JUDGMENT OF THE COURT (Third Chamber)

16 July 2009 *

In Case C-208/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Bayerisches Landessozialgericht (Germany), made by decision of 15 March 2007, received at the Court on 20 April 2007, in the proceedings

Petra von Chamier-Glisczinski

v

Deutsche Angestellten-Krankenkasse,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh (Rapporteur), J. N. Cunha Rodrigues, U. Lõhmus and P. Lindh, Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2008,

after considering the observations submitted on behalf of:

— Mr von Chamier-Glisczinski, successor in law to Mrs von Chamier-Glisczinski, by O. Kieferle, Rechtsanwalt,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Norwegian Government, by J.A. Dalbakk, P. Wennerå and K. Fløistad, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 19 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended in turn by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) ('Regulation No 1408/71'), and also of Articles 18 EC, 39 EC and 49 EC, and Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68').

2 The reference has been made in the context of proceedings between Mrs von Chamier-Glisczinski and the Deutsche Angestellten-Krankenkasse (German employee sickness insurance fund, 'DAK'), with regard to its refusal to pay certain costs relating to care received in a specialised establishment in Austria.

3 Mrs von Chamier-Glisczinski died on 20 May 2007. Her husband carried on the main proceedings in her name.

Legal context

Community law

4 Article 1 of Regulation No 1408/71 provides that, for the purposes of its application:

'(a) *employed person* and *self-employed person* mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;

...

(f) (i) *member of the family* means any person defined or recognised as a member of the family... by the legislation under which benefits are provided or...

...

(h) *residence* means habitual residence;

(i) *stay* means temporary residence;

…

(o) *competent institution* means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

…

(p) *institution of the place of residence* and *institution of the place of stay* means respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) *competent State* means the Member State in whose territory the competent institution is situated;

…'

5 Article 2(1) of the same regulation 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.'

6 Pursuant to Article 4(1)(a), Regulation No 1408/71 is to apply to all legislation concerning the branches of social security including, inter alia, 'sickness benefits'.

7 Article 19, headed 'Residence in a Member State other than the competent State — General rules', of Section 2, headed 'Employed or self-employed persons and members of their families', of Chapter 1 of Title III of Regulation No 1408/71 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... shall receive in the State in which he is resident:

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

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

…'

8 In the same section, Article 22 of Regulation No 1408/71 is headed 'Stay outside the competent State — Return to or transfer of residence to another Member State during

sickness or maternity — Need to go to another Member State in order to receive appropriate treatment'. Pursuant to this article:

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits..., and:

…

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution 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 provisions of 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;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

2. The authorisation required under paragraph 1(b) 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.

…

3. Paragraphs 1 and 2 shall apply by analogy to members of the family of an employed or self-employed person.

…'

9 Pursuant to Article 36 of Regulation No 1408/71, benefits in kind provided in accordance, in particular, with the provisions of Articles 19 and 22 of that regulation, by the institution of one Member State on behalf of the institution of another Member State are to be fully refunded. Such refunds are to be determined and made in accordance with Articles 93 to 95 of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159).

10 Under Article 10 of Regulation No 1612/68:

‘1. 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;

…’

German law

11 Book XI of the Social Security Code (Sozialgesetzbuch, ‘SGB XI’) provides for an insurance scheme against the risk of reliance on care (‘care insurance’).

12 In its written response, received at the Court Registry on 20 April 2008, to the written question which the Court addressed to it on 12 March 2008, the German Government set out certain aspects of that scheme. It is apparent from that response, read together with the written observations of the Commission of the European Communities, that the scheme provides for various types of assistance in favour of persons who are reliant on care: in particular, care-related benefits in kind (‘Pflegesachleistung’), governed by Paragraph 36 of SGB XI; a care allowance for care services paid by the patient personally (‘Pflegegeld’, ‘the care allowance’), governed by Paragraph 37 of SGB XI; combined

benefits ('Kombinationsleistung'), governed by Paragraph 38 of SGB XI; and full in-patient care in a care home ('vollstationäre Pflege'), governed by Paragraph 43 of SGB XI.

13 Under Paragraph 36 of SGB XI, persons requiring care at home have the right to benefits in kind provided by employees of out-patient care services which are parties to service agreements with the Pflegekasse ('care fund'). The costs of those services are paid by that fund, subject to a ceiling which varies in relation to the extent to which the beneficiary is reliant on care. At the time of the facts of the dispute in the main proceedings, that ceiling was DEM 2 800 (approximately EUR 1 432) per month for category III and might be increased to DEM 3 750 (approximately EUR 1 918) per month in cases requiring intensive assistance. The care fund pays for the services concerned on the basis of the charges fixed in the service agreement concluded with the various out-patient services. Medical treatment provided in the home does not fall within benefits in kind as referred to in Paragraph 36 of SGB XI, but is covered by sickness insurance.

