# OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 11 September 2008 [1]

## I — Introduction

1. By decision of 15 March 2007 the Bayerisch Landessozialgericht München (Germany) referred two questions to the Court, pursuant to Article 234 EC, the first concerning the interpretation of Article 19(1)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 [2] and the second the interpretation of Articles 18 EC, 39 EC and 49 EC.

2. These questions were raised in the context of a case which Ms Petra Von Chamier-Glisczinski brought against the DeutscheAngestellten-Krankenkasse ('the DAK') with the aim of obtaining the reimbursement of the costs incurred for in-patient care in a care home in Austria.

1 — Original language: Italian.
2 — OJ English Special Edition 1971(II), p. 416.

## II — Legal framework

A — *Community law*

1. The relevant provisions of the Treaty

3. Article 18(1) EC provides as follows:

'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'.

4. On the basis of Article 39(1) to (3) EC:

'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.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission'.

5. The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

2. Secondary law

6. Disparities between national legislation in the area of social security undeniably constitute an obstacle to the movement of workers.

For this reason, the authors of the Treaty of Rome conferred on the Council the power to adopt in this sector 'such measures … as are necessary to provide freedom of movement for workers'. Article 51 (now Article 42 EC) provides in particular for the making of 'arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefit to persons resident in the territories of the Member States'.

7. This power was first exercised by the Council in 1958 with the adoption of a regulation coordinating the national legislation on the various categories of social security, destined to be applied to the various risks covered by that legislation. Currently, such coordination is ensured by Regulation No 1408/71, [3] the original text of which has been amended many times.

3 — The provisions of Regulation No 1408/71 are supplemented by Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 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 L 74, 1972, p. 1).

8. For the purposes of the present case Article 19(1) and (2), first paragraph, of this Regulation are noteworthy in particular, and provides:

'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, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the 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.

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside'.

9. The text of Article 22(1)(b)(i) of the Regulation should also be recalled, which provides:

'1. A worker 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, and:

...

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State,

... shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed however by the legislation of the competent State'.

10. The national court also refers in its first question to Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 [4] on freedom of movement for workers within the Community. This Article was repealed [5] by Article 38 of Directive 2004/38/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 amending Regulation (EEC)

4 — OJ English Special Edition 1968(II), p. 475.
5 — With effect from 30 April 2006.

No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.[6] Paragraph 1 of that Article provides:

'The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse'.

B — *National law*

11. In response to a question asked by the Court, the German Government has set out the broad outlines of the care insurance scheme set out in the Sozialgesetzbuch (SGB).

12. This regime provides for three forms of intervention in favour of persons reliant on care.

13. Article 36 of Book XI of the SGB provides that persons in need of assistance and care at home have the right to *benefits in kind* from employees of the out-patient care services which have contractual arrangements with the Fund for persons reliant on care. The costs of such services are paid by the Fund subject to a maximum ceiling, which varies in relation to the level of dependence of the beneficiary. For category III, the ceiling is EUR 1 432 per month and can be raised to EUR 1 918 per month for cases which require intensive and continued assistance which involves particularly high costs. The Fund pays for the services on the basis of the charges stated in the service agreements concluded with the various out-patient services. Medical care at home does not fall within benefits in kind as referred to in Article 36 and is covered by sickness insurance.

14. Article 37 of Book IX of the SGB provides that persons reliant on care can benefit from a *monthly care allowance* when they obtain for themselves the assistance and care services they require. The allowance may be used freely by the beneficiary and therefore also to pay for benefits not covered by the insurance or supplied by persons not affiliated to the

6 — OJ L 158, 2004, p. 77.

service providers with whom agreements have been established. The amount of the allowance also varies in relation to the level of dependence. For category III, the amount is EUR 665 per month.

15. Article 38 of Book XI of the SGB provides for what are known as *combined* benefits. On the basis of this provision, the insured person who does not benefit from all of the benefits in kind to which he is entitled may obtain *at the same time* the care allowance provided for in Article 37, the amount of which decreases by a percentage corresponding to the use of the benefits in kind. It is for the beneficiaries to decide the proportion of the benefits in kind they intend to use. The objective of the combined services is to allow greater autonomy in the organisation of care at home by the person reliant on care.

16. The cost of services exceeding the maximum provided for under the care insurance is payable by the dependent person.

17. Finally, on the basis of Article 43 of Book XI of the SGB, referred to in the Commission's observations, persons reliant on care are entitled to full in-patient care in a care home when assistance at home or partial in-patient care in a care home is not possible or is not to be considered in view of the special features of the case in point. The Fund for persons reliant on care covers with a lump sum the costs of care, medical care and social assistance. The lump sum is EUR 1 432 for persons reliant on care belonging to category III. In total, the amounts paid by the Fund must not exceed 75% of the total amount of the costs for the care, assistance and accommodation of the dependent person. Article 43 also provides that the annual amount of the costs paid by a Fund for persons reliant on care in respect of members being cared for entirely in care homes must not exceed an average of EUR 15 339 per person. This maximum may be exceeded in exceptional cases. An insured party who chooses full in-patient care in a care home although the Fund considers that this is not necessary is entitled to a contribution corresponding to the ceiling laid down in Article 36 for the relevant category of dependence.

