Overview of social policy case law of the European Court of Justice

Introduction
Throughout 2004, discussions were monopolised by constitutional matters and the long-awaited enlargement of the European Union. Whilst attention was focussed on the appointment of the ten new Commissioners, the Court of Justice of the European Communities (CJEC) devoted part of the year to adapting to the requirements of enlargement. This approach, both discreet and thoughtful, is entirely suited to the nature of the Court, which rarely produces sensationalist rulings. The European citizen generally follows high-profile cases such as Bosman in 1995 on restrictions on professional footballers or Kreil in 2000 on access to the German Federal Army for women. The Court nevertheless plays a decisive role beyond these cases in the different areas of European integration, which has often earned it the title “driving-force of integration”. The self-assertive phase embarked on by the Court and mentioned in the previous version of Social Developments in the European Union continued in 2004. The Court has continued to reaffirm and elucidate the principles stemming from its previous rulings which, in the light of the number of cases pending before the Court, is a very useful process. The following pages will deal only with rulings concerning social policy, and in particular three themes which we regard as very important: equal treatment for men and women, social security in Community law, and the rights and obligations of employees and employers. For each theme, only those rulings which are of particular interest will be discussed and an exhaustive review will not be attempted. Care will be taken, however, to inform the reader of other disputes settled by the Court which may be of interest.
1. Equal treatment for men and women

1.1 The entitlement of transsexuals to a survivor’s pension: K.B. v. National Health Service Pensions Agency (1)

National legislation which, by failing to recognize the new sexual identity of transsexuals, makes it impossible for them to marry, is in breach of Community law if the consequence is to deprive them of entitlement to a survivor’s pension.

K.B., a nurse, worked for the National Health Service (NHS) for twenty years, during which time she contributed to the NHS pension scheme which provides for the payment of a survivor’s pension to the surviving spouse (that is to say the person married to the affiliated person). K.B. has shared an emotional and domestic relationship for a number of years with R., who has undergone a surgical gender reassignment, changing his sex from female to male. K.B. wishes R. to be able to benefit from the widower’s pension. United Kingdom legislation prevents a transsexual from marrying under his new sex because it is impossible to amend the birth certificate which states the original sex. Moreover, the law regards any marriage in which the spouses are not a man and a woman as null and void. Against their wishes, therefore, K.B. and R. have not been able to marry, which prevents R. from receiving the survivor’s pension. K.B. brought an action before the British courts because she believes herself to be the victim of discrimination based on sex in respect of pay. She believes that the notion of “widower” should be interpreted in such a way as to encompass the surviving member of a couple who would have achieved the status of widower had his sex not resulted from surgical gender reassignment. The Court of Appeal referred this question to the Court of Justice.

According to the Court, a survivor’s pension paid under an occupational pension scheme falls within the scope of Article 141 EC and Article 1 (1) sub-paragraph 1 (2) of Directive 75/117 concerning the

1 CJEC, Case C-117/01, K.B., ruling of 7 January 2004, not yet published at the time of writing these lines.

2 Article 141 EC stipulates “1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. [...] ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration [...]”
The Court points out that the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, cannot in itself be considered as being prohibited by Community law because it constitutes discrimination on the grounds of sex. Whether the claimant is a man or a woman is irrelevant for the purposes of awarding the survivor’s pension. However, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. This inequality of treatment relates to the capacity to marry, which is a necessary precondition for the grant of a widower’s pension. Indeed, by comparison with a heterosexual couple where neither party’s identity is the result of gender reassignment surgery and the couple are therefore able to marry, a couple such as K.B. and R. are quite unable to satisfy the marriage requirement. The fact that it is impossible for them to marry is due to the United Kingdom rules concerning marriage and birth certificates.

Recalling that the European Court of Human Rights has held that the fact that it is impossible for a transsexual to marry according to his new sexual identity was a breach of his right to marry under Article 12 of the ECHR, the Court notes that the legislation at issue must be considered as being in principle incompatible with Community law. However, given that it is for the Member States to determine the conditions under which legal recognition is given to a change of gender, the Court leaves it to the national court to determine whether a person in K.B.’s situation can rely on Community law in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension.

which the worker receives directly or indirectly in respect of his employment, from his employer”. The first sub-paragraph of Article 1 (1) of the Directive states: “The principle of equal pay for men and women […] means, for the same work or for work to which an equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration”.