14 The care allowance provided for in Paragraph 37 of SGB XI allows persons who are reliant on care to benefit from a monthly care allowance when they arrange for themselves, independently, the care and assistance services that they need. The beneficiary is free to use that allowance as he sees fit and therefore also to pay for services which are not covered under the care insurance or which are provided by service providers which are not among those with a service agreement. The amount of the allowance itself varies according to the degree of reliance on care. At the time of the facts of the dispute in the main proceedings, that amount was DEM 1 300 (approximately EUR 665) per month for category III.

15 Paragraph 38 of SGB XI governs combined benefits, that is, a combination of benefits in kind within the meaning of Paragraph 36 of SGB XI and the care allowance provided for in Paragraph 37 of SGB XI. In accordance with Paragraph 38, an insured person who does not use all the benefits to which he is entitled pursuant to Paragraph 36 may obtain, in parallel, the care allowance referred to in Paragraph 37, of which the amount, however, decreases in proportion to the use of the benefits in kind referred to in Paragraph 36. It is for the beneficiary to decide the proportion of the latter benefits he intends to use. It is apparent from the documents submitted to the Court that the

purpose of combined benefits is to facilitate greater autonomy in the organisation of the home care of persons reliant on care.

16 The part of the costs of care in excess of the ceilings provided for under the care insurance remains the responsibility of the person reliant on care.

17 In addition, under Paragraph 43 of SGB XI, the text of which is set out in the Commission's observations, persons reliant on care are entitled to full in-patient care in a care home when home assistance or partial in-patient care in a care home is not possible or cannot be considered in view of the special features of the specific case. In those circumstances, the care fund covers the costs of care, medical treatment and social assistance by way of a lump sum. The monthly lump sum at the time of the facts of the dispute in the main proceedings was DEM 2 800 (approximately EUR 1 432) for persons reliant on care falling within category III, and in exceptional cases requiring particularly intensive assistance, DEM 3 300 (approximately EUR 1 688). In total, the amounts paid by the care fund are not to exceed 75% of the total amount of costs for the stay from which the person reliant on care benefits. Insured persons who opt for full in-patient care in a care home, despite the fact that the care fund considers that this is not necessary in view of their condition, are entitled to a contribution corresponding to the ceiling laid down in Paragraph 36 of SGB XI for the category of reliance on care into which they fall.

18 In addition, Paragraph 34(1)(1) of SGB XI, which appears among the general provisions of that text, provides, subject to certain exceptions relating to temporary residence which are not relevant to the dispute in the main proceedings, that the right to receive benefits is suspended for the period that the insured person is abroad. It is, however, apparent from the order for reference that that provision must be read in the light of the judgment in Case C-160/96 *Molenaar* [1998] ECR I-843, paragraphs 39 and 44), in which the Court held that Articles 19(1), 25(1) and 28(1) of Regulation No 1408/71 preclude entitlement to an allowance such as the care allowance provided for in Paragraph 37 of SGB XI being made conditional upon the residence of the insured person in the territory of the Member State where he is insured. It is apparent from the case-file submitted to the Court that the German authorities are of the view that the judgment in *Molenaar* requires the care allowance, since it is a cash benefit, to be

provided outside of Germany unlike benefits which are classified by German law as benefits in kind, such as those referred to in Paragraphs 36 or 43 of SGB XI.

19 Lastly, it also follows from the case-file submitted to the Court that, under Paragraph 72 of SGB XI, care funds cannot provide full in-patient care within the meaning of Paragraph 43 thereof, except in specialised homes that are parties to service agreements within the meaning of that text.

Austrian law

20 It is common ground that Austrian law does not provide for benefits in kind intended to cover the risk of reliance on care, at least not for persons in a situation such as that of Mrs von Chamier-Glisczinski.

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

21 It is apparent from the order for reference that Mrs von Chamier-Glisczinski, a German national resident in Munich (Germany) and reliant on care, received from DAK, the social security organisation with which she was insured through her husband, combined benefits consisting of care insurance as provided for in Paragraph 38 of SGB XI, corresponding to category III.

22 In response to a request for clarification sent to the national court under Article 104(5) of the Rules of Procedure of the Court of Justice, the national court sent the Court two

letters, received at the Court Registry on 11 and 18 April 2008 respectively, one from the applicant in the main proceedings and the other from DAK.

23 The applicant in the main proceedings states inter alia that Mr von Chamier-Glisczinski was employed in Germany from 1 March 1987 to 30 June 2002, but that he was released from his obligation to work with effect from August 2001, pursuant to an amendment terminating his contract of employment. At the oral hearing, Mr von Chamier-Glisczinski, in response to certain questions put by the Court, stated inter alia that that amendment had been concluded principally due to the fact that he no longer considered himself to be in a position to provide at home the care which his wife's state of health necessitated.

