OPINION OF ADVOCATE GENERAL
BOT
delivered on 13 January 2011 (1)

Case C-388/09

Joao Filipe da Silva Martins
v
Bank Betriebskrankenkasse – Pflegekasse

(Reference for a preliminary ruling from the Bundessozialgericht (Germany))

(Social security – Regulation (EEC) No 1408/71 – Sickness benefits – Former migrant worker who has acquired an entitlement, in the State of employment, to an allowance covering the risk of reliance on care under a compulsory insurance scheme – Return to the State of origin – Absence of cover against the risk of reliance on care in the State of origin – Possibility of continuing to be insured, on an optional basis, under the care insurance scheme in the former State of employment and of receiving care allowance in the State of origin)

1. This reference for a preliminary ruling concerns the interpretation of Articles 9(1), 15 and 28(1)(b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. (2)

2. The reference was made in the context of a dispute between Mr da Silva Martins, of Portuguese nationality, and Bank Betriebskrankenkasse – Pflegekasse (sickness fund – care fund, 'BBKK'), concerning the latter's refusal to allow Mr da Silva Martins to maintain his optional continued insurance under the German care insurance scheme and to pay him, as from the date of his definitive return to Portugal, the corresponding care allowance.

3. The reference invites the Court to rule on the question of maintaining such insurance when the insured person is now compulsorily insured under the Portuguese social security scheme but is not, under that insurance, covered against the risk of reliance on care in Portugal. It also invites the Court to rule once more on the question of the exportability of such a care allowance to a Member State other than the State where he is insured.

4. In this Opinion, I shall conclude that, in the light of the principles laid down in Articles 9(1) and 15(1) of Regulation No 1408/71, Mr da Silva Martins may, in my view, maintain his optional continued insurance under the German care insurance scheme even though, at the same time, he is also compulsorily insured under the Portuguese social security scheme, since there is, under the latter scheme, no cover against the risk of reliance on care. Furthermore, in the light of the judgment in *Molenaar* (3) and of Article 28(1)(b) of Regulation No 1408/71, I shall conclude that Mr da Silva Martins must be able to continue to receive, on the basis of his optional continued insurance under the German care insurance scheme, the care allowance

towards which he has made regular contributions since 1 January 1995.

I – European Union legal framework

A – *Support for elderly persons reliant on care*

5. As a consequence of improvements in health, social progress and a general increase in life expectancy, there is an increasing number of elderly persons who gradually lose autonomy and find themselves reliant on others to carry out essential everyday tasks (getting up, walking, dressing themselves, washing themselves, eating or even taking care of themselves). To date, support for those reliant on care has generally been provided informally by family members.

6. Regulation No 1408/71 contains no specific rules applicable to the coordination of benefits covering the risk of reliance on care. In 1971, support for persons reliant on care was not a topic for discussion and, to my knowledge, none of the social security schemes of the Member States provided cover against that risk. Since the procedure for the amendment of that regulation requires unanimity within the Council of the European Union, the latter has not expressly taken into account the introduction, in certain Member States, of those new forms of social benefits, which do not fall within the classical branches of social security contained in that regulation. Faced with that omission, the European Parliament feared that, in practice, those benefits would not be exportable to the State of residence of a worker. (4) Similarly, the European Commission, in its communication of 12 March 1997 entitled 'Modernising and improving social protection in the European Union', (5) pointed out that the co-ordination system provided for by Regulation No 1408/71 was in danger of 'becoming outdated and losing touch with a number of developments' and noted that new types of benefit, such as those for elderly persons reliant on care, could not be easily accommodated within the legal concepts contained in that regulation, which is based on the classical branches of social security. (6)

7. Several questions having been referred to it concerning the exportability of German care allowance in *Molenaar* and of Austrian care allowance in *Jauch*, (7) the Court extended the material scope of Regulation No 1408/71 to benefits covering the risk of reliance on care, by classifying them as sickness benefits within the meaning of Article 4(1)(a) of that regulation. According to the Court, such benefits 'are essentially intended to supplement the sickness insurance benefits to which they are, moreover, linked at the organisational level, in order to improve the state of health and the quality of life of persons reliant on care'. (8)

8. Only with the entry into force, on 1 May 2010, of Regulation (EC) No 883/2004 (9) would this issue finally form the subject-matter of a specific provision, reflecting not only the Court's case-law, but also all the specific features of support in relation to the risk of reliance on care. However, that regulation is not applicable to the present case and the question referred to the Court of Justice by the referring court must therefore be examined solely in the light of the provisions of Regulation No 1408/71.

