and Case 100/78 *Rossi* [1979] ECR 831, paragraph 14.

63. Thus, that case-law does not establish a principle which applies across the board to the provisions of Regulation No 1408/71 and according to which exercise of the right to freedom of movement, hence the change as regards the applicable social security legislation, must never lead to a reduction or loss of the right to social security benefits. Rather, it relates to specific provisions of Regulation No 1408/71, such as Article 58(1) concerning the calculation of cash benefits on the basis of the average wage or salary, as was the case in *Nemec*,[37] referred to in *Bosmann*.[38]

64. Generally speaking, that case-law relates to situations concerning the right to receive social benefits and, in particular, their calculation in the competent Member State by reference to periods of insurance acquired or contributions made, or, more generally, it relates to rights acquired in another Member State prior to the exercise of the right to free movement and aims at ensuring that those factors constitutive of a social benefit are duly taken into account and thus not 'lost' as regards entitlement to the social benefit concerned in the competent Member State.[39]

65. Accordingly, as it is plain that *Nemec*[40] envisages a context substantially different from the circumstances of *Bosmann*,[41] it cannot be inferred from the reference to *Nemec* in paragraph 29 of *Bosmann* that the Court considered the loss of Mrs Bosmann's right to child benefit owing to the change in the applicable legislation as giving rise to the possibility for Germany, as the non-competent Member State, to grant that benefit nevertheless on the basis of its national law. Rather, in my view, the Court referred to that case-law more generally — alongside other factors such as Article 42 EC and the preamble to Regulation No 1408/71 — in order to illustrate that that regulation must be interpreted in a manner favourable to migrant workers in the sense that, as regards the question at issue in *Bosmann*, its provisions must not have the effect of depriving a Member State, even if it is not the competent State, of the right to grant workers social benefits provided for under its national legislation.[42]

66. This all leads me to conclude that a Member State other than the competent State is not wholly deprived by Regulation No 1408/71 of any possibility of granting workers and members of their family social protection above and beyond, or in addition to, the protection arising from the application of that regulation, and this holds true also in situations such as those at issue, where the worker does not, as a result of exercising his right to freedom of movement, suffer a loss or reduction as compared with the social protection previously enjoyed and where there is, or may be, entitlement to child benefit in the competent State.

67. Lastly, as far as the relevance of residence in the Member State other than the competent State is concerned, I do not think that the right of that Member State to grant social benefits is dependent as such upon that condition being fulfilled.

68. Rather, in the specific circumstances of Mrs Bosmann's case, residence or habitual residence constituted merely the relevant substantive requirements on the basis of which, pursuant to Paragraph 62(1)(1) of the German EStG, she could claim child benefit in Germany.[43]

37 — Cited in footnote 35.

38 — Cited in footnote 4.

39 — Cf. *Nemec*, cited in footnote 35, and the cases mentioned in footnote 36.

40 — Cited in footnote 35.

41 — Cited in footnote 4.

42 — To that effect, see also *Chamier-Glisczinski*, cited in footnote 26, paragraph 56.

43 — See, to that effect, *Bosmann*, cited in footnote 4, paragraphs 28 and 36.

69. However, there appears to be no objective reason why a Member State other than the competent State should, by contrast, not be allowed to grant child benefit if, as in the cases before the referring court, the entitlement to child benefit is instead based on a different connecting factor such as that of being subject, or treated as being subject, to unlimited income tax liability in Germany, as provided for under Paragraph 62(1)(2) of the EStG. The decisive point is, according to the rationale of *Bosmann*, that the entitlement to the social benefit in question arises from the legislation of the Member State which is other than the competent Member State. [44]

70. In the light of the foregoing, I propose that it be stated in answer to the single question in Case C-611/10 and to Questions 1 and 2 in Case C-612/10 that Articles 14(1)(a) and 14a(1)(a), respectively, of Regulation No 1408/71 must be interpreted as not precluding a Member State whose legislation is not the applicable legislation for the purposes of those provisions from granting family benefits under its national law to a worker who is only temporarily employed or posted on its territory in circumstances such as those at issue in the cases before the referring court, where neither the worker nor his children are habitually resident in that Member State, where the worker does not suffer any legal disadvantage as a result of exercising his right to freedom of movement and where there is, or may be, entitlement to child benefit in the competent State.

B – *Question 3 in Case C-612/10, concerning whether a provision of national law such as point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, is in conformity with EU law*

71. Question 3 in Case C-612/10 is designed to ascertain whether EU law — in particular, the Treaty rules on the fundamental freedoms, and Regulation No 1408/71 — precludes provisions of national law such as point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, which exclude entitlement to family benefits where — or, as regards the latter provision, to the extent that — a comparable benefit is paid in another Member State or would be due if an application to that effect were made.

