OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 28 June 2007 [1]

1. The present reference from the Cour d'arbitrage (Court of Arbitration), [2] now Cour constitutionnelle (Constitutional Court), of Belgium [3] concerns the compatibility of a scheme of care insurance benefits, such as the one established by the Flemish Community, with various provisions of Council Regulation (EEC) No 1408/71 [4] and with Articles 18, 39 and 43 EC.

2. A broader issue is whether Community law prevents an autonomous entity of a Member State from making the grant of social security benefits conditional on residence in the territory of the autonomous entity concerned or in the territory of another Member State, thereby excluding persons working in the autonomous entity in question who are resident in another part of the national territory.

3. Still more broadly, what is the impact of Community law on the federal or decentralised structure of a Member State and on what is deemed to be a 'purely internal situation' outside the scope of Community law?

Prologue — the Kingdom of Belgium as a federal State

4. The Belgian federal system, rather like a devolutionary cousin of the Community, [5] did not come about as a result of a single plan. [6] It is the result of incremental changes, originally driven by the Flemish desire to gain cultural autonomy, which took form in the Communities, and the Walloon desire

1 — Original language: English.

2 — 'Arbitragehof' in Dutch and 'Schiedshof' in German.

3 — On 7 May 2007, the name of the referring Court was changed, by amendment of the Belgian Constitution, into Cour constitutionnelle/Grondwettelijk Hof/Verfassungsgerichtshof (Constitutional Court), *Moniteur belge/BelgischStaatsblad* of 8 May 2007, pp. 25101 and 25102.

4 — Regulation 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 (OJ English Special Edition 1971(II) p. 416), amended on numerous occasions, most recently by Regulation (EC) No 629/2006 of 5 April 2006 of the European Parliament and of the Council (OJ 2006 L 114, p. 1).

5 — See K. Lenaerts, 'Constitutionalism and the many faces of federalism', *American Journal of Comparative Law*, 1990, pp. 205 to 263.

6 — See the well-known excerpt from the Schuman Declaration of 9 May 1950: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.'

for economic autonomy, which was achieved through the Regions. [7]

5. Belgium now consists of three Communities (the Flemish Community, the French Community and the German-speaking Community), [8] three Regions (the Walloon Region, the Flemish Region and the Brussels Region) [9] and four linguistic regions (the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region). [10]

6. Both the Communities and the Regions have been granted mutually exclusive spheres of competence for certain matters. [11]

Both the Communities and the Regions thus act as autonomous legislators with regard to their own competences.

7. Decrees are the legal instruments by which the three Communities, as well as the Flemish and the Walloon Regions, exercise their legislative competences. These Decrees have the same force of law as federal laws. [12]

Legal framework

Relevant Community law

8. Article 17 EC provides:

'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

7 — For further enlightenment in English on the rather labyrinthine Belgian federal structure, see P. Peeters, 'The Federal Structure: Kingdom, Regions and Communities', in G. Craenen (ed.), *The Institutions of Federal Belgium: An Introduction to Belgian Public Law*, Leuven/Amersfoort, Acco, 1996, pp. 55 to 69. For an in-depth analysis of the Belgian federal structure: A. Alen, K. Muylle, *Compendium van het Belgisch staatsrecht*, Diegem, Kluwer, 2004, pp. 239 to 499 and M. Uyttendaele, *Précis de droit constitutionnel belge. Regards sur un système institutionnel paradoxal, 3ème édition*, Brussels, Bruylant, 2005, pp. 815 to 1071.

8 — Article 2 of the Belgian Constitution. The Dutch, French and German texts of the Belgian Constitution refer, respectively to 'gemeenschappen', 'communautés' and 'Gemeinschaften'.

9 — Article 3 of the Belgian Constitution. The Dutch, French and German texts of the Belgian Constitution refer, respectively to 'gewesten', 'régions' and 'Regionen'.

10 — Article 4 of the Belgian Constitution. The Dutch, French and German texts of the Belgian Constitution refer, respectively to 'taalgebieden', 'régions linguistiques' and 'Sprachgebiete'. On the distinction between communities, regions and linguistic regions, see further P. Peeters, cited in footnote 7 above.

11 — See A. Alen, K. Muylle, pp. 348 to 354; see also M. Uyttendaele, pp. 945 to 947 (both cited in footnote 7 above). Both point out that there are some nuances and exceptions to the system of exclusive competences.

12 — See Articles 127(2), 128(2), 129(2), 130(2) and 134, second paragraph of the Belgian Constitution and Article 19(2) of the Loi spéciale de réformes institutionnelles/Bijzondere wet tot hervorming der instellingen [Special law on the reform of the institutions] of 8 August 1980, *Moniteur belge/Belgisch Staatsblad* of 15 August 1980.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'

9. Article 18 EC provides:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

…'

10. Article 39 EC provides:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

…'

11. Article 43 EC provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited …

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings … under the conditions laid down for its own nationals by the law of the country where such establishment is effected …'

12. The following recitals of Regulation No 1408/71 [13] are relevant:

'…

13 — I will refer throughout this Opinion to the version of Regulation No 1408/71 as in force on the date the Court of Arbitration made the present reference (10 May 2006), which I deem to be most relevant to the referring Court.

[10] … with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment of self-employment;[14]

[11] … in certain situations which justify other criteria of applicability, it is possible to derogate from this general rule.

…'

13. Article 2 of Regulation No 1408/71 lists those covered by the Regulation:

'1. 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 …'

14. Article 3 of Regulation No 1408/71 enshrines the principle of equal treatment:

'1. Subject to the special provisions of this Regulation, persons 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 the State. …'

15. Article 4 sets out the material scope of Regulation No 1408/71:

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

(a) sickness and maternity benefits; …

14 — From the context and from other language versions of the Regulation, it seems obvious that the English version contains a typographical error, and that it should be read as 'employment or self-employment'.

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.

2a. This Regulation shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance.

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone;

and

(c) which are listed in Annex IIa.[15]

2b. This Regulation shall not apply to the provisions in the legislation of a Member

15 — The Flemish care insurance is not listed in Annex IIa.

State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory[16]

…'

16. Subject to certain exceptions not relevant to the present case, Article 13 determines the legislation applicable to migrant workers:

'1. … [P]ersons 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. …

(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; …'

17. Article 19 contains the general rules, in the context of sickness and maternity benefits, in case of residence in a Member State other than the competent state:

'1. 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, taking account where appropriate of the provisions of Article 18,[17] shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution

16 — The Flemish care insurance is likewise not listed in Annex II, Section III.

17 — Article 18 provides for the aggregation of periods of insurance, employment or residence in the context of sickness and maternity benefits.

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. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State. …'

18. Article 21 contains the rules, in the context of sickness and maternity benefits, applicable in case of stay in, or transfer of residence to, the competent State:

'1. The employed or self-employed person referred to in Article 19(1) who is staying in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were resident there, even if he has already received benefits for the same case of sickness or maternity before his stay.

…

4. An employed or self-employed person and members of his family referred to in Article 19 who transfer their residence to the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State even if they have already received benefits for the same case of sickness or maternity before transferring their residence.'

Relevant national legislation

19. By Decree of 30 March 1999 [18] ('the 1999 Decree'), the Flemish Community established a 'care insurance' (zorgverzekering) covering, up to a monthly maximum, non-medical assistance and services for persons unable to perform daily tasks necessary for their basic needs or other related activities. [19]

18 — Decreet van de Vlaamse Gemeenschap van 30 maart 1999 houdende de organisatie van de zorgverzekering [Decree of the Flemish Community of 30 March 1999 concerning the organisation of the care insurance], *Moniteur belge/Belgisch Staatsblad* of 28 May 1999, p. 19149.

19 — Article 3 of the Decree of 30 March 1999, as amended by Article 40 of the Decreet van de Vlaamse Gemeenschap van 20 december 2002 houdende bepalingen tot begeleiding van de begroting 2003 [Decree of the Flemish Community of 20 December 2002 containing provisions to accompany the 2003 budget], *Moniteur belge/Belgisch Staatsblad* of 31 December 2002, p. 59138.

20. The Flemish care insurance was established in order to meet the needs of the ageing population of Flanders. [20] In particular, it aims to provide financial assistance for help with daily tasks for the growing population of elderly, and more generally for those in need of such help regardless of age. [21]

21. The French-speaking and German-speaking communities have not established similar care insurance schemes.

22. Article 2(1) of the 1999 Decree defines non-medical assistance and services as

'assistance and services provided by third persons to a person with a reduced capacity for self-care in a residential, semi-residential or ambulant context.'

23. The 1999 Decree has been amended on numerous occasions. [22] Most importantly for present purposes, the Decree of 30 April 2004 [23] ('the 2004 Decree') amended the 1999 Decree in response to a letter of formal notice from the Commission of 17 December 2002, requesting that the Flemish Community comply with Regulation No 1408/71. In particular, the Commission considered that the 1999 Decree as it originally stood infringed, inter alia, Articles 2, 13, 18, 19, 20, 25, and 28 of Regulation No 1408/71 [24] and Articles 39 and 43 EC by making affiliation to the care insurance scheme and the payment of benefits conditional, without exception, upon residence in the Dutch-speaking region or the bilingual region of Brussels-Capital.

