Overview of recent cases before the European Court of Human Rights and the European Court of Justice (March-May 2008)

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NEWS AND CASES

1. Overview of recent cases before the European Court of Human Rights and the European Court of Justice (March-May 2008)

Pensions and same-sex couples

In this period both the Court of Human Rights and the Court of Justice considered cases concerning the treatment of same-sex couples as compared to married or cohabiting, heterosexual couples. The Court of Human Rights had previously considered this issue in Mata Estevez where the applicant had lived with another man for more than 10 years in a joint household but was unable to marry under Spanish law. Following the death of his partner, the applicant claimed a social security allowance for a surviving spouse. However, the Spanish authorities refused to grant a survivor's pension on the grounds that he had not been married. The applicant complained that the difference of treatment regarding eligibility for a survivor's pension between homosexual partners and married couples amounted to unjustified discrimination that infringed his right to respect for his private and family life under Articles 8 and 14 of the Convention. The Court held that according to its established case law "long-term sexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8". However, the Court went on to acknowledge that the applicant's emotional and sexual relationship related to his private life within the meaning of Article 8, and accepted that the question might arise as to whether the decision to refuse a pension could amount to a discriminatory interference in breach of Articles 8 and 14 taken together. It did not have to decide this as, even supposing that the refusal did constitute an interference with respect for private life, the Court found that this interference was justified under Article 8.2. In the subsequent Karner case, in contrast, the Court ruled that a claim to the succession of a tenancy by the long-term homosexual partner of the deceased fell within the ambit of Article 8 and that there had been a breach of that Article. Although the Court in Karner referred (without dissent) to Mata Estevez, the status of the former case is now perhaps somewhat unclear.

The Court has also considered the related issue of the comparison between married and unmarried couples. In the Shackell case, the applicant argued that the failure to provide a survivor's pension in the case of an unmarried couple was discriminatory under Article 14. However, the Court recalled that the European Commission had held, in the case concerning an unmarried cohabiting couple who sought to compare themselves with a married couple, that these are not analogous situations. Though in some fields, the de facto relationship of cohabitees is now recognised, there still exist differences between married and unmarried couples, in particular differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit.

1 Mata Estevez v Spain, 56501/00 10 May 2001.
3 Shackell v United Kingdom, 45851/99, 27 April 2000.
4 Lindsay v. United Kingdom, 11089/84, 1 January 1986, (1986) 49 DR 181.
The Court noted that this decision dated from 1986 and accepted that there may well be increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, it ruled that "marriage remains an institution which is widely accepted as conferring a particular status on those enter it" and accordingly, the situation of the applicant was not comparable to that of a widow. In any case, the Court ruled that the promotion of marriage, by way of limited benefits for surviving spouses, could not be said to exceed the margin of appreciation afforded to the Contracting States.

In the period considered here, three relevant cases have been considered by the Courts of Justice and Human Rights which perhaps highlight the complexity of the issue. First, the Court of Justice considered the refusal of an occupational survivor’s pension to a person because he was not married to his partner although they had entered into a ‘registered partnership’ under German law. This case was considered under Directive 2000/78 which prohibits discrimination on a range of grounds including sexual orientation. However, it specifically excludes state social security schemes. It is, however, relevant for the manner in which the Grand Chamber of the Court approached the issue of discrimination. Mr. Maruko and the EC Commission had argued that a refusal of survivor’s pension constituted indirect discrimination on grounds of sexual orientation as two persons of the same sex could not marry under German law. The Grand Chamber shortly replied that

If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor’s benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

Although it appears that the national court was already of the view that spouses and life partners were comparable, it is noteworthy that the Court did not express an opinion on this subject, arguably correctly, given the complexity of national provisions.

The Court of Human Rights has also considered a related issue in an admissibility decision concerning a claim for an Austrian civil service pension. The couple concerned again lived in a homosexual relationship but were refused a dependant’s pension. This pension had been payable to a related person or to a non-related person of the opposite sex who had shared and run the common household without remuneration for at least the past ten years. However, in October 2005, the Austrian constitutional court, referring to the ECHR decision in Karner, had departed from its earlier view that such provisions were not inconsistent with the Austrian constitution. The Court interpreted Karner as meaning that, where the law does not require the existence of marriage or family relations, but allows for the existence of a life partnership, a difference on the grounds of sex or sexual orientation might constitute a violation of Article 14 of the ECHR (absent justification). The court pointed out that the Austrian legislation only required a common

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5 The Grand Chamber recently approved this statement in Burden v United Kingdom, 13378/05, 29 April 2008.
6 Case C-267/06, Maruko [2008] ECR I-000.
7 At para 72.
9 Austrian Constitutional Court, G 87-88/05, V./05, 10 October 2005
household, which spoke against any justification for the differential treatment and ruled that the provisions were in breach of the Austrian constitution.

Following this, the legislation was amended to extend the definition of dependant to include ‘a non-related person, who for at least the past ten months, has shared and run the common household without remuneration, if … that person takes care of the children living in that household …’. The Austrian government argued that the provisions were now non-discriminatory, but the applicants maintained that they were still victims of a violation as same-sex partners were required to show that they cared for children unlike opposite sex couples who, under transitional provisions, were still entitled to the pension regardless of whether they raised children or not. The Court considered that complex issues were involved and declared the application admissible.

Finally, in Burden the Court of Human Rights rejected a claim by two sisters who lived together that they should be treated in the same way as a married couple or a civil partnership (under UK law) as concerns tax legislation. The Grand Chamber interestingly did not follow the chamber judgment which had left open the issue as to whether the sisters could be considered analogous to a married couples or civil partners and had, by a narrow majority, held that the UK could not be said to have exceeded its margin of discretion and that the difference in treatment was reasonably and objectively justified. The Grand Chamber in contrast, held that ‘the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners’ and ruled that they were not in an analogous situation. The Court stated, in particular that ‘[r]ather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature’ (citing in particular the lack of any ‘legally binding agreement’ between the sisters). In general, the view that siblings are not analogous to a married couple or civil partnership seems a reasonable assessment (although see the strong dissent from Judge Borrego Borrego). However, the Court also took the opportunity to comment on the broader issue of comparability between married couples, civil partners and cohabiting couples. It stated

… there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand ....