1. Main submissions of the parties

72. Mr Hudzinski and Mr Wawrzyniak argue that EU law precludes a rule of national law under which any entitlement to a social benefit within the meaning of Regulation No 1408/71 is generally precluded where there is an entitlement to a comparable benefit in another Member State.

73. They point out, in particular, that the German provisions at issue exclude entitlement to family benefit even in cases where, pursuant to Article 13 et seq. of Regulation No 1408/71, Germany is required to grant a benefit as the competent State. Moreover, the payment of benefits is excluded even where a comparable benefit would be received if an application to that effect were made, which is contrary to the ruling of the Court in *Schwemmer*. [45]

74. The Hungarian Government takes the view, by contrast, that a Member State other than the competent State is free to exclude under its national legislation — as is the case in Paragraph 65(1) of the EStG — the provision of any complementary family benefit in cases where the person concerned is entitled to analogous or comparable family benefit in the competent State.

75. In the view of the Commission, also, a rule such as that laid down in Paragraph 65(1) of the EStG is not contrary to Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71, or to primary EU law.

44 — See, to that effect, *Bosmann*, cited in footnote 4, paragraphs 31 to 33; see also above at point 56.

45 — Cited in footnote 27.

76. The German Government emphasises that neither under Regulation No 1408/71 nor according to the rules on freedom of movement for workers is there an obligation for Germany to provide child benefit in circumstances such as those of the cases before the referring court.

2. Appraisal

77. By way of a preliminary remark, it should be noted that the background against which Question 3 has been put by the referring court is that — as emerges from the information provided by that court and as emphasised by the German Government — the statutory conditions which must be satisfied for the purposes of the grant of the child benefit in Germany are not fulfilled in the cases before the referring court in so far as they fall to be assessed under point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG.

78. Furthermore, it should be noted that — contrary to what Mr Hudzinski and Mr Wawrzyniak seem to suggest — according to the information provided by the Bundesfinanzhof in its order for reference in Case C-612/10, it is settled case-law of the German courts that, in principle, point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, does not apply in cases where Germany is required to grant family benefits pursuant to the rules laid down in Article 13 et seq. of Regulation No 1408/71.

79. That said, it should be emphasised that in the situations under consideration here, EU law does not impose an obligation on the competent German authorities to grant Mr Hudzinski or Mr Wawrzyniak the child benefit in question.

80. In that regard it should be noted, first, that, as has been explained above,[46] pursuant to the clear rules laid down in Articles 14(1)(a) and 14a(1)(a), respectively, of Regulation No 1408/71, Mr Hudzinski and Mr Wawrzyniak remained, during their temporary performance of work in Germany, subject to the legislation of their Member State of origin. In those circumstances, it is thus Poland as the competent Member State, not Germany, which is required to grant child benefit in accordance with its national legislation.

81. Secondly, there is to my mind no indication — and this has actually not been disputed in substance by the parties — that the rules on the determination of the legislation applicable, as laid down in Articles 14(1)(a) and 14a(1)(a) of Regulation No 1408/71, considered in isolation, would be incompatible with EU law, in particular with freedom of movement or the principle of equality.

82. It should suffice to point out, in that regard, that it is also apparent from the case-law of the Court that the purposes served by Article 14(1)(a) of Regulation No 1408/71 are consistent with the fundamental freedoms, in that that provision seeks to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than the State in which they are established, and in that it is aimed at overcoming obstacles likely to impede freedom of movement for workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings.[47]

83. Likewise, the Council has in my view made an appropriate choice — in performance of its task under Article 42 EC (now Article 48 TFEU) to set up a system of coordination facilitating the exercise of freedom of movement for workers and the guarantee of equal treatment — by providing in Article 14a(1)(a) of Regulation No 1408/71 that, by way of exception to the general rule, individuals who normally pursue activities as self-employed persons in a Member State are to remain subject to

46 — See points 47 and 48 above.

47 — See, to that effect, inter alia, *Plum*, cited in footnote 16, paragraphs 19 and 20, and Case C-202/97 *FTS* [2000] ECR I-883, paragraphs 28 and 29.

the legislation of that State if they perform work only on a temporary basis in another Member State, as the complications which a change in the applicable social security legislation may otherwise entail could arguably have the effect of deterring a person from taking up work in another Member State for only a relatively short period of time.

84. Thirdly, as I have explained above [48] and as the German and Hungarian Governments have rightly submitted, even if the *Bosmann* [49] rationale is applicable — as I suggest — to circumstances such as those under discussion, only the option of granting child benefit, not an obligation to do so, can be inferred from that judgment so far as Germany, as a Member State other than the competent State, is concerned.