24 It follows from the order for reference as well as from the case-file submitted to the Court that, on 27 August 2001, Mr von Chamier-Glisczinski requested DAK, in substance, to provide the care insurance benefits to which Mrs von Chamier-Glisczinski was entitled under German legislation, in the form of full in-patient care provided for by Paragraph 43 SGB XI, in a care home in Austria in which she wished to stay ('the request of 27 August 2001'). At the oral hearing, Mr von Chamier-Glisczinski stated in that regard that he intended to acquire a business based near Salzburg (Austria) and hoped to be able to place his wife in a care home near that city.

25 By decision of 31 August 2001, DAK rejected the request of 27 August 2001, in particular on the ground that, in cases such as Mrs von Chamier-Glisczinski's, Austrian law makes no provision for the grant of benefits in kind to members of the social insurance scheme of that Member State. According to DAK, Mrs von Chamier-Glisczinski was nevertheless entitled to the care allowance referred to in Paragraph 37 of SGB XI for category III, namely DEM 1 300 per month.

26 It is apparent from the order for reference that, from 17 September 2001 to 18 December 2003, Mrs von Chamier-Glisczinski stayed in a care home established in

Austria, to which she had moved, also according to the order for reference, because her husband intended to look for employment there.

27 It is, however, claimed in the applicant's letter mentioned in paragraph 22 above that Mr von Chamier-Glisczinski had been looking for work in Austria since August 2001 so that he 'could be near his wife'. In addition, at the oral hearing, Mr von Chamier-Glisczinski stated that, in connection with the possible acquisition of the Austrian business mentioned in paragraph 24 above, he had been spending most of his time in Salzburg, whilst retaining his residence in Munich. He also stated at that hearing that, in February 2002, the negotiations for the acquisition of that business fell through, so that, from that moment on, he had to seek employment in Austria.

28 By decision of 20 March 2002, DAK rejected the objection made against its decision of 31 August 2001. It is apparent from the case-file submitted to the Court that the principal ground for that rejection was that the full in-patient care in a care home provided for in Paragraph 43 of SGB XI could not be 'exported', since it concerned a benefit in kind. According to DAK, by virtue of the judgment in *Molenaar*, cited above, only the care allowance, as a cash benefit, could be provided in Austria notwithstanding the limitation provided for in Paragraph 34 of SGB XI. Moreover, the specialised home in Austria concerned was not, according to DAK, a party to a service agreement within the meaning of SGB XI, whereas, even on German territory, full in-patient care provided for in Paragraph 43 of that text could be provided only in homes that are parties to service agreements within the meaning of that text.

29 At the oral hearing, Mr von Chamier-Glisczinski stated that at the end of 2003 he declared a business activity in Germany, moved his residence to Laufen (Germany) and brought his wife back to Germany. It follows from the applicant's letter mentioned in paragraph 22 above that, from July 2004, Mrs von Chamier-Glisczinski was cared for in a care home located near Laufen, the place where her husband set up his business in April 2004.

30 It is apparent from the letter of DAK mentioned in paragraph 22 above that Mr von Chamier-Glisczinski was insured with it:

— on an optional basis, until 30 June 2002, as an employee;

— compulsorily, for the period from 1 July 2002 to 18 December 2003, when he was registered as a job seeker at the Munich employment agency, from which he received unemployment benefits, and

— from 19 December 2003, as a self-employed person.

31 By judgment of 11 October 2005, the Sozialgericht München (Munich Social Court) dismissed the action brought against DAK's decision of 20 March 2002.

32 In the context of the appeal brought against that judgment before the Bayerisches Landessozialgericht (Regional Social Court of the Land of Bavaria), the applicant in the main proceedings seeks repayment of the costs for the period from 17 September 2001 to 18 December 2003 linked to her stay in the Austrian care home in the amount of the difference between the care allowance already granted pursuant to Paragraph 37 of SGB XI and the amount provided for by the German legislation for full in-patient care referred to in Paragraph 43 of SGB XI.

33 In support of her claims, the applicant alleges that the benefits in kind actually correspond, as far as DAK is concerned, to cash benefits, so that no permissible criteria for differentiation exist for refusing to export benefits in kind. The applicant adds that the refusal to provide benefits in kind infringes Article 39 EC read together with Article 10 of Regulation No 1612/68, applicable by analogy. Lastly, the applicant invokes breach of the freedom to provide services laid down in Article 49 EC.

34 Considering that the resolution of the dispute before it depends on the interpretation of Community law, the Bayerische Landessozialgericht decided to stay the proceedings and to refer 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... 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... 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... State?'

The questions referred for a preliminary ruling

The first question

35 It is apparent from the order for reference that, by its first question, the national court wishes to know whether Regulation No 1408/71, where appropriate in the light of Articles 18 EC, 39 EC and 49 EC and taking into account Article 10 of Regulation No 1612/68, is to be interpreted as meaning that a person reliant on care, insured as a member of the family of an employed or self-employed person, is entitled to obtain the provision of benefits in the form of repayment or assumption of costs by the competent institution, where, unlike the social security system of the competent State, that of the Member State where that person resides makes no provision for its insured persons to receive benefits in kind in situations of reliance on care such as that of the person concerned.