This series of cases show a clear tendency – also reflected in recent EU and national law – to recognise the position of same-sex couples at least where these are recognised in national law. However, the precise scope of this recognition remains to be clarified. The cases also highlight that – even in the case of social security benefits – this is not a simple comparison between heterosexual and homosexual couples as to access to, for example a survivor’s pension. Rather we have married couples, life partnerships and cohabiting couples (of whatever sexual

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10 Burden v United Kingdom, 13378/05, 29 April 2008. This case also has interesting discussions of the issues of victim and exhaustion of remedies.

11 Although the focus on the ‘contractual’ aspect rather than the public aspects of such relationships is perhaps questionable. One might doubt whether, had the sisters agreed some form of legally binding contract as to their co-residence, this would have made them comparable to a married couple or civil partnership.

12 At para 65 of the judgment.
orientation) both in countries which do and do not have life partnership legislation. Similarly social security systems include those which distinguish between married couples and couples not legally married and those (like the former Austrian legislation) which distinguish between heterosexual and homosexual relationships. All this suggests that this is an area likely to see considerable development in terms of case law in coming years.

The ECHR’s effort to set out a strategy whereby it will require equality between marriage and legal relationships broadly corresponding to marriage, but not between married couples (and life partnerships) on the one hand and cohabiting couples on the other is interesting and may help to clarify the legal position in those countries which have adopted life partnership legislation. However, it leaves open the issue as to what happens where same-sex couples who want to enter into a legal relationship cannot do so.

Citizenship and residence (again)

Readers will recall that in an important judgment – *Tas Hagen* – the ECJ ruled that a Netherlands benefits for war victims which are specifically excluded from Regulation 1408/71 could be exported and overruled the residence requirement in national law. The Court based its approach on the concept of EU citizenship and the right to free movement of persons. The residence test in *Tas Hagen* was rather crude one (requiring that one be resident at the time of application) and Advocate General Kokott suggested that the Member States could, in principle, determine how long a person must have resided in the territory before he or she could claim a particular benefit and that, in the absence of contrary Community law provisions, a Member State could require the person concerned to be resident in the state when benefits begin to be paid and, where appropriate, throughout the entire period of receipt of benefits. However, the Court in *Nerkowska* has gone significantly further in overruling a long-term residence test concerning a Polish disability pension granted to civilian victims of war or repression.

The Court followed the approach to free movement adopted in recent cases, holding that national legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union. The Polish law constituted such a restriction by making the payment of the disability pension conditional on residence in Poland, which meant that it was liable to deter Polish nationals from exercising their freedom to move and to reside in another Member State.

The Court accepted that the arguments advanced by the Polish government that (i) the wish to ensure that there is a connection between the society of the Member State concerned and the recipient of a benefit and (ii) the necessity to verify that the recipient continues to satisfy the conditions for the grant of that benefit constituted objective considerations of public interest.

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14 At para 63 of her opinion.

15 Case C-499/06 *Nerkowska* [2008] ECR I-000.
which were capable of justifying the restrictions on freedom of movement. In particular, the Court accepted that it is lawful for a Member State to restrict the grant of such benefits, by means of a nationality or residence condition, to persons who are regarded as showing a certain degree of connection to the society of that Member State. However, the Court pointed out that Ms. Nerkowska was a Polish national and lived in that State for more than 20 years and that this was sufficient to establish such a connection. In those circumstances, it held that the requirement of residence throughout the period of payment of the benefit was disproportionate, since it went beyond what is necessary to ensure that such a connection exists. The Court also rejected the argument that a residence condition was the sole means of verifying that the recipient of a disability pension continues to satisfy the conditions for the grant of that pension, holding that it could not be reasonably claimed that the objective pursued could not be achieved by other means which, although less restrictive, were just as effective.

It is difficult to argue in principle against the approach taken by the Court. However, Member States may have some basis for arguing that the Court is paying no more than lip service to the ‘wide margin of appreciation’ which the Courts says they enjoy in this area. Whether these decisions in the very specific area of benefits for war and repression will have implications for broader (and more costly) social security benefits remains to be seen.

**Regulation 1408 cases**

We report below the full judgement of the Court of Justice in relation to the recent case involving the residency provisions in the Flemish care insurance scheme. This case is important in the context of the move in a number of EU countries to a greater federalisation. In addition to the Flemish care insurance case, the Court of Justice considered a number of detailed cases concerning Regulation 1408/71.

In *Chuck* the issue was whether, in calculating entitlement to a pension, the national authorities were obliged to take into account contributions paid in another member state even though the claimant was no longer resident in the EU. The Dutch social security authorities argued that as the benefit in question was not exportable under Article 10 of the Regulation, it should not have to apply the rules concerning aggregation. However, the Court ruled that aggregation must be applied even where the claimant is resident in a non-Member State. In principle this appears correct as the Regulation does not explicitly impose any condition and the claimant otherwise

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17 Advocate General Poiares Maduro had proposed that only nationality or residence ‘at the time of the repressive events’ should be considered relevant and – following the recent C-450/05 *Habelt* [2007] ECR I-000 judgement – had argued that Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bounds of the national community, but also within the wider context of the society of peoples of the Union (at para 23 of the opinion). The Court did not, however, adopt this view.
18 Although see the opposite approach in relation to unemployment benefits in Case C-406/04, *De Cuyper v Office national de l’emploi* [2006] E.C.R. I-6947.
19 Case C- 331/06 *Chuck* [2008] ECR I-000.
20 Indeed Article 36(3) of the implementing Regulation 574/72 envisages a situation where a claim is made outside the EU.
satisfied the conditions for aggregation. However, as the Court pointed out there is no provision of EU law which requires Member States to pay pensions in non-Member States and the right to any such payment remains subject to national law.\textsuperscript{21} This leaves the outcome of the case rather unclear.\textsuperscript{22}

A second case - Derouin - concerned the implications of a bilateral convention: in this case the French-UK double taxation convention for the scope of income subject to social insurance contributions.\textsuperscript{23} Mr. Derouin lived and worked (in a self-employed capacity) in France and was also a partner in a UK firm. A dispute arose as to whether or not his UK income should be subject to the French ‘general social contribution’ (CSG) and ‘social debt repayment contribution’ (CSRD).\textsuperscript{24} The Advocate General, following the Allard case, held that Article 14d(1) of the Regulation required the base of contributions to include income obtained in another Member State even where the Member States concerned were covered by a double taxation agreement. In Allard the Court had ruled that Regulation 1408/71 required the Belgian moderation contribution to be calculated in such a way as to include the income obtained in the territory of another Member State even if, after paying that contribution, the self-employed person could not claim any social security or other benefit at the expense of that State.