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The United Kingdom had already been criticised on two occasions by the European Court of Human Rights on 11 July 2002 (3) for having denied a transsexual a change to his birth certificate thus prohibiting his marriage to a person of his former sex. After these two rulings, the United Kingdom government had promised to change the legislation and indeed did so. The Gender Recognition Act 2004 grants legal recognition of their gender reassignment to transsexuals. It provides for a sex recognition certificate to be issued by a special panel in two cases: where either the claimant suffers from a medically diagnosed sexual dysphoria, has lived according to his/her new sex for two years and intends to continue to do so until death, or where he/she has legally changed sex under the law of a foreign country featuring in the list drawn up by the relevant minister. The issuing of such a certificate involves a change in the person’s legal status and permits him/her to marry a person of the opposite sex. The law is due to enter into force on 4 April 2005.

1.2 The right to maternity leave: Gómez v. Continental Industrias del Caucho SA (4)

A female worker must be able to take her annual leave during a period other than her maternity leave even if the latter coincides with the period generally established by a collective agreement for annual leave for staff as a whole.

Ms Gómez, an employee at Continental Industrias, was on maternity leave from 5 May until 24 August 2001. This period coincided with one of the periods for annual leave in her workshop, laid down by collective agreement. When she nevertheless applied to take that leave after her maternity leave, Continental Industrias did not allow her request. Ms Gómez bought proceedings before the Juzgados de lo Social de Madrid. The referring court referred a question to the Court of Justice in respect of Directives 93/104 concerning the organisation of working time (Council of the European Union, 1993), 92/85 on the protection of

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3 ECHR, rulings of 11 July 2002, Christine Goodwin v. United Kingdom and I. v. United Kingdom, not yet published in European Court Reports.

4 CJEC, Case C-342/01, Gómez, ruling of 18 March 2004, not yet published at the time of writing these lines.
pregnant workers (Council of the European Communities, 1992) and 76/207 concerning equal treatment for men and women (Council of the European Communities, 1976).

The Court began by pointing out that paid annual leave of at least four weeks, enshrined in Article 7(1) of Directive 93/104, is a particularly important principle of Community social law. Its aim is to allow the worker actual rest. The purpose of maternity leave is different: the latter is intended to protect the woman’s biological condition during this period as well as to protect the special relationship between the woman and her child following childbirth. Furthermore, Article 11 (2) (a) of Directive 92/85 provides that, in principle, the rights connected with the employment contract must also be assured in a case of maternity leave: including the right to annual paid leave. Finally, the determination of when annual leave is to be taken falls under Article 5 (2) (b) of Directive 76/207. The Directive at the same time permits the adoption of provisions intended to protect women in relation to pregnancy and maternity. However, these provisions must not give rise to unfavourable treatment regarding working conditions. It follows that Community law requires a female worker to be able to take her annual leave during a period other than the period of her maternity leave, even if the period of maternity leave coincided with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

We shall briefly mention the principles brought out by the Court in other disputes. In Alabyrinth, the Court decided that the former Article 119 (new Article 141) of the Treaty must be interpreted as requiring that any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included among the pay components taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is back-dated to the period covered by the reference pay. In the absence of any Community legislation in this sphere, it is for the

5 “2. To this end, Member States shall take the measures necessary to ensure that: […] b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment […] shall be, or may be declared null and void or may be amended”.

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competent national authorities to determine how, in compliance with all the provisions of Community law, any pay rise awarded during or before maternity leave must be included among the pay components used to calculate the pay due to a worker during maternity leave (6).

In *Elsner-Lakeberg*, the Court ruled that Community law was contravened by a national provision according to which part-time teachers did not receive any remuneration for additional hours worked when the additional work did not exceed three hours per calendar month, if that different treatment affects considerably more women than men and if there is no objective unrelated to sex which justifies that different treatment or it is not necessary in order to achieve the objective pursued (7).

