JUDGMENT OF THE COURT (Grand Chamber)

1 April 2008 *

In Case C-212/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Cour d'arbitrage, now the Cour constitutionnelle (Belgium), made by decision of 19 April 2006, received at the Court on 10 May 2006, in the proceedings

Government of the French Community,

and Walloon Government

v

Flemish Government,

THE COURT (Grand Chamber),

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

* Language of the case: French.

Advocate General: E. Sharpston,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 27 March 2007,

after considering the observations submitted on behalf of:

— the Government of the French Community, by J. Sambon and P. Reyniers, avocats,

— the Walloon Government, by M. Uyttendaele, J.-M. Bricmont and J. Sautois, avocats,

— the Flemish Government, by B. Staelens and H. Gilliams, advocaten,

— the Netherlands Government, by H.G. Sevenster and P. van Ginneken, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 EC, 39 EC and 43 EC, and of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1) ('Regulation No 1408/71').

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

Legal context

The relevant provisions of Community law

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

'This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

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

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

(a) sickness and maternity benefits;

…

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

…

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

…'

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

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

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

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to the provisions of Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

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

…'

The relevant provisions of domestic law

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

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

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

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

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

…

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

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

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

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

11 Article 5 of the Decree of 30 March 1999, as most recently amended by the Decree of the Flemish Parliament amending the Decree of 30 March 1999 on the organisation of care insurance (Decreet van de Vlaamse Gemeenschap houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering), of 25 November 2005 (*Moniteur Belge* of 12 January 2005, p. 2153, which too has

retrospective effect from 1 October 2001, lays down as follows the conditions for reimbursement by the care insurance scheme:

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

…

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

…

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

…'

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

12 This case originates from the third action for annulment brought by the applicant Governments against the Decree of 30 March 1999, the two earlier actions having

been rejected in part and in whole by the Cour d'arbitrage (Court of Arbitration). In those earlier cases, the Cour d'arbitrage stated, in particular, in its judgment No 33/2001 of 13 March 2001, that the care insurance scheme introduced by that Decree concerned 'aid to persons', a matter falling, by virtue of Article 128(1) of the Belgian Constitution, within the powers of the Communities, and did not, therefore, trespass on the exclusive powers of the federal State in the sphere of social security.

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

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

'(1) Does a care insurance scheme which:

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

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

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

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

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

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

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

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

Concerning the questions referred

The first question

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

16 For the purpose of answering that question, it is to be borne in mind that the Court has consistently held that the distinction between benefits excluded from the scope

of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each benefit, in particular its purposes and the conditions on which it is granted, and not on whether it is classified as a social security benefit by national legislation (see, inter alia, Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 11; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 28, and Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 16).

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

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

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

20 Secondly, the Court has earlier held that benefits intended to improve the state of health and quality of life of persons reliant on care, such as those at issue in the main proceedings, have as their essential purpose the supplementing of sickness insurance

benefits and must accordingly be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 (Case C-160/96 *Molenaar* [1998] ECR I-843, paragraphs 22 to 24; Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 28, and Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 38).

21 Furthermore, as the Walloon Government observes, care insurance cannot be excluded from the ambit of Regulation No 1408/71 on the basis of Article 4(2)b thereof, which covers certain kinds of non-contributory benefits, provided that they are governed by provisions of domestic law applicable to part only of the territory of a Member State.

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

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

Concerning the second and third questions

24 By those two questions, which may appropriately be examined together, the national court seeks in essence to ascertain whether, on a proper construction of Articles

18 EC, 39 EC and 43 EC, legislation of a federated entity of a Member State limiting affiliation to a scheme such as the care insurance scheme at issue in the main proceedings and entitlement to the benefits provided by that scheme to persons residing in the territory coming within that entity's competence and to persons pursuing an activity in that territory and residing in another Member State, with the result that persons are excluded who work in that territory but reside in the territory of another federated entity of the same State, is contrary to those provisions.