However, in Derouin the Court ruled that, as Regulation 1408/71 was a means of co-ordination and not harmonization, Member States have the power to determine the tax base for contributions and are entitled to forego the inclusion of income earned in another Member State.\textsuperscript{25} Indeed the Court went further than the case submitted to it to say that a Member State could make such a waiver either ‘unilaterally or in the context of [a] tax treaty’.\textsuperscript{26} The Court distinguished the Allard case on the basis that in that case the Member State had chosen to include the income from another Member State.\textsuperscript{27} Thus it would now appear that a Member State can decide either to include or exclude income from another Member State in the base for social contributions (in such cases) and that either approach is acceptable to the Court. This case is a further example of the difficulties faced by the different rules applying to tax and social security contributions despite the increasing convergence between the two systems in national law.\textsuperscript{28} The solution proposed by the Court is, to a certain extent, logical but hardly makes for a strong system of co-ordination.

\textsuperscript{21} Chuck at para 39.
\textsuperscript{22} And raises the question as to whether the national authorities and courts should not have made more effort to resolve the issue rather than referring a very ‘preliminary’ question to the ECJ.
\textsuperscript{23} Case C-103/06 Derouin [2008] ECR I-000.
\textsuperscript{24} The Court noted that it had held that these contributions fall within the scope of the Regulation: Case C-34/98 Commission v France [2000] ECR I-995 and Case C-169/98 Commission v France [2000] ECR I-1049.
\textsuperscript{25} At paras 26-7. The Court did go on to say (at para 30) that ‘the exclusion from the tax base for social security contributions of a worker’s foreign source income cannot affect the worker’s right to receive all of the benefits provided for that (sic.) the applicable legislation’.
\textsuperscript{26} Derouin at para 27.
\textsuperscript{27} However, in Allard (at para 22) the Court had held that Article 14d(1) required that a person simultaneously self-employed in Belgium and in France must be subject, as a result of the latter activity, to the appropriate Belgian legislation under the same conditions as if he was self-employed in Belgium. Clearly Derouin does not give rise to the same outcome.
\textsuperscript{28} See the discussion by Advocate General Mengozzi at para 29 of the Derouin opinion.
Advocate General Mengozzi discussed at length the obstacles to allowing Member States to derogate from the obligation to take into account income from another Member State. As he pointed out Article 6 of Regulation 1408/71 provides that that Regulation replaces any bilateral social security conventions (subject to the specific provisions in Articles 7 and 8) but the result of the Court’s decision is that – at least in certain respects – the Member States can vary the application of the Regulation by bilateral tax conventions. In addition, the French-UK tax convention was not notified to the Commission as required under Article 8 of the Regulation (although it falls, in part, within the scope of Regulation 1408). The Advocate General concluded that allowing a derogation in relation to income in another Member State could open a breach in the equality of treatment provided for in Article 14. Unfortunately, the Court did not specifically address any of these points in its judgment.

Finally in Bosmann the Court considered again the rules concerning the overlapping of family benefits payable by different Member States. The Bosmann case concerned a woman living in Germany but working in the Netherlands. She was entitled under national law to German child benefits on the basis of residence but these were refused by the German authorities on the basis that the Netherlands was the competent state. However, she was not, in fact, eligible for Netherlands benefits as her children were over the relevant age limit. The likely answer to this question – based on a long line on case law – was that while the Netherlands was the competent state, in the particular circumstances, EU law did not preclude her entitlement to the benefits under national (German) law. The Grand Chamber of the Court eventually arrived at this conclusion but by the most circuitous route possible and at the cost of further confusing the law in this area.

The Court rejected the Commission’s argument that this result was required by article 10 of Regulation 574/72 (concerning overlapping of benefits on the basis of insurance and residence) on the basis that the facts of the case did not involve such an overlap. However, the Court’s alternative reasoning is incoherent. It states that Ms. Bosmann’s situation is subject to the general rule for determining the legislation applicable set out in Article 13(2)(a) of Regulation No 1408/71 (para 26). The effect of this is that ‘only the legislation of [the Member State of employment] is applicable’ to her (para 17). However, in the circumstances of this case, ‘the Member State of residence cannot be deprived of the right to grant child benefit to those resident within its territory’ (para 31). In other words it is not the case that only the legislation of the Member State of employment is applicable to Ms. Bosmann. The Court’s dismissal of the Luitjen judgment (in which it held that article 13 was binding to the exclusion of other family benefit legislation) on the basis of a difference in the facts of the cases without addressing the issues of principle is equally unconvincing.

While the Court has adopted clear lines of principle in a range of areas concerning social security, such as EU citizenship and cross-border health care, its treatment of rather routine issues concerning Regulation 1408/71 in cases such as those noted here, provides little grounds

29 At paras 63-86 of the opinion.
30 At para 82.
31 Case C-352/06 Bosmann [2008] ECR I-000.
32 Case 60/85 Luitjen [1986] ECR 2365. Especially given that Advocate General Mazák had taken the (arguably more logical) view that article 13 did preclude entitlement to German benefits.
for optimism that the system of preliminary reference is making the (already rather complicated) system of regulation 1408/71 clearer or more easy to apply in practice.

UN sanctions and social security

The UK House of Lords has recently referred an interesting question to the ECJ concerning restrictions placed on the payment of certain social security benefits in accordance with the UN asset-freezing regime. The case involves restrictions which were placed on the payment of social security benefits to women who were not themselves ‘suspected terrorists’, but each of whom was ‘married to a man listed under United Nations Security Council Resolution 1390 as a person associated with Usama Bin Laden, Al Qaida or the Taliban.’ The UN Resolutions were given effect in EU law by Regulation (EC) 881/2002. Article 2 provides that:

1. All funds and economic resources belonging to, or owned by or held by, a natural or legal person, group or entity designated by the Sanctions Committee … shall be frozen.

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, [such] a … person, group or entity …

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, [such] a … person, group or entity … so as to enable that person, group or entity to obtain funds, goods or services.

In the UK social security benefits payable to persons listed for involvement in terrorism are suspended, and payments are approved under licence by the Treasury generally only where benefits are necessary to meet basic needs. However, in mid-2006 the UK government decided to extend this regime to state benefits paid to individuals sharing the same household with a listed person. The effect of these restrictions on social security benefits were described as ‘draconian’ by the lower UK courts which, however, upheld the government’s approach.