The Court also decided that Community law must be interpreted as precluding a national provision which reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried and are obliged to work, excluding widowers who have not remarried and are in the same situation (8). Readers interested in this issue should also consult the *Schneider, Haackert, Baas* (9) and *Hlozek* (10) rulings.

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6 CJEG, Case C-147/02, *Alabaster*, ruling of 30 March 2004, not yet published at the time of writing these lines.

7 CJEG, Case C-285/02, *Elsner-Lakeberg*, ruling of 27 May 2004, not yet published at the time of writing these lines.

8 CJEG, Case C-319/03, *Bribeche*, ruling of 30 September 2004, not yet published at the time of writing these lines.

9 CJEG, Case C-380/01, *Schneider*, ruling of 5 February 2004; CJEG, Case C-303/02, *Haackert*, ruling of 4 March 2004; CJEG, Case C-284/02, *Baas*, ruling of 8 November 2004, not yet published at the time of writing these lines.

10 CJEG, Case C-19/02, *Hlozek*, ruling of 9 December 2004, not yet published at the time of writing these lines.
2. Rights and obligations of employees and employers

2.1 Obligation to inform employees in Community-scale groups of undertakings for the purposes of establishing a Works Council: Kühne & Nagel (11)

The obligation to provide information to employees of Community-scale groups for the purposes of establishing a European Works Council cannot be evaded by locating the central management of the group outside the European Union.

Kühne & Nagel AG & Co. KG is part of a group of Community-scale enterprises Kühne et Nagel whose parent company is established in Switzerland and in which attempted negotiations with a view to establishing a Works Council did not succeed. Council Directive 94/95 (Council of the European Union, 1994) provides for the establishment of European Works Councils for Community-scale enterprises or groups of enterprises. When the central management of a group is located in a third country and has no designated representative in one of the Member States of the European Union, the management of the enterprise within the group employing the greatest number of employees in one of the Member States, in other words, the deemed central management, is obliged to make arrangements allowing for the establishment of a European Works Council. In this case, it was for the German member of the group Kühne et Nagel to take on this role.

The German management, without disputing that it was under an obligation to provide information to the German works council, stated that it could not perform its obligation because it did not have this information and the central management located in Switzerland refused to supply it. The dispute was brought before the German courts, and the Bundesarbeitsgericht, to which the case was referred on final appeal, referred the case to the Court of Justice for an elucidation of the obligation to provide information set out in Article 1(2) of the 1994 Directive.

11 CJEC, Case C-440/00, Kühne & Nagel, ruling of 13 January 2004, not yet published at the time of writing these lines.
The Court pointed out that the aim of the Directive is to ensure that the employees of Community-scale undertakings are properly informed and consulted by a system of negotiations between central management and employee representatives when decisions which affect them are taken in a Member State other than that in which they are employed. The Court affirmed that, in order for this aim to be achieved, it is essential that the employees concerned be guaranteed access to information enabling them to determine whether they have the right to demand the opening of negotiations between central management and employee representatives for the setting up of a European Works Council. Such a right is a necessary prerequisite for determining whether a Community-scale undertaking or group of undertakings exists, which is itself a precondition for the setting up of a European Works Council or of a transnational procedure for informing and consulting employees. When the central management is located outside the European Union, the responsibility for supplying employee representatives with the information essential to the opening of such negotiations for the setting up of a European Works Council falls to the deemed central management located within the Union. Given the need for the system of transnational information and consultation which the Directive seeks to establish to function properly, if the deemed central management does not have the information essential for the opening of negotiations on the setting up of such a Council, it must demand the essential information from the other undertakings belonging to the group located in the Member States. Moreover, the managements of the other undertakings belonging to the group which are located in the Member States are obliged to provide the deemed central management with the said information in their possession. Finally, the Member States must, whilst being mindful of the undertakings’ interests, ensure that adequate administrative or judicial procedures are in place to enable the obligations deriving from the Directive to be enforced. The information to be supplied under the Directive encompasses information on the average number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and the structure of the undertaking and the undertakings of the group, as well as the names and addresses of the employee representatives who might participate in the setting up of a special negotiating body or the establishment of a European Works Council. It
is for the national court to determine whether, in the present case, this information is essential for the opening of negotiations on the setting up of a European Works Council. The Court confirmed these principles in *ADS Anker*, a similar case on which it ruled on 15 July 2004 (12).

