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Overview of case law of the Court of Justice in 2001 in the field of social policy

Introduction

Case law of the European Court of Justice (ECJ) contributes decisively to building a social Europe. The Court has shown itself able to recall and impose a certain number of fundamental general principles enshrined in the Treaty of Rome. Its case law has made it possible to formulate standards and has even extended the scope of European law in the social sphere through extensive interpretation. Certain rulings have encouraged Community authorities to supplement existing standards with new directives or regulations; others have led to revisions of European regulations relating to, for example, social security. This can be demonstrated by referring to various directives on the issue of equal treatment for male and female workers, as well as the landmark Regulation 1408/71 on social security for migrant workers, aimed at adjusting to different ECJ decisions. These two examples illustrate perfectly the Court's role as an engine in the development of Community social law (Van Raepenbusch, 1999).

Being aware of the importance of this case law, we thought it worthwhile to describe certain of the Court's rulings from the past year in this 2001 edition of Social Developments in the European Union. The aim is to afford the reader an overview of the areas of social policy which have been disputed before the highest Community court and to describe as clearly as possible the solutions reached.

The year 2001 was prolific in case law. A great many rulings were made. While most of them were only of minor importance, simply confirming decisions previously made, some are more worthy of attention, either because they allowed the Court to clarify previous case law, or because they had a direct influence on Community legislation or allowed for major advances in key areas of European social policy. This was the case for the eagerly awaited Smits-Peerbooms and Vanbraekel rulings concerning health care. We shall be discussing these two cases later; they were the logical development of the well-known Kholl and Decker rulings and will play an essential role in the future development of cross-border health care. The same goes for the Khalil et al ruling which will serve as a foundation for the adoption of a new legal basis permitting the extension of the co-ordination of social security systems to third country nationals. In the Tele Danmark and Maria Jiménez Melgar rulings, the Court also clarified its case law on the protection of pregnant workers. The ECJ has likewise offered clarifications on Directive 91/533 concerning an employer's obligation to inform the employee of conditions applicable to his contract or employment relationship and how the contract applies to overtime.

For clarity's sake, we have divided the rulings we plan to examine into four distinct categories: health care, equal treatment for men and women, social security for migrant workers, and the rights and obligations of workers and employers.

1. Health care: the compatibility of schemes for the reimbursement of care provided abroad with the freedom to provide services

Access to care abroad and its corollary, patient mobility, have given rise to numerous disputes since two rulings, **Kholl** and **Decker**, called into question the Luxembourg legislation defining the relevant procedure. This legislation stipulated that in order for the cost of medical care provided in another Member State – in this instance, orthodontics and the supply of spectacles – to be covered by social security, prior consent had to be obtained from the insured person's sickness insurance fund.

According to the ECJ, these provisions of Luxembourg law undermined the principles of free movement of goods and services, which also apply to national social security schemes. These rulings have been welcomed as constituting social progress for patients, an advance in European citizens' rights and a positive step on the way to establishing an internal market in health. Despite their importance, however, these rulings have left numerous matters unresolved (Coheur *et al.*, 2000: 1). The question as to whether the scope of this case law remains limited to reimbursement schemes, or whether it also covers schemes providing for benefits in kind, has remained open. Moreover, these two cases pertained to care provided outside a hospital environment, such as corrective spectacles and dental consultations. The ECJ did not express a view as to whether this case law also covered medical care provided within a hospital environment (Bosco, 2000). This is why the Court's two rulings on 12 July were welcomed. The Smits-Peerbooms and Vanbraekel cases provided arguments which enabled the ECJ to clarify the real scope of its decision and the full impact of the principles of the free movement of goods and services on national health care schemes.

The Smits and Peerbooms case

Ms Geraets-Smits, a Dutch national, has suffered from Parkinson's disease for years. She received treatment in a German clinic specialising in the specific and multidisciplinary treatment of Parkinson's disease. Once she had paid the invoice, she requested reimbursement from the Stichting Ziekenfonds. The latter informed Ms Geraets-Smits that the cost of the treatment would not be refunded under the legislation on sickness insurance funds because satisfactory and adequate treatment for Parkinson's disease was available in the Netherlands and that it had not therefore been necessary to have recourse to treatment provided in Germany. She lodged an appeal against this decision with the Arrondissementsrechtbank, submitting that the clinical treatment provided in Germany has a number of advantages over the fragmentary approach used in the Netherlands. The neurologist appointed as an expert witness by the national court concluded that there was no clinical or scientific evidence to prove that the German approach was more

appropriate and that there was therefore no strictly medical justification for the treatment received in Germany.

Mr Peerbooms fell into a coma following a road accident. His neurologist decided to have him transferred to an Austrian University Clinic in Innsbruck. This establishment provided special intensive therapy using neurostimulation which, in the Netherlands, was used only experimentally at one rehabilitation centre in Tilburg and at another in Utrecht. Mr Peerbooms was not admitted to either of these establishments, which did not accept patients aged over twenty-five. He would therefore have had to be transferred to the rehabilitation centre in Hoensbroek, where this treatment was not used. He was thus transferred in a vegetative state to the Austrian clinic. After receiving the neurostimulation therapy, he emerged completely from his coma and regained full consciousness. The request for reimbursement made by the neurologist to the Stichting CZ Groep Zorgverzekeringen was rejected because adequate treatment as required by the patient could have been provided in an establishment with which the sickness insurance fund had contractual arrangements or, if necessary, in one with which there were no such arrangements but which was nevertheless located in the Netherlands. The appeal lodged by the neurologist against this decision was also rejected on the grounds that, according to current medical criteria, the treatment provided for comatose patients at Innsbruck did not present any advantage over the care provided in the Netherlands, and that it had not therefore been necessary for Mr Peerbooms to go to Austria to receive adequate treatment. The expert appointed by the court also submitted a report in which he concluded that appropriate and adequate treatment was not available in the Netherlands other than at the rehabilitation centres of Utrecht and Tilburg, to which it had not been possible to admit the patient due to his age. The expert added that the treatment available in Hoensbroek would not have been suitable.