## III — Main proceedings and questions referred

18. In the situation of being reliant on care, Ms Von Chamier-Glisczinski, a German citizen resident in Munich, received from the DAK, the social security agency with which she was insured through her husband, the care insurance benefits provided for in Article 38 of Book XI of the SGB (combined benefits).

19. On 27 August 2001, Ms Von Chamier-Glisczinski asked the DAK for the benefits in kind to which she was entitled under German regulations to be paid to a care home in Austria, in which she intended to stay. This request was refused by the DAK by decision of 31 August 2001, the reason given being that, in situations such as that of Ms Von Chamier-Glisczinski, Austrian law did not provide, under its own social security regime, for the payment of benefits in kind to members. According to the DAK, she was entitled only to the care allowance provided for in Article 37 of Book XI of the SGB, corresponding to category III, amounting to DEM 1 300 (EUR 664.68).

20. From 17 September 2001 to 18 December 2003, Ms Von Chamier-Glisczinski stayed in a State-recognised care home in Austria, where she went, according to the order for reference, because her husband intended to look for work in that country.

21. By decision of 20 March 2002, the DAK rejected Ms Von Chamier-Glisczinski's complaint against the decision of 31 August 2001. She then brought an action before the Sozialgericht München, which dismissed it by judgment of 11 October 2005. Ms Von Chamier-Glisczinski appealed against this judgment to the Bayerisches Landessozialgericht München, reiterating her request for reimbursement of the costs of her stay in the Austrian care home, to the extent of the difference between the care allowance received and the ceiling at which the costs of the benefits in kind referred to in Article 36 of Book XI of the SGB are paid by the competent body in respect of persons in category III.

22. Considering that the outcome of the case depended on the interpretation of Community law, the Bayerisches Landessozialgericht München stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Should Article 19(1)(a) — in conjunction, as the case may be, with Article 19(2) — of Regulation (EEC) No 1408/71 be interpreted in the light of Article 18 EC and Articles 39 EC and 49 EC, in conjunction with Article 10 of Regulation (EEC) No 1612/68, as meaning that an employed or self-employed person, or a member of that person's family, may not receive any cash benefits or reimbursement provided on behalf of the competent institution by the institution of the place of residence, if there is provision under the law applicable to the institution of the place of residence for persons insured by that institution to receive only cash benefits, and not benefits in kind?

2. If there is no such entitlement to benefits in kind, is there, in the light of Article 18 EC, or Articles 39 EC and

49 EC, any entitlement to payment — subject to prior approval — by the competent institution of the costs of in-patient care in a care home situated in another Member State, in the amount of the benefits payable in the competent Member State?'

## IV — Proceedings before the Court

23. On 18 September 2007, the referring court informed the Court of Justice that, following the decease of Ms Von Chamier-Glisczinski, her husband had taken over the proceedings, and that the questions referred were maintained.

24. The applicant in the main proceedings, the Commission and the German and Norwegian Governments submitted written observations to the Court pursuant to the second and third paragraphs of Article 23 of the Statute of the Court of Justice. They also expressed their views orally at the hearing on 12 June 2008.

25. A request for clarification was sent to the national court pursuant to Article 104(5) of the Rules of Procedure of the Court. The latter also asked the German Government some questions and requested a written response.

## V — Legal analysis

### A — *Preliminary observations*

26. Before examining the questions referred it is necessary to set out in more detail the factual context of the present case, which emerges from the referring court's replies to the Court's request for clarification and from the explanations provided by the applicant at the hearing.

27. In response to the request for clarification, the Bayerisches Landessozialgericht München sent the Court two letters, the first from the applicant's lawyer and the second from the DAK. The first states that during Ms Von Chamier-Glisczinski's entire stay at the Austrian care home, her husband maintained his residence in Munich, where he was employed until 30 June 2002. From August 2001, however, he was freed of his employment obligations by virtue of an agreement concluded with his employers in view of the termination of his employment contract. From August 2001 until December 2003 he looked for work in Austria, where his wife resided. Finally in December 2003 Mr Von Chamier-Glisczinski began a commercial enterprise which was based in Laufen from April 2004. The letter from the DAK states on the other hand that it is apparent from the applicant's file that, from 17 September 2001 until 30 June 2002, Mr Von Chamier-Glisczinski was an employed person and insured with the defendant voluntarily, that from 1 July 2002 until 18 December 2003 he was registered as unemployed with the employ-

ment service in Munich, from which he received unemployment benefit, and was compulsorily insured with the defendant and, finally, that from 19 December 2003, he was insured with the DAK as a self-employed person.

28. At the hearing, Mr Von Chamier-Gliszczinski explained that in August 2001 he had begun negotiations with an Austrian pharmaceutical company with the objective of starting a commercial enterprise of his own. This project, which would have led to his being based in Austria, where his wife had resided since September 2001, did not materialise due to failure to obtain funding.

