JUDGMENT OF THE COURT
5 March 1998 *

In Case C-160/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Sozialgericht Karlsruhe (Germany) for a preliminary ruling in the proceedings pending before that court between

Manfred Molenaar,

Barbara Fath-Molenaar

and

Allgemeine Ortskrankenkasse Baden-Württemberg,

on the interpretation of Articles 6 and 48(2) of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini,

* Language of the case: German.

J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann, L. Sevón and K. M. Ioannou, Judges,

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr and Mrs Molenaar, by S. de Witt, Rechtsanwalt, Freiburg,

— the Allgemeine Ortskrankenkasse Baden-Württemberg, by K. Hirzel, Rechtsassessor, Justiziar,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, acting as Agent,

— the Austrian Government, by M. Potacs, Univ. Doz. DDr., Bundeskanzleramt, acting as Agent,

— the Swedish Government, by L. Nordling, Director General of Legal Affairs in the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent, and

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr and Mrs Molenaar, represented by W. Schirp, Rechtsanwalt, Freiburg, the Allgemeine Ortskrankenkasse Baden-Württemberg, represented by K. Hirzel, the German Government, represented by E. Röder, the Austrian Government, represented by G. Hesse, Magister at the Bundeskanzleramt, and the Commission, represented by P. Hillenkamp, at the hearing on 8 October 1997,

after hearing the Opinion of the Advocate General at the sitting on 9 December 1997,

gives the following

Judgment

1 By order of 28 March 1996, which was received at the Court on 13 May 1996, the Sozialgericht (Social Court) Karlsruhe referred to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty a question concerning the interpretation of Articles 6 and 48(2) of that Treaty.

2 The question was raised in proceedings between Mr and Mrs Molenaar, who are of Dutch and German nationality respectively, and the Allgemeine Ortskrankenkasse (General Local Health Insurance Fund) Baden-Württemberg ('the AOK'), concerning the couple's right to German social care insurance ('care insurance') benefits.

3 That insurance scheme was introduced, from 1 January 1995, by the Pflegeversicherungsgesetz (Care Insurance Law, hereinafter 'the Law'), contained in Volume

XI of the Sozialgesetzbuch (German Code of Social Law, hereinafter 'the SGB'). It is designed to cover the costs entailed if insured persons should become reliant on care, that is to say, if a permanent need were to arise for those insured to resort, in large measure, to assistance from other persons in the performance of their daily routine (bodily hygiene, nutrition, moving around, housework, and so on).

4 Under the Law, any person insured, either voluntarily or compulsorily, against sickness must contribute to the care insurance scheme.

5 Care insurance gives entitlement, first, to benefits designed to cover the costs incurred for care provided in the home by a third person. Those benefits, designated as 'home care', the amount of which depends on the degree of reliance on care on the part of the person concerned, may be provided, at the choice of the recipient, either in the form of care dispensed by authorised bodies or in the form of a monthly allowance, known as 'the care allowance', enabling recipients to choose the form of aid they consider most appropriate to their condition.

6 Secondly, care insurance gives entitlement to direct payment of the cost of nursing home or hospital care provided to the insured person, to allowances designed to cover the absence on holiday of the third party who usually looks after the person insured and to allowances and payments for various costs entailed by the insured person's reliance on care, such as the purchase and installation of special equipment and work required to adapt the home.

7 Lastly, care insurance will, in certain circumstances, pay old age and invalidity insurance contributions, as well as accident insurance, for the third party assisting the insured person.

8 Pursuant to Paragraph 34(1)(1) of Volume XI of the SGB, insurance care benefits may be paid only to insured persons residing on German territory.

9 Mr and Mrs Molenaar are employed in Germany but resident in France. Both are voluntarily insured against sickness in Germany, and were required to take out care insurance from 1 January 1995.

10 However, in December 1994 and January 1995 the competent social security fund, the AOK, informed them that they were not entitled to care insurance benefits while they resided in France.