B – *Relevant provisions of Regulation No 1408/71*

9. Regulation No 1408/71 was adopted under Article 42 EC, in accordance with which the Council is to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers … payment of benefits to persons resident in the territories of Member States'.

10. As stated in the second and fourth recitals in the preamble to Regulation No 1408/71, its objective is to ensure free movement of employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation. To that end, as is clear from the fifth, sixth and tenth recitals in the preamble to that regulation, it upholds the principle of equality of treatment of workers under the various national legislations and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. In order to avoid overlapping of national legislation applicable and

the complications which could result therefrom, the eighth recital in the preamble to Regulation No 1408/71 states that the provisions of that regulation seek to ensure that the persons concerned should, in principle, be subject to the social security scheme of only one single Member State.

11. The general provisions of that regulation are contained in Title I, in Articles 1 to 12.

12. Article 2(1) of the regulation provides it is to apply ‘to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States’. In the present case, it is common ground that Mr da Silva Martins falls within the personal scope of Regulation No 1408/71, since the Court has repeatedly held that the concept of ‘worker’, within the meaning of Article 2(1) of that regulation, also covers retired workers. (10)

13. Article 4(1)(a) provides that the regulation is to apply to all legislation concerning branches of social security relating to sickness and maternity benefits. In the present case, it is also common ground that the benefits provided under the German care insurance scheme constitute ‘sickness benefits’ within the meaning of that provision and, more specifically, sickness insurance ‘cash benefits’ covered by, inter alia, Article 28(1)(b) of Regulation No 1408/71. (11)

14. With regard to admission to voluntary or optional continued insurance, Article 9(1) of that regulation is worded as follows:

‘The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons.’

15. Article 12 of the regulation prohibits conferring or maintaining the right to several benefits of the same kind for one and the same period of compulsory insurance, subject to certain exceptions which are not relevant to the dispute in the main proceedings.

16. The provisions of Title II of Regulation No 1408/71 then determine the legislation applicable to workers moving within the Community. Those provisions are set out Articles 13 to 17 of that regulation.

17. In accordance with Article 13(1), persons to whom that regulation applies are to be subject to the legislation of a single Member State only. As regards persons to whom the legislation of a Member State ceases to be applicable, they are to be subject to the legislation of the Member State in whose territory they reside, in accordance with Article 13(2)(f).

18. Article 15 of Regulation No 1408/71, entitled ‘Rules concerning voluntary insurance or optional continued insurance’, is worded as follows:

‘1. Articles 13 to 14d shall not apply to voluntary insurance or to optional continued insurance unless, in respect of one of the branches referred to in Article 4, there exists in any Member State only a voluntary scheme of insurance.

2. Where application of the legislations of two or more Member States entails overlapping of insurance:

– under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme;

– under two or more voluntary or optional continued insurance schemes, the person

concerned may join only the voluntary or optional continued insurance scheme for which he has opted.

…'

19. The special provisions relating to sickness benefits, which include benefits covering the risk of reliance on care, are set out in Title III, in Articles 18 to 36 of Regulation No 1408/71.

20. As regards pensioners who are entitled to draw pensions under the legislation of several Member States, the rules of coordination covering sickness benefits are set out in Articles 27 and 28 of that regulation. The provisions contain a 'conflict rule' which makes it possible to determine, with respect to pensioners entitled to draw two retirement pensions for example, the institution responsible for the provision of benefits and the applicable legislation.

21. Article 27 of that regulation covers cases in which there is a right to benefits in the Member State of residence. It is worded as follows:

'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides, and who is entitled to benefits under the legislation of the latter Member State, taking account where appropriate of the provisions of Article 18 and Annex VI, shall, with the members of his family, receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State.'

22. Article 28(1)(b) of Regulation No 1408/71 covers, for its part, cases in which there is no right to cash benefits in the Member State of residence. That provision is worded as follows:

'A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. The benefits shall be provided under the following conditions:

…

(b) cash benefits shall, where appropriate, be provided by the competent institution as determined by the rules of paragraph 2, in accordance with the legislation which it administers. However, upon agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.'