Ms Smits and Mr Peerbooms based their action, taken with a view to obtaining reimbursement of the costs of their treatment, on those provisions of the Treaty upholding the freedom to provide services.

In order to resolve these two disputes, the Dutch court (the Arrondissementsrechtbank te Roermond) referred to the ECJ for a preliminary ruling two questions. The first related to whether Articles 59 and 60 of the EC Treaty must be interpreted as being inconsistent with a Member State's legislation which states that the insured person is only entitled to claim benefits from a hospital located in another Member State if prior authorisation from the insured person's sickness insurance fund has been obtained, the said authorisation only being granted on two conditions. First, the proposed treatment must be amongst the benefits for which the sickness insurance scheme of the first Member State assumes responsibility, which means that the treatment must be regarded as normal in the relevant professional circles. Second, the treatment abroad must be necessary in terms of the medical condition of the person concerned, which supposes that timely and adequate care cannot be obtained from a contracted care provider in the first Member State. The Dutch court then asked whether, if the requirement to obtain authorisation did constitute a barrier to the freedom to provide services, this barrier could be justified by overriding reasons in the general interest.

The ECJ recalled that Community law does not detract from the power of Member States to organise their social security systems. In the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits. Member States must comply with Community law when exercising that power, and this is particularly the case when it comes to the freedom to provide services. There is no doubt that medical activities, despite their special characteristics (benefits in kind, payments made directly by the sickness insurance fund to the hospital etc.) do fall within the scope of the freedom to provide services enshrined in Articles 59 and 60 of the Treaty.

The Court also held that making the reimbursement of costs incurred in another Member State subject to **prior authorisation** from the insurance fund, as is the case in the Netherlands, may deter or even prevent insured persons from applying to providers of medical services

established in another Member State. As in the earlier rulings, Kholl and Decker, the ECJ confirmed that such a barrier to the freedom to provide services may be justified insofar as, firstly, there exists a serious risk of undermining a social security system's financial balance or, secondly, where there exists the objective of maintaining an equitable medical and hospital service open to all and where maintaining treatment capacity or medical competence on national territory is essential for public health, and even for the survival of the population. The Court found that a requirement for prior authorisation could be seen as a necessary and reasonable measure guaranteeing a rational, stable, balanced and accessible range of hospital services through planning and service agreements.

Nevertheless, such an exception to the principle of the freedom to provide services can only be regarded as acceptable if the criteria applied to the granting of authorisation are objective and non-discriminatory with respect to suppliers established in another Member State. The Court thus considered that the conditions stipulated by the Netherlands were not compatible with the principle of equal treatment, since they offer an advantage to Dutch health care suppliers having no contractual arrangements with the sickness insurance fund concerned, to the detriment of foreign health care suppliers.

With regard to the first condition, the ECJ specifically confirmed that a Member State had the power to define which services were compulsorily covered by the sickness insurance scheme. However, as to whether the planned treatment is considered to be "normal in the professional circles concerned", the Court found that this criterion could not be decided exclusively according to the views of Dutch doctors, but should be based on what has been sufficiently tried and tested in the international medical world.

With regard to the condition concerning the need for the particular treatment, the Court ruled that this condition could only be justified if it was not applied more strictly to foreign providers than to Dutch care providers having no contractual arrangements with the insured person's sickness insurance fund. Consequently, authorisation must be granted if the same or equally effective treatment cannot be obtained without

undue delay from a contracted establishment. Where this is the case, no priority should be given to non-contracted Dutch hospitals. When assessing medical necessity, the national authorities must consider all the circumstances in each instance.

The Vanbraekel case

Ms Descamp, whose married name is Vanbraekel, is a Belgian national who sought authorisation from the ANMC, the sickness insurance fund under which she was insured, to undergo orthopaedic surgery in a French hospital. Authorisation was refused on the grounds that the request was not adequately justified, since Ms Descamps had not produced the opinion of a Belgian doctor practising in a national university institution. Despite being refused authorisation, she went ahead with this operation and then requested reimbursement of the cost of her care from the ANMC. The refusal to grant authorisation was ruled to have had no basis by the Cour de Travail in Mons, which applied to the Court of Justice to find out the tariffs applicable for the reimbursement of the treatment provided in France. Taking as their basis the Kholl ruling, the Vanbraekel family had in fact requested reimbursement at Belgian rates which were higher than the French rates.