11 Mr and Mrs Molenaar thereupon brought proceedings before the Sozialgericht Karlsruhe for a declaration that they were not bound to pay contributions to the care insurance scheme so long as they were not entitled to benefits thereunder. They claimed that the residence condition, on which entitlement to those benefits depends by virtue of Paragraph 34(1)(1) of Volume XI of the SGB, was contrary to Articles 6 and 48 of the Treaty.

12 Taking the view that an interpretation of those provisions was necessary before it could reach a decision, the Sozialgericht Karlsruhe referred the following question to the Court of Justice for a preliminary ruling:

'Are Articles 6 and 48(2) of the EC Treaty to be interpreted as restricting the right of a Member State to set up a social security system covering the risk of reliance on care as part of statutory compulsory insurance arrangements under which persons residing in another Member State are liable to pay compulsory contributions, even though their entitlement to benefits is simultaneously excluded or suspended because of their place of residence?'

13 By its question, the national court is asking essentially whether Articles 6 and 48(2) of the Treaty preclude a Member State from requiring persons working in its territory but residing in another Member State to contribute to a social security scheme of the care insurance type while excluding payment of benefits thereunder in the Member State in which those persons are resident.

14 With a view to answering that question, it must be recalled that, according to the Court's case-law (see, *inter alia*, Case 368/87 *Hartmann Troiani* v *Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333, paragraph 20, and Case C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033, paragraph 30), in order to safeguard the effective exercise of the right to freedom of movement enshrined in Article 48 of the EC Treaty, the Council was required, under Article 51 thereof, to set up a system to enable workers to overcome obstacles with which they might be confronted in national social security rules. In principle, the Council carried out that duty by introducing Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

15 In the circumstances, it is necessary to examine the question raised in the light of the provisions of that regulation, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6, hereinafter 'Regulation No 1408/71'), and therefore to determine whether it covers a scheme such as care insurance.

16 All the interveners in the proceedings agree that a scheme such as that at issue in the main proceedings falls within the scope of Regulation No 1408/71.

17 The applicants in the main proceedings and the Austrian, German and Swedish Governments take the view, more specifically, that benefits provided under the scheme may be treated as 'sickness benefits' referred to in Article 4(1)(a) of that

regulation. The applicants in the main proceedings claim that those benefits could also be treated as 'old-age benefits' referred to in Article 4(1)(c).

18 On the other hand, the Commission considers that, although benefits under the scheme are indeed covered by Regulation No 1408/71, they cannot be linked exclusively to any one branch of social security referred to in Article 4(1) of that regulation. In its view, those benefits display characteristics in common with the sickness, invalidity and old-age branches referred to in Article 4(1)(a), (b) and (c), but cannot be strictly identified with any one of them.

19 On this point, it must be recalled that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within it is based essentially on the constituent elements of each particular benefit, in particular its purpose and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14).

20 The Court has consistently stated 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 concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, in particular, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case 122/84 *Scrivner* [1985] ECR 1027, paragraphs 19 to 21; Case C-356/89 *Newton* [1991] ECR I-3017; and Case C-78/91 *Hughes*, cited above, paragraph 15). That list is exhaustive, so that a branch of social security not mentioned therein does not fall within that category even if it confers upon recipients a legally defined position entitling them to benefits (see, in particular, Case C-25/95 *Otte* [1996] ECR I-3745, paragraph 22).

21 As regards the first of those two conditions, it is common ground that the provisions concerning the grant of care insurance benefits confer on recipients a legally defined right.

22 With regard to the second condition, it appears from the file that care insurance benefits are designed to develop the independence of persons reliant on care, in particular from the financial point of view. The system introduced is aimed at encouraging prevention and rehabilitation in preference to care and at promoting home care in preference to care provided in hospital.

23 Care insurance gives entitlement to full or partial direct payment of certain expenditure entailed by the insured person's reliance on care such as care provided in the home, in specialised centres or hospitals, the purchase of equipment required by insured persons, the carrying out of work in the home and the payment of monthly financial aid allowing the insured to choose the method of assistance they prefer and, for example, to remunerate in one form or another the third party assisting them. The care insurance scheme provides cover, furthermore, against the risks of accident, old age and invalidity for some of those third parties.

24 Accordingly, benefits of that type are essentially intended to supplement sickness insurance benefits to which they are, moreover, linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care.