36 The applicant in the main proceedings claims in that regard that, as a benefit in kind could, in practice, be provided in the form of a payment of costs, there is no obstacle *de facto* to the export of such benefits and that the insured person has a right to repayment of the corresponding costs, enforceable against the competent institution, up to the amount of benefits due in the Member State of that institution.

37 In contrast, the German and Norwegian Governments together with the Commission are of the view that Article 19(1)(a) and (b) of Regulation No 1408/71 distinguishes clearly between benefits in kind and cash benefits by establishing a twofold mechanism according to which, in the State of residence, an employed or self-employed person receives, on the one hand, benefits in kind in accordance with the legislation applicable to the institution of the place of residence and, on the other hand, cash benefits in accordance with the legislation applicable to the competent institution. Therefore, a transfer of residence to another Member State could lead to total or partial loss of rights to social security benefits. In the main proceedings, since, for persons in situations such as Mrs von Chamier-Glisczinski's, Austrian law provides for only cash benefits and not

for benefits in kind, the applicant in the main proceedings may not rely on Article 19(1) of Regulation No 1408/71 to claim repayment of certain costs incurred in a specialised care home in Austria.

38 On those points, it should be noted at the outset that Article 2(1) of Regulation No 1408/71 states that the regulation is to apply in particular to employed or self-employed persons 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 as well as to the members of their families and their survivors. In accordance with Article 1(a)(i) of that regulation, the terms 'employed person' and 'self-employed person' designate, in particular, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons. Pursuant to Article 1(f)(i), for the purposes of applying the regulation, the term 'member of the family' means, among other things, any person defined or recognised as a member of the family by the legislation under which benefits are provided.

39 It follows that insured persons such as Mr and Mrs von Chamier-Glisczinski fall within the scope *ratione personae* of Regulation No 1408/71. First, as follows from paragraph 30 above, when DAK took its decisions, mentioned in paragraphs 25 and 28 above, to refuse to grant the full benefits applied for and, subsequently, to reject the objection made against its initial decision, Mr von Chamier-Glisczinski was insured on an optional basis with DAK. Second, it is apparent in particular from the order for reference that Mrs von Chamier-Glisczinski was insured with DAK through her husband.

40 In addition, it is necessary to point out that the Court has already held that benefits such as those provided under the German care insurance scheme, even if they have their particular characteristics, fall within 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71, since they are essentially intended to supplement the sickness insurance benefits to which they are, moreover, linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care (see, to that effect, *Molenaar*, cited above, paragraphs 24 and 25).

41 Such benefits thus fall within Chapter 1 of Title III of Regulation No 1408/71, which consists of Articles 18 to 36 of the regulation.

42 In that regard, the national court drafted the present question with respect to the terms of Article 19 of Regulation No 1408/71. Read in the light of the case-law of the Court of Justice, in particular the judgments in Case C-215/90 *Twomey* [1992] ECR I-1823, paragraph 18, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 89, that provision guarantees, at the expense of the competent Member State, the right for an employed or self-employed person as well as for members of that person's family residing in the territory of another Member State whose condition requires treatment in the territory of the Member State of residence to receive sickness benefits in kind provided by the institution of the latter Member State.

43 However, in this case, in the light of the factual background to the main proceedings, it is necessary to examine whether, instead of Article 19 of Regulation No 1408/71, Article 22 of the same regulation can be taken into consideration. Even if, formally, the national court has limited its question to the interpretation of Article 19, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the question referred (see, to that effect, inter alia, Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38; Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 20; and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64).

44 It is apparent from the case-file submitted to the Court that, prior to the request of 27 August 2001, Mrs von Chamier-Glisczinski was already receiving benefits provided by the German care insurance scheme in the form of combined benefits as provided for in Paragraph 38 of SGB XI. It appears therefore that, at the time of that request, she fulfilled the condition of being reliant on care, entitling her to the benefits provided for by that scheme including, where home care or partial in-patient care in a care home is not possible or cannot be considered in view of the special features of the specific case, full in-patient care in a care home, in accordance with Paragraph 43(1) of SGB XI.

45 Such a situation, if it were to be confirmed by the national court, could lead to Article 22(1)(b) and (3) of Regulation No 1408/71 being taken into consideration. As is apparent in particular from that article's heading, Article 22(1)(b) read together with the first paragraph of Article 22(3) concerns, in particular, the situation where a member of the family of an employed or self-employed person transfers his residence during sickness to a Member State other than that of the competent institution.

46 In the present case, it is, however, not necessary to answer the question which of Articles 19 or 22(1)(b) of Regulation No 1408/71 could apply in specific factual circumstances such as those giving rise to the dispute in the main proceedings. In a situation such as Mrs von Chamier-Glisczinski's, the mechanisms introduced by those provisions, with the exception of the authorisation required under Article 22(1)(b) (which is to 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), do not differ significantly in their results. Even though, as is apparent from paragraphs 42 and 45 above, Articles 19 and 22(1)(b) refer to different situations and, accordingly, pursue different aims, both the mechanisms introduced by those provisions are designed to ensure, in particular, that a member of the family of an employed or self-employed person receives, in a Member State other than that of the competent institution, benefits in kind provided on behalf of the competent institution by the institution of the place of residence or, as the case may be, of the place of stay, in accordance with the legislation applicable to the institution of that other Member State, as well as cash benefits in accordance with the legislation applicable to the competent institution, provided either directly by that latter institution or on its behalf.