The ECJ held that if the refusal of authorisation for treatment in another Member State was unfounded, the insured person was entitled to receive an amount equivalent to that which she would ordinarily have received if authorisation had been properly granted in the first place, in other words, reimbursement in accordance with the legislation applicable in the Member State where the treatment took place. The foregoing all follows from a straightforward application of Article 22(1)(c) of Council Regulation 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, self-employed persons and members of their families (Council of the European Communities, 1971). However, where this level of cover proves less advantageous than that which would have been applicable if the person had received hospital services in his or her country of origin, then in accordance with the principle of the freedom to provide services, Member States should pay an additional reimbursement to

cover the difference. Otherwise, the lower level of reimbursement might deter, or even prevent, patients from applying to providers of medical services established in other Member States. The Court then considered whether such differences in treatment could be justified by overriding reasons in the general interest. It found that this obligation to cover the difference between the French and Belgian tariffs was not such as to undermine the financial balance or the fundamental objectives of the national health system of the Member State in which the person is insured. This is all the more true in that, theoretically, this reimbursement does not constitute an additional financial burden on the Belgian sickness insurance system.

It is likely that these two rulings will play an important role in the future development of cross-border health care.

The Smits-Peerbooms ruling is decisive in that it confirms that the alternative procedure for cover of health care services abroad – recognised in the Kholl and Decker rulings and grounded directly in the EC Treaty – applies in principle to all sickness insurance schemes, whether based on a system of reimbursements or on mechanisms involving benefits in kind, and to all health services, whether provided within or outside a hospital environment. Without actually prohibiting a system involving prior authorisations, the ruling considerably restricts Member States' discretionary power to decide their own authorisation policies by requiring that any refusal should be necessary, proportionate, objective and non-discriminatory.

The Vanbraekel ruling is also important. The ECJ could have limited its decision to the questions referred to it for a preliminary ruling, or to the circumstances existing in Belgium where a specific authorisation procedure exists, based on Belgian tariffs for reimbursement. However, the Court actually gave its ruling in general terms and itself took the initiative of linking the freedom to provide services to Regulation 1408/71 (Palm, 2001).

2. Equal treatment for men and women

Equal treatment was enshrined in Article 119 of the Treaty of Rome (subsequently Article 141(1) EC after amendment) which obliged the Member States to apply the principle of equal pay for male and female workers for equal work. Subsequent directives have extended the scope of this principle to access to work and working conditions, social security schemes, occupational social security schemes and to the self-employed, including in agriculture.

It has been settled case law ever since the Defrenne III ruling that the elimination of discrimination based on sex is an essential personal right which forms part of the general principles of Community law enforced by the ECJ (Berthou, 2001). The Court has played a considerable role in developing principles of equal pay, equal treatment and equal opportunity, and is a fundamental source for enshrining the notion of discrimination in labour law. We shall be considering three of the ECJ's rulings this year which deal with the application of this Community principle.

Establishing the existence of discrimination with respect to remuneration: Susanna Brunnhofer v. Bank der Österreichischen Postsparkasse AG

In response to two questions referred to it for a preliminary ruling by an Austrian court, on the interpretation of former Article 119 of the Treaty and Directive 75/117 of 10 February 1975 on equal pay for male and female workers, the ECJ provided an object lesson in how to determine in a specific instance whether the principle of equal treatment has been infringed.

In this case, Ms Brunnhofer, a bank employee, alleged that the principle of equal treatment had been breached by her employer, on the grounds that her male colleague received larger salary increases even though they were both classified in the same salary group as provided for in the collective agreement applicable to their job. Ms Brunnhofer submitted that the fact that they belonged to the same category implied that they were doing equal work or at least work of the same value, justifying the

same salary. The bank denied any discrimination, alleging that the difference in salary was due both to the fact that the male employee worked overtime, which the claimant did not, and also to the male colleague's quality of work and level of responsibility.

Establishing the existence of discrimination: two factors require consideration: on the one hand unequal pay, and on the other the existence of the same work or work of equal value.

The ECJ recalled that the concept of equal pay is defined in Community law. In the present case, the monthly salary supplement to which workers are entitled in their employment contract does answer this definition. The Court emphasises that the guarantee of equal pay must be based on a general overall assessment of all consideration paid to the worker as well as on a review of each aspect of remuneration.

Next, it is necessary to determine whether or not equal work or work of equal value is being performed. The fact that the workers concerned belonged to the same salary group provided for by the collective agreement is not enough to conclude that they are performing equal work or work of equal value. Various precise and concrete factors need to be taken into consideration, including the nature of the activities actually entrusted to them, the training requirement for carrying them out, and the working conditions. It is for the national courts to decide, bearing in mind that in this instance the male colleague was responsible for dealing with important customers and enjoyed authority to enter into binding commitments which Ms Brunnhofer did not, in that she merely supervised loans.

The burden of proof: the ECJ recalls that it is up to the worker who believes himself to be the victim of discrimination to adduce proof that he receives lower remuneration than that made to a colleague performing equal work or work of equal value. If the female employee establishes the existence of apparent discrimination, then it is for the employer to prove that the difference in pay is objectively justified by factors other than discrimination based on sex and which adhere to the principle of proportionality. It would then be possible for the employer to explain these differences in the light of circumstances not taken into

consideration by the collective agreement. The Court has nevertheless ruled that for work paid at time rates, a difference in pay decided when the worker was engaged cannot be justified by factors known only after the employees have taken up their duties and which can be assessed only while the employment contract is being performed, such as a difference in the individual work capacity of the employees concerned or in the effectiveness of an employee's work in relation to that of a colleague.