24. The 2004 Decree amended the care insurance scheme by excluding from its scope persons to whom the social security scheme of another Member State of the Euro-

20 — See B. Cantillon, 'L'indispensable réorientation de l'assurance-dépendance flamande'/'De noodzakelijke heroriëntering van de Vlaamse zorgverzekering', *Revue belge de sécurité sociale/Belgisch Tijdschrift voor Sociale Zekerheid*, 2004, pp. 9-13. As to the specific aims and operation of the Flemish care insurance, see S. Rottiers, *De weerbaarheid van de Vlaamse zorgverzekering: Waalse klachten en Europese bedenkingen*, Antwerpen, Berichten Centrum voor Sociaal Beleid Herman Deleeck, 2005.

21 — Voorstel van Decreet — van de heer Guy Swennen en mevrouw Sonja Becq c.s. — houdende de organisatie van de zorgverzekering [Proposition for a Decree — from Mr Guy Swennen and Ms Sonja Becq c.s. — concerning the organisation of the care insurance], *Parlementaire Stukken*, Vlaams Parlement, 1998-1999, nr. 1239/1, p. 2.

22 — Most recently by the Decreet van de Vlaamse Gemeenschap van 23 december 2005 houdende bepalingen tot begeleiding van de begroting 2006 [Decree of the Flemish Community of 23 December 2005 containing provisions to accompany the 2006 budget], *Moniteur belge/Belgisch Staatsblad* of 30 December 2005, p. 57499.

23 — Decreet van de Vlaamse Gemeenschap van 30 april 2004 houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering [Decree of the Flemish Community of 30 April 2004 amending the Decree of 30 March 1999 concerning the organisation of the care insurance], *Moniteur belge/Belgisch Staatsblad* of 9 June 2004, p. 43593.

24 — The relevant parts of Article 2, 13, 18 and 19 are set out or explained at points 13 to 17 above. Article 20 contains special rules for frontier workers and their families. Article 25 contains rules regarding unemployed persons and their families. Article 28 contains rules regarding pensions payable under the legislation of one or more States in cases where there is no right to benefits in the country of residence.

pean Union or a State party to the European Economic Area applies by virtue of Regulation No 1408/71, and by extending its scope to persons residing in another Member State but working in the Dutch-speaking region or the bilingual region of Brussels-Capital.

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.

25. Article 4 of the 1999 Decree, as amended by the 2004 Decree, now reads as follows:

§ 2*ter*. 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.

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

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.'

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

§ 2*bis*. Any person referred to in paragraphs 1 and 2 to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme of another Member State of

26. Article 5 of the 1999 Decree, as last amended by the Decree of 25 November

2005,[25] lays down the conditions for reimbursement under 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 a State party to the European Economic Area; …

5. for at least five years prior to 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 European Economic Area; …'.

The main proceedings and the questions referred

27. The main proceedings are the third action for annulment of the 1999 Decree brought before the Court of Arbitration. The Government of the French Community brought an action for annulment against the original version of the 1999 Decree ('the first action'). The College of the Commission of the French Community[26] brought an action for annulment against an intermediate version of the 1999 Decree, namely the version of 18 May 2001[27] ('the second action').

25 — Decreet van de Vlaamse Gemeenschap van 25 November 2005 houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering [Decree of the Flemish Community of 25 November 2005 amending the Decree of 30 March 1999 concerning the organisation of the care insurance], *Moniteur belge/Belgisch Staatsblad* of 12 January 2006, p. 2153.

26 — An institution created pursuant to Article 136 of the Belgian Constitution.

27 — The version following amendment by the Decreet van de Vlaamse Gemeenschap van 18 mei 2001 houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering [Decree of the Flemish Community of 18 May 2001 amending the Decree of 30 March 1999 concerning the organisation of the care insurance], *Moniteur belge/Belgisch Staatsblad* 28.07.2001, p. 25712. The purpose of this amendment was to improve the practical applicability of the care insurance scheme: see Voorstel van Decreet — van mevrouw Ria Van den Heuvel, mevrouw Patricia Seysens, de heer Guy Swennen en mevrouw Simonne Janssens-Vanoppen — houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering [Proposition for a Decree — from Ms Ria Van den Heuvel, Ms Patricia Seysens, Mr. Guy Swennen, and Ms Simonne Janssens-Vanoppen — amending the Decree of 30 March 1999 concerning the organisation of the care insurance], *Parlementaire Stukken*, Vlaams Parlement, 2000-2001, nr. 540/1, p. 2.

28. For the most part, the Court of Arbitration dismissed the first action. [28] It held that, under the Belgian federal system, the care insurance was to be regarded as 'aid to persons', which is a matter for the Flemish, French and German-speaking Communities within their respective spheres of competence. The Flemish care insurance therefore did not trespass upon the competences of the Federal State with regard to social security.

29. The Court of Arbitration dismissed the second action in its entirety. [29]

30. The main proceedings in this third action concern two separate actions for annulment, both brought on 9 December 2004, which were joined before the Court of Arbitration. In the first, the Government of the French Community seeks annulment of Article 4, paragraph 2*ter* of the 1999 Decree as amended by the 2004 Decree. It alleges, inter alia, that that provision breaches the principles of equality and non-discrimination and constitutes an impediment to freedom of movement for persons and workers. In the second, the Walloon Government seeks annulment of the 2004 Decree in its entirety. It alleges that the 2004 Decree breaches rules governing national competences and the principles of equality and non-discrimination.

31. The Court of Arbitration dismissed the pleas alleging that the Flemish Community lacked the competence to establish the care insurance. It considered, however, that the pleas based on Community law could not safely be answered by reference to the wording of the Treaty or of Regulation No 1408/71, nor to the existing case-law of the Court of Justice. The Court of Arbitration therefore referred the following questions 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 the Council Regulation (EEC) No 1408/71 of 14 June

28 — Judgment 33/2001 of 13 March 2001, *Moniteur belge/ Belgisch Staatsblad,* 27 March 2001, p. 10002.

29 — Judgment 8/2003 of 22 January 2003, *Moniteur belge/ Belgisch Staatsblad*, 3 February 2003, p. 4525.

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 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?'

32. Written observations have been submitted by the Government of the French Community and the Walloon Government, by the Flemish Government, by the Netherlands Government and by the Commission.

33. All parties except the Netherlands Government attended the hearing on 27 March 2007 and presented oral argument.

First question

34. By its first question, the referring Court wishes to know whether a care insurance scheme such as the one established by the Flemish Community falls within the scope *ratione materiae* of Regulation No 1408/71, as defined in Article 4 thereof.

35. All parties are in agreement that this question should be answered in the affirmative. They consider that the benefits provided by the Flemish care insurance are properly to be categorised as social security benefits within the meaning of Regulation No 1408/71.

36. As the Court has stated on numerous occasions, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, 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. [30]

37. Benefits that are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care have the essential purpose of supplementing sickness insurance benefits, and must therefore be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71. [31] The Flemish care insurance appears to fit squarely within that definition. It should therefore be classified as a 'sickness benefit' within the meaning of Article 4(1)(a) of Regulation No 1408/71.

38. The Walloon Government correctly points out that the Flemish care insurance cannot be excluded from the scope of Regulation No 1408/71 by Article 4(2b). [32] First, it is not listed in Annex II, Section III of the

30 — See, inter alia, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 20; Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 25; Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37; Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 22; and Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 17.

31 — *Molenaar*, paragraphs 24 and 25; *Jauch*, paragraph 28; and *Hosse*, paragraph 38, all cited in previous footnote.

32 — See point 15 above.

regulation. Second, it appears to be a contributory benefit, [33] inasmuch as it is financed, at least partially, [34] by payment of contributions by those affiliated. [35]

Second and third questions

39. The Flemish care insurance excludes from its scope persons working in the Dutch-speaking region or in the bilingual region of Brussels-Capital, but living in one of Belgium's other linguistic regions. Do Regulation No 1408/71 and/or the provisions of the Treaty on freedom of movement for persons and on citizenship of the Union preclude such an arrangement?

Admissibility

40. The Flemish Government's principal argument is that the second and third questions are inadmissible, because an answer would be neither useful nor necessary to the determination of the main proceedings. Before the national court, the applicants have opposed the *establishment* of the care insurance scheme, arguing that the Flemish Community lacked the necessary competence. The interpretation of Community law suggested by the applicants would, perversely, result in the *extension* of the scheme to persons living in the French-speaking region.

41. The Flemish Government also claims that the referring court has itself answered the third question, by establishing that the Flemish care insurance scheme does not endanger the competence of the federal legislator regarding the economic union within Belgium, because of the limited sums of money at stake and the limited effects of the benefits in question. [36] The same could be said of any effect on freedom of movement within the Community.

42. I am not convinced by these arguments.

43. The Court has held on numerous occasions that the procedure provided for by Article 234 EC is an instrument of coop-

33 — Rather than a special non-contributory cash benefit as defined in Article 4(2a).