29. In the following analysis account will be taken of the information set out above, to the extent that some of it may influence the answers to be given to the questions asked by the referring court.

B — *The first question referred*

30. By the first question referred the Bayerisches Landessozialgericht München asks, essentially, whether on the basis of the system provided for by Article 19(1)(a) of Regulation No 1408/71 the institution of the Member State of residence of the worker is obliged to pay, on behalf of the competent institution, cash benefits, possibly in the form of reimbursement or direct payment of expenses, in situations in which the social security system of that State, unlike that of the competent institution, does not provide for payment of benefits in kind to persons insured by it.

31. The first question seeks, therefore, to ascertain whether the applicant in the main proceedings has, under Article 19 of Regulation No 1408/71, the right to the equivalent in cash of the benefits in kind in question which may be relied on *as against the social security bodies of his State of residence*.

32. Before I answer this question I think it timely to provide some clarification.

33. Firstly, I would note that Regulation No 1390/81 extended the scope *ratione personae* of Regulations No 1408/71 and No 574/72 to self-employed persons and members of their families. Mr and Ms Von Chamier-Glisczinski's situation is, therefore, governed by those regulations, although it emerged during the hearing that Mr Von

Chamier-Glisczinski, during the period of his wife's stay in the care home in Austria, was not looking for employment in that State, but intended to set up his own business.

34. I recall also that the Court has already ruled on the application of Regulation No 1408/71 to benefits under the German care insurance scheme. In *Molenaar*, the Court considered that such benefits, although they have their own characteristics, must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71, for they are 'essentially intended to supplement sickness insurance benefits, to which they are … linked at the organizational level, in order to improve the state of health and the quality of life of persons dependent on care'.[7] Articles 18-36 of the Regulation are therefore applicable to those benefits.

35. The referring court has identified Article 19 of the Regulation as the legal provision applicable to Mr and Ms Von Chamier-Glisczinski's situation. I have, however, some doubts whether this is correct. In point of fact, that article governs the situation of a worker, or a family member, who, *at the time* that the risk giving rise to entitlement to social security benefits materialises, in the present case the need to rely on care, resides in a Member State other than the competent Member State. The situation of a worker, or a family member, who, *after having become entitled to benefits from the competent State*, transfers his residence to another Member State, is governed instead by Article 22(1)(b) of the Regulation.

36. In the case in point, it is undisputed that Ms Von Chamier-Glisczinski was already in receipt of German care insurance benefits, in the form of what are known as combined benefits, before her transfer of residence from Germany to Austria. Her situation appears to me, therefore, to fall within the ambit of Article 22(1)(b), rather than that of Article 19.

37. Changing the relevant legal provision does not, however, imply a substantial change in the applicable regime. In fact, as will become clearer below, Article 22(1)(i) and (ii) provides for a system analogous to that of Article 19(1)(a) and (b), except for the requirement that the worker, or family member, should request from the competent institution authorisation to continue medical treatment in another Member State.[8] However, in the case envisaged in Article 22(1)(b), which appears to be that of Ms Von Chamier-Glisczinski, this authorisation 'may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment'.

7 — Case C-160/96 [1998] ECR I-843, paragraph 24.

8 — Regarding benefits in kind it is provided that the length of the period during which they are provided is governed by the legislation of the competent State and not by that of the State of residence (or stay), as is the case for Article 19.

38. Lastly, it is to be borne in mind that in *Twomey*, the Court, after first remarking on the particularly broad definition of worker in Regulation No 1408/71, clarified that Article 19 thereof also applies to an unemployed person residing in a Member State other than the competent State, whenever he became ill, in particular whether or not before the ending of employment. [9] It follows, pursuant to paragraph (2) of Article 19, that the latter applies also to *family members of the unemployed person who reside in a Member State other than the competent Member State*. The same conclusion must hold good, in my opinion, as regards Article 22(1)(b) of the Regulation. On the one hand, the concept of worker in the text of this article is the same, as implicitly recognised by the Court at paragraph 16 of the judgment. On the other, the ambit of Article 22(1)(b), as of Article 19, differs from that of Article 25 of the Regulation, which governs the situation of unemployed persons staying temporarily in a Member State other than the competent State in search of employment, [10] *without however having transferred their residence.* [11] Therefore the circumstance, which is apparent from the letter from the DAK sent to the Court by the referring court, that for a certain period of time during his wife's stay at the care home in Austria Mr Von Chamier-Glisczinski was registered as unemployed in Germany and received unemployment benefit from the competent bodies of that State, even if confirmed, would not of itself exclude the application of Article 19 [nor, for the same reasons, of Article 22(1)(b)] of the Regulation to Ms Von Chamier-Glisczinski's situation.