### 2.2 Organisation of working time: Pfeiffer et al v. Deutsches Rotes Kreuz (13)

For emergency workers working for an emergency medical service the maximum weekly working time, including periods spent on call, should not exceed 48 hours. Derogations to this principle are only valid if the worker has given consent individually, expressly and freely.

Mr Pfeiffer and the other applicants before the national court are, or have been employed as, emergency workers by the *Deutsches Rotes Kreuz* (German Red Cross), a private law institution which *inter alia* manages the land-based emergency service carried out by means of ambulances and emergency medical vehicles. In the various contracts of employment, the employer and employees apply a collective agreement according to which the average weekly working time of the employees, taking account of their obligation to provide an on-call service of at least 3 hours per day on average, was extended from 38.5 hours to 49 hours. During these on-call periods, the emergency workers concerned must make themselves available to their employer at the place of employment and must remain continuously alert in order to be able to act immediately should the need arise. Before the *Arbeitsgericht Lörrach*, Mr Pfeiffer and his colleagues sought to confirm that their average weekly working time should not exceed the limit of 48 hours provided for in Directive 93/104/EC concerning certain aspects of the organisation of working time. This court stayed proceedings in order to refer several questions for a preliminary ruling on this subject to the Court of Justice.

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12 CJCE, Case C-349/01, *ADS Anker*, ruling of 15 July 2004, not yet published at the time of writing these lines.

13 CJEC, Cases C-397/01 to C-403/01, *Pfeiffer et al.*, ruling of 5 October 2004, not yet published at the time of writing these lines.
The Court noted first that this Directive also applies to the activities of emergency workers in attendance in ambulances in the framework of an emergency service. None of the exclusions provided is relevant in this case: the services concerned are not essential for the protection of public health, safety and order in cases, such as a disaster, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to the planning of working time, nor are they road transport services given that the main purpose of the activity in question is to provide initial medical treatment to a person who is ill or injured. The Court went on to state that consent must be freely and expressly given by each worker if the 48-hour maximum period of weekly working time, as laid down by the Directive, is to be validly exceeded and that it is not sufficient for the employment contract to refer to a collective agreement which permits such an extension.

Along the lines of *Jaeger* (14), the Court ruled that such periods of duty time must be taken into account in their totality in the calculation of a maximum daily and weekly working time. The Court confirms that the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his/her safety and health. In the case of the emergency workers, the Directive precludes legislation in a Member State the effect of which is to permit the maximum duration to be exceeded, whether by means of a collective agreement or a works agreement based on such an agreement. The Court lastly notes that the Directive fulfils all the conditions necessary for it to produce a direct effect as regards the maximum weekly working time of 48 hours, that is, so far as its subject matter is concerned, it appears unconditional and sufficiently precise, enabling it to be relied upon before the national courts by individuals against the State where the latter has failed to implement the Directive by the end of the period prescribed or where it has failed to implement the

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14 CJEC, Case C-151/02, *Jaeger*, ruling of 9 September 2003, ECR. 2003, I-8389. This ruling was referred to in the last version of Social Developments.
Directive correctly. In the case of a dispute between individuals, a Directive cannot be invoked, since it cannot of itself impose obligations on an individual. Nevertheless, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive. In this case, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by the Directive in question, is not exceeded.

The Court has also ruled on working hours in *Wippel*. The Court ruled that Community law does not preclude legislation establishing the maximum working time at 40 hours per week and eight hours per day, and which regulates maximum working time and the organisation of working time without distinction to full-time and part-time workers. It does not preclude a contract of part-time employment of workers of the same undertaking, under which the length of weekly working time and the organisation of working time are not fixed but are dependent on quantitative needs in terms of work to be performed, determined on a case-by-case basis, such workers being entitled to accept or refuse that work (15).

