

**JUDGMENT OF THE COURT (Third Chamber)**

11 April 2013 (\*)

(Social security for migrant workers – Article 45 TFEU – Regulation (EEC) No 1408/71 – Article 71 – Wholly unemployed atypical frontier workers who have maintained personal and business links in the Member State of last employment – Regulation (EC) No 883/2004 – Article 65 – Right to benefit in the Member State of residence – Refusal to pay by the Member State of last employment – Admissibility – Relevance of the judgment of the Court of 12 June 1986 in Case 1/85 Miethe – Transitional provisions – Article 87(8) – Concept of ‘unchanged situation’)

In Case C-443/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (Netherlands), made by decision of 25 August 2011, received at the Court on 29 August 2011, in the proceedings

**F.P. Jeldes,**

**M.A. Peeters,**

**J.G.J. Arnold**

v

**Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader and C.G. Fernlund (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 October 2012,

after considering the observations submitted on behalf of:

- Mr Jeldes, by P. Van der Wulp,
- Ms Peeters, by S. van der Beek-Verdoorn,
- the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, by I. Eijkhout, acting as Agent,
- the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,
- the Czech Government, by D. Hadroušek and M. Smolek, acting as Agents,

- the Danish Government, by V. Pasternak Jørgensen and C. Vang, acting as Agents,
- the German Government, by J. Möller and T. Henze, acting as Agents,
- the European Commission, by M. van Beek and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2013,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 65 and 87(8) of 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) as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43) ('Regulation No 883/2004') and of Article 45 TFEU and Article 7(2) of Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475).

2 The request has been made in proceedings between Mr Jeltès, Ms Peeters and Mr Arnold, on the one hand, and the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, on the other hand, concerning its rejection of their applications to obtain or maintain benefits under the Law on unemployment (Werkloosheidswet; 'the WW').

## **Legal context**

### *European Union law*

#### Regulation (EEC) No 1408/71

3 Article 1 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71') provides as follows:

'For the purpose of this Regulation:

...

(b) "frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; ...

...

(o) "competent institution" means:

(i) the institution with which the person concerned is insured at the time of the application for benefit

...

...

(q) “competent State” means the Member State in whose territory the competent institution is situated;

...’

4 Article 71 of Regulation No 1408/71 states:

‘1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) A frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;

(ii) A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense;

(b) (i) An employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

...’

Regulation No 883/2004

5 Article 1 of Regulation No 883/2004 defines ‘frontier workers’, ‘competent institutions’ and ‘competent Member State’ in essentially the same way as Article 1 of Regulation No 1408/71.

6 Article 11(3)(c) of Regulation No 883/2004 provides that ‘a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State’.

7 Article 65 of Regulation No 883/2004, entitled 'Unemployed persons who resided in a Member State other than the competent State', states as follows:

'1. A person who is partially or intermittently unemployed and who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State shall make himself available to his employer or to the employment services in the competent Member State. He shall receive benefits in accordance with the legislation of the competent Member State as if he were residing in that Member State. These benefits shall be provided by the institution of the competent Member State.

2. A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.

An unemployed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject.

3. The unemployed person referred to in the first sentence of paragraph 2 shall register as a person seeking work with the competent employment services of the Member State in which he resides, shall be subject to the control procedure organised there and shall adhere to the conditions laid down under the legislation of that Member State. If he chooses also to register as a person seeking work in the Member State in which he pursued his last activity as an employed or self-employed person, he shall comply with the obligations applicable in that State.

4. The implementation of the second sentence of paragraph 2 and of the second sentence of paragraph 3, as well as the arrangements for exchanges of information, cooperation and mutual assistance between the institutions and services of the Member State of residence and the Member State in which he pursued his last occupation, shall be laid down in the Implementing Regulation.

5. (a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he/she had been subject to that legislation during his/her last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence.

(b) However, a worker other than a frontier worker who has been provided benefits at the expense of the competent institution of the Member State to whose legislation he/she was last subject shall firstly receive, on his/her return to the Member State of residence, benefits in accordance with Article 64, receipt of the benefits in accordance with (a) being suspended for the period during which he/she receives benefits under the legislation to which he/she was last subject.

6. The benefits provided by the institution of the place of residence under paragraph 5 shall continue to be at its own expense. ...