34 — As the referring judgment indicates in its first question under (d), the care insurance is financed by a combination of members' annual contributions and a grant paid out of the budget for expenditure of the autonomous Community concerned.

35 — This is a sufficient condition for a benefit to be classified as contributory: see *Jauch*, cited in footnote 30, paragraphs 29 to 33.

36 — See paragraph B. 10.3 of the referring judgment.

eration between the Court of Justice and the national courts, by means of which the Court provides national courts with the points of interpretation of Community law which they need in order to decide disputes before them. [37]

44. In the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [38]

45. It is true that in exceptional circumstances the Court will examine the conditions in which the case was referred by the national court, in order to assess whether it has jurisdiction. However, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [39]

46. In the present case, even if (as the Flemish Government submits) the Court's answer to Questions 2 and 3 may lead to the extension of the scope of the Flemish care insurance rather than its abolition, it cannot be said that the reply to those questions will not be of assistance in enabling the national court to determine whether the Flemish care insurance as it stands is compatible with Community law.

37 — See, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-378/93 *La Pyramide* [1994] ECR I-3999, paragraph 10; Case C-361/97 *Nour* [1998] ECR I-3101, paragraph 10; and Case C-380/01 *Schneider* [2004] ECR-1389, paragraph 20.

38 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; *Schneider*, cited in previous footnote, paragraph 21; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraphs 16 to 17; and Case C-295/05 *ASEMFO* [2007] ECR I-2999, paragraph 30.

39 — *PreussenElektra*, cited in footnote 38, paragraph 39; *Canal Satélite Digital*, also in footnote 38, paragraph 19; *Schneider*, cited in footnote 37, paragraph 22; Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 17; and *ASEMFO*, cited in footnote 38, paragraph 31.

47. Moreover, the fact that the referring court may have answered, under national law, a question that is similar to the third question referred does not mean that the answer may be transposed automatically to the situation under Community law.

48. It follows that the second and third questions are admissible.

Substance

Preliminary remark

49. In its written observations, the Commission distinguishes between two categories of persons: (i) citizens of other Member States and Belgian citizens who have made use of their freedom of movement rights; (ii) Belgian citizens who have not made use of their freedom of movement rights. The distinction seems a useful one and I shall adopt it.

Citizens of other Member States and Belgian citizens who have made use of their freedom of movement rights

— Does the situation of this group of persons fall within the scope of Regulation No 1408/71 and/or the provisions of the Treaty on the freedom of movement for persons?

50. Citizens of other Member States who work in the Dutch-speaking region or in the bilingual region of Brussels-Capital but live in another linguistic region come within the scope of Article 39 or 43 EC (depending on whether they are, respectively, employed or self-employed). They also come within the scope of Regulation No 1408/71, by virtue of Article 2 thereof. Belgian citizens who have made use of their freedom of movement rights are in an analogous situation.

51. More generally, any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other

than that of residence falls within the scope of Article 39 EC. [40]

52. Moreover, even if, according to their wording, the rules on freedom of movement for workers are intended, in particular, to secure the benefit of national treatment in the *host* State, they also preclude the *State of origin* from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State. [41]

53. Community law does not of course detract from the power of the Member States to organise their social security systems — in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted. [42] When exercising that power, the Member States must nevertheless comply with Community law. [43]

— Does the residence requirement attached to the Flemish care insurance constitute an obstacle to freedom of movement for workers?

54. It is well established that the EC Treaty provisions relating to freedom of movement for workers are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community and that they 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. [44]

40 — See, inter alia, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9; Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 27; Case C-385/00 *De Groot* [2002] ECR I-11819 paragraph 76; Case C-232/01 *Van Lent* [2003] ECR I-11525, paragraph 14; and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31.

41 — *De Groot*, paragraph 79; see also, inter alia, *Terhoeve*, paragraphs 27 to 29; and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 31 to 34.

42 — The Treaty did not provide for the harmonisation of the social security legislation of the Member States. In particular, Article 42 EC (the legal basis, with Article 308 EC, of Regulation No 1408/71) provides only for the coordination of legislation. Substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, are therefore unaffected by that provision: see Joined Cases C-393/99 and C-394/99 *Hervein* [2002] ECR I-2829, paragraph 50 and the case-law cited therein. See also Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 20; and Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 20, in which the Court held that the system put in place by Regulation No 1408/71 is merely a system of coordination, concerning inter alia the determination of the legislation applicable to employed and self-employed workers who make use, under various circumstances, of their right to freedom of movement.

43 — See, inter alia, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; Case C-385/99 *Müller-Fauré and Van Riet* [2003] ECR I-4509, paragraph 100, and the case-law cited therein; Case C-56/01 *Inizan* [2003] ECR I-12403, paragraph 17; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23.

44 — See, inter alia, Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 16; *Terhoeve*, cited in footnote 40, paragraph 27; Case C-190/98 *Graf* [2000] ECR I-493, paragraph 21; *Ritter-Coulais*, cited in footnote 40, paragraph 33; Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25; and Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 14.

55. Provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement are potentially capable of constituting an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. [45] In other words, a national measure can potentially constitute a prohibited obstacle even if it is non-discriminatory.

56. However, in order actually to constitute an obstacle, such provisions must affect access of workers to the labour market and their effect on freedom of movement must not be too indirect and uncertain. [46]

57. At this stage, let us examine the practical effect of the Flemish care insurance rules. Imagine a French national who wishes to take up employment in Hoegaarden (situated in the Dutch-speaking region of Belgium) and who currently lives in Givet in the Champagne-Ardenne region in France (about 95 kilometres south of Hoegaarden). Not implausibly, he might prefer to live in a region where his mother tongue is the official language and where his children can easily go to a local school in that same language. He might therefore decide to move to Jodoigne (situated in the French-speaking region of Belgium) about seven kilometres south of Hoegaarden. If he does so, he will not be able to join the Flemish care insurance. If he wanted to sign up to that scheme and still live in a region where French is an official language, he would have to choose between settling in the bilingual region of Brussels-Capital (for example in Woluwe-Saint-Lambert/Sint-Lambrechts-Woluwe, about 44 kilometres to the west of Hoegaarden) or keeping his residence in France. [47]

58. The prospect of daily commuting on overcrowded highways, and indeed the environmental impact of such commuting, might dissuade him from taking up the employment in question, and hence from exercising his right to freedom of movement. Since the French Community and the German-speaking Community have not established similar care insurance schemes, he could not solve the problem by seeking affiliation to a care insurance scheme at a place of residence within Belgium outside the Dutch-speaking region or the bilingual region of Brussels-Capital.

45 — Case C-10/90 *Masgio* [1991] ECR I-1119, paragraphs 18 and 19; *Terhoeve*, cited in footnote 40, paragraph 39; Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 33; *De Groot*, cited in footnote 40, paragraph 78; *Van Lent*, cited in footnote 40, paragraph 16; *Kranemann*, cited in footnote 44 above, paragraph 26; and *Turpeinen*, also in footnote 44, paragraph 15.

46 — *Graf*, cited in footnote 44, paragraphs 23 to 25.

47 — For the sake of completeness, I add that he might also consider moving to one of the communes within the Dutch-speaking region with certain administrative facilities for French-speakers and availability of (primary) schools in French. The closest ones would presumably be Wezembeek-Oppem and Kraainem or Herstappe, all slightly over 40 kilometres to the west or east of Hoegaarden. See further J. Clement, Taalvrijheid, bestuurstaal en minderheidsrechten. Het Belgisch model, Antwerp/Groningen/Oxford, Intersentia, 2003, pp. 838 to 850.

59. Thus, it is clear that the residence requirement may in certain circumstances be an obstacle to freedom of movement for persons.

— Is the effect of the residence requirement on freedom of movement too indirect and uncertain?

60. The Commission suggests that this assessment should be left to the national judge.

61. I disagree.

62. I find it difficult to see precisely what criteria the referring court, without guidance from this Court, would apply in order to evaluate remoteness and uncertainty. It seems to me that the Court has sufficient material to resolve the point as a question of principle.

63. The Flemish Government estimates that the number of people affected will be relatively small and that the possibility of affiliation to the care insurance is likely to have only a marginal influence on individuals' choice as to whether to exercise their freedom of movement rights. It therefore relies on *Graf*, in which the Court held that in order to constitute an obstacle, national provisions must affect access of workers to the labour market and their effect on the freedom of movement must not be too indirect and uncertain. [48]

64. In *Graf*, the Court was concerned with a future and purely hypothetical event. By contrast, it is clear in the present case that *any* migrant worker considering taking up employment in the Dutch-speaking region will potentially be affected by the residence requirements governing affiliation to the Flemish care insurance. This is not a hypothetical situation.

65. I do not think that the Court should try to evaluate the precise extent to which such a measure affects the individual worker's decision. Otherwise, the fact that some workers may not be daunted by a particular measure could always be used as a reason for holding

48 — *Graf*, paragraphs 23 to 25.

that that measure's effect on access to the labour market was potentially too uncertain and indirect. Moreover, it is difficult to see how the Court would go about conducting such an evaluation. It seems to me that, for a measure to constitute an obstacle, it is sufficient that it should be reasonably likely to have that effect on migrant workers.