II – The German legislation

A – *Care allowance*

23. In Germany, care insurance was introduced, from 1 January 1995, by the Law on care insurance (Pflegeversicherungsgesetz), which comprises Book XI of the Code of Social Security (Sozialgesetzbuch, 'SGB XI').

24. That insurance is designed to cover the costs entailed if insured persons should become reliant on care, that is to say, if a permanent need were to arise for those insured to resort, in large measure, to assistance from other persons in the performance of their daily routine (bodily hygiene, nutrition, moving around, housework, and so on). That scheme provides for various types of assistance in favour of persons who are reliant on care: in particular, care-related

benefits in kind (‘Pflegesachleistung’), governed by Paragraph 36 of the SGB XI, which the applicant received prior to his return to Portugal, and a care allowance for care services paid by the patient personally (‘Pflegegeld’, ‘the care allowance’), governed by Paragraph 37 of the SGB XI (12), which was paid to Mr da Silva Martins from 1 January 2002.

25. The care allowance allows persons who are reliant on care to benefit from a monthly care allowance when they arrange for themselves, independently, the care and assistance services that they need. The beneficiary is free to use that allowance as he sees fit and therefore also to pay for services which are not covered under the care insurance or which are provided by service providers which are not among those with a service agreement.

26. Reliance on care is assessed by the medical service of the sickness insurance scheme, which, on the basis of four indicators (personal hygiene, eating, mobility and domestic help), has created three categories of reliance on care. The amount of the care allowance varies according to the degree of reliance on care. At the time of the facts of the dispute in the main proceedings, that amount was EUR 205 per month for category I, that is to say for persons needing assistance at least once per day for personal hygiene, eating and mobility.

27. Any person insured, either voluntarily or compulsorily, against sickness must contribute to the care insurance scheme. (13) As the German Government stated at the hearing, entitlement to the care allowance is subject to a minimum period of insurance which was previously 5 years and is now two years. Once that condition has been met, the amount of the allowance does not vary according to the period of contributions.

B – *Conditions governing the maintenance of optional continued insurance*

28. Paragraph 26 of the SGB XI, which is reproduced in the observations of the German Government, provides as follows:

‘(1) Persons who are no longer subject to the insurance obligation under Paragraph 20 or Paragraph 21 and were insured for at least 24 months within the last five years before ceasing to be so subject or for 12 months immediately before so ceasing may, on application, continue to be insured under the social care insurance scheme, where no insurance obligation under Paragraph 23(1) commences for them. The application must within three months of the end of affiliation … to the competent care insurance fund.

(2) Persons who are longer subject to the insurance obligation because their permanent or habitual residence has been transferred abroad may, on application, continue to be insured.’

C – *Conditions governing the maintenance of entitlement to payment of the allowance*

29. Paragraph 34(1)(1) of the SGB XI (14) provides, for its part, that entitlement to benefits is suspended:

– so long as an insured person remains abroad. In the case of a temporary stay abroad of up to six weeks in a calendar year, the care allowance must be maintained in accordance with Paragraph 37 or a proportional amount in accordance with Paragraph 38 of the SGB XI;

– where the insured person receives, directly on the basis of Paragraph 35 of the Federal law on welfare (Bundesversorgungsgesetz) or under legislation which provides for the application by analogy of that federal law, compensation benefits linked to reliance on care which are paid by the statutory accident insurance scheme or from public funds under a compulsory accident insurance or assistance scheme. The same applies where similar benefits are paid from abroad or by an intergovernmental or supranational institution.

III – Facts

30. Mr da Silva Martins, now aged 75, was employed in Portugal before establishing his residence and working in Germany. On that basis, he made contributions to the German care insurance scheme when it was introduced in 1 January 1995.

31. Since September 1996 Mr da Silva Martins has received a retirement pension amounting to approximately EUR 700. As the recipient of such a pension, he was covered by the compulsory care insurance scheme of the Krankenversicherung der Rentner (Pensioners' Sickness Insurance Fund). (15) Since May 2000 Mr da Silva Martins has also received a retirement pension paid by the Portuguese authorities amounting to approximately EUR 150.

32. From August 2001 BBKK granted Mr da Silva Martins category I care-related benefits in kind. Then, on account of a stay in Portugal from December 2001, which was initially described as temporary, BBKK granted him care allowance at the amount of EUR 205 from 1 January 2002 and paid him it until 31 December 2002.

