Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 September 2019*

(References for a preliminary ruling — Social security for migrant workers — Regulation (EEC) No 1408/71 — Article 13 — Applicable law — Resident of a Member State falling within the scope of Regulation (EEC) No 1408/71 — Allowances under the old-age pension or child benefit schemes — Member State of residence and Member State of employment — Refusal)

In Joined Cases C-95/18 and C-96/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court, the Netherlands), made by decisions of 2 February 2018, received at the Court on 9 February 2018, in the proceedings

Sociale Verzekeringsbank

v

F. van den Berg (C-95/18),

H.D. Giesen (C-95/18),

C.E. Franzen (C-96/18),

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Jürimäe (Rapporteur), D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 January 2019,

after considering the observations submitted on behalf of:

– the Sociale Verzekeringsbank, by H. van der Most and N. Abdoelbasier,

– F. van den Berg, by E.C. Spiering,

– the Netherlands Government, by M.K. Bulterman, H.S. Gijzen and L. Noort, acting as Agents,

– the Czech Government, by M. Smolek, J. Pavliš and J. Vláčil, acting as Agents,

* Language of the case: Dutch.

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, L. Zettergren and A. Alriksson, acting as Agents,

– the European Commission, by M. van Beek and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 March 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 45 and 48 TFEU, and of Articles 13 and 17 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, in its version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71').

2 The requests have been made in proceedings between the Sociale Verzekeringsbank (social security fund, the Netherlands; the 'SVB'), on the one hand, and Mr F. van den Berg, Mr H.D. Giesen and Ms C.E. Franzen, on the other, concerning the decisions by the SVB reducing the old-age pension and partner allowance granted to Mr van den Berg and Mr Giesen, respectively, and refusing to grant child benefit to Ms Franzen.

Legal context

European Union law

3 The first, the fourth to sixth and the eighth to eleventh recitals of Regulation No 1408/71 read as follows:

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

…

Whereas it is necessary to respect the special characteristics of national social security legislations and to draw up only a system of coordination;

Whereas it is necessary, within the framework of that coordination, to guarantee within the [European Union] equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors;

Whereas the provisions for coordination must guarantee that workers moving within the [European Union] and their dependants and their survivors retain the rights and the advantages acquired and in the course of being acquired;

…

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

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

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

Whereas in certain situations which justify other criteria of applicability, it is possible to derogate from this general rule.'

4 Article 1 of that regulation provides:

'For the purpose of this Regulation:

(a) employed person and self-employed person mean respectively:
   (i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;
   (ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population if such person:

   – can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

   – failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

…'

5 Article 2(1) of that regulation, entitled 'Persons covered', states:

'This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

6 Under Article 4(1) of that regulation:

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

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.'

7 Title II of Regulation No 1408/71, entitled 'Determination of the legislation applicable', contains Article 13, which 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;

…

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

8 Under Article 17 of that regulation:

'Two or more Member States, the competent authorities of these States or the bodies designated by these authorities may by common agreement provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain categories of persons or of certain persons.'

Netherlands law

The AOW

9 Under Article 2 of the Algemene Ouderdomswet (General Law on Old-Age Pensions) of 31 May 1956 (Stb. 1956, No 281; 'the AOW'), a 'resident' within the meaning of that law is a person living in the Netherlands.

10 Article 3(1) of the AOW provides that the place where a person lives is to be determined according to the circumstances.

11 Under Article 6(1)(a) of the AOW, insured persons, pursuant to the provisions of that law, are persons who have not yet reached retirement age and who are residents. Article 6(3) provides that, by derogation from paragraphs 1 and 2 of that article, the categories of persons insured may be extended or restricted by or under a general administrative regulation.