39. Having made the above clarification, I shall now examine the first question asked by the referring court.

40. It is apparent from this court's decision that for a certain period Ms Von Chamier-Glisczinski received the combined benefits provided for by Article 38 of Book XI of the SGB. The latter presupposes care at home for a person reliant on care. At the hearing Mr Von Chamier-Glisczinski moreover confirmed that his wife was, until her move to the care home in Austria, cared for at home.

41. It is also apparent from the order for reference that, in August 2001, Ms Von Chamier-Glisczinski sent the DAK a request aimed at obtaining authorisation to move to a care home in Austria while retaining her right to German care insurance benefits, which was refused. As we have seen, on the basis of Article 43(1) of Book XI of the SGB, persons reliant on care are entitled to full in-patient care in a care home when assistance at home, or partial in-patient care in a care home, is not possible. Under paragraph 2 of that Article, the care fund covers the costs of in-patient care with a lump sum; for persons falling within category III, such as Ms Von Chamier-Glisczinski, this sum is EUR 1 432 per month. Moreover, on the basis of Article 43(4), the insured person who chooses full in-patient care in a care home although the competent body does not consider it necessary is none

9 — Case C-215/90 [1992] ECR I-1823, paragraphs 13-15 and 18.
10 — See paragraph 15 of *Twomey*, cited above.
11 — On the basis of the definition in Article 1(h) of Regulation No 1408/71, 'residence' means 'habitual residence'.

the less entitled to a contribution equal to that laid down by Article 36 for the relevant category of dependence; for category III this contribution is EUR 1 432 per month.

42. On the basis of the above it is reasonable to suppose that, in the request sent to the DAK, Ms Von Chamier-Glisczinski indicated that she wished to move from the combined benefits regime laid down by Article 38 of Book XI of the SGB to the benefits referred to in Article 43, while requesting at the same time that such benefits be 'exported' at the time of her transfer to the care home in Austria. The DAK's refusal was based on the application of Article 19 of Regulation No 1408/71 and not on the absence of grounds enabling it to grant the benefits referred to in Article 43. In other words, Ms Von Chamier-Glisczinski would in all likelihood have received those benefits if she had stayed in a care home in Germany. By deciding to move her residence to Austria, she lost her entitlement to the benefits provided for by Articles 36, 38 and 43 of Book XI of the SGB, while maintaining entitlement to the care allowance provided for by Article 37 which, in her case, amounted to around EUR 665 per month. She would not, moreover, have received any benefits under the Austrian social security system which, on the basis of the information in the order for reference, does not appear to provide for benefits in kind for situations of reliance on care, such as that of Ms Von Chamier-Glisczinski. [12]

12 — The German Government holds another view as it considers that the referring court wrongly understood the relevant provisions of Austrian law.

43. The German and Norwegian Governments and the Commission submit that the unfavourable situation in which Ms Von Chamier-Glisczinski found herself resulted from differences in the social security regimes of the Member States, regimes which were only coordinated by Regulation No 1408/71 and not harmonised.

44. It must at the outset be recalled that Article 19 of Regulation No 1408/71 provides for different regimes for cash benefits and for benefits in kind. While the first are paid to workers who reside in a Member State other than that in which they are employed 'by the competent institution in accordance with the legislation which it administers' [Article 19(1)(b)], the second are paid on behalf of the competent institution by the institution of the place of residence 'in accordance with the legislation administered by that institution as though [the worker] were insured with it' [Article 19(1)(a)]. As has already been ascertained, an analogous system is provided for by Article 22(1)(i) and (ii) of the Regulation.

45. The twofold mechanism resulting from those provisions enables a worker insured with a social security system in one Member State who resides or stays in another Member State, on the one hand, to 'export' the cash benefits to which he is entitled on the basis of the legislation of the competent State and, on the other hand, to receive in the Member State of residence the same benefits in kind as persons insured with the system of that State are entitled to. Moreover, referral to the legislation of the State of residence or stay allows avoidance of the situation that the institutions of that State, asked to pay benefits

in kind to a worker insured with the system of another Member State, are obliged to apply legislation other than that of their own State. It is in consequence on the basis of this legislation that, for example, the type of benefits, the method of payment, [13] the period of payment [14] and the extent of the cover are defined. The benefits are paid 'on behalf of the competent institution', [15] which is obliged, pursuant to Article 36 of the Regulation, to reimburse them fully to the institution of the place of residence or stay.

46. On the basis of the definition established by the Court's case-law the notion of 'benefits in kind' does not exclude benefits consisting in payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses, while 'cash benefits' are essentially those designed to compensate for a worker's loss of earnings through illness. [16] In *Molenaar*, cited above, the Court affirmed that German care insurance benefits 'designed to cover care received by the person concerned, both in the home and in specialised centres, purchases of equipment and work carried out, indisputably fall within the definition of "benefits in kind" referred to in Articles 19(1)(a), 25(1)(a) and 28(1)(a) of Regulation No 1408/71'. [17] The benefits which Ms Von Chamier-Glisczinski requested from the DAK, although comprising payment of a sum of money as reimbursement of costs incurred, therefore constitute benefits in kind and are subject to the regime laid down for such benefits by Regulation No 1408/71.