66. I accept that it is difficult to estimate how many people will in fact be affected by the residence requirement in the Flemish care insurance. However, it is clear that many people may potentially be affected, especially in a country such as Belgium, where many non-Belgian EU citizens work.

67. The effects of the residence requirement are therefore not too indirect and uncertain.

68. The Flemish Government also submits that affiliation to the care insurance is a dubious 'advantage', given the compulsory nature of the contributions to be paid.

69. I do not accept this argument.

70. It is to be assumed that the Flemish Government, in establishing the care insurance scheme, thought it was providing its citizens with a benefit rather than placing them under a burden. On the Flemish Government's argument, paying for unemployment benefits would likewise be regarded as disadvantageous. Any particular individual may pay contributions throughout his working life without ever drawing unemployment benefit — indeed, he may hope that he will never need to do so. The whole point of such social security schemes is, however, not that everyone benefits directly, but that everyone benefits potentially, to the advantage of society as a whole.

— Is the residence requirement also indirectly discriminatory?

71. As I have already indicated, [49] a national measure that constitutes an obstacle to freedom of movement for persons cannot stand, even if it is non-discriminatory. However, since the question of discrimination was raised to a greater or lesser extent by most of the parties in their written observations and also at the hearing, I shall deal with it here.

49 — See point 55 above.

72. It is well established that the principle of equal treatment, as laid down in Article 39(2) EC and implemented, as far as concerns social security for migrant workers, by Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result. [50]

73. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of the latter. [51]

74. A provision of national law must thus be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage. Such a provision is then permissible only if it is objectively justified and proportionate. [52]

75. The Flemish Government submits that migrant workers are treated exactly like Belgian workers in a similar situation.

76. The difficulty, however, is to determine the correct comparator, i.e. who are the Belgian nationals who are in a 'similar situation'.

77. The second and fourth recitals in the preamble to Regulation No 1408/71 indicate that its objective is to ensure freedom of

50 — Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraph 32; Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 24; and *Celozzi*, cited in footnote 30, paragraph 22.

51 — Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 18; *Borawitz*, paragraph 25; and *Celozzi*, paragraph 24.

52 — See, to that effect, *O'Flynn*, paragraph 20; Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 45; *Borawitz*, cited in footnote 50, paragraph 27; and *Celozzi*, cited in footnote 30, paragraph 26.

movement for employed and self-employed persons within the Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the 5th, 6th and 10th recitals, Regulation No 1408/71 seeks to guarantee equal treatment for all workers occupied on the territory of a Member State as effectively as possible and to avoid penalising workers who exercise their right to free movement. [53] Article 13(2)(a) provides that, as a general rule, the applicable legislation is to be the *lex loci laboris*.

78. The Member State in whose territory equality is to be achieved will therefore normally be the State where the place of work is situated.

79. As the Commission suggested at the hearing, the correct starting point for the comparison is therefore not the place of residence, but the place of work. What happens when we compare two groups whose members all work in the Dutch-speaking region or the bilingual region of Brussels-Capital but who live, respectively, in the Dutch-speaking region or the bilingual region of Brussels-Capital on the one hand and in the French-speaking or German-speaking regions of Belgium on the other hand?

80. Suppose there are two employees of the same company located in Hoegaarden. Both wish to live as close as possible to their place of work. Worker A is a Dutch-speaking Belgian. He decides to live in Hoegaarden itself. Worker B is French. For the reasons suggested earlier, he decides to live in Jodoigne. They work in the same Member State, in the same region, in the same city and for the same company. Their houses are 7 kilometres apart. Worker A can — indeed, must — join the Flemish care insurance and will be able to access its benefits. Worker B cannot. It is evident that, in this example, there is no equality of treatment.

81. It is unnecessary to establish that the provision in question in practice affects a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. [54]

53 — See Case C-68/99 *Commission* v *Germany* [2001] ECR I-1865, paragraphs 22 and 23; Case C-249/04 *Allard* [2005] ECR I-4535, paragraph 31; *Piatkowski*, cited in footnote 42, paragraph 19; and *Nikula*, also in footnote 42, paragraph 20. In that respect, the Court's statement in *Piatkowski*, paragraph 34, that 'the EC Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security' should not be read outside its context. It first appeared in *Hervein* (cited in footnote 42), paragraph 51. There, it followed a paragraph in which the Court emphasised that the Treaty does not provide for harmonisation of social security legislation and that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working there, remain unaffected. In other words, Community law does not require Member States to provide equal contributions or the same manner of calculating those contributions. The facts of both *Hervein* and *Piatkowski* bear out that that is what the Court had in mind.

54 — See, to that effect *O'Flynn*, cited in footnote 51, paragraph 21; and *Celozzi*, cited in footnote 30, paragraph 27.

82. It is also immaterial whether the contested measure affects, in some circumstances, nationals of the State in question resident in other parts of the national territory as well as nationals of other Member States. In order for a measure to be discriminatory, it is not necessary for it to put at an advantage all the nationals of the State in question or to put at a disadvantage only nationals of other Member States, but not nationals of the State in question. [55]

83. A scheme such as that at issue in the main proceedings therefore imposes a difference in treatment to the detriment of migrant workers.

— The application of the *lex loci laboris* to denote the competent part of the competent State

84. At the hearing, the Commission also suggested that, in application of Article 13 of Regulation No 1408/71, the *lex loci laboris* should be used as the sole connecting factor, to denote both the Member State and the decentralised authority of that Member State whose legislation is applicable. Otherwise, by virtue of national legislation, a migrant worker may lose a benefit that he had been granted by virtue of Community law. This would endanger the coordination regime established by Regulation No 1408/71.

85. I agree with the Commission.

86. To pursue my earlier illustration: suppose that the same French national who took up a job in Hoegaarden initially decides to commute between his work and his home in Givet. He does this for a number of years. Then he decides that life would be easier for all the family if they moved closer to his place of work and settled in Jodoigne. Upon moving his residence from France to the French-speaking region of Belgium, whilst continuing to work in the Dutch-speaking region, he will lose the benefits of the Flemish care insurance. It is apparent that this may dissuade him from exercising his right to freedom of movement and residence.

87. When taken at face value, the situation I have just described appears to be the one envisaged in Article 21(4) of Regulation No 1408/71: a worker who was previously not resident in the competent State transfers his residence to the competent State, in casu Belgium.

55 — See, to that effect, inter alia, 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.

88. Article 21(4) of Regulation No 1408/71 provides that the migrant worker should receive or continue to receive benefits in accordance with the legislation of the competent State. Prima facie the situation under the Flemish care insurance seems to comply with this requirement inasmuch as the French migrant is treated in accordance with the legislation of the competent State, in casu Flemish legislation.

89. There are however two flaws in this reasoning.

90. First, the prima facie conclusion that there is no inequality of treatment is dependent upon comparing a French national moving to the French-speaking part of Belgium with a Belgian national living in the French-speaking part of Belgium.

91. As I have indicated earlier, this is the wrong comparison to make.

92. Second, as the Commission correctly observed at the hearing, the coordination system of Regulation No 1408/71 is based on the idea that social security regimes are organised on a Member State basis.

93. When Article 13 renders the *lex loci laboris* applicable, it assumes both that the territorial entity where the place of work is situated is competent to grant the relevant benefits, and that it is competent to do so on an equal basis for everyone working within that territory.

94. Similarly, when Article 21(4) of Regulation No 1408/71 determines that a migrant worker upon moving to the competent State shall receive or continue to receive benefits in accordance with the legislation of the competent State, it assumes that the competent State is indeed *competent* to grant the migrant worker whichever benefits it grants to its own citizens. However, in the present case the competent authority of the competent State is, in fact, competent in respect of only part of the territory of that State.

95. In order for the French worker in my example to be granted the benefits, he has either to go on living in France or to move,

not just to the competent State (Belgium), but to the part of the competent State where the competent authority is competent (the Dutch-speaking region or the bilingual region of Brussels-Capital).

96. The solution is to use the *lex loci laboris* to denote the applicable social security regime, both with regard to the Member State (Belgium) and with regard to the decentralised authority of the Member State whose legislation is applicable (Flemish Community). The situation described in my example would then effectively be equated with the one envisaged in Article 19(1) of Regulation No 1408/71, which provides for a person to enjoy his benefits even if he resides 'in a Member State other than the competent State', i.e. in casu anywhere outside the Dutch-speaking region or the bilingual region of Brussels-Capital.

97. Such a solution also provides consistency in the use of the term 'State' within Regulation No 1408/71. If the place of work determines the competent State, then references to the competent State in Regulation No 1408/71 are also to be read (where necessary) as references to the competent entity within the competent Member State.

— If the residence requirement is properly to be characterised as an obstacle to freedom of movement and/or as indirect discrimination that operates to the detriment of migrant workers, is it objectively justified?

