



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

6 November 2014\*

(Social security — Regulation (EEC) No 1408/71 — Family benefits — Rules governing cases of overlapping entitlements to family benefits)

In Case C-4/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 27 September 2012, received at the Court on 2 January 2013, in the proceedings

**Agentur für Arbeit Krefeld — Familienkasse**

v

**Susanne Fassbender-Firman,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Greek Government, by T. Papadopoulou, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 10 April 2014,

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 76(2) of Regulation (EEC) No 1408/71 of the Council 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

\* Language of the case: German.

amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1), ('Regulation No 1408/71').

- 2 The request has been made in proceedings between the Agentur für Arbeit Krefeld — Familienkasse (Employment Agency, Krefeld — Family Allowances Office, 'the Familienkasse') and Ms Fassbender-Firman, resident in Belgium and employed in Germany, concerning a demand for repayment of the family allowances paid to her by the Familienkasse.

## **Legal context**

### *EU law*

- 3 Under the heading 'General rules', Article 13 of Regulation No 1408/71 provides:

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

2. Subject to Articles 14 to 17:

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

...'

- 4 Article 73 of Regulation No 1408/71 provides:

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

- 5 Article 76 of Regulation No 1408/71 is worded as follows:

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

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

6 Article 10(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 160), as amended and updated by Regulation No 118/97 ('Regulation No 574/72'), provides:

'(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of [Regulation No 1408/71], up to the sum of those benefits.'

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

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

...'

7 It should be noted, on the one hand, that Regulation No 1408/71 has been replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) and, on the other, that Regulation No 574/72 has been replaced by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), those regulations having become applicable on 1 May 2010, in accordance with Article 91 of Regulation No 883/2004 and Article 97 of Regulation No 987/2009. However, given the material time of the facts at issue in the main proceedings, those facts continue to be governed by Regulation No 1408/71 and Regulation No 574/72.

#### *German law*

8 Under the heading 'Other child benefits', Paragraph 65 of the law on income tax (Einkommensteuergesetz), in the version applicable at the material time of the facts at issue in the main proceedings, provides:

'1. Family allowances shall not be paid for a child who receives one of the following benefits or who would receive such a benefit if an application to that effect were made:

- (1) allowances for dependent children provided under statutory accident insurance or financial assistance provided under statutory invalidity-old age insurance;
- (2) child benefits granted outside Germany and comparable to family allowances or to one of the benefits referred to in point 1;

...'

- 9 Under the heading ‘Other child benefits’, Paragraph 4 of the law on family allowances for dependent children (Bundeskindergeldgesetz), in the version applicable to the facts in the main proceedings, provides:

‘Family allowances shall not be paid for a child who receives one of the following benefits or who would receive such a benefit if an application to that effect were made:

- (1) allowances for dependent children provided under statutory accident insurance or financial assistance provided under statutory invalidity–old age insurance;
- (2) child benefits granted outside Germany and comparable to family allowances or to one of the benefits referred to in point 1;