47 As is apparent from paragraphs 24, 25 and 32 above, by her request of 27 August 2001, Mrs von Chamier-Glisczinski sought, in essence, to have benefits, classified as benefits in kind by the German legislation, to which she was entitled pursuant to that legislation, provided to her in respect of the care she received in a specialised home in Austria.

48 In the context of Regulation No 1408/71, the concepts of benefits in kind and cash benefits must receive an autonomous Community law interpretation (see, to that effect, Case C-466/04 *Acereda Herrera* [2006], ECR I-5341, paragraphs 29 and 30). However, the Court has already held, with regard to the care insurance scheme at issue in the main proceedings, that care insurance benefits consisting in the direct payment or reimbursement of the costs of a specialised home entailed by the insured person's reliance on care fall within the definition of benefits in kind within the meaning of Title III of Regulation No 1408/71 (see, to that effect *Molenaar*, cited above, paragraphs 6 and 32, and also Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, paragraph 26), those benefits including, among other things, full in-patient care as provided for in Paragraph 43 of SGB XI.

49 Accordingly, benefits such as those which are the subject of the request of 27 August 2001, although they consist in the payment of a sum of money by way of reimbursement of costs, constitute, contrary to what the applicant in the main proceedings claims, benefits in kind within the meaning of Title III of Regulation No 1408/71 and thus fall within the provisions of that regulation concerning such benefits.

50 It should be borne in mind, in that context, that the Court has already interpreted Article 19 of Regulation No 1408/71 as meaning that an insured person in circumstances falling within that provision is to receive, in the Member State in which he resides, benefits in kind in so far as the legislation of that State, whatever the more specific name given to the social protection scheme of which it forms part, provides for the provision of benefits in kind designed to cover the same risks as those covered by the insurance concerned in the competent State (see, to that effect, *Molenaar*, cited above, paragraph 37). That interpretation is confirmed both by the wording of Article 19, and by the objective of guaranteeing employed and self-employed persons access, in the Member State of residence or stay, to care corresponding to their state of health on an equal footing with persons insured with the social security system of that Member State.

51 In addition, in accordance with Article 19(2) of Regulation No 1408/71, members of the family within the meaning of the regulation are to receive, at the expense of the competent State, benefits in kind provided by the institution of their place of residence

within the limits and in accordance with the provisions of the legislation administered by that institution (see, to that effect, Case C-451/93 *Delavant* [1995] ECR I-1545, paragraph 15).

52 It follows from paragraph 46 above that, since the mechanisms introduced by Articles 19 and 22(1)(b) of Regulation No 1408/71 are similar, the situation must in principle be analogous with respect to insured persons falling within the latter provision read together with Article 22(3) of the regulation.

53 Consequently, regardless of whether it is Article 19 or Article 22(1)(b) of Regulation No 1408/71 which may apply in the dispute in the main proceedings, in accordance with the mechanisms introduced by one or other of those provisions, where the legislation of the Member State of residence of the socially insured person concerned does not provide for the provision of benefits in kind in order to cover the risk in respect of which entitlement to such benefits is claimed, Regulation No 1408/71 does not, of itself, require that those benefits be provided outside the competent State by or on behalf of the competent institution.

54 In circumstances such as those in the main proceedings, Article 10 of Regulation No 1612/68, which is mentioned in the present question for a preliminary ruling, cannot have any effect on that interpretation.

55 However, contrary to what the German and Norwegian Governments along with the Commission maintain, Articles 19 and 22 of Regulation No 1408/71 cannot be interpreted to mean that, in the case of residence in a Member State other than the competent State, the socially insured person's access to benefits in kind is governed exclusively by the legislation of the Member State of residence, so that, where the legislation of the latter Member State does not provide for the grant of benefits in kind covering the risk in respect of which entitlement to such benefits is claimed, those provisions have the effect of preventing the competent institution from granting such benefits in kind.

56 Indeed, it would be both to go beyond the objective of Regulation No 1408/71 and to exceed the purpose and scope of Article 42 EC to interpret that regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that regulation (see, to that effect, Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 11; Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 24; and Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraphs 27 to 29 and 33).

57 In the light of all the foregoing, the answer to the first question must be that, where, unlike the social security system of the competent State, that of the Member State of residence of a person reliant on care, insured as a member of the family of an employed or self-employed person within the meaning of Regulation No 1408/71, does not provide for the provision of benefits in kind in situations of reliance on care such as those of that person, Articles 19 or 22(1)(b) of that regulation do not of themselves require the provision of such benefits outside the competent State by or on behalf of the competent institution.