47. Pursuant to Article 19(1)(a) of that Regulation, as interpreted by the Court in *Molenaar*, a worker who resides in a Member State other than the competent Member State is entitled to the benefits in kind which the institution of the Member State of residence or stay pays in analogous situations to persons insured with it, '*in so far as* the legislation of that State, whatever the more specific name given to the social protection scheme of which it forms part, *provides for the payment of benefits in kind* designed to cover the same risks as those covered by … insurance in the Member State of employment'. [18]

48. It follows that no claim may be made by the worker *vis-à-vis the State of residence*, if the legislation of that State does not provide for payment of benefits in kind designed to cover the risk in respect of which such benefits are claimed. This conclusion seems to me to be in line with the wording of Article 19(1)(a) of the Regulation, and with its purpose, which

13 — Under some national regimes, for example, the cost of medical treatment in public hospitals is normally paid directly by the competent institution, in others there is instead a system of reimbursement. The percentage of cover of the cost of medical treatment varies from system to system.

14 — As has been seen, for situations falling within the scope of application of Article 22(1), the period of payment of the benefits is determined by the legislation of the competent State.

15 — See Articles 19(1)(b), and 22(1)(i).

16 — See Case 61/65 *Vaassen-Göbbels* [1966] ECR 407, in particular p. 429.

17 — Paragraph 32.

18 — Paragraph 37. Emphasis added.

is to ensure for the worker access in the Member State of residence or stay to care adequate to his state of health *on an equal footing* with persons insured with the social security system of that State.

49. In Ms Von Chamier-Glisczinski's case, since it appears that the Austrian social security scheme does not provide for payment of benefits in kind designed to cover the risk of becoming reliant on care, what I have said above means that she has no claim *vis-à-vis the institutions of the State of residence*.

50. In that light, I therefore agree with the interpretation suggested by the German and Norwegian Governments and by the Commission in their respective observations.

51. I do not, however, share the view that it follows from the nature of Article 19(1)(a) of the Regulation as a rule of conflict of laws that a worker's entitlement to benefits in kind in the case of residence in a Member State other than that of employment is governed exclusively by the legislation of the Member State of residence, in the sense that no claim, with the object of obtaining such benefits, may be made *on the basis of the legislation of the competent Member State as against the institutions of that State* if the legislation of the Member State of residence does not provide for payment of benefits in kind designed to cover the risk in respect of which such benefits are requested.

52. In that regard, the Court has previously ruled in *Jordens-Vosters* that Regulation No 1408/71 has 'the essential object … [of ensuring] that social security schemes governing workers in each Member State moving within the Community are applied in accordance with uniform Community criteria' and that 'to interpret Regulation No 1408/71 as prohibiting national legislation to grant a worker social security broader than that provided by the application of the said Regulation would therefore be going beyond that objective, and also outside the purpose and scope of Article [42 EC]'.[19] More precisely, the Court affirmed, on that occasion, that it would be misconstruing the letter and spirit of Article 19 of the Regulation to interpret it as prohibiting 'the competent institution [from granting] social security benefits to a worker … which are more favourable than those which it is bound to provide for them under the community rules if the national legislation which that institution applies enables it in particular circumstances to grant such additional social security to those insured persons'. According to the Court it *matters little* that a worker resides in the territory of a Member State other than the competent State; although under Article 19 of the regulation this factor is decisive 'for the determination of the institution responsible for the provision of the benefit to which the insured person is entitled and of the law applicable to the provision of those benefits, *it has no bearing* … on the grant by the relevant

19 — Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 11.

legislation of additional social security benefits to which the insured person is not entitled but which the competent institution may allow him or her'. [20]

53. Analogously, in *Pierik I*, [21] concerning not Article 19 but Article 22 of Regulation No 1408/71, the Court, after affirming that 'within the context of the general objectives of the Treaty Article 22 … constitutes one of the measures intended to permit a worker who is a national of one of the Member States of the Community, without regard to the national institution to which he is affiliated or the place of his residence, to receive benefits in kind provided by any other Member State', [22] considered that 'benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence' [Article 22(1)(b)] do not refer solely to benefits in kind provided in the Member State of residence but also benefits which the competent institution is empowered to grant, [23] the reason being that, as declared by the Court, the Regulation requires that a worker should be guaranteed the possibility of receiving the most appropriate treatment for his state of health, whatever the place of his residence or the place within the Community where such treatment is available. [24]

54. The two abovementioned precedents concern care provided in the territory of the Member State of employment by the social security body of that State to a worker resident in the territory of another Member State whereas, in Ms Von Chamier-Glisczinski's case, reimbursement is requested for benefits received in the State of residence. It does not, however, appear to me that that fact alone is such as to prevent application of the principles laid down by the Court to situations such as that which is the subject-matter of the main proceedings.