12 The Law of 29 April 1998 (Stb. 1998, No 267) added an Article 6a to the AOW, applicable retroactively from 1 January 1989, according to which:

'If necessary, by derogation from Article 6 of the AOW and the provisions based thereon,

(a) persons shall be considered to be insured persons if their insurance, on the basis of this law, results from the application of the provisions of a treaty or convention or a decision of an organisation of public international law;

(b) persons shall not be considered to be insured persons if, by virtue of a treaty or convention or a decision of an organisation of public international law, the legislation of another State applies to them.'

13 Article 13(1)(a) of the AOW provides that a reduction of 2% is to be applied to the pension amounts for every calendar year during which the person entitled to the pension was not insured after the age of 15 years but before the age of 65 years.

14 Article 13(2)(a) provides that a reduction of 2% is to be applied to the gross benefit payable for every calendar year during which the spouse of the person entitled to the pension was not insured after the person entitled to the pension had reached the age of 15 years but before that person had reached the age of 65 years.

15 Under the first sentence of Article 45(1) of the AOW, as it was worded on 1 April 1985, insured persons or previously insured persons are entitled, as appropriate, subject to the conditions and in accordance with the rate to be determined by general administrative regulation, to make contributions during periods after their 15th birthday but prior to their 65th birthday in respect of which they are not insured or were not insured.

16 Under that same provision, as it was worded on 1 January 1990, insured persons or previously insured persons were entitled to be insured voluntarily, as appropriate, subject to the conditions and in accordance with the rate to be determined by general administrative regulation or by the provisions implementing that regulation, during periods after their 15th birthday but prior to their 65th birthday in respect of which they are not insured or were not insured.

The AKW

17 Article 2 and Article 3(1) of the Algemene Kinderbijslagwet (General Law on Child Benefits) of 26 April 1962 (Stb. 1962, No 160; 'the AKW') are identical in content to Article 2 and Article 3(1) of the AOW.

18 Under Article 6(1)(a) of the AKW, persons who are insured, in accordance with the provisions of that law, are persons with the status of residents.

19 Article 6a(b) of the AKW, in its version applicable in the main proceedings, provides that, if necessary by derogation from Article 6 of the AKW and the provisions based thereon, persons will not be considered to be insured persons if, by virtue of a treaty or convention or a decision of an organisation of public international law, the legislation of another State applies to them.

The decrees extending and restricting the category of persons insured under national insurance

20 In the course of the period spanned by the cases in the main proceedings, a number of successive versions of the Besluit uitbreiding en beperking kring verzekerden volksverzekeringen (Decree on the extension and restriction of the categories of persons insured under national insurance) were adopted under Article 6(3) of the AOW and Article 6(3) of the AKW. As a result, the successive decrees of 19 October 1976 (Stb. 557; 'the 1976 BUB'), 3 May 1989 (Stb. 164; 'the 1989 BUB') and 24 December 1998 (Stb. 746; 'the 1999 BUB') are applicable to the circumstances at issue in the main proceedings.

21 Under Article 2(1)(a) of the 1976 BUB, the following persons are not 'insured' within the meaning of the AOW, in particular: residents who are engaged in gainful employment outside the Netherlands and who, with regard to that employment, are insured under a foreign statutory scheme for old age and death benefits, and child benefits in force in the country in which they work.

22 The 1976 BUB was replaced by the 1989 BUB, Article 10(1) of which, in the version applicable from 1 July 1989 to 1 January 1992, provided that 'the following persons are not insured under the social security scheme: residents who work exclusively outside the Netherlands'. In respect of the period from 1 January 1992 to 1 January 1997, that same provision of the 1989 BUB provided that 'the following persons are not insured under the social security scheme: residents who, for a continuous period of at least 3 months, are employed exclusively outside the Netherlands'. According to the wording applicable from 1 January 1997 to 1 January 1999, Article 10(1) of the 1989 BUB provided that 'the following persons are not insured under the social security scheme: residents who, for a continuous period of at least 3 months, are employed exclusively outside the Netherlands, unless that work is carried out by virtue of an employment relationship with an employer who lives or is established in the Netherlands'.