Equal treatment and the protection of pregnant women: Maria Luisa Jiménez v. Ayuntamiento de Los Barrios and Tele Danmark A/S and Handels-og Kontorfunktionaerernes Forbund i Danmark

Directive 92/85/EEC concerns the implementation of measures intended to promote the improvement of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding. It was adopted on 19 October 1992 under Article 118A of the EEC Treaty (Council of the European Communities, 1992). Prior to the entry into force of this Directive, the rights of pregnant workers were covered by national legislation. Their rights with respect to non-discrimination were protected by other Community provisions on equality, and a substantial body of case law from the European Court of Justice had accumulated.

As well as the right to maternity leave and the right to time off for ante-natal examinations, the Directive also provides for **protection against dismissal**, which runs from the beginning of the pregnancy to the end of maternity leave. The ECJ rulings in cases concerning the refusal to appoint and the dismissal of pregnant women are reflected in the Directive. An example of this is the Dekker ([1]) ruling of 1990, in which the Court ruled that a refusal to appoint a pregnant woman to a position due to her condition constituted direct discrimination based on sex, contrary to Directive 76/207/EEC (Council of the European Communities, 1976: 40). In its ruling on Webb v. EMO Air Cargo

1 *Dekker*, C-177/88, ruling of 8 November 1990.

Ltd. ([2]), the ECJ found that it was contrary to the said Directive to dismiss Ms Webb, engaged to replace a woman on maternity leave, when the latter discovered that she, too, was pregnant.

Questions for preliminary rulings concerning the prohibition on dismissals of pregnant workers are frequently referred to the ECJ. Two cases in 2001 enabled the Court to clarify its case law on this prohibition, by stipulating that dismissal of a worker due to her pregnancy constituted direct discrimination based on sex, irrespective of whether the employment contract was **fixed-term or open-ended**.

The Tele Danmark case

In June 1995, Ms Brandt Nielson was recruited by Tele Danmark for a period of six months from 1 July 1995. In August 1995, she informed her employer that she was pregnant and expected to give birth in early November. On 23 August, she was dismissed with effect from 30 September, on the grounds that she had not informed Tele Danmark that she was pregnant when she was recruited.

Ms Brandt Nielsen brought proceedings for compensation against Tele Danmark before the lower court, on the grounds that her dismissal by Tele Danmark was contrary to the Danish legislation on equal pay. The court dismissed her action on the grounds that Ms Brandt Nielsen, who had been recruited for a six-month period, had failed to state that she was pregnant at the recruitment interview, although she was expected to give birth during the fifth month of the contract of employment. The Court of Appeal nevertheless ruled in her favour on appeal, on the grounds that it was not disputed that the dismissal was linked to her pregnancy.

Tele Danmark appealed to the Supreme Court. The company argued that that the prohibition under Community law of dismissing a pregnant worker did not apply to a worker recruited on a temporary basis who, despite knowing that she was pregnant when the contract of employment was concluded, failed to inform the employer of this, and

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2 *Webb/EMO Air Cargo Ltd.*, C-32/93, ruling of 14 July 1994.

who because of her right to maternity leave was unable, for a substantial part of the duration of that contract, to perform the work for which she had been recruited.

The Jiménez Melgar case

In June 1998, Ms Jiménez Melgar was engaged by the Spanish Municipality of Los Barios for a duration of three months. Her contract was renewed twice, until 2 May 1999. On 3 May 1999, she signed a fourth fixed-term, part-time contract. Like the previous contracts, it did not specify an expiry date. However, on 12 May Ms Jiménez Melgar received a letter from the Municipality informing her that the contract would expire on 2 June 1999. In the meantime, the Municipality had been informed about Ms Jiménez Melgar's state of pregnancy. Her child was born on 16 September 1999. Ms Jiménez Melgar brought proceedings against the Municipality before the competent court, contending that she had been dismissed in a discriminatory way, in breach of her fundamental rights.

The two courts referred questions to the Court of Justice on the scope and interpretation of Community provisions on the principle of equal treatment for men and women in the area of employment, which place Member States under an obligation to adopt the necessary measures to prohibit the dismissal of workers during the period from the beginning of pregnancy until the end of maternity leave, save in exceptional cases not connected to their condition.

In the Jiménez Melgar case, the ECJ emphasised that Article 10 of Directive 92/85 imposes on the Member States, in particular in their capacity as employer, precise obligations which afford them no margin of discretion in their performance. If transposition measures are not taken by a Member State within the period prescribed (which was the case for Spain), the Directive confers rights on individuals which they may assert before a national court against the authorities of that State.

The ECJ also noted that the prohibition on the dismissal of pregnant workers set out in Community provisions, which do not draw any distinction according to the length of the employment relationship, applied equally to fixed-term contracts and to those concluded for an

indefinite period. The Court nevertheless admitted that the non-renewal of a fixed-term contract, when it comes to an end as stipulated, cannot be regarded as a dismissal and is not as such contrary to Community law. However, under certain circumstances, the non-renewal of a fixed-term contract may be considered as a refusal to engage a worker. A refusal to engage a worker who is nevertheless considered capable of carrying out the activity concerned, if motivated by the worker's state of pregnancy, constitutes direct discrimination on grounds of sex. The ECJ concluded that it was for the national court to determine whether the non-renewal of Ms Jiménez Melgar's contract had, in actual fact, been motivated by her pregnancy.