...’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 10 Ms Fassbender-Firman, a German national, and her husband, a Belgian national, have one son, born in 1995. The family, which had been living in Germany, moved to Belgium in June 2006 and is now resident in that Member State. Ms Fassbender-Firman is in employment in Germany in respect of which social security contributions are payable. Her husband, previously unemployed, has since November 2006 worked for a Belgian temporary employment agency.
- 11 Ms Fassbender-Firman has always received family allowances in Germany for her child. Her husband has not applied for payment of family allowances in Belgium and has therefore not received any either.
- 12 When the Familienkasse learnt that the family had moved to Belgium it withdrew the award of family allowances to Ms Fassbender-Firman with effect from July 2006 and demanded the repayment of the family allowances paid between July 2006 and March 2007 (‘the period at issue’).
- 13 In the administrative proceedings brought by Ms Fassbender-Firman, the Familienkasse took the view that, although Ms Fassbender-Firman was entitled, under German legislation, to family allowances during the period at issue, an entitlement to such allowances existed in Belgium too. This entitlement amounted, according to the Familienkasse, to EUR 77.05 per month from July to September 2006 and EUR 78.59 per month from October 2006 to March 2007. According to the Familienkasse, pursuant to Articles 76 to 79 of Regulation No 1408/71, the entitlement to German family allowances had to be suspended up to the amount of the Belgian family allowances, and only the difference between the respective entitlements in Germany and Belgium could be paid. The Familienkasse stated that it was irrelevant in the light of Article 76(2) of Regulation No 1408/71 that no application had been made for the family allowances provided for in Belgium. That provision was specifically intended to prevent the system of competences established by Regulation No 1408/71 from being circumvented by an insured person refraining from making an application for family allowances.
- 14 The Finanzgericht (Finance Court), before which Ms Fassbender-Firman brought her action, ruled that the Familienkasse’s decision to withdraw the award and recover the family allowances was unlawful.
- 15 The Finanzgericht held that, while under the relevant rules, the circumstantial conditions for German family allowances being paid in part only were indeed satisfied, the Familienkasse had not exercised the discretion accorded it by Article 76(2) of Regulation No 1408/71, that provision being the relevant anti-overlapping provision in the case at issue, in that the entitlements concerned arose from more than one employment. The Familienkasse had wrongly felt obliged to deduct the Belgian family allowances and had therefore acted unlawfully.

- 16 According to the Finanzgericht, the decision to deduct from the amount of the German family allowances the amount of the allowances that would have been awarded in Belgium falls, in accordance with Article 76, paragraph 2 of Regulation No 1408/71, within the discretionary power of the authorities. The Finanzgericht accordingly considered that the Familienkasse, in such a situation, was not exercising a circumscribed power.
- 17 By its appeal brought on a point of law against the judgment of the Finanzgericht, the Familienkasse claims that Article 76(2) of Regulation No 1408/71 must not be construed as conferring a discretionary power, for the purposes of German tax and social law, on the authorities when they assess the legal inferences they draw from the facts. Article 76(1) of Regulation No 1408/71 contains the basic rules that make it possible to resolve problems of overlapping entitlements to family benefits. It follows from those rules that entitlement to German family allowances is suspended up to the amount of the family allowances that Ms Fassbender-Firman may claim in the Member State of residence, insofar as the payment of such benefits is provided for in the case of employment. In other words, entitlement to family benefits admittedly exists in principle, but it is not necessarily exercised in practice. Even though this is a right that does not have to be exercised, suspension comes about automatically.
- 18 On that basis, the Familienkasse considers that the expression ‘may’, used in Article 76(2) of Regulation No 1408/71, which makes it possible for the provisions of Article 76(1) to be applied, cannot be interpreted as conferring discretion on the administrative authority and that it simply means that the Member State in which the benefit is suspended need henceforth award only that part of the family benefits that is its responsibility, even when no application has been made for family benefits in the family’s Member State of residence.
- 19 The Familienkasse adds that Article 76(2) of Regulation No 1408/71 makes it possible to prevent, for reasons of fairness in the division of the burden of family benefits, the person entitled to family benefits from being able to decide, by applying or not applying for family benefits, which Member State is to bear the burden of paying those benefits.
- 20 Ms Fassbender-Firman, on the other hand, considers the ruling by the Finanzgericht to be correct. She deduces from the wording of Article 76(2) of Regulation No 1408/71 that it falls within the discretion of the administrative authorities of a Member State to decide whether or not to deduct from the family benefits it awards the amount of the benefits that would be paid by another Member State. In the exercise of that discretion, account ought to be taken of the right not to accept that a potential beneficiary of family benefits should be able to decide which Member State is to pay those benefits.
- 21 According to the referring court, the effect of Article 76(2) of Regulation No 1408/71 is to confer on the competent institution the power to decide whether or not to apply Article 76(1) of that regulation when no application for benefits has been made in the Member State of residence of the members of a migrant worker’s family and therefore to suspend, wholly or in part, the entitlement to the family benefits payable by that institution.
- 22 The referring court is of the opinion that the notion of ‘benefits provided for’ in Article 76(1) of Regulation No 1408/71 does not cover the case of benefits that have not been applied for. Article 76(2) is a special rule covering the specific case in which the potential recipient of benefits has refrained from making an application for benefits, as is apparent not least from the drafting history of the provision. By inserting paragraph 2 into Article 76 of Regulation No 1408/71, the EU legislature intended to respond to the previous case-law of the Court of Justice (judgments in *Salzano*, C-191/83, EU:C:1984:343; *Ferraioli*, C-153/84, EU:C:1986:168; and *Kracht*, C-117/89, EU:C:1990:279), according to which, if an application for benefits has not been made in the Member State of residence of the members of a migrant worker’s family, the entitlement to family benefits in that worker’s Member State of employment is not to be suspended.