23 On 1 January 1999, the 1989 BUB was replaced by the 1999 BUB. Article 12 of the latter provides that 'the following persons are not insured under the social security scheme: persons who, for a continuous period of at least 3 months, work exclusively outside the Netherlands, unless that work is carried out exclusively by virtue of an employment relationship with an employer who lives or is established in the Netherlands'.

24 The 1989 BUB and the 1999 BUB both contained a hardship clause, in Articles 25 and 24, respectively, which enabled the SVB, within the framework laid down by the 1989 BUB, to derogate in certain cases from the other provisions of that decree in order to remedy an unacceptable degree of unfairness which might arise from the insurance obligation or the exclusion therefrom by virtue of that decree, or within the framework of the 1999 BUB, not to apply articles of that decree or even to derogate from them to the extent that their application, in the light of the importance of the extension and restriction to categories of insured persons, leads to an unacceptable degree of unfairness arising exclusively from the insurance obligation or the exclusion therefrom by virtue of that second decree.

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

25 The defendants in the main proceedings are all Netherlands nationals and are resident in the Netherlands.

Case C-95/18

26 Mr Giesen's wife worked in Germany in 1970 and again from 19 May 1988 to 12 May 1993 as a 'geringfügig Beschäftigte', that is to say, a person in marginal employment. More specifically, she was a sales assistant in a clothing store and worked under an on-call contract for an equivalent number of hours not exceeding 2 or 3 days each month.

27 On 22 September 2006, Mr Giesen submitted an application for an old-age pension and a partner's allowance under the AOW, which the SVB granted by decision of 3 October 2007. However, the partner's allowance was reduced by 16% given that, during the period when she had been working in Germany, Mr Giesen's wife had not been insured under the social insurance system in the Netherlands. Mr Giesen filed a complaint against that decision objecting to the reduction of that allowance. By decision of 20 May 2008, that complaint was dismissed as unfounded.

28 By judgment of 13 October 2008, the Rechtbank Roermond (District Court, Roermond, the Netherlands) declared Mr Giesen's action against the decision to be unfounded.

29 Mr van den Berg had worked for short periods in Germany between 25 June and 24 July 1972 and between 1 January 1990 and 31 December 1994. As his earnings were insufficient, he was not required to pay contributions in Germany. On 17 January 2008, Mr van den Berg applied for an old-age pension under the AOW. By decision of 1 August 2008, the SVB awarded him that pension, but with a 14% reduction taking into account the fact that, for more than 7 years, Mr van den Berg had not been insured in the Netherlands. By decision of 25 November 2008, his complaint against that decision was upheld in part and the reduction set at 10%.

30 By judgment of 19 October 2009, the Rechtbank Maastricht (District Court, Maastricht, the Netherlands) declared the action against the decision of 25 November 2008 to be unfounded.

Case C-96/18

31 Ms Franzen was in receipt of child benefit in the Netherlands under the AKW for her daughter born in 1995, whom she was bringing up alone. In November 2002, she informed the SVB that, since 1 January 2001, she had been working in Germany for 20 hours per week as a hairdresser. Since Ms Franzen's earnings from that work were very low, she had only been registered for the mandatory Unfallversicherung (German statutory occupational accident scheme), and was not entitled to cover under any other German social security scheme. By decision of 25 February 2003, the SVB withdrew her child benefit with effect from 1 October 2002.

32 By letter dated 21 September 2003, Ms Franzen applied under Article 24 of the 1999 BUB for her exclusion from social protection to be lifted. By decision of 15 March 2004, the SVB rejected that application on the ground that Ms Franzen was not insured either under EU law or under Netherlands law. However, the SVB notes that in its notification of the decision, it had suggested that Ms Franzen apply to the competent German institution to make her subject exclusively to Netherlands legislation under Article 17 of Regulation No 1408/71. Ms Franzen did not act on that suggestion.