Admissibility

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

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

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

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

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

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

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

Substance

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

33 In this respect, it must be borne in mind that it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (see, inter alia, with regard to freedom of establishment and freedom of movement for workers, respectively, Case 20/87 *Gauchard* [1987] ECR 4879, paragraphs 12 and 13, and Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 26, and the decisions there cited). The same holds good in respect of the provisions of Regulation No 1408/71 (see, to that effect, Case C-153/91 *Petit* [1992] ECR I-4973, paragraph 10, and Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraph 70).

34 On the other hand, as the Court has also stated, any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of those provisions (see in particular, to that effect, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9; *Terhoeve*, paragraph 27, and Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17).

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

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

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

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

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

40 It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court (see, to that effect, Case C-250/03 *Mauri* [2005] ECR I-1267, paragraph 21, and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 29).

41 Second, the legislation at issue in the main proceedings may also exclude from the care insurance scheme employed or self-employed workers falling within the ambit of Community law, that is to say, both nationals of Member States other than the Kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but who live in another part of the national territory, and Belgian nationals in the same situation who have made use of their right to freedom of movement.

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

43 In this respect it is important to bear in mind that, although Member States retain the power to organise their social security schemes, they must none the less, when exercising that power, observe Community law and, in particular, the provisions of

the EC Treaty on freedom of movement for workers (Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33).

44 It is also settled case-law that all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraph 13; *Terhoeve*, paragraph 37, and Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraph 114). In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity (see, inter alia, *Bosman*, paragraph 95, and *Terhoeve*, paragraph 38).

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

46 In the light of those principles, measures which have the effect of causing workers to lose, as a consequence of the exercise of their right to freedom of movement, social security advantages guaranteed them by the legislation of a Member State have in particular been classed as obstacles (see, inter alia, Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 21; Case C-165/91 *van Munster* [1994] ECR I-4661, paragraph 27, and *Hosse*, paragraph 24).

47 Legislation such as that as issue in the main proceedings is such as to produce those restrictive effects, inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence in either a limited part of national territory, viz., the Dutch-speaking region and the bilingual region of Brussels-Capital, or in another Member State.

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

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

50 For a measure to restrict freedom of movement, it is not necessary for it to be based on the nationality of the persons concerned or even for it to have the effect of bestowing an advantage on all national workers or of operating to the detriment solely of nationals of other Member States, but not of nationals of the State in question (see, to that effect, Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 41, and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14). It is enough that the measure should benefit, as in the case of the care insurance scheme at issue

in the main proceedings, certain categories of persons pursuing occupational activity in the Member State in question (see, by analogy, as regards freedom to provide services, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25, and C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 37).

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

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

53 In any event, it is not inconceivable, given such factors as the ageing of the population, that the prospect of being able or unable to receive dependency benefits such as

those offered by the care insurance scheme at issue in the main proceedings should be taken into consideration by the persons concerned in exercising their right to freedom of movement.

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

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

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

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

58 That line of argument cannot be accepted. As the Advocate General, in paragraphs 101 to 103 of her Opinion, and the Commission have noted, the Court has consistently held that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law (see, inter alia, Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 38, judgment of 26 October 2006 in Case C-102/06 *Commission* v *Austria,* paragraph 9).

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

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

Concerning the fourth question

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

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

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

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Benefits provided under a scheme such as the care insurance scheme established by the Decree of the Flemish Parliament on the organisation of care insurance (Decreet houdende de organisatie van de zorgverzekering) of 30 March 1999, in the version contained in the Decree of the Flemish Parliament amending the Decree of 30 March 1999 (Decreet van de Vlaamse Gemeenschap houdende wijziging van het decreet van 30 maart 1999 houdende de organisatie van de zorgverzekering) of 30 April 2004, fall within the scope *ratione materiae* of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999.**

2. **On a proper construction of Articles 39 EC and 43 EC, legislation of a federated entity of a Member State, such as that governing the care insurance scheme established by the Flemish Community by the decree of 30 March 1999, as amended by the Decree of the Flemish Parliament of 30 April 2004, limiting affiliation to a social security scheme and entitlement to the benefits**

provided by that scheme to persons either residing in the territory coming within that entity's competence or pursuing an activity in that territory but residing in another Member State, is contrary to those provisions, in so far as such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.

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

[Signatures]