- 23 The referring court states that it has previously dealt with the question of the discretion conferred by Article 76(2) of Regulation No 1408/71 in the case giving rise to the judgment in *Schwemmer* (C-16/09, EU:C: 2010: 605), although the Court of Justice was not, however, required to examine that question in its judgment.
- 24 The referring court also explains that, in German legal language, the use of the expression ‘may’ in legislation does not necessarily mean that discretion is conferred on the administrative authority, for the legislature sometimes uses that term as a synonym for ‘is empowered to’ or ‘is entitled to’. That court considers, however that nothing falling within the ambit of Article 76(2) of Regulation No 1408/71 as a rule of priority in cases of overlapping entitlements supports such an interpretation. Moreover, although the criteria that could be applied to the exercise of discretion are not defined, the fact that the interpretation of Article 76 of Regulation No 1408/71 suggests several potentially applicable criteria could indicate that this is indeed a provision conferring discretion on the administrative authorities.
- 25 The referring court considers that, if Article 76(2) of Regulation No 1408/71 confers on the competent institution the power to decide whether or not to apply Article 76(1) of Regulation No 1408/71 when no application for benefits has been made in the Member State of residence, the considerations on which that institution must base its decision have to be defined. It adds that, in such a case, the question also arises of the extent of the judicial review of such a decision that may be made.
- 26 It was in those circumstances that the Bundesfinanzhof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Must Article 76(2) of Regulation No 1408/71 be interpreted to the effect that the competent institution of the Member State of employment enjoys discretion in applying Article 76(1) of Regulation No 1408/71 if no application for benefits has been made in the Member State of residence of the members of the family?
- (2) If the first question is answered in the affirmative, on the basis of what discretionary considerations may the institution competent for family benefits in the Member State of employment apply Article 76(1) of Regulation No 1408/71 as if benefits had been granted in the Member State of residence of the members of the family?
- (3) If the first question is answered in the affirmative, to what extent is the discretionary decision by the competent institution subject to judicial review?’

## **The questions referred for a preliminary ruling**

### *The first question*

- 27 By its first question, the referring court asks in essence whether, on a proper construction of Article 76(2) of Regulation No 1408/71, the competent institution of the Member State of employment of a migrant worker enjoys discretion regarding the application of the rule against overlapping laid down in Article 76(1) of that regulation when no application has been made for family benefits in the Member State of residence of the members of that worker’s family.

### *Preliminary observations*

- 28 It should be recalled, at the outset, that while Article 73 of Regulation No 1408/71 provides that a worker subject to the legislation of a Member State is 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, that provision, albeit a general rule governing family benefits, is not however an absolute rule (see judgments in *Schwemmer*, EU:C:2010:605, paragraphs 41 and 42, and *Wiering*, C-347/12, EU:C:2014:300, paragraph 40).