The second question

58 By its second question, the national court — referring to the situation in which provision is made for benefits in kind for persons insured as members of the family of an employed or self-employed person who, like Mrs von Chamier-Glisczinski, are reliant on care by the social security system of the competent State, but not by that of the Member State of residence — wishes to know whether, in circumstances such as those in the main proceedings, Articles 18 EC, 39 EC or 49 EC preclude legislation such as that introduced by Paragraph 34 of SGB XI, on the basis of which a competent institution refuses to pay, independently of the mechanisms introduced by Article 19 or, as the case may be, Article 22(1)(b) of Regulation No 1408/71 and for an unlimited period, the costs linked to a stay in a care home situated in the Member State of residence up to an amount equal to the benefits to which the person concerned would have been entitled if he had received the same care in a home — party to a service agreement — situated in the competent State.

59 The applicant in the main proceedings claims that, under Article 39 EC, the benefits in kind intended to care for an insured person covered by care insurance must also be provided in Member States other than the Federal Republic of Germany, at least in the form of a reimbursement or direct payment of costs, up to the level of the German model, relating to the care received.

60 In contrast, the German Government contends that, just as the EC Treaty does not require the amendment, on the basis of an interpretation in conformity with primary law, of a secondary rule of law laying down the non-exportation of benefits in kind in certain situations, so primary law does not include a direct legal basis which could supplement or replace that rule.

61 For its part, the Norwegian Government points to the characteristics of the services provided in a specialised care home in submitting that, in the dispute in the main proceedings, there is no right to the payment of certain costs relating to those services on the basis of Article 39 EC and 49 EC.

62 Lastly, the Commission contends that, since Regulation No 1408/71 governs situations such as those in the main proceedings, recourse to primary law in the present proceedings is possible only if the relevant provisions of that regulation are unlawful. However, those provisions are not invalid with respect to primary law. The rules of conflict and coordination which they contain are, according to the Commission, necessary to avoid the cumulation of benefits and justified by practical considerations.

63 First of all, it follows, both from the case-law of the Court and from Article 152(5) EC, that Community law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 29 and the case-law cited). In the absence of harmonisation at Community level, it is thus for the legislation of each Member State to determine the conditions for granting social security benefits in kind. However, when exercising that power, the Member States must comply with Community law (see, inter alia, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46, as

well as Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 29 and the case-law cited), in particular the provisions of the Treaty on the free movement of services (see Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23), freedom of movement for workers (see Case C-228/07 *Petersen* [2008] ECR I-0000, paragraph 42) or, further, the freedom of every citizen of the European Union to move and reside in the territory of the Member States (see Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33, and Case C-507/06 *Klöppel* [2008] ECR I-943, paragraph 16).

64 Moreover, the Court has held that, by adopting Regulation No 1408/71, the Council, bearing in mind the wide discretion that it enjoys with regard to the choice of the most appropriate measures for achieving the result envisaged in Article 42 EC (see, to that effect, inter alia, Case C-360/97 *Nijhuis* [1999] ECR I-1919, paragraph 30), has in principle fulfilled the obligation arising from the task entrusted to it by that article of setting up a system allowing workers to overcome any obstacles which may arise for them from national rules in the field of social security (see, to that effect, inter alia, Case C-443/93 *Vougioukas* [1995] ECR I-4033, paragraph 30; *Molenaar*, cited above, paragraph 14, and Case C-293/03 *My* [2004] ECR I-12013, paragraph 34). It has not been maintained in the present proceedings that Article 19 or 22, or any other provision of Regulation No 1408/71, is invalid in situations such as that in the dispute in the main proceedings, and no evidence to suggest that this might be the case has been submitted to the Court.

65 As follows from paragraphs 50 and 52 above, the mechanisms laid down, as the case may be, by Article 19 or Article 22 of Regulation No 1408/71 reflect the Community legislature's intention to favour a solution according to which, with regard to sickness benefits provided in kind, the insured persons may gain access, in the Member State of residence or stay, to care corresponding to their state of health on an equal footing with persons insured with the social security system of that Member State (see also, to that effect, with regard to Article 22 of Regulation No 1408/71, Case C-156/01 *van der Duin and ANOZ Zorgverzekeringen* [2003] ECR I-7045, paragraph 50, and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 45). It is true that, in accordance with Article 36 of Regulation No 1408/71, in the case of residence outside the competent State, the benefits in kind provided by the institution of the place of residence on behalf of the competent institution, by virtue in particular of the provisions of Articles 19 and 22 of that regulation, give rise to full reimbursement by the latter institution. However, in

exercising its wide discretion, the Community legislature was entitled to choose, in view in particular of the possibility of urgent medical treatment being needed outside the competent State, not to require the institution of the place of residence to provide, notwithstanding the practical and administrative complications involved, benefits in kind pursuant to the legislation applied by the competent institution, legislation with which the institution of the place of residence would not necessarily be familiar.