33 On 30 January 2006, Ms Franzen applied for child benefit again, which the SVB granted to her by decision of 27 March 2006, with effect from the first quarter of 2006.

34 By letter dated 5 June 2007, Ms Franzen applied to have that child benefit backdated to the fourth quarter of 2002. By decision of 5 July 2007, the SVB determined that, as of the first quarter of 2006, Ms Franzen was no longer entitled to claim child benefit, but decided not to recover the amount paid in error. By decision of 16 November 2007, the complaint lodged by Ms Franzen against that decision of 5 July 2007 was declared unfounded and her application of 5 June 2007 for a review of that decision was rejected.

35 On 6 February 2008, while Ms Franzen's appeal against that rejection was still pending before the Rechtbank Maastricht (District Court, Maastricht), the SVB adopted a new decision amending the grounds for its decision of 16 November 2007, stating that the requests for child benefit had been rejected on the ground that, under Article 13(2) of Regulation No 1408/71, only German legislation applied to Ms Franzen, thereby precluding the application of Netherlands social insurance schemes.

36 By judgment of 5 August 2008, the Rechtbank Maastricht (District Court, Maastricht) declared the actions brought by Ms Franzen against the decisions of the SVB of 16 November 2007 and 6 February 2008 to be unfounded.

Considerations generally applicable to all three cases

37 Mr van der Berg, Mr Giesen and Ms Franzen appealed against the judgments of the Rechtbank Maastricht (District Court, Maastricht) and the Rechtbank Roermond (District Court, Roermond) before the Centrale Raad van Beroep (Court of Appeal on Social Security and the Public Service, the Netherlands). The latter court decided to stay the proceedings and refer questions to the Court of Justice for a preliminary ruling on the interpretation of Article 13 of Regulation No 1408/71 and Articles 45 and 48 TFEU in order to determine whether EU law precludes the exclusion of Mr van den Berg, Mr Giesen and Ms Franzen from the Netherlands social security system for the periods at issue in this case.

38 In the judgment of 23 April 2015, *Franzen and Others* (C-382/13, EU:C:2015:261), the Court held that Article 13(2)(a) of Regulation No 1408/71, read in conjunction with Article 13(1) of that regulation, must be interpreted, in circumstances such as those in the main proceedings, as not precluding a migrant worker, who is subject to the legislation of the Member State of employment, from receiving, by virtue of national legislation of the Member State of residence, an old-age pension and family benefits from the latter State.

39 On 6 June 2016, the Centrale Raad van Beroep (Court of Appeal on Social Security and the Public Service) delivered two judgments, one concerning Mr van den Berg and Mr Giesen and the other concerning Ms Franzen, in which it interpreted the judgment of 23 April 2015, *Franzen and Others* (C-382/13, EU:C:2015:261), as permitting an exception from the principle of a single applicable legislation in social security matters under Article 13 of Regulation No 1408/71 in cases such as those of Mr van den Berg and Mr Giesen and that of Ms Franzen. That court therefore applied the hardship clauses provided for in Article 25 of the 1989 BUB and Article 24 of the 1999 BUB, in order to exclude the application of Article 6a(b) of the AOW and Article 6a(b) of the AKW and granted the applicants' claims in both sets of proceedings.

40 The SVB filed an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court, the Netherlands), the referring court in the main proceedings, against the judgments of the Centrale Raad van Beroep (Court of Appeal on Social Security and the Public Service).

41 The referring court is of the view that it is impossible, on the basis of the judgment of 23 April 2015, *Franzen and Others* (C-382/13, EU:C:2015:261), to determine, without having a reasonable doubt, whether in circumstances such as those at issue in the main proceedings, EU law not only allows, but actually requires the disapplication of a national law providing for the exclusion of a resident of the Netherlands from the social insurance scheme of that Member State if that person works in another Member State and is subject to the social security legislation of that other Member State on the basis of Article 13 of Regulation No 1408/71.