The House of Lords has now decided to refer a question to the European Court of Justice as to whether the words ‘for the benefit of’ in Article 2.2 [of Regulation 881/2002] have a wide meaning which covers any application of money from which a listed person derives some benefit, or whether they apply only to cases in which funds, financial assets or economic resources are, to use the language of the United Nations Resolution and Article 2.2, ‘made available’ for his benefit, so that he is in a position to choose how to use them.

At the same time the court very clearly stated its own view that the ‘intrusive regime’ adopted by the Treasury was not required by Article 2.2. Their Lordships set out four reasons for this. First, the approach was not necessary to give effect to the purpose of the UN Security Council’s resolution which was to prevent funds from being used for terrorist activities. Second, to avoid an ‘anomalous discrepancy’ between the meaning of Articles 2.2 and 2.3 it would be logical to imply the restriction contained in Article 2.3 - which prohibits making economic resources

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33 R (M) v Her Majesty’s Treasury [2008] UKHL 26.
available to a listed person *only* where it enables that person ‘to obtain funds, goods or services’ – in Article 2.2. Third, the term ‘made available’ in Article 2.2 should be read as referring to a benefit made available to the listed person ‘which he could use for terrorist purposes’. Finally, the court took the view that the Treasury interpretation of the Regulation produced ‘a disproportionate and oppressive result’. Given the ongoing development of the CFI and ECJ case law in this area, it will be interesting to see how the Court replies to this question.

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34 Initially the Court of First Instance (CFI) in Case T-306/01 *Yusuf* [2005] ECR II-3533- had refused to apply general principles of Community law in assessing the validity of the Regulation, holding that the Regulation implemented binding international law so that its validity could only be tested against fundamental peremptory provisions of international law (or *ius cogens*). However, the approach taken by the court has been heavily criticised, and, in more recent decisions, both the CFI and the Court of Justice have taken quite a different approach (e.g. Case C-229/05P *PKK and KNK v Council* [2007] ECR I-439
2. The Flemish care insurance case – discrimination within federal states

Judgment

Court of Justice, 1 April 2008

(Grand Chamber composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, A. Tizzano (Rapporteur), G. Arestis, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský and J. Klučka, Judges)

Government of the French Community and Walloon Government v Flemish Government (Case C-212/06)


2 The reference was made in the context of proceedings between several federated entities of the Kingdom of Belgium. In those proceedings, the Government of the French Community and the Walloon Government, on the one hand, and the Flemish Government, on the other, are in dispute over the conditions for affiliation to the care insurance scheme established by the Flemish Community for persons whose autonomy is reduced by serious and prolonged disability.

Legal context

The relevant provisions of Community law

3 The scope ratione personae of Regulation No 1408/71 is defined in Article 2(1) thereof, which provides:

‘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.’

4 Article 4 defines the scope ratione materiae of that regulation as follows:

‘This Regulation shall apply to all legislation concerning the following branches of social security:
(a) sickness and maternity benefits;

...

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.

...

2b This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.

...

5 Article 3 of Regulation No 1408/71, headed ‘Equality of treatment’, provides:

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

6 Lastly, Article 13 of the Regulation determines the legislation applicable to migrant workers in the field of social security. It is worded as follows:

‘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 the provisions of 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;

(b) a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State;

…’.

The relevant provisions of domestic law

7 By decree of the Flemish Parliament on the organisation of care insurance (Decreet houdende de organisatie van de zorgverzekering) of 30 March 1999 (Moniteur belge of 28 May 1999, p. 19149, ‘the Decree of 30 March 1999’), the Flemish Community introduced
a scheme of care insurance in order to improve the state of health and living conditions of persons whose autonomy is reduced by serious and prolonged disability. This scheme confers entitlement, subject to certain conditions and up to a maximum amount, to have an insurance fund take responsibility for the paying of certain costs occasioned by a state of dependence for health reasons, such as expenses involved in home help services or in the purchase of equipment or products needed by the insured person.

The Decree of 30 March 1999 has been amended on several occasions, in order in particular to take account of objections raised by the Commission of the European Communities and leading to the opening of infringement proceedings in 2002. In essence, the Commission challenged the compatibility with Regulation No 1408/71 of the condition of residence in the Dutch-speaking region or in the bilingual region of Brussels-Capital to which affiliation to that care insurance scheme and the payment of the services for which it provided were made subject in the original version of the decree.

The criterion of residence was, therefore, adapted by the Decree of the Flemish Parliament amending the Decree of 30 March 1999 on the organisation of care insurance (Decreet van de Vlaamse Gemeenschap houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering) of 30 April 2004 (Moniteur Belge of 9 June 2004, p. 43593, ‘the Decree of 30 April 2004’). That decree, which had retroactive effect to 1 October 2001, chiefly extended the scope ratione personae of the care insurance scheme to persons working in the territory of those regions and residing in a Member State other than the Kingdom of Belgium. It also excluded from that ambit persons residing in those regions but subject to the social security system of another Member State. As a result of the adoption of those amendments, the Commission decided on 4 April 2006 to take no further action in the infringement procedure in question.

Article 4 of the Decree of 30 March 1999, as amended by the Decree of 30 April 2004, defines as follows the classes of persons who must or may be affiliated to the care insurance scheme:

§1. Any person residing within the Dutch-speaking region must join a care insurance scheme approved by this Decree.

... §2. Any person residing within the bilingual region of Brussels-Capital may on a voluntary basis join a care insurance scheme approved by this Decree.

§2bis Any person referred to in paragraphs 1 and 2 to whom, on the basis of the rules governing the law applicable under Regulation (EEC) No 1408/71, the social security scheme of another Member State of the European Union or of another State party to the European Economic Area applies as of right shall not fall within the scope of this Decree.

§2ter Any person not residing in Belgium to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme in Belgium applies as of right because of his employment in the Dutch-speaking region must join a
care insurance scheme approved by this decree. The provisions of this decree concerning persons referred to in paragraph 1 shall apply by analogy.

Any person not residing in Belgium to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme in Belgium applies as of right because of his employment in the bilingual region of Brussels-Capital may elect to join a care insurance scheme approved by this decree. The provisions of this decree concerning persons referred to in paragraph 2 shall apply by analogy.'