...'

8 Article 87 of Regulation No 883/2004 entitled 'Transitional provisions' states:

'1. No rights shall be acquired pursuant to this Regulation for the period before its date of application.

...

8. If, as a result of this Regulation, a person is subject to the legislation of a Member State other than that determined in accordance with Title II of Regulation (EEC) No 1408/71, that legislation shall continue to apply while the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within 3 months after the date of application of this Regulation to the competent institution of the Member State whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time limit indicated, the change of applicable legislation shall take place on the first day of the following month.

...'

Regulation (EC) No 987/2009

9 Recital 13 in the preamble to Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1; 'the Implementing Regulation') provides:

'This Regulation provides for measures and procedures to promote the mobility of employees and unemployed persons. Frontier workers who have become wholly unemployed may make themselves available to the employment services in both their country of residence and the Member State where they were last employed. However, they should be entitled to benefits only from their Member State of residence.'

*Netherlands law*

10 According to the documents before the Court, Article 19(1)(f) of the WW makes a worker's right to receive unemployment benefit conditional on his residence in the Netherlands.

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

11 Mr Jeltès and Ms Peeters are frontier workers of Netherlands nationality who worked in the Netherlands while resident in Belgium and Mr Arnold is a frontier worker of Netherlands nationality who worked in the Netherlands while resident in Germany.

12 Mr Jeltès became unemployed in August 2010, that is, after 1 May 2010, the date from which Regulation No 883/2004 began to apply. He submitted a claim for unemployment benefit, under the WW, to the Netherlands authorities but they rejected his claim.

13 Ms Peeters became unemployed in May 2009 and received unemployment benefit from the Netherlands authorities. On 26 April 2010 Ms Peeters found new employment, before becoming unemployed again as from 18 May 2010. During the period when she took up work again she stopped receiving unemployment benefit but the Netherlands authorities informed her that, if before 25 October 2010 she were once again to become unemployed, she could make a claim for

the continuation of that benefit. When she became unemployed again, Ms Peeters approached those authorities but they refused to resume payment of that benefit.

14 Mr Arnold became unemployed and obtained unemployment benefit from the Netherlands authorities under the WW as from 2 February 2009. In March 2009, he began a self-employed activity in Germany. Those authorities terminated payment to him of his unemployment benefit while informing him that, should he cease to be self-employed before 30 August 2011, he could make a claim for the continuation of that benefit. Mr Arnold ceased that activity and applied, on 1 June 2010, for its continuation. However, the Netherlands authorities refused to pay him the benefit.

15 According to the order for reference and the documents before the Court, Netherlands law prohibits the payment of unemployment benefit to unemployed workers who do not reside in national territory. The referring court adds that, with regard to the three applicants in the main proceedings, the Netherlands authorities based their refusal on Article 65 of Regulation No 883/2004, under which the Member State of residence, that is to say the Kingdom of Belgium for the first two applicants and the Federal Republic of Germany for the third applicant, is the Member State responsible for paying unemployment benefit.

16 The applicants in the main proceedings brought, before the Rechtbank Amsterdam, an action against the refusal decisions adopted by the Netherlands authorities. That court notes that it is not in dispute that Article 65 of Regulation No 883/2004 does not offer the applicants the possibility of claiming unemployment benefit from those authorities. It adds however that it is also not contested that those persons are atypical frontier workers, within the meaning of Case 1/85 *Miethe* [1986] ECR 1837, in so far as they have retained particularly close personal and business links in the Member State in which they were last employed. According to the referring court, it follows that it is probably in that State, that is in the present case the Kingdom of the Netherlands, that they have the best chances of reintegration into working life. It therefore asks whether, as in the *Miethe* case, the applicants may claim unemployment benefit in that Member State.

17 Given that it still has doubts, following the entry into force of Regulation No 883/2004, as to the continuing relevance of *Miethe*, the Rechtbank Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is the supplementary scope of the judgment in Case 1/85 *Miethe* [citation above], which was delivered while Regulation No 1408/71 was in force, still valid under Regulation No 883/2004, that is to say, a right for an atypical frontier worker to choose the Member State in which he makes himself available to the employment recruitment services, and from which he receives unemployment benefit, on the ground that his prospects of reintegration into working life are greatest in the Member State of his choice? Or does Article 65 of Regulation No 883/2004, considered as a whole, provide sufficient guarantees that a wholly unemployed worker will receive a benefit under conditions which are most favourable for him in his search for work, and has the *Miethe* judgment lost its added value?