98. Is the obstacle or differential treatment at issue based on objective considerations which are independent of the nationality of the persons concerned and proportionate to the aim legitimately pursued by the national law? [56]

99. The Flemish Government submits that the residence requirement is inherent in the division of competences within the Belgian Federal State. The difference in treatment results not from discrimination, but from the fact that the Flemish Community has no competence with respect to persons residing in one of the other linguistic regions of Belgium. According to Belgian constitutional law, such persons come within the competence of the French or German-speaking Communities. Those communities have chosen not to establish a care insurance scheme similar to the one in Flanders. To assimilate such differences of treatment to discrimination is to deny Member States the right to opt for a federal structure composed of autonomous federated entities that adopt rules applicable only to that part of the national territory for which they are competent.

56 — See, inter alia, *O'Flynn*, cited in footnote 51, paragraph 19; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27; *Borawitz*, cited in footnote 50, paragraph 26; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 66; and *Celozzi*, cited in footnote 30, paragraph 25.

100. I do not accept this argument.

101. It is well established that a Member State may not plead provisions, practices or situations in its internal legal order, including those resulting from its federal organisation, in order to justify a failure to comply with the obligations and time-limits laid down in a directive.[57] A Member State may indeed allocate internal legislative powers freely as it sees fit. However, it alone remains responsible under Article 226 EC for complying with its obligations under Community law.[58] The Court has also made it clear that the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to the principles of a national constitutional structure.[59]

102. The same must apply *a fortiori* to breaches of Treaty provisions[60] and of directly applicable law derived from a regulation.

103. Therefore, whilst the argument that the Flemish Community lacked the requisite competence to legislate with regard to persons not living in the Dutch-speaking region or the bilingual region of Brussels-Capital is understandable from a domestic perspective, it has no bearing on the question whether the residence requirement does or does not comply with Community law.

104. The Flemish Government argues that such an analysis would make it de facto impossible for Member States to adopt a federal structure. I do not accept that contention.

105. Belgium is not the only Member State to have chosen a federal or otherwise decentralised structure. Community law has not made it impossible for other federal Member States, and/or their decentralised authorities, to exercise their competences as defined

57 — See , inter alia, Case 69/81 *Commission* v *Belgium* [1982] ECR 163, paragraph 5; Case C-323/96 *Commission* v *Belgium* [1998] ECR I-5063, paragraph 42; Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, paragraph 23, and Case C-111/00 *Commission* v *Austria* [2001] ECR I-7555, paragraph 12; and compare the well-established rule of international law to that effect, as enshrined in Article 27 of the 1969 Vienna Convention on the Law of Treaties: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty …'.

58 — See, inter alia, Joined Cases 227/85 to 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraphs 9 to 10; Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24; Case C-388/01 *Commission* v *Italy*, cited in footnote 55, paragraph 27; Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 38.

59 — Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3.

60 — See, to that effect, Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151, paragraph 8.

by national law. However, a Member State cannot use its decentralised structure as a cloak in order to justify a failure to comply with its obligations under Community law.

106. It might be said that, if so, decentralised authorities of Member States need some mechanism by which to participate in the elaboration of EU law, especially when the Member State itself is not competent. (I add in passing that analogous arguments arise in respect of locus standi in direct actions before the Court under Article 230 EC. [61])

107. That is a fair point. Appropriate institutional arrangements can, however, be set up to ensure such participation in the Community legislative process. This can be achieved, for example, through the first paragraph of Article 203 EC, which implicitly allows regional ministers to represent their Member State in the Council. I note that such arrangements have, indeed, been made within the Belgian constitutional structure. [62]

108. The Flemish Community's presumed lack of competence to legislate with regard to persons not living in the Dutch-speaking region or the bilingual region of Brussels-Capital cannot therefore be invoked by way of objective justification.

109. The Flemish Government further argues that persons working in the Dutch-speaking region but living in the French-speaking region can always apply to the

61 — See, for example, Case C-95/97 *Région wallonne* v *Commission* [1997] ECR I-1787; and Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245. See further P. Van Nuffel, 'What's in a Member State? Central and decentralised authorities before the Community courts', *Common Market Law Review*, 2001, pp. 894 to 899. S. Weatherill, 'The Challenge of the Regional Dimension in the European Union' in S. Weatherill and U. Bernitz (eds.), *The Role of Regions and Sub-national Actors in Europe*, Oxford and Portland, Oregon, 2005, pp. 30 and 31, describes such *locus standi* for sub-State actors as the natural corollary of the obligations imposed directly by EU law on such entities.

62 — Thus, the Federal State and the federated entities of Belgium have concluded an agreement under national law whereby Belgium can be represented in the Council either by a combination of representatives of the Federal State and the federated entities or by the Federal State or (one of the) federated entities alone: see the cooperation agreement of 8 March 1994, *Moniteur belge/Belgisch Staatsblad*, 17 November 1994, as amended on 13 February 2003, *Moniteur belge/Belgisch Staatsblad*, 25 February 2003. See H; Bribosia, 'La participation des autorités exécutives aux travaux du Conseil de l'Union et des conférences intergouvernementales' in Y. Lejeune (ed.), *La participation de la Belgique à l'élaboration et à la mise en œuvre du droit européen/De deelname van België aan de voorbereiding en de uitvoering van het Europees recht*, Brussels, Bruylant, 1999, pp. 85 to 144. Further on the possibility of participation of decentralised authorities in decision-making in the Union: P. Van Nuffel, *De rechtsbescherming van nationale overheden in het Europees recht*, Deventer, Kluwer, 2000, pp. 472 to 488; and in general on the role of decentralised authorities within the EU: K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, Second Edition, London, Sweet & Maxwell, 2005, pp. 532 to 537.

care system of the French Community.[63] However, neither the French Community nor the German-speaking Community has apparently established an equivalent care insurance. That argument therefore falls away.

110. In so far as nationals of other Member States working in Belgium and Belgian nationals who have exercised rights of freedom of movement are concerned, the second and third questions referred should therefore be answered to the effect that Articles 39 and 43 EC and Article 3 of Regulation No 1408/71 preclude an autonomous Community of a federal Member State from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent or 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 same federal State for which another autonomous Community is competent.

111. Having reached this conclusion, it is unnecessary to examine whether such persons may also claim rights under Article 18 EC, which confers a general right on every citizen of the Union to move and reside freely within the territory of the Member States, subject to certain limitations. In relation to freedom of movement for workers, that provision finds specific expression in Article 39 EC. In respect of persons who have exercised classic economic rights of freedom of movement, it is accordingly unnecessary to rule separately on the interpretation of Article 18 EC.[64]

Belgian citizens who have not made use of their freedom of movement rights

112. Is this group to be regarded as being in a 'purely internal situation' that falls outside the scope of Community law?

113. The Court has held on numerous occasions that the Treaty rules governing freedom of movement for persons and measures adopted to implement them cannot be

63 — Paragraph A.3.2.2. of the referring judgment.

64 — See, inter alia, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22; Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 37; and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 80.

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. [65]

114. More specifically, in *Petit* the Court held that Regulation No 1408/71 does not apply to situations which are confined in all respects within a single Member State. [66] The applicant in those proceedings was a Belgian national, had always resided in Belgium and had worked only in the territory of that Member State.

115. When analysed in terms of the classic economic freedoms, the situation of Belgians who have never exercised a right of freedom of movement appears to be purely internal. Does that mean that it remains wholly unaffected by the application of EC law?

116. I must confess to finding something deeply paradoxical about the proposition 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. One might ask rhetorically, what sort of a European Union is it if freedom of movement is guaranteed between Dunkirk (France) and De Panne (Belgium), but not between Jodoigne and Hoegaarden?

117. From what I have said earlier regarding the application of the concepts of *lex loci laboris* and competent State, it may be that the entities between which barriers actually need to be abolished are not necessarily always the Member States, but the entities that have the *relevant regulatory authority* (be these Member States or decentralised authorities within a single Member State). [67]

118. The beneficial effects of dismantling barriers to freedom of movement between Member States can easily be undermined if decentralised authorities of Member States have the relevant competences and are free to establish such barriers between themselves. In the light of trends towards regional

65 — See, inter alia, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraph 16; Case C-153/91 *Petit* [1992] ECR I-4973, paragraph 8; *Terhoeve*, cited in footnote 40, paragraph 26; Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16; Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraph 69; and *ITC*, cited in footnote 41, paragraph 29.

66 — See *Petit*, paragraph 10, and *Khalil*, paragraph 70, both cited in previous footnote.

67 — In the context of state aid, the Court has indeed been prepared to examine the impact of such aid by specific reference to the area in which an autonomous infra-State body exercised its competences: see Case C-88/03 *Portugal* v *Commission (Azores)* [2006] ECR I-7115, paragraphs 54 to 78 and the Opinion of Advocate General Geelhoed, at points 48 to 62.

devolution in several Member States, this may be a serious issue. However beneficial devolution may be from the perspective of subsidiarity [68] and democratic accountability, it must not come at the cost of (de facto) endangering the area of freedom of movement or the *effet utile* of Community law.

119. Moreover, the situation that arises in the present case is a rather curious version of a 'purely internal situation'.

120. Since the Belgian Communities and Regions act as autonomous legislators within their spheres of competence, their position is, in that respect, equivalent to that of a Member State. Were Flanders an independent Member State of the Union, the impossibility for those living in Wallonia but working in Flanders to affiliate to the Flemish care insurance scheme would clearly fall foul of the Treaty.