11 Article 5 of the Decree of 30 March 1999, as most recently amended by the Decree of the Flemish Parliament amending the Decree of 30 March 1999 on the organisation of care insurance (Decreet van de Vlaamse Gemeenschap houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering), of 25 November 2005 (Moniteur Belge of 12 January 2005, p. 2153, which too has retrospective effect from 1 October 2001, lays down as follows the conditions for reimbursement by the care insurance scheme:

‘The user must fulfil the following conditions in order to be able to claim reimbursement of the costs of non-medical assistance and services by a care insurance scheme:

…

3. At the time of reimbursement, he must be legally resident in a Member State of the European Union or in a State party to the Agreement on the European Economic Area;

…

5. for at least five years before reimbursement, he must have resided without interruption either in the Dutch-speaking region or the bilingual region of Brussels-Capital or, as a person covered by a social insurance scheme, in a Member State of the European Union or a State party to the Agreement on the European Economic Area; …’

…’.

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

12 This case originates from the third action for annulment brought by the applicant Governments against the Decree of 30 March 1999, the two earlier actions having been rejected in part and in whole by the Cour d’arbitrage (Court of Arbitration). In those earlier cases, the Cour d’arbitrage stated, in particular, in its judgment No 33/2001 of 13 March 2001, that the care insurance scheme introduced by that Decree concerned ‘aid to persons’, a matter falling, by virtue of Article 128(1) of the Belgian Constitution, within the powers of the Communities, and did not, therefore, trespass on the exclusive powers of the federal State in the sphere of social security.

13 The decision for reference makes it clear that the dispute in the main proceedings turns, more specifically, on Article 4 of the Decree of 30 March 1999 in the version contained in the Decree of 30 April 2004 (‘the Decree of 30 March 1999, as amended’). In their actions,
brought before the referring court on 10 December 2004, the applicant Governments pleaded infringement of Regulation No 1408/71 and of various provisions of the EC Treaty, claiming that to exclude from that scheme persons who, although working in the Dutch-speaking region or in the bilingual region of Brussels-Capital, reside in national territory, but outwith the territory for which those regions are respectively competent, amounts to a restrictive measure hindering the free movement of persons.

In those circumstances, the Cour d’arbitrage has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does a care insurance scheme which:

(a) has been established by an autonomous Community of a federal Member State of the European Community,

(b) applies to persons who are resident in the part of the territory of that federal State for which that autonomous Community is competent,

(c) provides for reimbursement, under that scheme, of the costs incurred for non-medical assistance and service to persons with serious, long-term reduced autonomy, affiliated to the scheme, in the form of a fixed contribution to the related costs and

(d) is financed by members’ annual contributions and by a grant paid out of the budget for expenditure of the autonomous Community concerned,

constitute a scheme falling within the scope *ratione materiae* of … Regulation … No 1408/71 …, as defined in Article 4 thereof?

(2) If the first question referred for a preliminary ruling is to be answered in the affirmative: must the regulation cited above, in particular Articles 2, 3 and 13 thereof and, in so far as they are applicable, Articles 18, 19, 20, 25 and 28, be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in the territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?

(3) Must Articles 18 EC, 39 EC and 43 EC be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in that territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons,
whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?

(4) Must Articles 18 EC, 39 EC and 43 EC be interpreted as not permitting the scope of such a system to be limited to persons who are resident in the territorial components of a federal Member State of the European Community which are covered by that system?

Concerning the questions referred

The first question

15 By its first question the national court seeks in substance to ascertain whether the benefits provided under a scheme such as the care insurance scheme established by the Decree of 30 March 1999 fall within the ambit ratione materiae of Regulation No 1408/71.

16 For the purpose of answering that question, it is to be borne in mind that the Court has consistently held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each benefit, in particular its purposes and the conditions on which it is granted, and not on whether it is classified as a social security benefit by national legislation (see, inter alia, Case 249/83 Hoeckx [1985] ECR 973, paragraph 11; Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 28, and Case C-332/05 Celozzi [2007] ECR I-563, paragraph 16).

17 On this point, the Court has also stated on numerous occasions that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Hoeckx, paragraphs 12 to 14; Commission v Luxembourg, paragraph 29, and Celozzi, paragraph 17).

18 In the case in the main proceedings, as is made apparent in all the observations submitted to the Court, it is not disputed that a scheme such as the care insurance scheme established by the Decree of 30 March 1999 satisfies those conditions.

19 First, the provisions of that decree make it plain that such a scheme gives a right, objectively and on the basis of a statutorily defined position, to reimbursement by a care insurance fund of the costs incurred in respect of the provision of help and non-medical services by any person whose autonomy is reduced by reason of serious and prolonged disability.

20 Secondly, the Court has earlier held that benefits intended to improve the state of health and quality of life of persons reliant on care, such as those at issue in the main proceedings, have as their essential purpose the supplementing of sickness insurance benefits and must accordingly be regarded as ‘sickness benefits’ for the purpose of Article 4(1)(a) of Regulation No 1408/71 (Case C-160/96 Molenaar [1998] ECR I-843, paragraphs 22 to 24;
Furthermore, as the Walloon Government observes, care insurance cannot be excluded from the ambit of Regulation No 1408/71 on the basis of Article 4(2)b thereof, which covers certain kinds of non-contributory benefits, provided that they are governed by provisions of domestic law applicable to part only of the territory of a Member State.

As a matter of fact, in contrast to the requirements laid down by the derogation provided for by Article 4(2)b, the care insurance scheme at issue in the main proceedings is contributory in kind, for it is funded, at the very least in part, by contributions paid by the persons insured, and is not mentioned in Annex II, Section III, to Regulation No 1408/71.

In consequence, the answer to be given to the first question is that benefits provided under a scheme such as the care insurance scheme established by the Decree of 30 March 1999, as amended, fall within the scope ratione materiae of Regulation No 1408/71.

Concerning the second and third questions

By those two questions, which may appropriately be examined together, the national court seeks in essence to ascertain whether, on a proper construction of Articles 18 EC, 39 EC and 43 EC, legislation of a federated entity of a Member State limiting affiliation to a scheme such as the care insurance scheme at issue in the main proceedings and entitlement to the benefits provided by that scheme to persons residing in the territory coming within that entity’s competence and to persons pursuing an activity in that territory and residing in another Member State, with the result that persons are excluded who work in that territory but reside in the territory of another federated entity of the same State, is contrary to those provisions.

Admissibility

The Flemish Government claims, principally, that those questions are neither helpful nor necessary to the settling of the dispute in the main proceedings, with the result that they must be declared inadmissible.

It states that before the national court the applicant Governments opposed the implementation of that care insurance scheme, denying that the Flemish Community was competent in that sphere, while the interpretation of Community law which they favour in respect of the second and third questions leads to the opposite result, that is to say, the extension of the care insurance benefits in question to persons residing in the French-speaking region.