We note in conclusion that a revision of the ‘working time’ Directive (1993) calling into question the case law in *Jaeger* and *Pfeiffer* (CEC, 2004) was discussed in 2004. For this purpose, the Commission wished to distinguish inactive periods within on call time, which would not be considered as working time (16). For further details, the reader is invited to read Christophe Degryse’s article in this volume.

15 CJEC, Case C-313/02, *Wippel*, 12 October 2004, not yet published at the time of writing these lines.

16 See also the position of the European Trade Union Confederation of 22 September 2004.
2.3 Protection of employees in the event of their employer's insolvency: Barsotti, Castellani and Venturi v. Istituto nazionale della previdenza sociale (INPS) (17)

The Directive on the protection of employees in the event of the insolvency of their employer authorises Member States to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees. This intervention ceiling must be paid in full even where the employer has paid a portion of the pay for the period covered by the guarantee.

Mr Barsotti, Ms Castellani and Ms Venturi, employees of insolvent companies, are owed part of their remuneration relating to the final period of their employment contract or employment relationship. They claimed payment of the balance thereof from the Fund. The INPS rejected those claims, either in part or in whole. The Tribunale di Pisa, the Tribunale di Siena and the Corte suprema di cassazione, before which the cases had been brought, decided to stay proceedings and make a reference to the Court in respect of the interpretation of Council Directive 80/987 concerning the protection of employees in the event of their employer's insolvency (Council of the European Communities, 1980). The Italian courts essentially asked whether Articles 3 (1), and the first sub-paragraph of Article 4 (3) of the Directive are to be interpreted as meaning that they allow a Member State to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees concerned and from which are to be deducted payments made by the employer during the period covered by the guarantee.

The Court points out that under Article 3 (1) of the Directive, Member States shall take the measures necessary to ensure that guarantee institutions, subject to Article 4 of that same Directive, ensure payment of employees’ outstanding claims relating to pay for the period prior to a given date. The first sub-paragraph of Article 4 (3) of the Directive provides the Member States with an option of setting a ceiling to the liability for employees’ outstanding claims in order to avoid the

(17) CJEC, Cases C-19/01, C-50/01, C-84/01, Barsotti e.a., ruling of 4 March 2004, not yet published at the time of writing these lines.
payment of sums going beyond the Directive’s social objective. That social objective is to guarantee employees a minimum level of Community protection in the event of the employer’s insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period \(^{(19)}\). While the Member States are entitled to set a ceiling to the liability for outstanding claims, they are bound to ensure, within the limit of that ceiling, the payment of all the outstanding claims in question. Any part payments received on account by the employees concerned on their claims in respect of the guarantee must be deducted therefrom in order to determine the extent to which they are outstanding. On the other hand, a rule against aggregation, according to which remuneration paid to the said employees during the period covered by the guarantee must be deducted from the ceiling set by the Member State to the liability for outstanding claims, directly undermines the minimum protection guaranteed by the Directive. Article 3 (1), and the first sub-paragraph of Article 4 (3) of the Directive do not allow a Member State to limit the liability of the guarantee institutions to a sum which covers the basic needs of the employees concerned and from which are to be deducted payments made by the employer during the period covered by the guarantee \(^{(19)}\).

3. Social security in Community law

3.1 Compensatory supplements to retirement pensions: Skalka v. Sozialversicherungsanstalt der gewerblichen Wirtschaft \(^{(20)}\)

Mr Skalka, an Austrian citizen, has, since May 1990, received a disability pension paid by the Sozialversicherungsanstalt. Since he reached the age of 60, the same amount of benefit has been paid as an early retirement pension based on a long period of insurance. Mr Skalka has been

\(^{18}\) CJEC, Case C-125/97, Regeling, ruling of 18 October 2001, ECR I-4493; CJEC, Case C-201/01, Walcher, ruling of 11 September 2003, ECR I-8827.

\(^{19}\) See also CJEC, Case C-520/03, Valero v. Fogasa, ruling of 16 December 2004.