2. Does European Union law, in this case Article 45 TFEU or Article 7(2) of Regulation No 1612/68, preclude the refusal by a Member State to award unemployment benefit under its national legislation in the case of a migrant worker (frontier worker) who has become wholly unemployed, who was last employed in that Member State and who, given the existence of social and family ties, may be assumed to have the best prospects of reintegration into working life in that Member State, solely on the ground that he resides in another Member State?

3. Having regard to Article 87(8) of Regulation No 883/2004, Article 17 of the Charter of Fundamental Rights [of the European Union] and the principle of legal certainty, what would be the

answer to the foregoing question if, before the date of the entry into force of Regulation No 883/2004, such a worker had been awarded an unemployment benefit under the legislation of the previous State of employment, where the maximum duration of the benefit and of the resumption had not yet lapsed at the time of that entry into force (and where that benefit was terminated on the ground that the unemployed person had again found work)?

4. Would the answer to Question 2 be different if undertakings had been given to the unemployed frontier workers concerned that they would be able to apply for resumption of their entitlement to benefits if, after finding new work, they were once again to become unemployed, and the information supplied in that regard does not appear to have been correct or unambiguous as a result of lack of clarity in implementing practice?’

### **Consideration of the questions referred for a preliminary ruling**

#### *The first question*

18 By its first question, the referring court wishes to ascertain, in essence, whether the judgment in *Miethe* remains relevant, following the entry into force of Regulation No 883/2004, for the purposes of the interpretation of Article 65(2) of that regulation, with the result that a worker who has maintained personal and business links with the State where he was last employed of such a kind that his prospects of reintegration into working life are greatest there, may choose to make himself available to the employment services of that Member State, not only in order to receive assistance from that Member State in seeking new employment, but also to obtain unemployment benefit.

19 In order to answer that question, reference must be made to the provisions of Article 71 of Regulation No 1408/71 and to the interpretation which the Court gave to those provisions in *Miethe*, before examining the substance of Article 65(2) of Regulation No 883/2004.

20 Article 71 of Regulation No 1408/71 contains specific provisions applicable to unemployed persons who, while last employed, resided in a Member State other than the competent State. Those provisions can be distinguished from the general rule provided for in Article 13(2) of that regulation, according to which a worker employed in the territory of one Member State shall be subject to the legislation of that State.

21 According to Article 71(1)(a)(ii) of Regulation No 1408/71, a frontier worker who is wholly unemployed is subject to the legislation of the Member State in whose territory he resides. The Court has held that that provision is based on the assumption that such a worker would find in that State the conditions most favourable to the search for new employment (*Miethe*, paragraph 17).

22 Under Article 71(1)(b) of Regulation No 1408/71, an employed person other than a frontier worker, that is a person who, contrary to frontier workers, does not return daily or at least once a week to his State of residence, can choose, if he is wholly unemployed, either to remain available to the employment services in the territory of the competent Member State or to make himself available to the employment services in the territory of the Member State where he resides. In the first case, he is to receive benefit from the Member State where he was last employed, in the second case from the Member State where he resides. The benefits concerned are not only of a monetary nature but also include assistance in finding new employment (see, to that effect, *Miethe*, paragraph 16).

23 The Court held, in paragraph 18 of *Miethe*, that the objective pursued by Article 71(1)(a)(ii) of Regulation No 1408/71, concerning frontier workers who are wholly unemployed, that is to ensure that migrant workers receive unemployment benefit under the most favourable conditions,

cannot however be attained where a wholly unemployed frontier worker has in exceptional circumstances maintained in the Member State in which he was last employed personal and business links of such a nature as to give him a better chance of finding new employment there. Such a worker must therefore be regarded as a 'worker other than a frontier worker' within the meaning of Article 71 of that regulation and is consequently covered by Article 71(1)(b). The worker may accordingly choose to make himself available to the employment services of the Member State where he was last employed and receive aid from that State, in the form both of assistance in finding employment and of payment of benefit.