In addition, according to the Flemish Government, the Cour d’arbitrage has itself already answered those questions in its decision to refer, by considering that the care insurance scheme at issue in the main proceedings does not infringe the exclusive competence of the federal authority in the sphere of economic union within Belgium, having regard to the amount and the limited effects of the benefits in question. For the same reasons, the
scheme cannot be said to restrict freedom of movement of persons within the meaning of the Treaty.

28 In that respect, it is to be borne in mind that, according to settled case-law, in the context of cooperation between the Court and national courts as provided for by Article 234 EC, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38; Case C-18/01 Korhonen and Others [2003] ECR I-5321, paragraph 19, and Case C-295/05 Asemfo [2007] ECR I-2999, paragraph 30).

29 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Community law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (Case C-415/93 Bosman [1995] ECR I-4921, paragraph 61, and Case C-355/97 Beck and Bergdorf [1999] ECR I-4977, paragraph 22).

30 Such is not, however, the case in the dispute in the main proceedings. It is enough to find that it is made clear in the decision making the reference that the reply to the second and third questions asked by the Cour d’arbitrage will be of use to it in determining whether the condition of residence, on which entitlement to the care insurance scheme depends, infringes, as the applicant Governments argue in the actions in the main proceedings, certain provisions of Community law concerning freedom of movement of persons.

31 The second and third questions referred for a preliminary ruling must therefore be declared admissible.

Substance

32 The Flemish Government maintains that those questions concern only a purely internal situation quite unconnected to Community law, viz., that of the non-application of the Decree of 30 March 1999, as amended, to persons both residing and working in Belgium.

33 In this respect, it must be borne in mind that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (see, inter alia, with regard to freedom of establishment and freedom of movement for workers, respectively, Case 20/87 Gauchard [1987] ECR 4879, paragraphs 12 and 13, and Case C-18/95 Terhoeve [1999] ECR I-345, paragraph 26, and the decisions there cited). The same holds good in respect of the provisions of Regulation No 1408/71 (see, to that effect, Case C-153/91 Petit [1992] ECR I-4973, paragraph 10, and
On the other hand, as the Court has also stated, any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of those provisions (see in particular, to that effect, Case C-419/92 Scholz [1994] ECR I-505, paragraph 9; Terhoeve, paragraph 27, and Case C-212/05 Hartmann [2007] ECR I-6303, paragraph 17).

In the circumstances of this case, it is established that the second and third questions referred by the national court concern all persons, whether they have made use of one of the fundamental freedoms guaranteed by the Treaty or not, working in the Dutch-speaking region or the bilingual region of Brussels-Capital, who are not, however, eligible for the care insurance scheme at issue in the main proceedings because they live in part of the national territory situated outside those two regions.

In those circumstances, two kinds of situations must be distinguished in the light of the principles recalled in paragraphs 32 and 33 above.

First, application of the legislation at issue in the main proceedings leads, inter alia, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community.

Community law clearly cannot be applied to such purely internal situations.

It is not possible, as the Government of the French Community suggests, to raise against that conclusion the principle of citizenship of the Union set out in Article 17 EC, which includes, in particular, according to Article 18 EC, the right of every citizen of the Union to move and reside freely within the territory of the Member States. The Court has on several occasions held that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 Uecker and Jacquet [1997] ECR I-3171, paragraph 23; Case C-148/02 Garcia Avello [2003] ECR I-11613, paragraph 26, and Case C-403/03 Schempp [2005] ECR I-6421, paragraph 20).

It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard also to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court (see, to that effect, Case C-250/03 Mauri [2005] ECR I-1267, paragraph 21, and Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941, paragraph 29).
Second, the legislation at issue in the main proceedings may also exclude from the care insurance scheme employed or self-employed workers falling within the ambit of Community law, that is to say, both nationals of Member States other than the Kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom of movement.

So far as that second category of worker is concerned, it falls therefore to be considered whether the provisions of Community law, interpretation of which is sought by the national court, preclude legislation such as that at issue in the main proceedings, inasmuch as it applies to nationals of Member States other than the Kingdom of Belgium or to Belgian nationals who have exercised their right of free movement within the European Community.

In this respect it is important to bear in mind that, although Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe Community law and, in particular, the provisions of the EC Treaty on freedom of movement for workers (Case C-135/99 Elsen [2000] ECR I-10409, paragraph 33).

It is also settled case-law that all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Joined Cases 154/87 and 155/87 Wolf and Others [1988] ECR 3897, paragraph 13; Terhoeve, paragraph 37, and Case C-318/05 Commission v Germany [2007] ECR I-0000, paragraph 114). In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity (see, inter alia, Bosman, paragraph 95, and Terhoeve, paragraph 38).

As a result, Articles 39 EC and 43 EC militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32; Case C-285/01 Burbaud [2003] ECR I-8219, paragraph 95, and Case C-442/02 CaixaBank France [2004] ECR I-8961, paragraph 11).

In the light of those principles, measures which have the effect of causing workers to lose, as a consequence of the exercise of their right to freedom of movement, social security advantages guaranteed them by the legislation of a Member State have in particular been classed as obstacles (see, inter alia, Joined Cases C-45/92 and C-46/92 Lepore and Scamuffa [1993] ECR I-6497, paragraph 21; Case C-165/91 van Munster [1994] ECR I-4661, paragraph 27, and Hosse, paragraph 24).
Legislation such as that at issue in the main proceedings is such as to produce those restrictive effects, inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence in either a limited part of national territory, viz., the Dutch-speaking region and the bilingual region of Brussels-Capital, or in another Member State.

Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the fact that employed or self-employed workers find themselves in a situation in which they suffer either the loss of eligibility care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of the rights conferred by Articles 39 EC and 43 EC.

It is of little importance in this regard, contrary to what the Flemish Government in substance maintains, that the differentiation at issue is based solely on the place of residence on national territory and not on any condition of nationality, with the result that it affects in the same way all workers, employed or self-employed, resident in Belgium.

For a measure to restrict freedom of movement, it is not necessary for it to be based on the nationality of the persons concerned or even for it to have the effect of bestowing an advantage on all national workers or of operating to the detriment solely of nationals of other Member States, but not of nationals of the State in question (see, to that effect, Case C-281/98 Angonese [2000] ECR I-4139, paragraph 41, and Case C-388/01 Commission v Italy [2003] ECR I-721, paragraph 14). It is enough that the measure should benefit, as in the case of the care insurance scheme at issue in the main proceedings, certain categories of persons pursuing occupational activity in the Member State in question (see, by analogy, as regards freedom to provide services, Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraph 25, and C-250/06 United Pan-Europe Communications Belgium and Others [2007] ECR I-0000, paragraph 37).