42 The Hoge Raad der Nederlanden (Supreme Court, the Netherlands) therefore decided to stay the proceedings in cases C-95/18 and C-96/18 and to refer the following questions to the Court of Justice for a preliminary ruling:

– In Case C-95/18:

'(1) (a) Must Articles 45 and 48 TFEU be interpreted as meaning that, in cases such as those at issue here, those provisions preclude a national rule such as Article 6a, introductory sentence and (b), of the AOW? That rule means that a resident of the Netherlands is not insured for

purposes of the social security scheme of that State of residence if that resident works in another Member State and is subject to the social security legislation of the State of employment under Article 13 of Regulation No 1408/71. The present cases are characterised by the fact that, on the basis of the legislation of the State of employment, the persons concerned do not qualify for an old-age pension because of the limited scope of their work there.

(b) For the purpose of the answer to Question 1(a), is it significant that, for a resident of a State of residence which, under Article 13 of Regulation No 1408/71 is not the competent State, there is no obligation to pay contributions under the social security schemes of that State of residence? For the periods during which that resident works in another Member State, he comes exclusively under the social security system of the State of employment under [Article 13], and in such a case Netherlands national legislation does not provide for an obligation to pay contributions either.

(2) For the purpose of the answer to Question 1, is it significant that the possibility existed for the parties concerned to take out voluntary insurance under the AOW, or that the possibility existed for them to request that the SVB conclude an agreement as referred to in Article 17 of Regulation No 1408/71?

(3) Does Article 13 of Regulation No 1408/71 preclude someone such as Mr Giesen's wife, who, prior to 1 January 1989, on the basis solely of the national legislation in her country of residence, namely the Netherlands, was insured under the AOW, from acquiring an entitlement to old-age benefits on the basis of that insurance, in relation to periods during which, under that provision of [that] regulation, she was subject, by reason of work carried out in another Member State, to the legislation of that Member State of employment? Or must entitlement to a benefit under the AOW be regarded as an entitlement to a benefit which, under national legislation, is not subject to conditions relating to paid employment or to insurance within the meaning of the [judgment of 20 May 2008, *Bosmann* (C-352/06, EU:C:2008:290)], with the result that the line of reasoning followed in that judgment can be applied in her case?'

– In Case C-96/18:

'(1) Must Articles 45 and 48 TFEU be interpreted as meaning that, in a case such as that in the main proceedings, those provisions preclude a national rule such as Article 6a, introductory sentence and (b) of the AKW? That rule means that a resident of the Netherlands is not insured for the purposes of the social security scheme of that State of residence if that resident works in another Member State and is subject to the social security legislation of the State of employment under Article 13 of Regulation No 1408/71. The present case is characterised by the fact that, on the basis of the legislation of the State of employment, the interested party does not qualify for child benefit because of the limited scope of her work there.

(2) For the purposes of the answer to Question 1, is it significant that the possibility existed for the interested party to request the SVB to conclude an agreement as referred to in Article 17 of Regulation No 1408/71?'

43 Cases C-95/18 and C-96/18 were joined for the purposes of the written and oral procedure and of the judgment by decision of the President of the Court of 12 March 2018.

Consideration of the questions referred

Admissibility of the request for a preliminary ruling in Case C-95/18

44 In his written observations, Mr van den Berg argues that the request for a preliminary ruling in case C-95/18 is inadmissible on the ground that an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court, the Netherlands) may only be brought in respect of a finite list of provisions that do not include Article 6a of the AOW. The referring court therefore should not have examined the substance of the case, and hence does not have jurisdiction to refer the questions to the Court for a preliminary ruling.

45 In that regard, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

46 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

47 In that regard, the Court has consistently held that under the procedure provided for in Article 267 TFEU, it is not for the Court to determine whether the decision referred to it was taken in accordance with the rules of national law governing the organisation of the courts and legal proceedings (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 26 and the case-law cited).