\(^{20}\) CJEC, Case C-160/02, Skalka, ruling of 29 April 2004, not yet published at the time of writing these lines.
Dalila Ghailani

habitually resident in Tenerife since the end of 1990. On 16 December 1999 he applied, on the basis of the GSVG (the federal law concerning social insurance for non-employees working in commerce), to the Sozialversicherungsanstalt for a compensatory supplement. That institution refused his application on the ground that he had his habitual residence abroad and that the benefit in question could not be exported. The Fund courts to which the case was referred held that the compensatory supplement was a special non-contributory benefit within the meaning of Article 10a (21) of Regulation No.1408/71 on the coordination of social security systems (Council of the European Communities, 1971) and could not be granted to a person habitually resident in a Member State other than the Republic of Austria. At both instances it was considered that there was no reason to request a preliminary ruling from the Court on the legal classification of the benefit, on the ground that the Jauch ruling of 8 March 2001 (22) gave a sufficient answer on that point. Mr Skalka appealed on a point of law against the appeal ruling to the Oberster Gerichtshof, which decided to stay proceedings and refer a question to the Court for a preliminary ruling.

The referring court asked whether the compensatory supplement provided for by the GSVG, a benefit included in Annex IIa to Regulation No.1408/71, constitutes a special non-contributory benefit within the meaning of Article 4(2a) (23) so that the situation of a person who, like Mr Skalka, fulfils after 1 June 1992 the conditions for the granting of that benefit, is governed with effect from 1 January 1995, the date of Austria’s accession to the European Union, by the

21 “Notwithstanding the provisions of Article 10 and Title III, the persons to whom the current regulation applies enjoy the special non-contributory benefits in cash under Article 4(2)(a) exclusively in the Member State in which they are resident under the legislation of that State insofar as the benefits are mentioned in Annex II (a). The benefits are paid by the institution in their place of residence”.


23 The Regulation “applies to special non-contributory benefits which are provided under legislation or schemes other than those referred to in Article 4(1) or excluded under Article 4(4), where such benefits are intended inter alia to provide supplementary, substitute or ancillary cover against the risks covered by the branches referred to in Article 4(1)(a) to (h)”.

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coordinating provisions in Article 10a of that Regulation and the benefit can therefore be paid only to a person habitually resident in Austria. The provisions in Article 10a of Regulation No.1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. That provision can apply only to benefits which are both special and non-contributory and which are listed in Annex IIa to that Regulation. The compensatory supplement is included in the list of special non-compensatory benefits within the meaning of Article 4 (2a) of Regulation No.1408/71, to which Annex IIa of that Regulation applies.

It remained therefore to be examined whether the benefit in question is special and non-contributory in nature. The Austrian compensatory supplement tops up a retirement or disability pension and is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. Its grant is dependent on objective criteria defined by law. Consequently, it must be classified as a ‘special benefit’ within the meaning of Regulation No.1408/71. As to whether or not it is contributory in nature, the determining criterion is how the benefit is actually financed. The Court must consider whether that financing comes directly or indirectly from social contributions or from public resources. In the case of the Austrian compensatory supplement, the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the federal budget the sums necessary to finance the benefit. The Austrian compensatory supplement must therefore be regarded as being non-contributory in nature as under Article 4 (2a) of Regulation No.1408/71.

According to the Court, under the provisions of Article 10a and Annex IIa of Regulation No.1408/71, the compensatory supplement, within the meaning of the GSG, falls within the scope of that Regulation and therefore constitutes a special non-contributory benefit within the meaning of Article 4 (2a) of that Regulation, so that the situation of a person who, after 1 June 1992, fulfils the conditions for the grant of that benefit is governed with effect from 1st January 1995, the date of Austria’s accession to the European Union, solely by the coordinating provisions laid down by the said Article 10a. It can therefore only be granted to a person whose habitual residence is in Austria.
3.2 Care allowance: Gaumain-Cerri & Barth v. Kaufmännische Krankenkasse-Pflegekasse (24)