55. On the other hand, to maintain that Article 19 constitutes an obstacle to payment by the institutions of a competent Member State to a person affiliated with them of benefits in kind on the basis of the legislation applicable to them, when such benefits are not provided for by the Member State of residence of the person concerned, could lead to results incompatible with the objectives of the Regulation. That would be the case, for example, if the competent Member State were to provide, to cover a given risk, only for benefits in kind and the Member State of residence only for cash benefits: in this case the worker would receive neither cash benefits, because not provided for by the competent Member State, obliged to pay them under Article 19(1)(b) of the Regulation, nor benefits in kind, because not provided for by the Member State of residence. In other words, the worker would be deprived of any cover for the risk in question, although the social security system of both Member States provided for cover. In such a situation, the worker would, moreover, be treated differently from persons affiliated to

20 — Paragraph 13. Emphasis added.
21 — Case 117/77 [1978] ECR 825.
22 — Paragraph 14
23 — Paragraph 21.
24 — Paragraphs 17 and 22.

the social security system of the competent Member State resident in that State, and from persons affiliated to the social security system of the State of residence.

56. It appears to me obvious that such a result would not be in keeping with the spirit of the Regulation or with the objectives pursued by the coordination of national social security legislation pursuant to Article 42 EC, amongst which are first of all the prohibition on discrimination and the retention of acquired rights. [25] In that regard it must also be recalled that the Court has consistently opposed an interpretation of Regulation No 1408/71 which could result in workers losing the social security advantages guaranteed to them by one Member State. [26]

57. If Regulation No 1408/71 does not preclude the reimbursement sought by Ms Von Chamier-Glisczinski from the DAK, nevertheless the right to such reimbursement cannot in my opinion derive from that Regulation, even if interpreted in the light of Treaty provisions on freedom of movement. It is therefore necessary to examine whether this right may be recognised directly on the basis of the latter, interpretation of which is the subject of the second question referred.

58. For all the reasons given above, I suggest that the Court reply as follows to the first question referred:

'Article 19(1)(a) of Council Regulation 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 must be interpreted as meaning that an employed or self-employed person who resides in the territory of a Member State which is not the competent Member State is not entitled to benefits in kind paid on behalf of the competent institution by the institution of the place of residence, when the legislation of the State of residence does not provide for payment of benefits in kind designed to cover the risk in respect of which such benefits are claimed. Article 19(1)(a) of Regulation 1408/71 does not prevent such a worker or a member of his family from obtaining payment of such benefits, in the form of reimbursement of expenses, from the competent institution, under the legislation which that institution applies'.

59. Article 22 of Regulation No 1408/71 must in my opinion be interpreted in the same manner, if the referring court should maintain that Ms Von Chamier-Glisczinski's situation

25 — See to that effect the Court's recent ruling in *Bosmann*, in which it is affirmed that Article 13(2)(a) of Regulation No 1408/71, on the basis of which a person employed in the territory of one Member State is subject to the legislation of that State even if he resides in the territory of another Member State,'is not [intended] to prevent the Member State of residence from granting, pursuant to its legislation, child benefit to that person' (Case C-352/06 [2008] ECR I-0000, paragraph 31).

26 — See Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 21; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 22; Case C-282/91 *de Wit* [1993] ECR I-1221, paragraphs 16 and 17; and Case C-165/91 *van Munster* [1994] ECR I-4661, paragraph 27. See, in addition, Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* [1997] ECR I-5501, paragraph 20; Case C-153/97 *Grajera Rodríguez* [1998] ECR I-8645, paragraph 17; and Case C-205/05 *Nemec* [2006] ECR I-10745, paragraphs 37 and 38.

falls within the ambit of this provision and not that of Article 19, as I believe it does.

C — *The second question referred*

60. By the second question referred, the national court asks the Court of Justice whether there is, on the basis of Articles 18 EC, 39 EC and 49 EC, any right that may be relied on against the *competent institution*, subject to prior approval, to payment of the costs of in-patient care in a care home in another Member State, *in the amount of the benefits payable in the competent Member State*.

61. The first point to be made here is that while, on the basis of settled case-law regarding the division of functions between the national court and the Community judicature provided for by Article 234 EC, it is for the former to apply to the case before it the rules of Community law, as interpreted by the Court, it is for the latter, however, to draw from all the information provided to it by the national court the points of Community law which require interpretation, having regard to the subject-matter of the proceedings. [27]

62. I have to say that the information I have concerning the case in the main proceedings leads me to believe that Ms Von Chamier-Glisczinski is not entitled to invoke the application of Article 49 EC in her favour. In fact, given the information provided by the referring court, and that provided by Mr Von Chamier-Glisczinski during the hearing, his wife did not move *temporarily* to Austria *for the purpose* of receiving care at the specialised centre in which she stayed, but *established her residence permanently in that* State, in anticipation of her husband's imminent move. She continued to reside permanently in Austria, and to stay in the care home in question, for a period of 27 months. In *Steymann* v *Staatssecretaris van Justitie*, the Court affirmed that Articles 59 and 60 of the Treaty (now Articles 49 EC and 50 EC) 'do not cover the situation where a national of a Member State goes to the territory of another Member State and establishes his principal residence there in order to receive services there for an indefinite period'. [28] This conclusion was confirmed in *Sodemare*, [29] which concerned provision of services in old people's homes.