In the Tele Danmark case, the company submitted that the prohibition of dismissal of pregnant women provided for by Community law did not apply in this instance. It was not the pregnancy itself which had been the determining reason for Ms Brandt Nielsen's dismissal, but the fact that she could not carry out a significant portion of the contract. Moreover, the fact that she had failed to inform the employer of her pregnancy, despite knowing that she would be unable to work during a substantial part of the term of the contract owing to her pregnancy, constituted a breach of the duty of good faith required in relations between employees and employers, capable in itself of justifying dismissal. The Court recalled that it had already ruled that a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave, or by the fact that the woman appointed cannot occupy in the post concerned for the duration of her pregnancy.

It follows that, as the dismissal of a worker motivated by her pregnancy constitutes direct discrimination based on sex, irrespective of the nature and extent of the economic loss incurred by the employer because of her absence due to pregnancy, whether the contract has been concluded for a fixed-term or an indefinite period does not affect the discriminatory nature of the dismissal. In both cases, the employee's incapacity to carry out her contract of employment is actually due to pregnancy.

The reader is also invited to look at the Court's decision in the case Pensionskasse für die Angestellten des Barmer Ersatzkasse Vvag and Hans Menauer. In this case, the Court of Justice effectively recalled that the principle of equal treatment for men and women should also apply to occupational pensions ([3]).

3. Social security for migrant workers: interpretation and scope of the provisions of Regulation 1408/71/EEC

Social security for workers and their family members is the implementation, in the area of social protection, of the freedom of movement of individuals within the Community. In the absence of a social security scheme applicable to migrant workers, the right to free movement recognised in the Treaties would exist only on a purely formal basis. The effect of there being no mechanism to protect their rights would be to deter workers from moving within the Union and would fatally undermine efforts to facilitate the mobility of European workers. In 1971, after the first two social security regulations had been in force for more than ten years, the Council deemed it necessary to revise them. Regulation 1408/71 of 14 June, on the application of social security schemes to employees, the self-employed and members of their families, laid the basis for a European co-ordination mechanism which has been supplemented by more than two hundred and fifty rulings from the Court of Justice in Luxembourg. Case law is continually arising from the application of this Regulation. The year 2001 was no exception (Carraud, 1994: 49-51 and 125-127; Gosseries, 1993).

The material scope of Regulation 1408/71: definition of benefits, V. Offermmanns and E. Offermanns case, Leclere case

In the Offermanns case, the children of divorced parents, of German nationality but residing in Austria, applied for the **grant of advances on maintenance payments** due from their father but unpaid. The children's application was dismissed by the Austrian court and this was confirmed on appeal on grounds of their not having Austrian

[3] *H. Menauer*, C-379/99, ruling of 9 October 2001.

nationality, which was a requirement of the Austrian federal legislation on the grant of advances for child maintenance. Moreover, the court held that these advances did not constitute family benefits within the meaning of Regulation 1408/71, nor social advantages within the meaning of Article 7(2) of Regulation 1612/68.

The Oberster Gerichsthof referred the question of the nature of family benefits under Article 4(1)(h) to the ECJ, which reached a different conclusion. In the light of settled case law, a benefit can be regarded as a social security benefit only if, first, it is granted – without any individual and discretionary assessment of personal needs – to recipients on the basis of a legally defined position and, second, it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71. In the case in question, the first condition was satisfied. Disagreement centred on the second. The Austrian Government and the Commission answered in the negative. The latter adduced the arguments that the advances were not granted definitively, since the person owing the maintenance could be made to repay them, and that the benefits in question were granted in place of a civil law obligation not falling within the scope of Article 4(1)(h) of the Regulation.

In its findings, the Court dismissed the fact that the recipient of the benefit is the child rather than the parent having custody. The distinction between personal rights and derived rights does not apply to family benefits, and children are a worker's family members within the meaning of Article 2(1) of the Regulation. The fact that the benefit is classified under domestic family law is not decisive either. All benefits in kind or in cash intended to meet family expenses are family benefits according to Article 1(u)(i).

In the Court's view, the term "meeting family expenses" must cover a public contribution to the family budget, intended to alleviate the costs attendant on caring for children. This is the case for the advance in question, the purpose of which is care of children, and which constitutes an immediate and definitive benefit to the family budget. It is therefore a family benefit within the meaning of the Regulation and must be granted irrespective of considerations of nationality.

In the Leclere case, the dispute involved two Belgians on the one hand and, on the other, a Luxembourg social security fund which refused to pay them the **Luxembourg childbirth, maternity and child-raising allowances** for a child born in March 1995, because the parents did not reside in Luxembourg. The father had in fact been an employee working in Luxembourg until 1981, when he suffered an accident at work. Since then he has received an invalidity pension paid by the Luxembourg social security services and is therefore liable to pay compulsory sickness insurance contributions and income tax in Luxembourg. The couple has also received family allowances. Though their case was dismissed at first instance, the applicants lodged an appeal before the Conseil superieur des assurances sociales, which referred the matter to the ECJ.

The first question referred to the Court for a preliminary ruling concerned the validity, in the light of Articles 48 and 51 EC (new Articles 39 and 42 EC) of certain provisions of Regulation 1408/71/EEC (first, Article 1(u)(i) and Annex II; second, Article 10a and Annex IIa). The first text excludes from the scope of Regulation 1408/71 ante-natal and childbirth allowances in Luxembourg, the second, non-contributory social benefits. These two provisions are not equivalent, however, in that the second establishes that the State in which the recipient of the benefits concerned resides is responsible for paying such benefits.