66 That said, the Court's interpretation of Regulation No 1408/71 in response to the first question submitted for a preliminary ruling must be understood without prejudice to the solution which flows from the potential applicability of provisions of primary law (see, by way of analogy, *Acereda Herrera*, cited above, paragraph 38). The finding that a national measure may be consistent with a provision of a secondary law measure, in this case Regulation No 1408/71, does not necessarily have the effect of removing that measure from the scope of the Treaty's provisions (see, to that effect, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 25, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 47). It follows that the applicability, as the case may be, of Articles 19 or 22 of Regulation No 1408/71 to a situation such as that at issue in the main proceedings does not of itself prevent the person concerned from claiming, pursuant to primary law, the payment of certain costs relating to care received in a care home situated in another Member State, under rules different to those provided for in those articles (see, by analogy, Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraphs 37 to 53, along with *Watts*, cited above, paragraph 48).

67 In the present case, it is necessary to check, as an initial matter, taking into account the elements of the Court file set out in paragraphs 21 to 30 above, whether a situation such as that at issue in the main proceedings actually falls within the scope of the provisions cited in the second preliminary question, namely Articles 18 EC, 39 EC and 49 EC. In that regard, the German and Norwegian Governments along with the Commission, in the light of the matters set out in the order for reference and in the replies to the request for clarification mentioned in paragraph 22 above, have expressed doubts as to the applicability of Articles 39 EC and 49 EC. The Norwegian Government and the Commission are of the view, moreover, that the Court should not answer the present question in the light of Article 18 EC.

68 With regard, first of all, to the applicability of Article 39 EC, it should be pointed out at the outset that there is no single definition of worker/employed or self-employed person in Community law; it varies according to the area in which the definition is to be applied (see, inter alia, Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 27). Thus, the concept of worker used in the context of Article 39 EC and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 42 EC and Regulation No 1408/71 (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 31, 32, 35 and 36).

69 With regard to Article 39 EC, it is settled case-law that the concept of 'worker' within the meaning of that provision has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; *Trojani*, cited above, paragraph 15; and *Petersen*, cited above, paragraph 45).

70 It is also apparent from the case-law that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC (see, to that effect, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 12 and 13; *Martínez Sala*, cited above, paragraph 32; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 57; *Ioannidis*, cited above, paragraph 21; as well as Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-0000, paragraph 36).

71 Mr von Chamier-Glisczinski claims that, at the time of the DAK decisions mentioned at paragraphs 25 and 28 above, he was seeking employment in Austria and that the situation of his wife, as a member of his family, thus fell within Article 39 EC.

72 However, as is apparent from paragraphs 26, 27 and 29 above, that assertion has not been supported by any element put to the Court. Indeed, as follows from paragraph 27 above, the indications provided by the applicant in the main proceedings in his letter mentioned in paragraph 22 above and at the oral hearing are not entirely consistent and give, instead, the impression that, at the time of the DAK decisions, Mr von Chamier-Glisczinski, in taking those steps in connection with the possible acquisition of a business based in Austria whilst continuing to reside in Germany, was not making use of the freedom of movement guaranteed by Article 39 EC.

73 In those circumstances, Article 39 EC does not appear to be capable of applying to the dispute in the main proceedings.

74 Next, as for Article 49 EC, it should be noted at the outset that no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services within the meaning of the Treaty. Thus, 'services' within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years (see, to that effect, Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 30 and 31, and Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraph 26).

75 None the less, it is apparent from the case-law that the provisions of the Treaty relating to the freedom to provide services do not cover the situation of a national of a Member State who establishes his principal residence, on a permanent basis, or in any event without there being a foreseeable limit to the duration of that residence, in the territory of another Member State, thereby being able to benefit, during that indefinite period, from the provision of services (see, to that effect, Case 196/87 *Steymann* [1988] ECR 6159, paragraph 17; *Trojani*, cited above, paragraph 28; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 22; and, with regard to specialised care homes, Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 38).

76 In the present case, it appears, on the basis of the information set out in paragraphs 22 to 24 along with 26 and 27 above, that Mrs von Chamier-Glisczinski did not move to Austria in connection with the provision, on a temporary basis, of care in the specialised institution in which she was an in-patient. It follows from that same information that she had fixed her residence on a stable basis in that Member State without a foreseeable limit to its duration.

77 In such circumstances, as the German and Norwegian Governments along with the Commission contend, the applicability of Article 49 EC cannot be upheld in the context of the present reference for a preliminary ruling.

78 Having regard to the conclusions concerning the applicability of Articles 39 EC and 49 EC set out in paragraphs 73 and 77 above, it must be recalled that, in any event, Mrs von Chamier-Glisczinski, as a German national, enjoyed the status of a citizen of the Union pursuant to Article 17(1) EC.

79 In going to Austria and in establishing her residence there, Mrs von Chamier-Glisczinski exercised the rights conferred on her by Article 18(1) EC. A situation such as hers is thus covered by the right enjoyed by citizens of the Union of free movement and residence in the territory of a Member State other than that of which they are nationals.