63. In the same way, the Von Chamier-Glisczinski's situation does not fall within the ambit of Article 39 EC. It emerges from

27 — See Case C-56/01 *Inizan* [2003] ECR I-12403, paragraphs 32 and 34 and the case-law cited.
28 — Case 196/87 [1988] ECR 6159, paragraph 17.
29 — Case C-70/95 *Sodemare and Others* [1997] ECR I-3395.

statements made at the hearing by Mr Von Chamier-Glisczinski that in fact, during the period of his wife's stay in the care home in Austria, he took no steps towards finding employment in that country.

64. Taking account of the factual context of the main proceedings, it is therefore necessary to limit the reply to the second question referred to the interpretation of Article 18 EC only.

65. Firstly, I do not share the objection raised by the Commission and the Norwegian Government, according to which it follows from the fact that Regulation No 1408/71 extends to the area of social security the freedom of movement provided for by the Treaty that only Article 19(1)(a) of that Regulation applies to the main proceedings, while Treaty provisions may be applied only subject to a declaration of invalidity of that article.

66. As a matter of fact, as I have already had occasion to explain above, [30] I consider that Article 19(1)(a) is not an obstacle to the recognition, for a worker and his family members, by virtue of Treaty provisions, of an enforceable right not as against the institution of the Member State of residence but as against that of affiliation.

67. In that respect, it is also to be borne in mind that the Court, in examining the relationship between Article 22(1) of Regulation No 1408/71 and the Treaty provisions concerning free movement of services, clarified, in *Kohll* [31], that that article *is not intended to regulate*, and hence *does not in any way prevent*, reimbursement by Member States, *at the tariffs in force in the competent State*, of costs incurred in connection with care provided in another Member State, but is limited to allowing an insured person to receive sickness benefits in kind, at the expense of the competent institution, in accordance with the provisions of the legislation of the State in which the services are provided. [32] The general scope of this statement, on the one hand, and the fact that Article 22(1) and Article 19(1) of the Regulation lay down identical rules for benefits in kind, on the other, lead me to believe that the Court's clarification applies, in addition to all the situations covered by Article 22(1) [including those specified in point (b)], also to the situations which fall within Article 19(1). Like Article 22(1), Article 19(1) is not intended to regulate, and consequently *does not prevent*, the reimbursement of expenses for medical treatment received in a

30 — See paragraphs 51-56.

31 — Case C-158/96 *Kohll* [1998] ECR I-1931.

32 — Paragraphs 26 and 27. In these paragraphs, the Court responded to an objection, raised by the Luxembourg Government and the competent institution, which is analogous to that raised by the Commission in the present case. See in addition *Vanbraekel*, paragraph 36. In *Inizan*, the Court ruled that Article 22(1)(c)(i) of the Regulation, in so far as it makes the grant of the benefits in kind to which it guarantees entitlement subject to prior authorisation, is not contrary to Articles 49 EC and 50 EC (Case C-56/01 [2003] ECR I-12403, paragraphs 15-36). See, finally, more recently, Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 46-48).

Member State other than that of affiliation on the conditions and at the tariffs provided for by the latter.

68. In *Kohll*, cited above, the Court went on to affirm that the right to this reimbursement arises directly from the Treaty provisions on free movement of services. [33]

69. The question which must be resolved here is whether the same right may be recognised by virtue of Article 18 EC, in a situation in which neither Article 49 EC nor 39 EC may be relied on.

70. In that regard, I recall first of all that it follows from settled case-law that Community law does not detract from the power of the Member States to organise their own social security systems. [34] In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine the conditions on which social security benefits are granted. [35] The fact remains, nevertheless, that the Member States must observe Community law when exercising that power [36] and, in particular, the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States. [37]

71. The Court has previously had occasion to declare that, inasmuch as a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national treatment less favourable than he would

33 — According to the Court, such provisions preclude national rules which make reimbursement, in accordance with the scale of the Member State of insurance, of the cost of medical treatment provided by a self-employed person established in another Member State subject to authorisation by the insured person's social security institution. Such rules, according to the Court, 'deter insured persons from approaching providers of medical services established in another Member State and constitute, for them and their patients, a barrier to freedom to provide services' (paragraphs 34 and 35 of the judgment).

34 — See, in particular, Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16, and *Sodemare and Others*, cited above, paragraph 27.

35 — See in particular Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12; Case C-349/87 *Paraschi* ECR I-4501, paragraph 15; and Joined Cases C-4/95 and C-5/95, *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36.

36 — See Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100; Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 23; *Watts*, paragraph 92 and *Kohll*, cited above, paragraph 19.