24 According to recital 3 in the preamble to Regulation No 883/2004, the legislature wished to modernise and simplify the provisions of Regulation No 1408/71, which had been made more complex and dense following numerous amendments and updates.

25 Article 65 of Regulation No 883/2004 thus replaced Article 71 of Regulation No 1408/71 by partially amending its content.

26 According to Article 65(2) of Regulation No 883/2004, a frontier worker who is wholly unemployed, who resided in a Member State other than the competent Member State and who continues to reside in that Member State, the Member State of residence, is to make himself available to the employment services of that State. That provision states that he may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.

27 With regard to a worker other than a wholly unemployed frontier worker, he is to make himself available either to the employment services of his State of residence, if he returns to that State, or to those of the Member State of his last employment, if he does not return to that State.

28 The possibility, provided for in Article 65(2) of Regulation No 883/2004, for the wholly unemployed frontier worker to make himself available, as a supplementary step, to the employment services of the Member State where he was last employed, is new compared to the content of Article 71(1)(a)(ii) of Regulation No 1408/71. The worker concerned, whatever links he has maintained in that State and, in particular, if his chances of reintegration into working life are best there, may thus also receive assistance in looking for new employment in that State. In making such provision, the legislature partially took the judgment in *Miethe* into account.

29 However, according to that judgment, a worker whose links with the State where he was last employed were such as to give him a better chance of finding new employment there and who, therefore, was to be regarded as a worker other than a frontier worker, was entitled not only to assistance from that State in seeking employment but also to receive unemployment benefit from it.

30 The question therefore arises whether the right of such a worker to obtain unemployment benefit from the Member State where he has been last employed was maintained by Regulation No 883/2004.

31 In that regard, it must be observed that this right is not apparent from the wording of Article 65(2) of Regulation 883/2004. The provision lays down that a wholly unemployed frontier worker must make himself available to the employment services of his State of residence. That is an obligation, not a right. According to Article 65(5)(a) of that regulation, that worker is to receive benefits, and thus unemployment benefit, in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Only as a supplementary step may he register with the employment services of the Member State of his last employment. In accordance with Article 56(1) of the



Implementing Regulation, which refers to Article 65(2) of Regulation No 883/2004, that registration concerns only the seeking of employment.

32 Since Regulation No 883/2004 postdates *Miethe*, the legislature could have drafted Article 65 of that regulation, had it wished to do so, given its desire to modernise and simplify the existing rules, in such a way as to integrate fully and clearly the interpretation of Article 71 of Regulation No 1408/71 given by the Court in that judgment. However, it did not do so. In those circumstances, it must be held that the absence of express mention, in Article 65(2) of Regulation No 883/2004, of a right to obtain unemployment benefit from the Member State of last employment indicates that the legislature deliberately intended to restrict the taking into account of *Miethe*, by providing only a supplementary possibility for the worker concerned to register as a person seeking employment with the services of that Member State in order to obtain additional assistance in finding new employment.

33 That interpretation is moreover corroborated by the *travaux préparatoires* relating to Regulation No 883/2004 and the Implementing Regulation.

34 With regard to Regulation No 883/2004, the European Commission had proposed to end the existing system, whereby the unemployed frontier worker receives unemployment benefit from the State of residence rather than the State where he was last employed. However, the Commission noted in a communication of 27 January 2004 that, in the Common Position (EC) No 18/2004 adopted by the Council on 26 January 2004, with a view to adopting Regulation No 883/2004 (OJ 2004 C 79 E, p. 15), the Council had failed to reach agreement on that proposal and had maintained the responsibility of the State of residence for payment of the benefit.

35 With regard to the Implementing Regulation, the European Parliament had proposed, in a report of 10 June 2008, to specify in a recital in the preamble to that regulation that the right of the worker to register with the employment services of the State where he was last employed was intended to promote the mobility of employees and unemployed persons but that the worker was entitled to only one benefit, in the Member State of residence. The Parliament had explained that its amendment was intended to remove any ambiguity concerning whether the judgment in *Miethe* did or did not apply. Thus, recital 13 in the preamble to Regulation No 987/2009 adopts the amendment in almost identical terms.