121. This case therefore presents an occasion for the Court to reflect on the nature and rationale behind its doctrine in respect of purely internal situations.

122. The Government of the French Community and the Walloon Government argue that freedom of movement for persons should be aligned, so far as possible, with free movement of goods. In that context, they refer to the Court's judgments in *Legros*, [69] *Lancry*, [70] and *Simitzi*, [71] which are said to have extended the prohibition on tariff barriers to a similar prohibition on regional borders inside a Member State. By analogy, the Flemish care insurance should be regarded as equivalent to an internal tariff barrier with regard to freedom of movement for persons.

123. In order to evaluate that argument, it is necessary to examine the reasoning

68 — See Article 1 EU, stipulating that decisions in the Union have to be taken 'as closely as possible to the citizen'. This may need to be understood in a broader sense than that enshrined in Article 5 EC. See N. MacCormick, *Questioning Sovereignty*, Oxford, OUP, 1999, p. 135: 'The doctrine of subsidiarity requires decision-making to be distributed to the most appropriate level. In that context, the best democracy — and the best interpretation of popular sovereignty — is one that insists on levels of democracy appropriate to levels of decision-making.' On federalism and social security in Belgium, see J. Velaers, 'Sociale zekerheid tussen unionisme en federalisme' in H. Deleeck (ed.), *Sociale zekerheid en federalisme*, Brugge, Die Keure, 1991, pp. 215 to 229. On the role of solidarity in this debate, see further G. Roland, T. Vandevelde, P. Van Parijs, 'Autonomie régionale et solidarité: une alliance durable?' in P. Cattoir et al. (eds.), *Autonomie, solidarité et cooperation/Autonomie, solidariteit en samenwerking*, Brussels, Larcier, 2002, pp. 525 to 540.

69 — Case C-163/90 [1992] ECR I-4625.

70 — Joined Cases C-363/93, C-407/93 to C-411/93 [1994] ECR I-3957.

71 — Joined Cases C-485/93 and C-486/93 [1995] ECR I-2655.

behind extending the prohibition on tariff barriers affecting free movement of goods to internal situations. In that regard, the Court's case-law invokes both practical and conceptual considerations.

124. In *Lancry*, the Court pointed out that charges such as those at issue in that case were imposed on all goods alike. It would be virtually impossible in practice to distinguish between products of domestic origin and those from other Member States. Verifying in every case whether a particular product in fact originated in another Member State would give rise to administrative procedures and further delays that would themselves constitute obstacles to the free movement of goods. [72]

125. This pragmatic justification for prohibiting internal tariff barriers affecting free movement of goods cannot however be transposed to freedom of movement for persons. The provisions on freedom of movement for persons do not contain a prohibition equivalent to that on tariff barriers in Article 25 EC.

126. The Court has, however, also provided a conceptual explanation for its case-law on internal tariff barriers.

127. In *Carbonati*, the Court recalled that the justification for prohibiting customs duties and charges having equivalent effect is that any pecuniary charges imposed on goods by reason of the fact that they cross a frontier constitute an obstacle to free movement. [73] It went on to hold, more broadly, that the very principle of a customs union, as provided for by Article 23 EC, requires free movement of goods to be ensured throughout the territory of the customs union. If Articles 23 and 25 EC refer expressly only to trade between Member States, that is because the framers of the Treaty took it for granted that no charges exhibiting the features of a customs duty were in existence within individual Member States.

128. The Court then concluded its reasoning with a more general statement. It pointed out that Article 14(2) EC, in defining the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', draws no distinction between inter-State frontiers and frontiers within a single State. Article 23 EC should be read together with Article 14(2) EC. It follows that the absence

72 — Lancry, cited in footnote 70, paragraph 31.

73 — Case C-72/03 *Carbonati* [2004] ECR I-8027, paragraph 22; see further Joined Cases 2/69 and 3/69 *Brachfeld and Chougol* [1969] ECR 211, point 14; and *Lancry*, cited in footnote 70, paragraph 25.

of charges between or within Member States is essential to realising the customs union and free movement of goods. [74]

129. It seems to me that, potentially at least, the same reasoning can be applied by analogy to freedom of movement for persons. Why should the provisions on freedom of movement for persons not likewise be read together with Article 14(2) EC? Indeed, unlike Article 25 EC, Article 39 EC does not explicitly refer only to cross-border situations. Rather, it stipulates that freedom of movement shall entail the right to move freely within the territory of Member States for the purpose of accepting offers of employment actually made. Advocate General Warner noted as much in *Saunders*, [75] where he argued that the right flowing from Article 39 EC is '*prima facie* one of access to every part of every territory. That is as one would expect, since the free movement of persons has as its object to contribute to the establishment of a common market in which the nationals of all Member States may take part in economic activity anywhere on the territory of the Community …'

130. Just as with Articles 23 and 25 EC, the Treaty draftsmen may well have taken it for granted when envisaging freedom of movement for persons within the Community that internal obstacles within a single Member State such as the one at issue in the present case would have been abolished. [76]

131. In his Opinion in *Lancry*, Advocate General Tesauro noted the 'paradox of a single market in which barriers to trade between Portugal and Denmark are prohibited, whilst barriers to trade between Naples and Capri are immaterial'. [77] He concluded that it was not for the Court to resolve this paradox, [78] warning that if it did so in respect of internal tariff barriers, that would call into question the settled case-law on purely internal situations, not only regarding goods, but also regarding services and persons generally.

74 — *Carbonati*, cited in previous footnote, paragraphs 23 to 24.

75 — Case 175/78 [1979] ECR 1129, at 1143.

76 — Indeed, at the moment the Treaties were drafted the formal process of federalisation had not yet started in Belgium. The obstacle at issue in the present case therefore did not exist and could not have existed. However, several other Member States had different degrees of non-unitary structures, most notably Germany and its Länder.

77 — Cited in footnote 70, at point 28. See also B. Cantillon, cited in footnote 20, at pp. 14 and 15, arguing that the exclusion of the inhabitants of the French-speaking part of Belgium from the Flemish care insurance poses problems from a single market point of view.

78 — Advocate General Mischo suggested in Joined Cases 80/85 and 159/85 *Nederlandse Bakkerij Stichting* [1986] ECR 3359, at 3375, that reverse discrimination 'is clearly impossible in the long run within a true common market, which must of necessity be based on the principle of equal treatment'. However, he took the view that 'such discrimination must be eliminated by means of the harmonisation of legislation'.

132. Whilst the Court did not follow Advocate General Tesauro in that respect, it has not yet fully grappled with the implications, for freedom of movement for persons, of the conceptual justification it has advanced for the abolition of internal tariff barriers affecting free movement of goods.

133. An additional impetus for so doing may perhaps be found in the articles of the Treaty on citizenship of the Union.

134. True, the Court has held that citizenship of the Union, as established by Article 17 EC, is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law. [79]

135. However, that statement requires one to solve the logically prior question of which situations, internal or not, are deemed to have no link with Community law.

136. The answer cannot be that all so-called 'internal situations' are automatically deprived of any link to Community law. [80] Article 141 EC on equal pay for men and women provides a clear example of a provision applicable to situations that are normally wholly internal to a Member State. The question whether the situation is internal is therefore conceptually distinct from the question whether there is a link with Community law. Both questions must be answered in the light of the goals of the relevant Treaty provisions.

137. It is true that in *Uecker and Jacquet* the Court explained its conclusion that Article 17 EC does not affect internal situations that have no link with Community law by recalling that Article 47 EU 'provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties'. [81] The Court decided that '[a]ny discrimination which nationals of a Member State may suffer under the law of that State fall[s] within the scope of that law

79 — *Uecker and Jacquet*, cited in footnote 65, paragraph 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 26; and Case C-192/05 *Tas-Hagen* [2006] ECR I-10451, paragraph 23.

80 — See the Opinion of Advocate General Warner in *Saunders*, cited in footnote 75, at 1142.

81 — The text of Article 47 EU itself refers to 'amending' rather than 'expressly amending'.

and must therefore be dealt with within the framework of the internal legal system of that State'. [82]

138. With all respect, I am not convinced that Article 47 EU provides a conclusive answer on this point. A different and plausible reading of that provision is that its primary purpose is to protect the *acquis communautaire* from being affected by the provisions of, and decisions taken under, Title V and Title VI of the EU Treaty. [83] I find it difficult to conceive that Article 47 EU was intended to protect certain parts of the existing EC Treaty from other parts, such as the articles on citizenship, that were *inserted by amendment into that same Treaty* by the Maastricht Treaty. If that were the case, logic would dictate that all provisions inserted into the EC Treaty by the Maastricht Treaty are to be regarded as a separate genus of Community law that cannot interact with or affect the rest of Community law. That seems clearly wrong.

139. As the Court first held in *Grzelczyk* [84] and confirmed most recently in *Commission* v *Netherlands*, [85] citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality. [86]

140. The Court has recently shown its willingness to draw the appropriate consequences in cases such as *Tas-Hagen* [87] and *Turpeinen* [88] and *Commission* v *Netherlands*. [89] It seems to me that, at least potentially, the provisions on citizenship likewise challenge the sustainability in its present form of the doctrine on purely internal situations. [90]

82 — *Uecker and Jacquet*, cited in footnote 65, paragraph 23.