37 — See Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33.

enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement. [38] According to the Court, those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his stay in the host Member State by legislation in his State of origin penalising the fact that he has used them. [39]

72. National legislation placing some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State would therefore give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is to say, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move. [40]

73. This would be the case, in my opinion, if national legislation denied to a member of a national social security care insurance scheme the reimbursement, within the limits of the cover guaranteed by such a scheme, of expenses incurred due to a stay in a specialised centre in another Member State, when reimbursement of such expenses would have been granted in the case of a stay in an establishment with which there was a contractual arrangement situated in the territory of the Member State of affiliation.

74. Such a difference of treatment could be justified only if it were based on objective considerations proportionate to the legitimate aim of the national provisions. [41]

75. In that regard I recall that in *Smits and Peerbooms* [42] the Court, extending the application of the principles laid down in *Kohll* to medical or hospital treatment, clarified that even if the legislation of a Member State which makes assumption of costs by the sickness insurance fund of affiliation for benefits received in a hospital situated in another Member State subject to prior authorisation constitutes an obstacle to the freedom to provide services, this may nevertheless be

38 — See Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 20; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30; and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 18.

39 — See *Turpeinen*, paragraph 22, and *Pusa*, paragraph 19, cited in the preceding footnote.

40 — See *Turpeinen*, paragraph 22, and *Pusa*, paragraph 19, cited above. See in addition Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39 and *Elsen*, cited above.

41 — See Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 66, *Turpeinen*, cited above, paragraph 32 and *Van Cuyper*, cited above, paragraph 40.

42 — Case C-157/99 [2001] ECR I-5473.

justified by the double objective of maintaining a balanced medical and hospital service open to all and the efficient management of financial resources which may be made available for health care. [43]

76. Analogous considerations apply with regard also to benefits for persons reliant on care provided in the framework of specialised centres. In fact, as, to my mind, correctly emphasised by the Norwegian and German Governments, there exist, as regards such benefits, the same requirements linked to maintaining a balanced care home service open to all, especially taking account of the increase in life expectancy in the Community countries, and the requirement of containing costs borne by the national social security regimes.

77. The requirement of prior authorisation for the purpose of obtaining reimbursement of the abovementioned costs, would not, therefore, be contrary to Article 18 EC, provided that the conditions governing the granting of authorisation are justified in relation to the abovementioned objectives, are based on objective criteria, are non-discriminatory and predetermined, and are in keeping with the requirement of proportionality. [44]

78. It must, nevertheless, be observed that, in the present case, it is apparent from the order for reference that Ms Von Chamier-Glisczinski's claim aimed at obtaining during her stay in the care home in Austria the benefits in kind provided for by the care insurance scheme to which she was affiliated was rejected solely on the basis of the reference to Article 19 of Regulation No 1408/71. For the reasons given above, the fact that this article is applicable does not exclude the right to reimbursement of expenses, within the limits of the cover provided for by such a scheme, by virtue of Article 18 EC. [45] The rejection of Ms Von Chamier-Glisczinski's claim cannot, therefore, on any view be regarded as legitimate.

43 — Paragraph 69 and following. On the basis of the case-law, outpatient treatment provided in another Member State cannot however be subject to authorisation (*Kholl*, cited above).

44 — Case C-385/99 *Muller-Fauré and van Riet*, cited above in footnote 36, and *Inizan*, cited in footnote 27. In *Leichtle*, the Court for example declared that the conditions on which authorisation to follow a health cure in another Member State was granted pursuant to German social security legislation to insured persons were contrary to the requirement of free movement of services.

45 — It must however be noted that, in certain cases, such a right to reimbursement and the right to benefits in kind provided by the State of residence or stay, which derive from the application of Regulation No 1408/71 may overlap. It is clear that in those cases it is necessary to avoid the risk of aggregation of benefits. This objective may be achieved through administrative cooperation between the bodies concerned, in accordance with the system established by the same Regulation.

## VI — Conclusion

79. In the light of all the foregoing considerations, I suggest that the Court give the following answer to the questions submitted to it by the Bayerisch Landessozialgericht München:

(1) Article 19(1)(a) of Council Regulation 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, must be interpreted as meaning that an employed or self-employed person who resides in the territory of a Member State which is not the competent Member State is not entitled to benefits in kind paid on behalf of the competent institution by the institution of the place of residence, when the legislation of the State of residence does not provide for payment of benefits in kind designed to cover the risk in respect of which such benefits are required. Article 19(1)(a) of Regulation 1408/71 does not prevent such a worker or a member of his family from obtaining payment of such benefits, in the form of reimbursement of expenses, from the competent institution, under the legislation which that institution applies.

(2) Article 18 EC must be interpreted as meaning that it precludes legislation of a Member State which denies to a member of the national social security care insurance regime the reimbursement, within the limits of the cover guaranteed by such a regime, of expenses incurred due to a stay in a specialised centre, in which he has benefited from the care and assistance requested from his State, situated in another Member State, where the assumption or reimbursement of such costs would have been made in the case of a stay in an establishment with which there was a contractual arrangement situated in the territory of the Member State of affiliation. Such disparity of treatment could be justified only if based on objective considerations, proportionate to the objective being legitimately pursued by the national law.