85. Fourthly, it is appropriate to recall in this context that, according to established case-law, EU law — subject to the requirements flowing, in particular, from the Treaty provisions on the freedom of movement for workers — does not limit the power of the Member States to organise their social security schemes and that, in the absence of harmonisation at EU level, it is for the legislation of each Member State to lay down the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted. [50]

86. It follows that in so far as EU law accordingly does not require the German competent authorities to grant child benefit in the situations under consideration here, provisions of national law such as point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, which exclude wholly or in part entitlement to child benefit in those situations, cannot be regarded as contrary to EU law.

87. Lastly, Mr Hudzinski and Mr Wawrzyniak have argued that it follows from *Schwemmer* [51] that Paragraph 65(1) of the EStG is not in conformity with EU law.

88. However, that judgment concerned a very specific issue relating to the provisions for preventing the overlap of benefits, as laid down in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72. The Court held, in essence, that in the situation under consideration in that case, the right to benefits under the legislation of a Member State cannot be suspended in conformity with those provisions if, under the legislation of the other Member State concerned, there is in principle an entitlement to family benefits, but where those benefits are not actually drawn because the parent entitled to those benefits has not made an application for them. [52]

89. It is obvious that that issue, to which *Schwemmer* [53] related, bears no resemblance to the situations in the cases before the referring court.

90. Moreover, even if it were to be concluded from *Schwemmer* [54] that Paragraph 65(1) of the EStG needs to be re-interpreted in a manner consistent with EU law or not applied so far as that particular aspect is concerned (a matter for the national court to decide), it does not follow from that judgment that Paragraph 65(1) of the EStG is in general contrary to the requirements of EU law and, more specifically, as regards the situations in the cases before the referring court, and would accordingly

48 — See points 52 and 53 above.

49 — Cited in footnote 4.

50 — See, referring to Paragraph 62(1) of the EStG, Case C-247/09 *Xhymshiti* [2010] ECR I-11845, paragraph 43; see further C-507/06 *Klöppel* [2008] ECR I-943, paragraph 16; and Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33.

51 — Cited in footnote 27.

52 — See, in particular, paragraphs 44 and 59 of the judgment in *Schwemmer* (cited in footnote 27).

53 — Cited in footnote 27.

54 — Cited in footnote 27.

have to be disapplied by the national court, with the consequence that, under the substantive conditions of the EStG remaining, Mr Hudzinski and Mr Wawrzyniak could claim — in accordance with the *Bosmann*[55] principle that it is open to the non-competent Member State to grant social benefits arising from its national legislation — child benefit in Germany[56].

91. In the light of the foregoing considerations, Question 3 in Case C-612/10 should be answered to the effect that EU law and, in particular, Regulation No 1408/71 do not preclude provisions of national law, such as point 2 of Paragraph 65(1) of the EStG, read in conjunction with Paragraph 65(2) of the EStG, from being applied in situations, such as those in the cases before the referring court, in a Member State other than the competent State for the purposes of entitlement to child benefit.

C – *Question 4 in Case C-612/10, concerning the overlap of entitlements to child benefit*

92. In the event of an affirmative answer to Question 3 in Case C-612/10, the referring court wishes to know how a possible overlap between entitlements in the competent Member State and another Member State should be resolved.

93. Having regard to the answer given to Question 3 in Case C-612/10, there is no need to reply to Question 4 in that case.

VI – Conclusion

94. For the reasons given above, I propose that the questions referred by the Bundesfinanzhof (Germany) should be answered as follows:

— Article 14(1)(a) and Article 14a(1)(a), respectively, of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version resulting from 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 whose legislation is not the applicable legislation for the purposes of those provisions from granting family benefits under its national law to a worker who is only temporarily employed or posted on its territory in circumstances such as those of the cases before the referring court, where neither the worker nor his children are habitually resident in that Member State, where the worker does not suffer any legal disadvantage as a result of exercising his right to freedom of movement and where there is, or may be, entitlement to child benefit in the competent State;

— the law of the European Union and, in particular, Regulation No 1408/71 do not preclude provisions of national law, such as point 2 of Paragraph 65(1) of the Einkommensteuergesetz (German federal law on income tax) ('the EStG'), read in conjunction with Paragraph 65(2) of the EStG, from being applied, in situations such as those of the cases before the referring court, in a Member State other than the competent State for the purposes of entitlement to child benefit.

55 — Cited in footnote 4.

56 — There is no indication that the Court would regard Paragraph 65(1) of the EStG generally as not being in compliance with Union law; see to that effect only *Xhymshiti*, cited in footnote 50, paragraphs 42 to 44.