25 In those circumstances, even if they have their own characteristics, such benefits must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71.

26 The question referred to the Court must therefore be examined in the light of the provisions of Regulation No 1408/71 concerning the grant of sickness benefits where the person concerned has his residence in a Member State other than the competent State. Under Article 19(1)(a) and (b) of Regulation No 1408/71,

'An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits ... shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers...'

27 The twofold mechanism resulting from those provisions applies equally to unemployed persons, pursuant to Article 25(1)(a) and (b), and to pensioners entitled to a pension under the legislation of a Member State other than the country of residence, pursuant to Article 28(1)(a) and (b) of Regulation No 1408/71.

28 The parties to the main proceedings and the Governments which have submitted observations to the Court differ as to whether the benefits at issue in the main proceedings, and in particular the care allowance, should be described as sickness insurance 'benefits in k ind' or 'cash benefits'.

29 On the one hand, the German and Swedish Governments maintain that care insurance benefits that are aimed at allowing recipients to cover the payment of certain expenses entailed by their condition, *inter alia* medical expenses, are sickness insurance 'benefits in kind', even though they are paid in the form of a monthly allowance such as the care allowance. The German Government points out in that connection that when the law was enacted the German legislature specified that the care allowance was a 'benefit in kind' under the sickness branch.

30 On the other hand, the applicants in the main proceedings, the Austrian Government and the Commission consider that benefits such as the care allowance, which are not intended to cover any particular expenses, are sickness insurance 'cash benefits'.

31 In its judgment in Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261, in particular at p. 278, the Court has already stated, in connection with Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), which preceded Regulation No 1408/71 and used the same terminology, that the term 'benefits in kind' does not exclude the possibility that such benefits may comprise payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses, and that 'cash benefits' are essentially those designed to compensate for a worker's loss of earnings through illness.

32 As stated above, in particular at paragraphs 5, 6, 7 and 23 of this judgment, care insurance benefits consist, first, in the direct payment or reimbursement of expenses incurred as a result of the insured person's reliance on care, in particular medical expenses entailed by that condition. Such benefits, which are designed to cover care received by the person concerned, both in the home and in specialised centres, purchases of equipment and work carried out, indisputably fall within the definition of 'cash benefits' referred to in Articles 19(1)(a), 25(1)(a) and 28(1)(a) of Regulation No 1408/71.

33 However, although the care allowance is also designed to cover certain costs entailed by reliance on care, in particular those relating to aid provided by a third person, rather than to compensate for loss of earnings on the part of the recipient, it nevertheless displays features distinguishing it from sickness insurance benefits in kind.

34 First, payment of the allowance is periodical and is not subject either to certain expenditure, such as care expenditure, having already been incurred, or *a fortiori* to the production of receipts for the expenditure incurred. Secondly, the amount of the allowance is fixed and independent of the costs actually incurred by the recipient in meeting his daily requirements. Thirdly, recipients are to a large extent unfettered in their use of the sums thus allocated to them. In particular, as the German Government itself pointed out, the care allowance may be used by recipients to remunerate a member of their family or entourage who is assisting them on a voluntary basis.

35 The care allowance thus takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, so as to compensate for the additional expense brought about by their condition.

36 A benefit such as the care allowance must therefore be regarded as a sickness insurance 'cash benefit', as referred to in Articles 19(1)(b), 25(1)(b) and 28(1)(b) of Regulation No 1408/71.

37 In those circumstances it follows, first, from the wording of Article 19(1)(a) of Regulation No 1408/71 that an employed person residing in a Member State other than that in which he is employed is to receive, in the Member State in which he resides, benefits such as care insurance benefits in kind in so far as the legislation of that State, whatever the more specific name given to the social protection scheme of which it forms part, provides for the payment of benefits in kind

designed to cover the same risks as those covered by care insurance in the Member State of employment. Those benefits are to be paid by the institution of the place of residence in accordance with the provisions laid down by the legislation of the Member State of residence. The same is true with regard to unemployed persons and pensioners covered by the legislation of a Member State other than that in which they reside, pursuant to Articles 25(1)(a) and 28(1)(a) of Regulation No 1408/71.