Ms Gaumain-Cerri, of German nationality, and her husband, who is French, reside in France and practise their profession on a part-time basis in an undertaking in Germany. By virtue of that employment, both are covered by German care insurance. Their son, who lives with them, is disabled. As a dependant of his parents he is in receipt of care insurance benefits, namely the care allowance. The parents themselves, at home and on a voluntary basis, assume the role of carers providing assistance to a reliant person. However, the KKH care fund, the body providing insurance against the risk of reliance on care, refuses to pay the old-age insurance contributions of Ms Gaumain-Cerri and her husband in respect of their activity as carers for a reliant person on the ground that they are not resident within Germany. Under the SGB (the German social security code), in view of the non-professional nature of that activity and in the absence of residence within the country, they are neither obliged to contribute to nor entitled to receive statutory old-age insurance. The non-professional nature of the activity in question means that they do not have the status of worker enabling them to rely on the provisions of the Regulation No.1408/71 (Council of the European Communities, 1971).

Ms Barth, who is of German nationality, is resident in Belgium and looks after a retired civil servant from whom she receives monthly payment in Germany. According to the SGB, the assistance provided by Ms Barth is non-professional. She carries out no other professional activity. The retired person whom she assists is in receipt of care insurance allowance from two bodies, the Landesamt für Besoldung und Versorgung NordrheinWestfalen, as the basic social insurance provider for retired civil servants, and the PAX Familienfürsorge Krankenversicherung, as an additional insurer under a compulsory private care insurance policy, the conditions of which are required by law to be identical to those applicable to the basic social insurance. Given the fact that she is resident outside Germany, the Landesversicherungsanstalt Rheinprovinz

24 CJEC, Cases C-502/01 and C-31/02, Gaumain-Cerri & Barth, ruling of 8 July 2004, not yet published at the time of writing these lines.
discontinued payment of the contributions enabling Ms Barth to acquire pension rights. Ms Gaumain-Cerri and Ms Barth brought proceedings before the Sozialgericht Hannover and the Sozialgericht Aachen respectively, claiming that the care insurance should pay the old-age insurance contributions on their behalf in respect of their activity assisting a reliant person.

The German courts asked the CJEC whether the payment of old-age benefit social contributions by the body providing care insurance for the third party providing home care for a reliant person constituted a sickness benefit or old-age benefit within the meaning of Article 1 of Regulation No.1408/71 and whether the fact that the said benefit is supplied by an institution under private law affects the answer. They also asked whether Article 39 EC of the Treaty, Regulation No.1408/71 or other provisions of derived law precluded denying the said benefit on the basis that the reliant person or the third party was resident outside the State of the institution with which the reliant person had care insurance.

The Court gave its answer in two stages. According to the Molenaar ruling (25), the benefits intended to cover the risk of old age of a third party assisting a reliant person, such as those provided for by care insurance, constitute ‘sickness benefits’ payable to the reliant person within the meaning of Article 4 (1)(a) of Regulation No.1408/71. The fact that the third party is personally in receipt of such a benefit is of no consequence on account of the fact that the person whose reliance on care justifies the grant of the whole of the benefit is thereby benefiting from a scheme designed to help him/her to receive the care which his/her condition requires. That benefit is thus fully covered by that branch of sickness insurance.

The fact that care insurance is at times provided in whole or in part by a private insurer on the basis of a private insurance contract cannot, in

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25 Ruling made in response to a question for a preliminary ruling raised during a dispute concerning the refusal to pay care allowance to persons subject to care insurance because they are not resident in Germany. CJEC, Case C-160/96, Molenaar, ruling of 5 March 1998, ECR I-843.
such a case, put it outside the scope of Regulation No.1408/71, since the conclusion of such a contract follows directly from the application of the social security legislation at issue.

The Court next considered whether, in a case such as that of Ms Gaumain-Cerri, the direct payment of the old-age insurance contributions of the third party assisting the reliant person is to be made in accordance with the legislation of the State of residence of the reliant person or in accordance with that of the competent State. Under Articles 19 and 20 of Regulation No.1408/71 (26), the fact that benefits are benefits ‘in kind’ or benefits ‘in cash’ may have an effect as to which legislation is applicable. As the care allowance takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, it should be considered as a sickness insurance cash benefit as referred to in Regulation No.1408/71. Payment of the old-age insurance of a third person to whom a reliant person resorts for assistance at home must itself also be categorised as a sickness insurance cash benefit by reason of its ancillary nature to the care insurance proper, inasmuch as it directly supplements the latter.