48 Mr van den Berg's arguments are therefore not sufficient to rebut the presumption of relevance mentioned in paragraph 46 above. It follows that the request for a preliminary ruling in Case C-95/18 is admissible.

The first and second questions in Cases C-95/18 and C-96/18

49 By its first and second questions in cases C-95/18 and C-96/18, which should be examined together, the referring court asks, in essence, whether Articles 45 and 48 TFEU must be interpreted as precluding a law of a Member State under which a migrant worker residing in that Member State, who is subject to the social security legislation of the Member State of employment under Article 13 of Regulation No 1408/71, is not insured for the purposes of the social security scheme of that Member State of residence, despite the fact that the legislation of the Member State of employment does not confer on that worker any entitlement to an old-age pension or child benefit.

50 To answer those questions, it should be recalled that in order to ensure free movement of workers within the European Union, while upholding the principle of equal treatment of those persons under the various measures of national legislation, Title II of Regulation No 1408/71 has established a system of coordination concerning, inter alia, the determination of the legislation applicable to employed and self-employed workers who make use of their right to freedom of movement. The

completeness of that system of conflict rules has the effect of divesting the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 34 and 35 and the case-law cited).

51 In that regard, Article 13 of Regulation No 1408/71 on the general rules for the determination of the applicable legislation provides, in paragraph 1, that the persons to whom that regulation applies are to be subject only to the legislation of a single Member State, which therefore excludes — subject to the cases provided for in Articles 14c and 14f — any possibility of the overlapping of the national legislation of Member States in respect of one and the same period (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 36 and the case-law cited).

52 Article 13(2)(a) of Regulation No 1408/71, which gives effect to the principle of single applicable legislation in social security matters as defined in Article 13(1) of that regulation, specifies that a person working as an employee in the territory of one Member State shall be subject to the legislation of that Member State even if he resides in the territory of another Member State.

53 However, the principle of a single applicable legislation cannot deprive a Member State that does not have jurisdiction by virtue of the provisions of Title II of Regulation No 1408/71 of the possibility of granting, under certain conditions, child benefits or an old-age pension to a migrant worker under its own national law. The purpose of Regulation No 1408/71 is not to prevent the Member State of residence from granting, pursuant to its legislation, child benefits and old-age benefits to that person even where, under Article 13(2)(a) of that regulation, the person in question is subject to the legislation of a Member State where that person is in employment (see, to that effect, judgment of 23 April 2015, *Franzen and Others*, C-382/13, EU:C:2015:261, paragraphs 58 to 61 and the case-law cited).

54 The referring court states that in the cases in the main proceedings, the applicable legislation of the Netherlands precludes a person residing in the national territory from being affiliated to the national social security system where that person is working in another Member State. Furthermore, that legislation does not provide for the possibility of disregarding that exclusion, since the hardship clauses provided for in the 1989 BUB and the 1999 BUB may not be invoked in the main proceedings. Therefore, a person in a situation such as that at issue in these cases may not, according to the referring court, benefit from a derogation from the principle of single applicable legislation established by the case-law of the Court.

55 This context is also characterised by that fact that the migrant workers in these cases have not been entitled to social welfare under the legislation of the Member State of employment, which is competent under Article 13 of Regulation No 1408/71.

56 It is true that, according to the settled case-law of the Court, all the provisions of the TFEU on freedom of movement of persons are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place Union nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (see, to that effect, judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraphs 33 and 34 and the case-law cited).

57 As regards, in the first place, Article 45 TFEU, although it precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedom of movement guaranteed by that article, that article does not confer on a worker travelling to a Member State other than his Member State of origin any entitlement, in the host Member State, to the same social welfare coverage as that which he enjoyed in his Member State of origin under the legislation of the latter State (see, by analogy, judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraphs 33 and 35).