The Court noted that there was no reason to call into question the validity of the first provision, but that the exclusion from the Regulation of ante-natal and childbirth allowances did not free the Member State from respecting other Community rules and in particular the provision in Council Regulation 1612/68 of 15 October on the free movement of workers within the Community (Council of the European Communities, 1968).

The same does not go for the second provision, in that it characterises the Luxembourg maternity allowance as a non-contributory social benefit. This allowance cannot in fact be regarded as a special allowance coming under the waiver in Article 10a, because it is not linked to the

social environment but is granted to every pregnant women and to every woman who has given birth, on condition that she is officially resident in Luxembourg when entitlement to the allowance arises. It follows that the award of this benefit cannot be contingent on residence in the competent Member State.

The second question related to whether or not an allowance such as the Luxembourg child-raising allowance is one of the family allowances as stipulated in Article 77 of the Regulation. For the purposes of this article, the benefits for dependent children to which persons receiving pensions are entitled – irrespective of the Member State where they reside – are family allowances. These are defined as cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family. The Luxembourg child-raising allowance is intended to make up for the loss in income incurred when one of the parents devotes himself or herself principally to raising children under the age of two years within the family home. The amount of that allowance is fixed irrespective of the number of children raised in the same home. It does not therefore correspond to the definition of family allowances which applies for Article 77.

The ECJ also examined the question of whether a person receiving an invalidity pension is able to derive from Article 73 of the Regulation a right to family allowances other than the family allowances referred to in Article 77. The Court answered in the negative. The father is in receipt of an invalidity pension and thus can no longer be classified as a worker within the meaning of Article 73. Nor can he invoke Article 7 of Regulation 1612/68. The latter protects against discrimination the rights acquired by workers during an employment relationship, even once this employment relationship has come to an end. Yet workers cannot acquire further rights unrelated to their former occupations. In the case in question, Mr Leclere had lost his status as a worker long before his child was born. He could not therefore benefit from Article 7 ([4]).

[4] Also see the Jauch ruling on insurance against risk of reliance on care, C-215/99, ruling of 8 March 2001.

The scope of Regulation 1408/71 as regards the individual: joined cases Khalil, Chaaban, Osseili v. Bundesanstalt für Arbeit, Nasser and Landeshauptstadt Stuttgart, Addou and Land Nordrhein-Westfalen

In this case, the Court of Justice examined the right of stateless persons and refugees or their spouses to family and educational allowances.

The applicants, Khalil, Chaaban, Nasser and Osseili all immigrated from the Lebanon to Germany where they have been resident without interruption since 1985/1986. They have been refused political refugee status, so that under German law they are regarded as stateless persons. Applicant Addou is an Algerian national. Her husband and children were Moroccan nationals. They immigrated to Germany from Algeria and Morocco and have lived there since 1988. Mr Addou obtained recognition as a political refugee under Article 1 of the Geneva Convention and maintained refugee status until his naturalisation. All the applicants were refused the award of family benefits on the grounds that, according to German federal legislation on family allowances, only foreigners in possession of a particular residence permit were qualified for family benefits. They all invoked Regulation 1408/71 before national courts: under Article 2(1) stateless persons and refugees should in fact be treated in the same way as nationals of the Member State of residence for the purposes of granting family benefits. The case was appealed to the Bundessozialgericht, which in turn referred it to the ECJ for a preliminary opinion.

The first question for a preliminary ruling concerned the validity of Regulation 1408/71 which includes within its personal scope stateless persons and refugees resident in a Member State and members of their families when they have no right to free movement as workers. The Court noted that there was no cause to doubt the validity of Regulation 1408/71 in the context of Article 51 of the EEC Treaty (now Article 42 EC). The establishment of complete freedom of movement for workers is the ultimate objective of Article 51, and this conditions the powers conferred on the Council. The Council cannot be criticised for having also included stateless persons and refugees resident on the territory of

Member States in order to take into account the international obligations of those States ([5]).

The second question related to whether stateless persons and refugees may rely on the rights conferred by Article 2(1) of Regulation 1408/71 where they have immigrated to that Member State directly from a non-member country and have not moved within the Union. The Court recalled that Regulation 1408/71 must be interpreted in the light of Article 51 of the EEC Treaty, whose principal objective is co-ordination of the Member States' social security schemes and the payment of benefits. The Regulation itself essentially covers workers who move within the Community, and their families. It follows that Articles 51 EEC and 2(1) of Regulation 1408/71 do not apply to situations which are confined in all respects within a single Member State. Such is the case of stateless persons and refugees who have immigrated to a Member State from a third country and who have not moved within the Union.