- 29 Accordingly, when there is a risk that rights under the legislation of the Member State of residence will overlap with rights under the legislation of the Member State of employment, Article 73 of that regulation must be considered in the light of the rules against overlapping in the latter and in Regulation No 574/72, in particular Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72 (see judgments in *Schwemmer*, EU:C:2010:605, paragraph 43, and *Wiering*, EU:C:2014:300, paragraph 42).
- 30 As its heading indicates, Article 76 of Regulation No 1408/71 contains '[r]ules on priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family'. It is clear from its terms that that article is intended to resolve questions relating to the overlapping of rights to family benefits payable under, on the one hand, in particular, Article 73 of that regulation and, on the other, the national legislation of the State of residence of family members conferring entitlement to family benefits by reason of carrying on an occupation (see judgments in *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364, paragraph 53, and *Schwemmer*, EU:C:2010:605, paragraph 45).
- 31 In the case in the main proceedings, in accordance with Article 73 of Regulation No 1408/71, Ms Fassbender-Firman was entitled in Germany, during the period at issue, to the payment of family allowances for her son. Furthermore, it is clear from the order for reference that, during that period and for the same child, her husband was also entitled to such allowances in Belgium by reason of carrying on an occupation, initially, on account of his status as an unemployed worker receiving benefits and, subsequently, by reason of his carrying on an occupation in that Member State.
- 32 It follows from the above that Article 76 of Regulation No 1408/71 applies to the facts of a case such as that in issue in the main proceedings.
- 33 According to the rule against overlapping laid down in Article 76(1) of Regulation No 1408/71, where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State of residence, entitlement to the family benefits due, pursuant to Article 73 of Regulation No 1408/71, in accordance with the legislation of the Member State where the migrant worker is employed, is to be suspended up to the amount provided for in the legislation of the Member State of residence.
- 34 In the case in the main proceedings, in accordance with that rule, entitlement to family allowances payable to Ms Fassbender-Firman under German law is thus, in principle, to be suspended up to the amount of family allowances provided for in the Belgian legislation.
- 35 However, it appears from the order for reference that Ms Fassbender-Firman's husband had neither applied for nor received family allowances in Belgium.
- 36 Article 76(2) of Regulation No 1408/71 provides that if an application for benefits is not made in the Member State in whose territory the members of the family are residing, the competent institution of the Member State of employment may apply the provisions of paragraph 1 of that article as if benefits were granted in the Member State of residence.
- 37 The Court has held that the purpose of the latter provision is to enable the Member State of employment to suspend the entitlement to family benefits, even if no application for the payment of benefits has been made in the Member State of residence and, consequently, no payment has been made by that Member State (judgments in *Schwemmer*, EU:C:2010:605, paragraph 56 and *Pérez García and Others*, C-225/10, EU:C:2011:678, paragraph 49).

- 38 Although the Court had ruled, before paragraph 2 was added to Article 76 of Regulation No 1408/71 by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), that there is no suspension of the entitlement to family benefits payable in the country of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family benefits for the children on the ground that not all the conditions laid down in the legislation of that Member State for the actual receipt of such benefits, including the condition that they must first be applied for, are satisfied (judgments in *Salzano*, EU:C:1984:343, paragraph 11; *Ferraioli*, EU:C:1986:168, paragraph 15, and *Kracht*, EU:C:1990:279, paragraph 11), the effect of that amendment to Article 76 of Regulation No 1408/71 is to allow suspension of entitlement to the family benefits provided under Article 76(1) of that regulation, even when an application has not been made for benefits in the Member State of residence.
- 39 In the light of the wording of Article 76(2) of Regulation No 1408/71, according to which ‘the competent institution’ of the Member State of employment ‘may’ apply the provisions of Article 76(1) of Regulation No 1408/71, it is therefore necessary to determine whether, as claimed by Ms Fassbender-Firman before the referring court, an institution such as that concerned in the case in the main proceedings, namely, the Familienkasse, enjoys discretion when it decides, no application for family benefits having been made in the Member State of residence, to suspend the entitlement to family benefits payable under the legislation of the Member State of employment up to the amount provided for in the legislation of the Member State of residence.