58 Nor may Article 45 TFEU be interpreted as conferring on a migrant worker an entitlement, in his Member State of residence, to the same social welfare coverage that he would have enjoyed had he been working in that Member State, when he is working in another Member State and does not enjoy such cover under the law of the competent Member State by virtue of Article 13 of Regulation No 1408/71.

59 As regards, in the second place, Article 48 TFEU, which provides for a system for coordinating, and not harmonising, the legislation of the Member States, substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with EU law, the conditions pursuant to which benefits may be granted under a social security scheme (judgment of 12 June 2012, *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339, paragraph 42).

60 An interpretation of Article 48 TFEU to the effect that it obliges a Member State that is not competent to grant social security cover to a migrant worker employed in another Member State would undermine, in circumstances such as those at issue in the main proceedings, the system for coordinating the legislation of the Member States applicable in the field of social security which finds expression in the principle of single applicable legislation under Article 13 of Regulation No 1408/71.

61 Such an interpretation could upset the balance struck by the TFEU as that obligation could, in cases such as those in the main proceedings, result in the exclusive application of the law of the Member State with the most advantageous social security coverage. Such a criterion would be particularly difficult to apply given the range of benefits available under different branches of social security, listed in Article 4(1) of Regulation No 1408/71.

62 Furthermore, such an outcome could interfere with the financial balance of the social security system in the Member State with the most advantageous social welfare cover.

63 It is apparent from the documents provided by the referring court in its requests for a preliminary ruling that the absence of social welfare cover for the migrant workers who are party to the main proceedings for the periods worked outside their Member State of residence is merely the consequence of the application of the legislation of the competent Member State under Article 13 of Regulation No 1408/71. The content of national social security legislation is not the subject of harmonisation, either under the provisions of the TFEU or Regulation No 1408/71.

64 Therefore, Articles 45 and 48 TFEU may not be interpreted as obliging the Member State of residence, in circumstances such as those at issue in the main proceedings, to grant benefits to a migrant worker who is not entitled to such benefits under the legislation of the Member State of employment, which is competent under Article 13 of Regulation No 1408/71.

65 However, it should be recalled that under Article 17 of Regulation No 1408/71, two Member States may agree on exceptions to the principle of single applicable legislation in the interest of certain categories of persons or certain persons. That possibility is particularly appropriate where, as is the

case for the parties in the main proceedings, the applicable law of the Member State of employment does not confer on the migrant worker an entitlement to an old-age pension or child benefits which he would have enjoyed had he remained unemployed in his Member State of residence.

66 It follows from the foregoing that Articles 45 and 48 TFEU must be interpreted as not precluding a law of a Member State under which a migrant worker residing in the territory of that Member State, who is subject to the social security legislation of the Member State of employment, under Article 13 of Regulation No 1408/71, is not insured for the purposes of the social security scheme of the Member State of residence, despite the fact that the legislation of the Member State of employment does not confer on that worker any entitlement to an old-age pension or child benefit.

The third question in Case C-95/18

67 By its third question in Case C-95/18, the referring court asks, in essence, whether Article 13 of Regulation No 1408/71 must be interpreted as precluding a Member State in whose territory a migrant worker resides and which is not competent under that article, from making an entitlement to an old-age pension conditional on that migrant worker having insurance that entails payment of mandatory contributions.

68 In that regard, it should be noted that although, under Article 13(2)(a) of Regulation No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting, pursuant to its legislation, a social security benefit such as old-age pension to that person (see, to that effect, judgment of 20 May 2008, *Bosmann*, C-352/06, EU:C:2008:290, paragraph 31).

69 In the judgment of 20 May 2008, *Bosmann* (C-352/06, EU:C:2008:290, paragraph 32), the Court, referring to the judgments of 12 June 1986, *Ten Holder* (302/84, EU:C:1986:242), and of 10 July 1986, *Luijten* (60/85, EU:C:1986:307), specified that, in those particular contexts, which differ from that of the case in the main proceedings, those judgments could not serve to exclude the possibility for a Member State, which is not the competent State and which has not made the entitlement to child benefit contingent on employment and insurance, to grant such a benefit to a person residing in its territory, if the possibility to grant such a benefit arises, in actual fact, from its legislation.