36 The answer to the first question is therefore that, after the entry into force of Regulation No 883/2004, the provisions of Article 65 of that regulation are not to be interpreted in the light of the judgment in *Miethe*. With regard to a wholly unemployed frontier worker who has maintained close personal and business links with the Member State where he was last employed of such a kind that his prospects of reintegration into working life are greatest in that State, Article 65 of Regulation No 883/2004 must be understood as allowing such a worker to make himself available as a supplementary step to the employment services of that State, not with a view to obtaining unemployment benefit in that State but only in order to receive assistance there in finding new employment.

### *Second question*

37 By its second question, the referring court asks, in essence, whether the rules on the freedom of movement for workers, in particular those in Article 45 TFEU, must be interpreted as precluding the Member State where the person was last employed from refusing, under its national law, to award unemployment benefit to a wholly unemployed frontier worker who has the best prospects of reintegration into working life in that Member State, on the ground that that worker does not reside in its territory.

38 That question should be examined in the light of situations such as that of Mr Jeltens. The situation of workers such as Ms Peeters and Mr Arnold has special characteristics which will be examined when replying to the third and fourth questions.

39 In the light of the coordination required by Regulation No 883/2004, the imposition of a residence condition provided for by national law does not lead, in a situation such as that of Mr Jeltens, to a result different from that entailed by the application of the rules in Article 65(2) and (5)(a) of Regulation No 883/2004, according to which a wholly unemployed frontier worker is to receive benefits in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person, and the benefits are to be provided by the institution of the place of residence. In addition, according to Article 11(3)(c) of Regulation 883/2004, a person receiving unemployment benefits in accordance with Article 65 of that regulation under the legislation of the Member State of residence is to be subject to the legislation of that Member State. It is apparent from the order for reference that the national authorities relied on Article 65 of Regulation 883/2004 in order to refuse to grant the applications to obtain or to continue to receive unemployment benefit payments submitted by the applicants in the main proceedings and to suggest to them that they approach the authorities of their State of residence.

40 It follows from the case-law of the Court relating to Regulation No 1408/71 that, by adopting Regulation No 883/2004, the legislature of the European Union, bearing in mind the wide discretion that it enjoys with regard to the choice of the most appropriate measures for achieving the result envisaged in Article 42 EC, has in principle fulfilled the obligation arising from the task entrusted to it by that Article of setting up a system allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security (see, by analogy, *inter alia*, Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 64 and case-law cited).

41 That said, the finding that the application, in a specific case, of a national measure may be consistent with a provision of secondary legislation, in the present case Regulation No 883/2004, does not necessarily have the effect of removing the application of that measure from the scope of the FEU Treaty's provisions (see, to that effect, *inter alia*, *von Chamier-Glisczinski*, paragraph 66, and, with regard to unemployment benefit, Case C-406/04 *Cuyper* [2006] ECR I-6947 and Case C-228/07 *Petersen* [2008] ECR I-6989).

42 In that regard, according to the documents before the Court, the unemployment benefit paid by the Netherlands authorities is higher than that paid by the Belgian authorities but the Belgian benefit is paid over a longer period.

43 It should however be recalled that since Article 48 TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States, substantive and procedural differences between the social security systems of individual Member States and, hence, in the rights of persons insured under those schemes, are unaffected by that provision (see *von Chamier-Glisczinski*, paragraph 84 and case-law cited).

44 In those circumstances, the Treaty rules on freedom of movement cannot guarantee to an insured person that a move to another Member State will be neutral as regards social security. In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less financially advantageous or disadvantageous for the person concerned (see *von Chamier-Glisczinski* paragraph 85, and Case C-562/10 *Commission v Germany* [2012] ECR, paragraph 57).

45 Thus, the fact that a person such as Mr Feltes receives his unemployment benefit from the competent institution of the Member State of residence, in the present case the Kingdom of Belgium, results from the application, in accordance with Regulation No 883/2004, of the law of that State on unemployment benefit. A difference between the benefit provided for in the legislation of the Member State of last employment and that granted pursuant to the legislation of the Member State of residence cannot, in those circumstances, be considered as a restriction on the freedom of movement for workers, since it results from the lack of harmonisation of European Union law in the matter (see, by analogy, Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 106).