To conclude this summary of the ECJ's rulings on the application of Regulation 1408/71, it should be pointed out that, in 1998, the Commission submitted a draft regulation on the co-ordination of social security schemes. This proposal was intended to modernise and simplify the provisions of Regulation 1408/71/EEC. The Stockholm European Council had invited the Council to lay down parameters prior to the end of 2001 which would update this Regulation, guaranteeing protection for persons circulating within the European Union whilst complying with national law, adhering to the acquis communautaire and bearing in mind the interests of the citizen (European Council: 2001a: point 33). Within the imposed deadline, the Employment and Social Affairs Council of 3 December 2001 adopted conclusions bearing on 12 criteria which should provide the basis for updating the Regulation in question. These criteria will be briefly described. There are two types of criteria: general ones which apply to the whole Regulation, and criteria specific to different categories of benefits. Of these criteria, we would

[5] Geneva Convention of 28 July 1951 on refugee status; New York Convention of 28 September 1954 on stateless persons.

draw particular attention to those intended to improve the rights of insured persons by extending the personal and material scope of the Regulation (criteria 2 and 3), improving cross-border access to health care for retired cross-border workers (criterion 8), extending the chapter on unemployment to schemes for self-employed workers and simplifying the conditions for exporting unemployment benefit (criterion 10), and extending the rights of pensioners and orphans to claim family benefits (criterion 11) (European Commission, 1998).

4. Rights and obligations of workers and employers

Safeguarding workers' rights after the transfer of an undertaking: the Oy Liikenne Ab and Pekka Liskojärvi cases

Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is intended to protect workers in the event of a change in ownership and in particular to ensure that their rights are guaranteed (Council of the European Communities, 1977). The Directive provides that the transferor's rights and obligations stemming from a contract of employment or an employment relationship are transferred to the transferee as a result of the transfer. It also protects the workers concerned against dismissal by the transferor or transferee whilst allowing dismissals for economic, technical or organisational reasons entailing changes in the workforce. The aim was to ensure that the restructuring of businesses within the Community would not have negative repercussions for workers. This Directive has proved to be an effective instrument for the protection of workers in the event of company reorganisation, guaranteeing that economic and technological reorganisation takes place in a peaceful and consensual manner. The effectiveness of this Community text has not however prevented national courts from making frequent referrals to the ECJ as to its proper application (European Commission, 1997a).

Following a tender procedure, a Finnish urban community awarded the operation of several local bus routes, which had formerly been awarded to the company Liikenne, to a new concessionary for three years.

Liikenne thereupon dismissed 45 drivers. The applicants were among the 33 who were re-recruited. They were re-engaged on conditions laid down by the national collective agreement in the sector, which are less favourable than those that had applied under the previous employer. No vehicles or other assets connected with the operation of the bus routes were transferred. Since they considered that there had been a transfer of an economic entity, the applicants claimed the right to continue to enjoy the conditions of employment offered by their former employer. They were successful at first instance and on appeal. The concessionary then appealed on a point of law. The highest Finnish court raised the issue of whether in this case there had indeed been a transfer of an undertaking within the meaning of Directive 77/187/CEE given that the new concessionary had obtained the contract following a call for tenders conducted in accordance with Council Directive 92/50 of 18 June 1992, which relates to the co-ordination of procedures for the award of public service contracts.

The ECJ provided a twofold answer. Directive 77/187 aims to guarantee the continuity of employment relationships existing within a given economic entity, irrespective of any change in ownership; the fact that the activity concerned has been awarded to another operator by a body governed by public law is not significant. The Court considers it immaterial that the contract for the operation of bus routes was granted following a procedure for the award of public contracts conducted in accordance with Directive 92/50. This Directive does not exempt the contracting authorities and the service providers who offer their services for the contract in question from all laws and regulations applicable to activities covered in the social sphere or that of safety. The workings of competition are not hindered, as operators retain room for manoeuvre and must assess the costs involved in the various possible solutions, if the Directive imposes the maintenance of certain contracts.

This principle having been outlined, the Court considered it necessary to provide indications as to how the national judge should apply it in the case in point. In order for the Directive to apply, a transfer of activities must have taken place. The decisive criterion is whether or not the entity in question retains its identity, as indicated by the fact that its

operation is actually continued or resumed. The absence of any contractual link between the two companies, as is the case here, is simply one indication that a transfer may not have taken place. The Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking.

However, the transfer must relate to a stable economic entity, in other words, to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. The mere fact that the service provided by the old and the new contractors is similar does not justify the conclusion that there has been a transfer of an economic entity between the first and the second undertaking. In this instance there was no transfer of assets. Whilst this factor may not be significant for an activity based essentially on manpower, the same cannot be said for bus transport. Where assets (plant and equipment) contribute significantly to the performance of the activity, the fact that such a transfer has not taken place must weigh heavily in favour of considering that the activity has not preserved its identity.

An employer's obligation to inform the worker of conditions applicable to his contract or employment relationship: the W. Lange and G. Schünemann case

The development of new forms of work has led to a proliferation of types of employment relationship. In the face of this development, the Member States considered it necessary to adopt provisions aimed at formalising these employment relationships, so as to better protect employees against possible infringements of their rights and to create greater transparency on the labour market. It was thus necessary to establish at Community level the general requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship (Council of the European Communities, 1991). With this aim in view, the Council adopted Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Overtime was not

mentioned specifically in the scope of this Directive. The Court of Justice nevertheless considered in the following ruling that it was an essential element of the employment contract lying within the scope of the Directive and was subject to the obligation to provide information.

In the case in question, Mr Lange had been employed by Georg Schünemann since June 1998. Article 1 of his contract provided that the length of the working week was to be 40 hours. The contract gave no details concerning overtime. Having refused to work overtime to fulfil orders within time limits agreed with a customer, Mr Lange was dismissed. The company contends that the employee in question had agreed to work overtime in the event of sudden increases in workload. Mr Lange maintained for his part that he had agreed to work overtime only in emergencies. According to the Arbeitsgericht, it was necessary to establish the contents of the agreement reached in relation to overtime in order to determine whether Mr Lange had breached his obligations towards his employer.