70 In ruling that the Member State which is not competent under Article 13 of Regulation No 1408/71 cannot make the right to family allowance contingent on insurance, the Court has merely made explicit the principle of single applicable legislation as it applies to migrant employees. Article 13(2)(a) of Regulation No 1408/71 provides that a person employed in the territory of one Member State is to be subject to the legislation of that State even if that person resides in the territory of another Member State. It follows that, under the principle of single applicable legislation, the Member State where the migrant worker resides cannot require that worker to be insured without undermining the system of coordination under Article 48 TFEU.

71 Such an insurance obligation, which entails the payment of contributions, required by a Member State that is not competent, under Article 13 of Regulation No 1408/71 could result in the migrant worker being obliged to contribute to social security systems in two different Member States, which would be contrary to the principle of single applicable legislation which the EU legislature intended to establish.

72 However, the fact that the Member State which is not competent under Article 13 of Regulation No 1408/71 may not make the right to child benefit conditional on insurance must not be understood as precluding any affiliation of a migrant worker in that Member State. The Member State of residence

may, on the basis of a connecting criterion other than employment or insurance conditions, grant benefits, in particular an old-age pension, to a person residing in its territory, if the possibility of granting such benefits arises, in actual fact, from its legislation.

73 It is apparent from the request for a preliminary ruling in Case C-95/18 that, in accordance with the national legislation applicable during the period at issue in the main proceedings, Mr Giesen's wife was insured under the AOW as a resident in the Netherlands during that period. The connecting criterion established by that legislation is the place of residence of the migrant worker.

74 At the oral hearing, the Netherlands government indicated however that contributions would have had to be paid in order for an old-age pension to be granted and that, at the time of the relevant facts in Case C-95/18, mere residence was not sufficient to obtain those benefits. Accordingly, it is for the referring court to determine whether, on the date of the facts at issue in Case C-95/18, Mr Giesen's wife was entitled to an old-age pension independently of any obligation to pay contributions.

75 It is also clear from the case-law of the Court that Articles 45 and 48 TFEU, and Regulation No 1408/71, which was adopted to implement them, are intended in particular to prevent the situation in which a worker who has exercised his right of free movement is treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (judgment of 12 June 2012, *Hudzinski and Wawrzyniak*, C-611/10 and C-612/10, EU:C:2012:339, paragraph 80 and the case-law cited).

76 That would be so if the national law at issue in the main proceedings placed the migrant worker at a disadvantage in relation to those who have always worked in the Member State where that law applies and that law obliges the worker to pay social contributions on which there is no return, which is for the referring court to determine.

77 It follows from all of the foregoing that Article 13 of Regulation No 1408/71 must be interpreted as precluding a Member State in whose territory a migrant worker resides, and which is not competent under that article, from making the entitlement to an old-age pension conditional on that migrant worker having insurance that entails payment of mandatory contributions.

Costs

78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

1. **Articles 45 and 48 TFEU must be interpreted as not precluding a law of a Member State under which a migrant worker residing in the territory of that Member State, who is subject to the social security legislation of the Member State of employment under Article 13 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in its version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, is not insured for the purposes of the social security scheme of that Member State of residence, despite the fact that the legislation of the Member State of employment does not confer on that worker any entitlement to an old-age pension or child benefit.**

2. Article 13 of Regulation No 1408/71, in its version amended and updated by Regulation No 118/97, as amended by Regulation No 1992/2006, must be interpreted as precluding a Member State on whose territory a migrant worker resides, and which is not competent under that article, from making an entitlement to an old-age pension conditional on that migrant worker having insurance that entails payment of mandatory contributions.

[Signatures]