46 The answer to the second question is therefore that the rules on the freedom of movement for workers, contained in particular in Article 45 TFEU, must be interpreted as not precluding the Member State where the person was last employed from refusing, in accordance with its national law, to grant unemployment benefit to a wholly unemployed frontier worker whose prospects of reintegration into working life are best in that Member State, on the ground that he does not reside in its territory, since, in accordance with the provisions of Article 65 of Regulation No 883/2004, the applicable legislation is that of the Member State of residence.

#### *The third and fourth questions*

47 The third and fourth questions relate to the situation of persons such as Ms Peeters and Mr Arnold who, in view of the proximity of the two periods of unemployment they experienced, requested, on the basis of national law, resumption of payment of the benefit which they initially received, but whose requests for such resumption were rejected on the ground of the entry into force, in the meantime, of Regulation No 883/2004.

48 The referring court asks whether, in such a situation, in order to avoid a restriction on the freedom of movement for workers, the transitional provisions of Article 87(8) of Regulation No 883/2004, Article 17 of the Charter of Fundamental Rights of the European Union concerning the right of property and the principles of legal certainty or of the protection of legitimate expectations must be interpreted as meaning that the workers concerned may continue to receive unemployment benefit from the State where they were last employed.

49 In that regard, it should be recalled that Article 87(8) of Regulation No 883/2004 provides, in favour of a person who, as a result of that regulation, is subject to the legislation of a Member State other than that to whose legislation he was subject under Title II of Regulation No 1408/71, for the continued application of the latter legislation for a certain period, provided that the relevant situation remains unchanged.

50 That provision thus applies, first, on condition that the applicable legislation is covered by Title II of Regulation No 1408/71 and, second, on condition that the relevant situation remained unchanged.

51 With regard to the first of those two conditions, it is not in dispute that Ms Peeters and Mr Arnold obtained unemployment benefit from the Netherlands authorities, pursuant to Netherlands legislation, in accordance with Article 71 of Regulation No 1408/71. However, that article does not fall under Title II of that regulation, concerning the general rules for the determining the legislation applicable, but under Title III of that regulation, concerning the specific provisions for determining that legislation with regard, inter alia, to unemployment benefit.

52 Accordingly, Article 87(8) of Regulation No 883/2004 cannot be regarded as directly applicable, as such, to the main proceedings.

53 The question arises, therefore, whether that fact precludes the continuation of the legislation which applied pursuant to Regulation No 1408/71.

54 According to all the observations submitted to the Court, that fact should not, alone, preclude such continuation.

55 In that regard, as stated, in essence, by the Advocate General in point 68 of his Opinion, the lack of any reference, in Regulation No 883/2004, to a transitional provision applicable to the situation of the workers concerned can be regarded as attributable to a lacuna which arose during the legislative process leading to the adoption of Regulation No 883/2004 and does not reflect the legislature's deliberate intention to make those workers directly subject to other legislation.

56 In those circumstances, the transitional provision laid down in Article 87(8) of Regulation No 883/2004 must be interpreted as applying, by analogy, to wholly unemployed frontier workers who, taking into account the links they have maintained in the Member State where they were last employed, receive unemployment benefit from it on the basis of the legislation of that Member State, pursuant to Article 71 of Regulation No 1408/71. The fact that the latter article falls under Title III of Regulation No 1408/71 does not preclude, in such a case, that application.

57 With regard, in the context of such an application of Article 87(8) of Regulation No 883/2004, to the question whether 'the relevant situation has remained unchanged', the observations submitted to the Court concerning the meaning to be given to that wording diverge.

58 From the point of view of the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen and of the Netherlands and Danish Governments, since the workers concerned were exercising a professional activity at the date of the entry into force of Regulation No 883/2004 and became unemployed only after that date, their situation must be considered as having changed, for the purposes of Article 87(8) of that regulation. In the opinion of Ms Peeters, the German Government and the Commission, those circumstances are not decisive and do not necessarily preclude the continued application of the law which was applicable pursuant to Regulation No 1408/71.