83 — See, in that sense, P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, OUP, 2004, p. 146; K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, Second Edition, London. Sweet & Maxwell, 2005, p. 808; A. Arnull et al., *Wyatt and Dashwood's European Union Law*, Fifth Edition, London, Sweet & Maxwell, pp. 326 to 327. This has certainly been the focus of cases thus far involving Article 47 EU. See, for example, Case C-170/96 *Commission* v *Council* [1998] ECR I-2763; Case C-176/03 *Commission* v *Council* [2005] ECR I-7879; and Case C-91/05 *Commission* v *Council*, pending.

84 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

85 — Case C-50/06 [2007] ECR I-4383, paragraph 32.

86 — See also Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-413/99, *Baumbast and R* [2002] ECR I-7091, paragraph 82; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 65; *Collins*, cited in footnote 56, paragraph 61; *Garcia Avello*, cited in footnote 79, paragraph 22; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 25; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 45; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 15; and Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917, paragraph 74; and *Turpeinen*, cited in footnote 44, paragraph 18.

87 — Cited in footnote 79.

88 — Cited in footnote 44.

89 — Cited in footnote 85.

90 — See S. O'Leary, *The Evolving Concept of Community Citizenship*, The Hague/London/Boston, Kluwer Law International, 1996. Discussing citizenship and free movement, the author argues inter alia that the provisions on citizenship are difficult to reconcile with reverse discrimination. See also N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', *Common Market Law Review*, 2002, p. 748.

141. The present case comes as close to a classic cross-border situation as a supposedly internal situation can. It thereby highlights the arbitrariness of attaching so much importance to crossing a national border. [91]

142. The group of persons concerned (Belgian citizens who have not exercised classic economic rights of freedom of movement), as well as being Belgian citizens, are also (and for that very reason) citizens of the Union (Article 17 EC). [92] There is no issue about the type of nationality that they hold, or whether it qualifies them to claim Union citizenship (unlike the situation in *Kaur*). [93] They fall squarely within the scope of the Treaty *ratione personae*.

143. By virtue of that citizenship, they have under EC law a right not only to move but also to reside anywhere within the territory of the Union (Article 18 EC). The previous Article 18 case-law has focused on moving. But that article also speaks of a right of residence.

144. If it were to pursue this line of analysis, the Court would therefore have to decide whether on a proper construction, the 'right to move and reside freely within the territory of the Member States' [94] in Article 18 EC means 'freedom to move and *then* reside' (i.e., freedom to reside derives from/flows from prior exercise of the freedom to move) or whether it means 'freedom *both* to move *and* to reside' (so that it is possible to exercise the freedom to reside/go on residing without first exercising the freedom to move between Member States).

145. The benefit to which the persons concerned wish to have access is one that, as I have indicated, falls equally squarely within Regulation No 1408/71. It is therefore clearly within the scope of the Treaty *ratione materiae*. Even if it were not, I recall that the Court was prepared to hold in *Tas-Hagen* that Article 18 might give access to a benefit through Member States' obligation to exer-

91 — Compare H.U.J. d'Oliveira, 'Is reverse discrimination still possible under the Single European Act?' in *Forty years on: the evolution of postwar private international law in Europe: symposium in celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1989*, Deventer, Kluwer, 1990, p. 84, pointing out the self-contradictory character of aiming at or completing an internal market while continuing to attach importance to the crossing of national borders.

92 — *Tas-Hagen*, cited in footnote 79, paragraph 18.

93 — Case C-192/99 [2001] ECR I-1237.

94 — In French: 'le droit de circuler et de séjourner sur le territoire des États membres'. In Dutch: 'het recht vrij op het grondgebied van de lidstaten te reizen en te verblijven'.

cise powers that are within their competence in a way that is consistent with Community law. [95]

146. Conceptually, it seems unfortunate that a benefit which is, in my view, clearly part of 'mainstream' social security and which is available both to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital and live within those particular parts of the national territory and to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital and have exercised 'classic' economic rights of freedom of movement should *by definition* be unavailable to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital but who live in the French-speaking or German-speaking regions.

147. Article 12 EC contains a broadly-drafted prohibition on discrimination in respect of what is covered by the Treaty. A further manifestation can be found in Article 3(1) of Regulation No 1408/71. Non-discrimination is also, of course, one of the fundamental principles of EC law. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [96] The importance of non-discrimination is underscored by the Charter of fundamental rights of the European Union [97] (Article 21) and by the legislative initiative of the Council in enacting two major directives, based on Article 13 EC, prohibiting various specific forms of discrimination. [98] Non-discrimination is also (of course) enshrined in the Treaty establishing a Constitution for Europe (Article I-4, Article II-81, and Article III-123). Discrimination is thus generally perceived to be repugnant and something that should be prohibited.

148. In its judgment in *Kenny*, [99] the Court seems already to have suggested that, within the field of social security law, the principle of non-discrimination may also prevent reverse discrimination. [100]

95 — *Tas-Hagen*, cited in footnote 79, paragraphs 20 to 24; see also Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 21 and 26; *De Groot*, cited in footnote 40, paragraph 75; *Schempp*, cited in footnote 86, paragraph 19; and *Turpeinen*, cited in footnote 44, paragraph 11.

96 — See, inter alia, Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 44; and Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56.

97 — OJ 2000 C 364, p. 1.

98 — Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

99 — Case 1/78 [1978] ECR 1489, paragraphs 16 to 21.

100 — See, in the same sense: C. Barnard, *EC Employment Law. Third Edition*, Oxford, OUP, 2006, pp. 213 to 214; and D. Wyatt, 'Social security benefits and discrimination by a Member State against its own nationals', *European Law Review*, 1978, pp. 488 to 494.

149. More generally, the Court made it clear in *Eman* that discrimination by a Member State against its own nationals can be caught by Community law under certain circumstances. There, a Netherlands national resident in a non-member country had the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas a Netherlands national residing in the Netherlands Antilles or Aruba had no such right. The Court held that whilst, in the current state of Community law, Member States could define the conditions for exercising the right to vote and to stand as a candidate in elections to the European Parliament by reference to residence in the territory in which the elections were held, the principle of equal treatment prevented the criteria chosen from resulting in different treatment of nationals who were in comparable situations, unless that difference in treatment was objectively justified. The Court held that it was not. [101]

150. If the analysis that I have set out earlier is correct, application of EC law will result in the Flemish care benefit, which is already available to all living within the Dutch-speaking region or the bilingual region of Brussels-Capital, having also to be made available (a) to 'classic' EC migrant workers (nationals of other Member States working in the Dutch-speaking region or the bilingual region of Brussels-Capital of Belgium but residing in the French-speaking or German-speaking regions or in their home Member State) (b) to Belgians who have already exercised a right of freedom of movement, to avoid a 'chilling' effect on the exercise of those rights. [102]

151. Thus, the *combination* of the application of national law and the application of EC law produces a situation in which the only category of persons residing in the French-speaking or German-speaking region who are not able to access the Flemish care benefit are Belgians who have not exercised a traditional right of freedom of movement, but who have exercised (and continue to exercise) a right to reside in a particular part of Belgium. Furthermore, the difference in treatment between such persons on the one hand, and nationals of other Member States and Belgians who have exercised classic economic rights of freedom of movement, on the other hand, *arises precisely* because EC law intervenes to prevent adverse treatment of the latter group. [103] If one then applies the test that is familiar from the discrimination

101 — *Eman*, cited in footnote 96, paragraphs 58 to 61.

102 — See, for example, *D'Hoop*, cited in footnote 86, paragraphs 30 and 31, where the Court held that the opportunities offered by the Treaty in relation to freedom of movement could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them. See also *Singh*, cited in footnote 44, paragraphs 19 and 23; and *Alevizos*, cited in footnote 64, paragraph 75.

103 — Compare the Opinion of Advocate General Poiares Maduro in *Carbonati*, cited in footnote 73, at points 61 and 62.

case-law, it appears that 'but for' their decision to reside in the French-speaking region although they work in the Dutch-speaking region, the former group would also be able to access the benefit.

152. The Government of the French Community raises an interesting tangential argument based on the Agreement between the European Community and its Member States and Switzerland on the freedom of movement for persons ('the EC-Switzerland Agreement'). [104] Article 7(b) of that Agreement requires the Contracting Parties to make provision for 'the right to occupational and geographical mobility which enables nationals of the Contracting Parties to move freely within the territory of the host State and to pursue the occupation of their choice'. That provision would indeed appear expressly to grant Swiss citizens the right to move freely, not only between Switzerland and the various Member States, but also between different parts of the territory of an individual Member State.