Accordingly, under Article 19 (1) (b) and (2), the payment of old-age insurance on behalf of the third party assisting a reliant person who is resident in France and who belongs to the family of a worker covered by German care insurance must be insured by the competent German institution in accordance with the legislation on care insurance as if the reliant person were resident in Germany, unless that person is entitled to an equivalent benefit under French law.

It remained to be examined whether the competent institution may refuse to grant a particular care insurance benefit on the ground that the third party is not resident within the competent Member State. The reply must be in the negative. The status of Union citizenship conferred by Article 17 EC, and which these third parties enjoy, enables nationals of the Member States who find themselves in the same situation to

26 These articles concern situations in which the interested parties are resident in a Member State other than the competent State, inter alia as cross-border workers, with regard to sickness and maternity insurance for employees and members of their families.
enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for. Refusal to pay the old-age insurance contributions of a third party assisting a reliant person on the ground that he/she is not resident in the competent State, the legislation of which is applicable, leads to different treatment of persons finding themselves in the same situation.

Thus, as concerns benefits such as those under German care insurance accorded to an insured person resident on the territory of the competent State or to a person resident on the territory of another Member State and covered by that insurance as a member of the family of a worker, the Treaty, in particular Article 17 EC, and Regulation No.1408/71 preclude payment of the old-age insurance contributions of a national of a Member State in the position of the third party caring for the recipient of those benefits being refused by the competent institution on the ground that that third party or the aforementioned recipient resides in a Member State other than the competent State.

It should be noted in concluding this section that, on one hand, Regulation (EC) No.883/2004 of the Parliament and the Council on the coordination of social security systems which repeals Regulation No.1408/71 (except for the purposes of certain Community agreements and acts) came into force on 20 May 2004 (European Parliament and Council of the European Union 2004). The Regulation aims to simplify and codify the existing legislation, whilst adhering to the principles of equality and assimilation as developed by the Court of Justice. On the other hand, Regulation (EC) No.631/2004 of the Parliament and the Council amending Council Regulation (EEC) No.1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation EEC No.574/72 laying down the procedure for implementation entered into force on 1st June 2004 (European Parliament and Council of the European Union, 2004). The amendments concern the alignment of rights and the simplification of procedures.
Conclusions

2005 will see a growth in the number of cases referred to the Court. Rulings will be made on a certain number of cases on which the Advocates General have produced opinions. It should be noted that most of them still concern equal treatment for men and women. In McKenna (27), the Court will rule on the question of whether an incapacity for work caused by a pregnancy-related illness occurring during pregnancy may, in accordance with Community law, be treated in the same way as incapacity for work caused by any other illness and be set against the number of days during which, under the sick-leave scheme applicable in the case, employees are entitled to have their pay maintained in full, and then in part. In Mayer (28), the Court will again be consulted on the effect of the principle of equal pay for men and women on these areas of social security.

Junk (29) will give the Court the opportunity to clarify, on the one hand, the meaning to be given to the concept of ‘redundancy’ in Council Directive 98/59/EC and, on the other, the scope of the information and consultation obligations imposed on the employer by that Directive. Finally, in Nikoloudi (30), the Court will rule on the compatibility of national legislation with the Community law concerning equal treatment for men and women. This legislation provides inter alia for the exclusion of part-time workers from appointment as established members of staff, where a certain category of part-time posts is available only to women.

27 CJEC, Case C-191/03, Western Health Board v. Margaret McKenna.
28 CJEC, Case C-356/03, Elisabeth Mayer v. Versorgungsanstalt des Bundes und der Länder.
29 CJEC, Case C-188/03, Irmtraud Junk v. Wolfgang Köhndl als Insolvenzverwalter über das Vermögen der Firma AWO.
30 CJEC, Case C-196/02, Vasiliki Nikoloudi v. Organismos Tilepikoinonion Elladios.
References