59 In that regard, it should be noted that the concept of 'unchanged situation' is not defined by Regulation No 883/2004. However, as the regulation is not a measure harmonising national social security systems but an enactment intended to coordinate those systems, each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions pursuant to which benefits may be granted under a social security scheme (see, to that effect, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] ECR, paragraph 42). The concept of 'unchanged situation' within the meaning of Article 87(8) of that regulation must, consequently, be interpreted by reference to the definition given by national social security legislation (see, by analogy, with regard to the term 'employment' within the meaning of Article 71(1) of Regulation No 1408/71, Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 33).

60 With regard to workers such as Ms Peeters and Mr Arnold, it is thus for the referring court to establish whether, under Netherlands law, on the date on which those workers found employment again after a first period of unemployment or, respectively, in the course of the months of April 2010 and March 2009, they were entitled to resumption of the payment of unemployment benefit if they found themselves unemployed again following expiry of a certain period. Reference by the

Netherlands authorities to the term 'resumption' may suggest that such an entitlement exists under Netherlands legislation. If that is so, it is for that court to determine whether, taking into account in particular the duration of the period during which the persons concerned worked again, they fulfil the conditions provided for under national legislation for entitlement to such resumption of the payment of that benefit, irrespective of the entry into force of Regulation No 883/2004.

61 It follows that the concept of 'unchanged situation' within the meaning of Article 87(8) of Regulation No 883/2004 must be assessed in the light of national social security legislation and that it is for the national court to establish whether workers such as Ms Peeters and Mr Arnold satisfy the conditions provided for in that legislation which would entitle them to claim resumption of payment of the unemployment benefit which was paid to them under that legislation in accordance with Article 71 of Regulation No 1408/71.

62 It follows from the above considerations that the answer to the third and fourth questions is:

- the provisions of Article 87(8) of Regulation No 883/2004 should be applied to wholly unemployed frontier workers who, taking into account the links they have maintained in the Member State where they were last employed, receive unemployment benefit from that Member State on the basis of its legislation, pursuant to Article 71 of Regulation No 1408/71;
- the concept of 'unchanged situation' within the meaning of Article 87(8) of Regulation No 883/2004 must be assessed in the light of national social security legislation. It is for the national court to establish whether workers such as Ms Peeters and Mr Arnold satisfy the conditions provided for in that legislation in order to be able to claim resumption of payment of the unemployment benefit which was paid to them under that legislation, in accordance with Article 71 of Regulation No 1408/71.

## **Costs**

63 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 (Third Chamber) hereby rules:

**1. After the entry into force of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009, the provisions of Article 65 of Regulation No 883/2004 are not to be interpreted in the light of the judgment of the Court of Justice of 12 June 1986 in Case 1/85 *Miethe*. With regard to a wholly unemployed frontier worker who has maintained close personal and business links with the Member State where he was last employed of such a kind that his prospects of reintegration into working life are greatest in that State, Article 65 of Regulation No 883/2004 must be understood as allowing such a worker to make himself available as a supplementary step to the employment services of that State, not with a view to obtaining unemployment benefit in that State but only in order to receive assistance there in finding new employment.**

2. The rules on the freedom of movement for workers, contained in particular in Article 45 TFEU, must be interpreted as not precluding the Member State where the person was last employed from refusing, in accordance with its national law, to grant unemployment benefit to a wholly unemployed frontier worker whose prospects of reintegration into working life are best in that Member State, on the ground that he does not reside in its territory, since, in accordance with Article 65 of Regulation No 883/2004, as amended by Regulation No 988/2009, the applicable legislation is that of the Member State of residence.

3. The provisions of Article 87(8) of Regulation No 883/2004, as amended by Regulation No 988/2009, should be applied to wholly unemployed frontier workers who, taking into account the links they have maintained in the Member State where they were last employed, receive unemployment benefit from that Member State on the basis of its legislation, pursuant to Article 71 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008.

The concept of 'unchanged situation' within the meaning of Article 87(8) of Regulation No 883/2004 as amended by Regulation No 988/2009 must be assessed in the light of national social security legislation. It is for the national court to establish whether workers such as Ms Peeters and Mr Arnold satisfy the conditions provided for in that legislation in order to be able to claim resumption of payment of the unemployment benefit which was paid to them under that legislation, in accordance with Article 71 of Regulation No 1408/71 as amended and updated by Regulation No 118/97, as amended by Regulation No 592/2008.

[Signatures]

\* Language of the case: Dutch.