153. If so, the paradoxical result would be that a Swiss citizen (like a national of another Member State) would be entitled to freedom of movement throughout Belgium, whilst a Belgian national would merely enjoy such freedom of movement rights within Belgium as he could derive from national law. To that extent, the EC-Switzerland Agreement throws into even sharper relief the fact that, if the traditional 'purely internal situation' argument is accepted, Belgian nationals who have not exercised classic economic rights of freedom of movement are, *by the very operation of EC law* (in combination with national law), the only class of persons residing or moving within the Union against whom the conditions for entitlement to the Flemish care insurance may discriminate with impunity.

154. In such circumstances, a prima facie case can, it seems to me, be made for saying that the group of Belgian nationals who have not exercised classic economic rights of freedom of movement *nevertheless* falls in principle within the scope of EC law and/or is sufficiently affected by its application that they ought also to be able to invoke EC law. [105]

155. Any discrimination against that group would, of course, be indirect rather than direct. For that reason, it would be open to

104 — Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6).

105 — Compare the Opinion of Advocate General Poiares Maduro in *Carbonati*, cited in footnote 73, at points 59 to 71, also relying on an interpretation of the principle of non-discrimination. See also E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (non-economic) European Constitution', *Common Market Law Review*, 2004, p. 771, suggesting that the combined effect of Articles 17 and 12 EC is to grant protection, as a matter of Community rather than national law, to citizens who have not exercised their free movement rights.

Member States to raise arguments of objective justification. It is not difficult to foresee circumstances in which such objective justification could potentially be made out. One can readily imagine (for example) that, in order to promote a less-developed region within its territory, or to deal with a problem that is endemic to one region but does not affect the rest of its territory, a Member State might wish to make certain advantages available only to those living within a particular region. Well-founded objective justification would leave Member States ample scope to apply differentiated rules in situations that, objectively, merited such treatment, whilst safeguarding citizens of the Union against arbitrary discrimination that could not be so justified.

156. It goes without saying that counter-arguments to the analysis that I have set out above on the impact of citizenship of the Union on purely internal situations, based upon continuing competences of the Member States,[106] could be put forward. Given that purely internal situations have traditionally been viewed as falling outside the scope of EC law, it is likely that Member States would indeed wish to present such arguments to the Court; and their arguments would need to be considered carefully. I am fully conscious of the fact that, in the present case, only one Member State (the Netherlands) has intervened. It would seem desirable for a proper exploration of the elements that I have canvassed above to take place against the background of fuller participation from the Member States and (as a corollary) a more developed presentation by the Commission. It might be that, on more detailed examination, the prima facie case that I have outlined above is refuted.

157. The Court would not, I suspect, wish to decide such a fundamental point in the present case (unless, of course, it decides to reopen the oral procedure and invite Member States to make their views on this issue known); and I do not see an overriding need for it to do so. There does nevertheless appear to me to be a possible argument — and one that is prima facie attractive because it would help to eradicate arbitrary discrimination — that citizens of the Union may rely upon that citizenship, in combination with the principle of non-discrimination, as against a decentralised authority that unquestionably exercises the *auctoritas* of the State, in order to access a benefit that Community law clearly intends should be available widely to all workers and that groups of fellow-workers can indeed access through the intervention of Community law.

106 — Thus far in the present case, the essential argument has been that a Member State with a decentralised constitutional structure thereby retains competence to discriminate between its own citizens *without* being required to provide objective justification for that discrimination.

On the potential applicability of Regulation (EEC) No 1612/68 of the Council [107]

158. At the hearing, the question was raised as to whether Regulation No 1612/68 might be applicable to the proceedings.

159. That regulation applies in general to freedom of movement for workers. It may therefore apply to social advantages which, at the same time, come within the specific scope of Regulation No 1408/71. [108] The two Regulations do not have the same scope *ratione personae*. [109] The notion of social advantage in Article 7(2) of Regulation No 1612/68 may also be broader than the notion of social security benefit under Regulation No 1408/71. [110]

160. Where there is a potential overlap between Regulation No 1408/71 and Regulation No 1612/68, the Court often first examines whether Regulation No 1408/71 is applicable. It goes on to examine the case on the basis of Regulation No 1612/68 on the occasions where Regulation No 1408/71 is found to be inapplicable, or where the alleged infringements of that regulation are not made out. [111] Given that the scope of Regulation No 1408/71 is the more specific, this seems to me a sensible approach.

161. In the present case, I consider that Regulation No 1408/71 is applicable and that Article 3(1) thereof precludes citizens of other Member States and Belgian citizens who have made use of their right to freedom of movement being denied access to the Flemish care benefit. Persons in that situation are therefore sufficiently protected by Regulation No 1408/71 and there is no need to consider the position under Regulation No 1612/68.

162. If the Court is minded to treat Belgian citizens who have *not* made use of a classic economic right to freedom of movement as entitled nevertheless to protection under Community law, it would likewise be

107 — Regulation of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968(II), p. 475), amended most recently by Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77).

108 — See Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 21; Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 17; and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 27.

109 — *Commission* v *Luxembourg*, cited in previous footnote, paragraph 20, following the Opinion of Advocate General Jacobs in the same case, points 32 to 34.

110 — See the Opinion of Advocate General Kokott in *Hosse*, cited in footnote 30, point 104, and the Opinion of Advocate General Kokott of 29 March 2007 in Case C-287/05 *Hendrix*, pending, point 52.

111 — See, inter alia, *Schmid*, cited in footnote 108; *Meints*, cited in footnote 52; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; Case C-33/99 *Fahmi* [2001] ECR I-2415; *De Cuyper*, cited in footnote 30; and *Celozzi*, also in footnote 30. *Commission* v *Luxembourg* and *Martínez Sala*, both cited in footnote 108, appear to be exceptions to this practice.

unnecessary to examine their position from the perspective of Regulation No 1612/68. Should the Court hold that such persons are in a purely internal situation with no link with Community law, neither Regulation No 1408/71 nor Regulation No 1612/68 can apply.

Fourth question

163. By its fourth question, the referring court wishes to know what would happen if the current (2004) version of the 1999 Decree were inconsistent with Community law. More particularly, the question arises whether Community law would preclude reversion to the system in force before the adoption of the 2004 Decree, i.e. a system where access to benefits under the Flemish care insurance was unequivocally dependent on residence in the Dutch-speaking region or the bilingual region of Brussels-Capital, irrespective of the category of claimant ('the 2001 version of the Decree').

164. The Flemish Government submits that a reply to the fourth question is necessary only if the present version of the Decree is inconsistent with Community law, which, in its submission, is not the case.

165. If the Court shares my view on the answers to be given to the first three questions, it is indeed necessary to answer the fourth question.

166. By a letter of formal notice of 17 December 2002, the Commission informed the Belgian Government that in its view the 2001 version of the Decree infringed Articles 39 and 43 EC as well as Regulation No 1408/71. The Commission specifically took issue with the residence requirement, under which only persons living in the Flemish region or in the bilingual region of Brussels-Capital could be affiliated to the Flemish care insurance.

167. The Flemish Parliament took the Commission's complaints into account and modified the Decree with the specific intention of making it compatible with Community law. [112]

112 — See the *travaux préparatoires* of the Decree of 30 April 2004, *Parlementaire Stukken*, Vlaams Parlement, 2003-2004, nr. 1970/1, p. 2: 'It appears from the final report [of the commission of experts] that the European Commission has rightly pointed out that Regulation (EEC) No 1408/71 applies to the legislation concerning the Flemish care insurance … On the request of the European Commission, this conclusion has to be transposed explicitly into legislation. An amendment of the Decree of 30 March 1999 concerning the organisation of the care insurance is therefore necessary …' (my translation).

168. The Flemish Government argues that the applicants in the main proceedings are not interested in promoting freedom of movement for migrant workers, but only in protecting the inhabitants of the French-speaking region. The situation is therefore purely internal. It also repeats its earlier argument that, since the Belgian constitutional structure prevents the Decree (in any of its versions) from being applied to inhabitants of the French-speaking or German-speaking regions, there is no infringement of Community law.

169. I do not find either argument convincing.

170. As to the first, it is self-evident that the applicants are entitled to defend the interests of the constituency they represent. It is however quite unclear why that fact of itself makes the whole situation a purely internal one.

171. As to the second, I have already recalled that according to the Court's consistent case-law, the internal constitutional structure of a Member State cannot excuse an infringement of Community law.

172. If, for the reasons set out above, the current (2004) version of the Decree is inconsistent with Community law, the same must *a fortiori* be true of the 2001 version of the Decree.

Conclusion

173. For the reasons given above, I consider that the questions referred by the Cour d'arbitrage (Court of Arbitration), now Cour constitutionnelle (Constitutional Court), of Belgium should be answered as follows:

'— A care insurance scheme such as the one established by the Flemish Community falls within the scope *ratione materiae* 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 defined in Article 4 thereof.

— In so far as nationals of other Member States working in Belgium and Belgian nationals who have exercised rights of freedom of movement are concerned, Articles 39 and 43 EC and Article 3 of Regulation No 1408/71 preclude an autonomous Community of a federal Member State from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent or 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 same federal State for which another autonomous Community is competent.

— Community law would preclude a system where access to benefits under the Flemish care insurance is unequivocally dependent on residence in the Dutch-speaking region or the bilingual region of Brussels-Capital, irrespective of the category of claimant.'