38 Secondly, it follows from Article 19(1)(b) of Regulation No 1408/71 that a worker is to receive cash benefits such as the care allowance in the Member State in which he resides even if the legislation of that State does not provide for benefits of that type. The benefits in question are paid by the competent institution of the Member State of employment under the conditions provided for by the legislation of that State. The same is true with regard to unemployed persons and pensioners covered by the legislation of a Member State other than that in which they reside, pursuant to Articles 25(1)(b) and 28(1)(b) of Regulation No 1408/71.

39 A provision such as Paragraph 34(1)(1) of Volume XI of the SGB, which prohibits 'cash' payment of care insurance benefits in the Member State in which the migrant worker resides, accordingly conflicts with Article 19(1)(b) of Regulation No 1408/71. Similarly, in the case of unemployed persons and pensioners covered by the legislation of a Member State other than that in which they reside, it conflicts with Articles 25(1)(b) and 28(1)(b) of Regulation No 1408/71.

40 However, neither that conflict nor the fact that care insurance benefits in kind are provided by the institution of the place of residence confer on migrant workers the right to be exempted in whole or in part from the payment of contributions for the financing of care insurance.

41 There is no rule of Community law which requires the competent institution to ascertain whether an employed person is likely to be able to take advantage of all the benefits of a sickness insurance scheme before registering that person and collecting the appropriate contributions. The right to benefits must be assessed, on the basis of the conditions laid down by the legislation of the competent Member State, on the date when entitlement arises, so that the situation on the date when the contribution is payable is not relevant in that connection. That is true in particular of the employed person's residence, which is not definitively settled when he joins the scheme or pays contributions.

42 Recognition of a right to exemption would amount, moreover, to accepting, as regards the scope of the risks covered by sickness insurance, a difference in the treatment of insured persons according to whether or not they resided on the territory of the State in which they were insured. To offer a migrant worker the possibility of choosing exemption would be equivalent, for the competent State, to asking him to waive in advance the benefit of the mechanism introduced by Articles 19(1), 25(1) and 28(1) of Regulation No 1408/71. No such consequence can arise either from the Treaty, in particular Articles 6 and 48(2) thereof, or from that regulation.

43 In any event, payment of contributions to a sickness insurance scheme in principle confers entitlement on insured workers to receive the corresponding benefits when they satisfy the conditions laid down by the legislation of the competent State, with the exception of those conditions which are not in accordance with the applicable social security provisions of Community law. Mr and Mrs Molenaar may therefore rely on Regulation No 1408/71 for the purpose of obtaining the benefit of the care allowance, notwithstanding the conflicting provisions of national law.

44 The answer to the question submitted must therefore be that Articles 6 and 48(2) of the EC Treaty do not preclude a Member State from requiring persons working in its territory but residing in another Member State to contribute to a social security scheme covering the risk of reliance on care, although Articles 19(1), 25(1) and 28(1) of Council Regulation (EEC) No 1408/71 do prevent entitlement to an

allowance such as the care allowance, which constitutes a sickness benefit in cash, from being subject to the condition that the insured person resides in the territory of the Member State where he is insured.

Costs

45 The costs incurred by the Austrian, German, Spanish and Swedish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Sozialgericht Karlsruhe by order of 28 March 1996, hereby rules:

Articles 6 and 48(2) of the EC Treaty do not preclude a Member State from requiring persons working in its territory but residing in another Member State to contribute to a social security scheme covering the risk of reliance on care, although Articles 19(1), 25(1) and 28(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

éRegulation (EEC) No 2001/83 of 2 June 1983, do prevent entitlement to an allowance such as the care allowance, which constitutes a sickness benefit in cash, from being subject to the condition that the insured person resides in the territory of the Member State where he is insured.

Rodríguez Iglesias	Gulmann	Ragnemalm
Wathelet	Schintgen	Mancini
Moitinho de Almeida	Kapteyn	Murray
Edward	Puissochet	Hirsch
Jann	Sevón	Ioannou

Delivered in open court in Luxembourg on 5 March 1998.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President