80 In those circumstances, it is necessary to examine the situation at issue in the main proceedings, taking into account the entitlements that a person reliant on care such as Mrs von Chamier-Glisczinski might have derived, as a citizen of the Union, from Article 18(1) EC.

81 Pursuant to that provision, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and in the measures adopted to give it effect.

82 In that regard, it follows from the case-law that the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union 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 another Member State by legislation of his Member State of origin penalising the mere fact that he has used those opportunities (see Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 26 and the case-law cited, and Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-0000, paragraph 34 and the case-law cited).

83 In the present case, it is not contested that Mrs von Chamier-Glisczinski, following her move to a care home in Austria, which was not party to a service agreement within the meaning of Paragraph 72 of SGB XI, was, in relation to the benefits in kind provided for in that text, in a situation less favourable than that which she would have been in if she had sought to benefit from full in-patient care within the meaning of Article 43 of the text in a care home — party to a service agreement — situated in Germany.

84 However, as Article 42 EC provides for the coordination, not the harmonisation, of the legislation of the Member States, substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision (see, to that effect, with regard to free movement of workers, Case 41/84 *Pinna* [1986] ECR 1, paragraph 20; Case C-340/94 *Jaeck* [1997] ECR I-461, paragraph 18; and Case C-221/95 *Hervein and Hervillier* [1997] ECR I-609, paragraph 16).

85 In those circumstances, Article 18(1) EC cannot guarantee to an insured person that a move to another Member State will be neutral as regards social security, in particular as regards sickness benefits (see, by analogy with Article 39 EC, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51, and Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraph 34). As the Commission states, in view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less advantageous or disadvantageous for the person concerned, according to the combination of national rules applicable pursuant to Regulation No 1408/71.

86 Thus, the situation in which Mrs von Chamier-Glisczinski found herself following her move to a care home in Austria resulted rather from the combined application, in accordance with Regulation No 1408/71, of the German and Austrian legislation on the risk of reliance on care than from the legislation appearing in Paragraph 34 of SGB XI. In the event that the benefits in kind were provided for by Austrian rules in situations of reliance on care such as that of the person concerned, then, in accordance with Regulation No 1408/71, those benefits would have to have been provided to that person by the institution of the place of residence, regardless of the content of the German legislation in that respect, and that institution would have been reimbursed by the competent institution, pursuant to Article 36 of the regulation.

87 In those circumstances, since the Federal Republic of Germany and the Republic of Austria may freely choose the mode of organisation of their sickness insurance schemes, one of those schemes cannot be considered to be the cause of a discrimination or a disadvantage for the sole reason that it has unfavourable consequences when it is applied, in accordance with the coordination mechanisms laid down in application of Article 42 EC, in combination with the scheme of another Member State.

88 In the light of all the foregoing, the answer to the second question referred must be that, where, unlike the social security system of the competent State, that of the Member State of residence of a person reliant on care, insured as a member of the family of an employed or self-employed person within the meaning of Regulation No 1408/71, does not provide for the provision of benefits in kind in given situations of reliance on care, Article 18 EC does not preclude, in circumstances such as those of the main proceedings, legislation such as that introduced by Paragraph 34 of SGB XI, on the basis of which a competent institution refuses in such circumstances to pay, independently of the mechanisms introduced by Article 19 or, as the case may be, Article 22(1)(b) of that regulation and for an unlimited period, the costs linked to a stay in a care home situated in the Member State of residence up to an amount equal to the benefits to which that person would have been entitled if he had received the same care in a care home — party to a service agreement — situated in the competent State.

Costs

89 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 (Third Chamber) hereby rules:

1. **Where, unlike the social security system of the competent State, that of the Member State of residence of a person reliant on care, insured as a member of the family of an employed or self-employed person within the meaning of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended in turn by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, does not provide for the provision of benefits in kind in situations of reliance on care such as those of that person, Articles 19 or 22(1)(b) of that regulation do not of themselves require the provision of such benefits outside the competent State by or on behalf of the competent institution.**

2. **Where, unlike the social security system of the competent State, that of the Member State of residence of a person reliant on care, insured as a member of the family of an employed or self-employed person within the meaning of Regulation No 1408/71, as amended and updated by Council Regulation No 118/97, as amended in turn by Regulation No 1386/2001, does not provide for the provision of benefits in kind in given situations of reliance on care, Article 18 EC does not preclude, in circumstances such as those of the main proceedings, legislation such as that introduced by Paragraph 34 of Book XI of the Social Security Code (Sozialgesetzbuch), on the basis of which a competent institution refuses in such circumstances to pay, independently of the**

mechanisms introduced by Article 19 or, as the case may be, Article 22(1)(b) of that regulation and for an unlimited period, the costs linked to a stay in a care home situated in the Member State of residence up to an amount equal to the benefits to which that person would have been entitled if he had received the same care in a care home — party to a service agreement — situated in the competent State.

[Signatures]