In addition, as Advocate General Sharpston has pointed out in paragraphs 64 to 67 of her Opinion, the restrictive effects of the legislation in question in the main proceedings are not to be considered too indirect and uncertain for it to be impossible to regard that legislation as constituting an obstacle contrary to Articles 39 EC and 43 EC. In particular, unlike the case giving rise to the judgment in Case C-190/98 Graf [2000] ECR I-493, referred to by the Flemish Government at the hearing, possible entitlement to the insurance care benefits at issue depends, not on a future and hypothetical event for the employed or self-employed worker concerned, but on a circumstance linked, ex hypothesi, to the exercise of the right to freedom of movement, namely, the choice of transfer of residence.

Likewise, as regards the Flemish Government’s argument that the legislation could in any case have only a marginal effect on freedom of movement, in view of the limited nature of the amount of benefits in question and the number of persons concerned, it need merely be observed that, according to the Court’s case-law, the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental Community
provisions and any restriction, even minor, of that freedom is prohibited (see, in particular, Case C-49/89 Corsica Ferries France [1989] ECR 4441, paragraph 8, and Case C-169/98 Commission v France [2000] ECR I-1049, paragraph 46).

53 In any event, it is not inconceivable, given such factors as the ageing of the population, that the prospect of being able or unable to receive dependency benefits such as those offered by the care insurance scheme at issue in the main proceedings should be taken into consideration by the persons concerned in exercising their right to freedom of movement.

54 It follows that domestic legislation such as that at issue in the main proceedings entails an obstacle to freedom of movement for workers and to freedom of establishment, prohibited in principle by Articles 39 EC and 43 EC.

55 According to well-established case-law, national measures capable of hindering the exercise of fundamental freedoms guaranteed by the Treaty or of making it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, inter alia, Case C-9/02 De Lasteyrie du Saillant [2004] ECR I-2409, paragraph 49, and Case C-104/106 Commission v Sweden [2007] ECR I-671, paragraph 25).

56 There is, however, nothing in either the file sent to the Court by the referring court or the observations of the Flemish Government capable of justifying the application, to persons working in the Dutch-speaking region or the bilingual region of Brussels-Capital, of a requirement of residence either in one of those two regions or in another Member State, for the purpose of eligibility for the care insurance scheme at issue in the main proceedings.

57 Here the Flemish Government refers exclusively to the requirements inherent in the division of powers within the Belgian federal structure and, particularly, to the fact that the Flemish Community could exercise no competence in relation to care insurance in respect of persons residing in the territory of other linguistic communities of the Kingdom of Belgium.

58 That line of argument cannot be accepted. As the Advocate General, in paragraphs 101 to 103 of her Opinion, and the Commission have noted, the Court has consistently held that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law (see, inter alia, Case C-87/02 Commission v Italy [2004] ECR I-5975, paragraph 38, Case C-102/06 Commission v Austria [2006], not published in the European Court Reports, paragraph 9).

59 It is therefore to be declared that a condition of residence such as that laid down in the Decree of 30 March 1999, as amended, is contrary to Articles 39 EC and 43 EC. That being so, there is no need to raise the question of an infringement of Regulation No 1408/71, in particular of Article 3(1) thereof (see, by analogy, Terhoeve, paragraph 41). Nor is there any need to give a ruling on the existence of a restriction liable to be prohibited by Article 18 EC, of which Articles 39 EC and 43 EC constitute the specific
expression so far as concerns freedom of movement for workers and freedom of establishment.

Having regard to all the foregoing, the reply to be given to the second and third questions is that, on a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State, such as that governing the care insurance scheme established by the Flemish Community by the Decree of 30 March 1999, as amended, limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme to persons either residing in the territory coming within that entity’s competence or pursuing an activity in that territory but residing in another Member State, is contrary to Articles 39 EC and 43 EC, in so far as such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

Concerning the fourth question

The fourth question deals with the consequences following from a finding by the national court of the incompatibility of the legislation in question in the main proceedings with Community law, the effect of which would be, according to that court, to re-establish the scheme in force before the Decree of 30 April 2004 was adopted. More specifically, it seeks to ascertain whether a scheme limiting eligibility for care insurance only to persons living in the Dutch-speaking region and the bilingual region of Brussels-Capital is contrary to Articles 18 EC, 39 EC and 43 EC.

On this point, it suffices to state that the considerations set out in paragraphs 47 to 59 above in response to the second and third questions hold good, with all the greater reason, with regard to legislation entailing an additional restriction compared with the scheme applicable following the adoption of the Decree of 30 April 2004, given that that legislation excluded from its ambit all persons working in the Dutch-speaking region or the bilingual region of Brussels-Capital but having their residence in another Member State, including therefore persons resident in another Member State.

The reply to be given to the fourth question is therefore that on a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme to persons residing in that entity’s territory is contrary to those articles, in so far as such limitation affects nationals of other Member States working in that entity’s territory or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

Costs

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

1. Benefits provided under a scheme such as the care insurance scheme established by the Decree of the Flemish Parliament on the organisation of care insurance (Decreet
2. On a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State, such as that governing the care insurance scheme established by the Flemish Community by the decree of 30 March 1999, as amended by the Decree of the Flemish Parliament of 30 April 2004, limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme to persons either residing in the territory coming within that entity’s competence or pursuing an activity in that territory but residing in another Member State, is contrary to those provisions, in so far as such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

3. On a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State limiting affiliation to a social security scheme and entitlement to the benefits provided by that scheme only to persons residing in that entity’s territory is contrary to those provisions, in so far as such limitation affects nationals of other Member States working in that entity’s territory or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

Notes

1. This case is important given the trend in a number of EU Member States towards a greater federalisation of government. Regulation 1408/71 (and the ‘new’ Regulation 883/2004) are primarily based on the territorial unit of the State and do not provide for systems of federal insurance (see article 4(2b) of Regulation 1408/71 excluding special non-contributory benefits the validity of which is confined to part of a State’s territory). Apart from its broader implications (which cannot be discussed here) federalisation, as Advocate General Sharpston discussed, has potentially important implications for freedom of movement of persons within the EU. Therefore the approach of the Court will be of considerable importance both in relation to the competence of federal units vis-à-vis social insurance and (perhaps) more generally.\(^{35}\)

\[^{35}\text{It is clear that this particular case was part of a broader attempt to challenge the Flemish scheme of care insurance. See the decisions of the Belgian Cour d'arbitrage arrêt no. 33/201 of 13 March 2001; no. 8/2003 of 22 January 2003 which consider issues of national law.}\]
2. As set out in paras 7-11 of the judgment, the Flemish care insurance only applied (compulsorily) to persons resident in the Dutch-speaking region or (voluntarily) to those in the bilingual Brussels region. As a result of action by the EC Commission the law was subsequently extended to persons working in those regions and residing in a Member State other than Belgium. However, persons working in the Dutch-speaking or bilingual regions but resident in other parts of Belgium remained excluded.