The national court asked the ECJ whether under Article 2(2)(1) of the Directive the employer was duty-bound to notify the employee of a clause requiring the employee to work overtime whenever requested to do so by the employer. The national court also asked whether, where an essential element of the contract or employment relationship within the meaning of Article 2 of the Directive has not been mentioned in a written document delivered to the employee or has not been mentioned with sufficient precision, that element should be regarded as inapplicable. The third question related to what rules regarding proof of the existence and content of a contract or employment relationship are applicable where the employer has breached his obligation to provide information. Should the national court apply by analogy principles of national law under which the proper taking of evidence is deemed to have been obstructed, or does Article 6 of the Directive ([6]) preclude the national judge from applying those principles?

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[6] Article 6 stipulates that the Directive is without prejudice to national law and practice concerning the form of the contract or employment relationship, proof

The Court noted that Article 2(2) refers only to normal working hours and does not cover overtime. However, the obligation to provide the employee with information may stem from Article 2(1) which establishes the principle that the employer must notify the employee of the essential elements of the contract or employment relationship. Whether or not the employee is obliged to work overtime whenever requested to do so by the employer is one of these essential elements. This information may take the form of a reference to the relevant laws, regulations, administrative or statutory provisions and collective agreements (by analogy with Article 2(2)(1)). The ECJ nevertheless emphasised that no provision of the Directive required an essential element of the contract or employment relationship that has not been mentioned in a written document delivered to the employee, or has not been mentioned therein with sufficient precision, to be regarded as inapplicable. The Directive in effect leaves Member States competent to specify appropriate sanctions to be applied in such cases, as long as the employee is able to pursue his claims by judicial process.

As to rules on the proper taking of evidence, the ECJ recalls that Directive 91/533 does not require the national court to apply, or refrain from applying, principles of national law under which the proper taking of evidence is deemed to have been obstructed where a party to the proceedings has not complied with his legal obligations to provide information, where the employer is alleged to have breached the obligation to provide information set out in the Directive. The directive in effect allows Member States to apply the rules as to proof of the nature and existence of the contract and employment relationship as laid down in national law ([7]).

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as regards the existence and content of a contract or employment relationship, and the relevant procedural rules.

7 See also *BECTU* ruling on workers' rights to annual paid holidays, C-173/99, ruling of 26 June 2001.

Conclusion

The ECJ was thus highly productive in 2001. Smits-Peerbooms was undoubtedly the most significant case overall. However, the Court has not yet resolved all the questions raised in this case. For example, whether or not the reasoning put forward in Smits-Peerbooms also applies to hospital care within schemes based on reimbursement or to care in kind provided outside a hospital environment is still under discussion. It will therefore be interesting to follow the Court's deliberations in this area and especially useful to read the rulings which the Community's supreme legal body is due to make on two cases now before it: Müller Fauré and Van Riet. In the first case, an insured person of Dutch nationality deliberately sought dental care during her holiday in Germany because she was not satisfied with Dutch dentists. Reimbursement was refused by her sickness insurance fund because the treatment provided was not urgent. In the second case, Ms Van Riet attended a Belgian hospital to have an arthroscopy performed without having to endure the Dutch waiting lists. She only requested authorisation from her insurance fund on returning home. Authorisation was refused on the grounds that adequate and sufficient care could have been provided in the Netherlands and that there had been no medical necessity justifying the treatment received in Belgium ([8]).

In any event, health care is a very sensitive area of European social policy, within which ECJ case law will play an increasingly important role. An awareness of this sensitivity and of the importance of what is at stake in this area led the Laeken European Council to emphasise in its conclusions that particular attention should be paid to the impact of European integration on the Member States' health care systems (European Council 2001b: point 30).

The Khalil et al ruling is another landmark in 2001. The Commission's proposal dated 12 November 1997 on the extension of Regulation 1408/71/EEC to third country nationals (European Commission,

8 *Müller-Fauré and Van Riet*, C-385/99.

1997b) was an attempt to address the requirement for equal treatment with Community nationals for third country nationals legally residing in the Community. A debate took place in the Council as to the choice of legal basis for this extension. The Commission proposed the legal basis of Regulation 1408/71 itself, *i.e.* Articles 51 and 235, currently 42 and 308 of the EC Treaty. The Khalil ruling revealed the need for a re-examination of the legal bases envisaged. The Council stipulates measures pursuant to Article 63, paragraph 4, defining the rights of third country nationals residing legally in one Member State to stay in other Member States and the conditions under which they may do so. This would seem to constitute an adequate legal basis to allow for the co-ordination of social security systems in the Member States to apply to all third country nationals fulfilling the material conditions of Regulation 1408/71 and who are currently excluded due to nationality.

Thus the Employment and Social Affairs Council held on 3 December 2001 agreed that Article 63(4) of the EC Treaty could perhaps be used as the legal basis for such an extension. The Council also noted that the co-ordination applicable to third country nationals should grant them a range of uniform rights which should be as close as possible to those enjoyed by European Union citizens. This demonstrates, if there were any need to do so, the importance of the ECJ's role in the development of Community legislation ([9]).

[9] Employment and Social Policy Council, Council 14762/01 (Press 451), 3 December 2001.

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