The Court’s answer

- 40 It is clear from the wording of Article 76(2) of Regulation No 1408/71 that that regulation does not require the suspension of the entitlement to the family benefits payable in accordance with the legislation of Member State of employment up to the amount provided for in the legislation of the Member State of residence, but that it authorises such suspension.
- 41 As pointed out by the Advocate General in points 48 and 49 of his Opinion, Article 76(2) of Regulation No 1408/71 makes it permissible, even when there is no actual overlapping of family benefits, for a migrant worker or the members of his family to be deprived of family benefits awarded under the legislation of a Member State, with the consequence that he or they could receive an amount of family benefits less than that provided for by the legislation both of the Member State of employment and of the Member State of residence of the members of the family. Given its effects, such a provision must be interpreted strictly.
- 42 In that context, it should be borne in mind that, according to settled case-law, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual, discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see the judgment in *Lachheb*, C-177/12, EU:C:2013:689, paragraph 30 and the case-law cited).
- 43 The requirement that a family benefit is to be awarded on the basis of a legally defined position means that the conditions governing not only its award, but also, where appropriate, its suspension are to be defined in the legislation of the Member States, in this case, the legislation of the Member State of employment.
- 44 It is a requirement of the principles of legal certainty and of transparency that migrant workers and their family members should have the benefit of a clear precise legal situation enabling them to ascertain not only the full extent of their rights but also, as the case may be, the limitations of those rights (see, by analogy, judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraphs 58 and 59).



- 45 Therefore, as the European Commission argued in its written observations, the entitlement to family benefits of the persons affiliated to a competent institution is not to be dependent on that institution's discretion.
- 46 It must accordingly be held that Article 76(2) of Regulation No 1408/71 authorises the Member State of employment to make provision in its legislation for suspension by the competent institution of the entitlement to family benefits when no application has been made for benefits in the Member State of residence. In such circumstances, the institution does not have discretion as regards the application, under Article 76(2) of that regulation, of the rule against overlapping laid down in Article 76(1) of Regulation No 1408/71, but is bound to apply the latter rule if such application is provided for by the legislation of the Member State of employment and if the conditions laid down by that legislation for that application are met.
- 47 In the present case, subject to the determinations to be made by the referring court, it is clear from the written response of the German Government to a question asked by the Court that suspension of entitlement to family benefits, when no application is made for family benefits in the Member State of residence, is provided for by German law, namely, Paragraph 65 of the law on income tax, in the version applicable to the facts in the main proceedings and Paragraph 4 of the Law on family allowances for dependent children, in the version applicable to the facts in the main proceedings, which have been interpreted and applied consistently with EU law following the judgment in *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10, EU:C:2012:339), so that, where applicable, any difference between the German family allowances and the family allowances awarded by another Member State is always paid.
- 48 In such a case, an institution such as that concerned in the main proceedings must suspend the entitlement to family benefits payable under the legislation of the Member State of employment up to the amount provided for in the legislation of the Member State of residence.
- 49 In the light of all the foregoing considerations, the answer to the first question is that Article 76(2) of Regulation No 1408/71 must be interpreted as authorising the Member State of employment to provide in its legislation for suspension by the competent institution of entitlement to family benefits when no application has been made for family benefits in the Member State of residence. In such circumstances, if the Member State of employment provides for such suspension of entitlement to family benefits in its national legislation, the competent institution is bound to apply that suspension in accordance with Article 76(2) of Regulation No 1408/71, provided that the conditions for the application of that legislation are met, and has no discretion in that regard.

### *The second and third questions*

- 50 In view of the answer given to the first question, there is no need to answer the second and third questions.

### **Costs**

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

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

**Article 76(2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be interpreted as authorising the Member State of employment to provide in its legislation for suspension by the competent institution of entitlement to family benefits when no application has been made for family benefits in the Member State of residence. In such circumstances, if the Member State of employment provides for such suspension of entitlement to family benefits in its national legislation, the competent institution is bound to apply that suspension in accordance with Article 76(2) of Regulation No 1408/71, provided that the conditions for the application of that legislation are met, and has no discretion in that regard.**

[Signatures]