3. The Court first had to consider the extent to which EU law applied (paras 33-42). Here it adopted the classic distinction between citizens who had exercised the right to free movement (and to whom EU law applies) and those who had not and who were, therefore, in a purely ‘internal’ situation to whom EU law could not be applied (para 38). The Advocate General had, interestingly if somewhat tentatively, suggested that the Court might wish to reconsider this approach in the light of its case law on free movement of goods and given the developing concept of EU citizenship. However the Court (para 39-40) explicitly rejected such an approach, although it did suggest that principles of EU law might in certain cases be relevant (even in internal situations) where national law required equality of treatment between its own nationals and those of other Member States.

4. The Court then considered the compatibility of the residence requirement with EU law. However, although in answering the first question referred it had held that the care insurance fell within the scope of Regulation 1408/71, it turned not to that Regulation but to the Treaty provisions on free movement. Following its recent case law it recalled that Articles 39 EC and 43 EC militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty. The Court found that migrant workers might be dissuaded from making use of their freedom of movement because moving to certain parts of Belgium would cause them to lose eligibility for the benefits which they might otherwise have claimed. Therefore the Flemish legislation could cause workers to lose social security advantages guaranteed them by the legislation of a Member State as a result of the exercise of their right to freedom of movement and must be classed as an obstacle to free movement. The Court rejected that arguments that the effect of the legislation were too indirect and uncertain to have this effect or would have such a marginal effect on freedom of movement as to be irrelevant (paras 51-2).

5. It was, therefore, necessary to consider if the provisions could be objectively justified. Here the Court decisively rejected that Flemish government’s arguments concerning the requirements inherent in the division of powers within the Belgian federal structure and, particularly, its argument that the Flemish Community could exercise no competence in relation to care insurance in respect of persons residing in the territory of other linguistic communities of the Kingdom of Belgium. Accordingly it ruled that the provisions of the law were in breach of Article 39 and 43 EC and that there was, therefore, no need to consider the impact of Regulation 1408/71.

6. In principle the outcome of the case is to be welcomed. Advocate General Sharpston described the essential argument submitted as being that ‘a Member State with a decentralised constitutional structure thereby retains competence to discriminate between

36 Opinion, paras 112-157.
37 Paras 45-48.
its own citizens without being required to provide objective justification for that discrimination'. The rejection of that argument, so far as EU law applies, is important both from the point of view of protecting EU citizenship and free movement. It is difficult to see any social policy rationale for the rather tortuous provisions of the Flemish legislation which exclude only those persons resident in other parts of Belgium.

7. However, the approach adopted by the Court may be somewhat problematic. First, while the Court’s strong support for the principle of free movement is to be welcomed, it is submitted that (i) its view that ‘any restriction, even minor’ on freedom of movement is prohibited, at the very least, begs the question as to what is ‘minor’; and (ii) such issues may better be decided by the national court (as the Commission argued) on the basis of guidelines from the Court. In the overall scheme of things it seems somewhat doubtful that the possible future impact of the restrictive rules in the Flemish care insurance would have had a significant impact on decisions as to whether to exercise freedom of movement but a national court is arguably better placed to assess this.

8. Second, the Court’s reliance on the Treaty provisions surely raises questions not only about the Flemish care insurance but also the many regional assistance schemes which (as we have seen) are specifically excluded from Regulation 1408/71. Persons considering moving are perhaps more likely to take into account the level of regional benefits provided than the possible impact of a future need for care insurance.

9. These issues could have been avoided had the Court considered the issue under Regulation 1408. Article 13 of that Regulation provides that ‘a person employed in the territory of one Member State shall be subject to the legislation of that State’. While this does not make reference to federal situations, the general principle of equality of treatment (set out in article 3(1) of the Regulation) would apply. In the case of a person (covered by the Regulation) employed in the Dutch-speaking region, the majority of national workers would be insured under the Flemish care insurance. Therefore, to avoid discrimination, all other workers (covered by the Regulation) should also be insured under that care insurance (regardless of the place of residence). Such an approach would, arguably, have been a much simpler solution which would have been easier to implement (it being easier to identify persons covered by Regulation 1408/71 than the more nebulous concept of those having exercised their right to free movement) and would have avoided raising the broader issues of the compatibility of regional welfare with EU law.

10. As the Advocate General pointed out in her opinion, the only group who can now be excluded from care insurance are Belgians (living outside the Dutch-speaking and Brussels regions) who have not exercised freedom of movement. She correctly points out

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38 At footnote 106 of the opinion.
39 One might ask how the Flemish government had competence in relation to care insurance as to persons residing in other Member States but not as to persons residing in other parts of Belgium.
40 For a contrary argument that the Court should not attempt to evaluate the extent to which a measure affects freedom of movement see the Advocate General at para 65.
41 The Court’s distinction of this case from the circumstances in Case C-190/98 Graf [2000] ECR I-493 is entirely unconvincing.
42 Of course, it may well be possible for Member States to provide an objective justification (not concerning internal competences) in such cases.
43 See the opinion of the Advocate General at paras 71-97.
44 Given that no justification has been provided for an alternative approach.
that this it is ‘deeply paradoxical … that, although the last 50 years have been spent abolishing barriers to freedom of movement between Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them within Member States’ (at para 116). There is clearly no easy answer to this issue and it would be a brave Court which would seek to follow the Advocate General’s arguments and extend EU law to (at least some areas of) what have been seen as purely internal issues. Yet such tensions between the (clearly related) drives to both greater EU integration and federalisation are likely to increase in coming years and to again present this issue to the Court.45

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45 Of course as the Court points out (at para 40) such discrimination could perhaps be addressed by national provisions (or international provisions such as the ECHR or ICCPR with national effect) which prohibit discrimination between non-moving nationals and comparable others (but this rather begs the question as to whether such persons are comparable to those who have exercised freedom of movement and/or whether objective justification for difference in treatment might be found by a national court).