33. When BBKK learnt that Mr da Silva Martins had notified the authorities of his definitive departure from Germany on 31 July 2002, BBKK, by a decision of 5 February 2003, terminated his insurance as from 31 July 2002 and, by a decision of 12 February 2003, ordered him to repay the care allowance paid from August to December 2002, amounting to EUR 1 025. By a decision of 4 February 2004, BBKK dismissed as unfounded the administrative appeal lodged by Mr da Silva Martins.

34. The Sozialgericht Frankfurt am Main (Social Court, Frankfurt am Main) allowed the appeal brought against that decision. In annulling the contested decisions, it held that, on the basis of optional continued insurance, Mr da Silva Martins was still insured by BBKK, which therefore had to continue to grant him the care allowance after 1 January 2003. By judgment of 13 September 2007, the Hessisches Landessozialgericht (Higher Social Court for the *Land* of Hesse) dismissed the appeal brought by BBKK, in so far as that appeal related to repayment of the care allowance. However, that court also amended the judgment by the Sozialgericht Frankfurt am Main and dismissed Mr da Silva Martins' action on the ground that insurance on an optional continued basis was ruled out under Paragraph 26(1) of the SGB XI, because the necessary application had not been submitted within the prescribed period.

35. Mr da Silva Martins then brought an appeal on a point of law before the Bundessozialgericht (Federal Social Court), claiming infringement of Articles 18 EC, 39 EC and 42 EC and infringement of Articles 19, 27 and 28 of Regulation No 1408/71. He claims that care insurance benefits should be exportable to another Member State, in particular where the insurance cover for those benefits has been financed by personal contributions and there are no comparable benefits in the Member State of origin, namely the Portuguese Republic.

IV – The question referred

36. The appeal on a point of law concerns the maintenance of Mr da Silva Martins' optional continued insurance under the German care insurance scheme from 1 August 2002 and the grant of the care allowance after 1 January 2003. (16)

37. The referring court emphasises that under Paragraph 26 of the SGB XI, Mr da Silva Martins should be entitled to maintain his optional continued insurance under the German care insurance scheme after 31 July 2002, although his compulsory insurance with the German sickness insurance fund is ruled out given his definitive departure from Germany. Nevertheless, the referring court notes that the rules relating to conflicts of laws laid down by Regulation No 1408/71, and in particular Article 15(2) of that regulation, seem to preclude the maintenance of such insurance. Furthermore, it states that, in accordance with Paragraph 34(1)(1) of the SGB XI, entitlement to the care allowance is suspended so long as a recipient remains permanently abroad.

38. The referring court therefore considers that the solution of this dispute depends on the interpretation of Articles 39 EC and 42 EC and Articles 27 and/or 28 of Regulation No 1408/71.

39. If this case must be examined in the light of Article 28 of that regulation, the referring court asks whether that provision should not therefore be interpreted as allowing the applicant to receive the German care allowance in Portugal. It points out that the Portuguese social security system provides no care allowances. In addition, it considers that Mr da Silva Martins acquired an entitlement to the German care allowance because of the contributions which he paid from 1995. Finally, it points out that the judgments of the Court in *Molenaar* and *Jauch* preclude entitlement to that allowance from being subject, under the legislation of a Member State, to the condition that the person reliant on care must be resident in the territory of that Member State.

40. However, if this case must be examined in the light of Article 27 of Regulation No 1408/71, the referring court considers that this presupposes taking the view that it is sufficient that Mr da Silva Martins receives general sickness insurance benefits in Portugal. The referring court then asks whether, as BBKK claims, that provision must be interpreted as precluding Mr da Silva Martins from receiving the German care allowance, since he can claim only the benefits provided for by the Portuguese legislation. In the referring court's view, that approach is excessive in that it would deprive a migrant worker of the rights which he has funded through his own contributions, which would be contrary to the purpose of Article 42 EC. Moreover, it would introduce a difference in treatment between a pensioner entitled to draw a single retirement pension, who would be able to export the German care allowance, and a pensioner entitled to draw two retirement pensions, such as Mr da Silva Martins.

41. The Bundessozialgericht decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is it compatible with the primary and/or secondary law of the European Community on freedom of movement and social security for migrant workers (in particular Articles 39 EC and 42 EC and Articles 27 and 28 of Regulation (EEC) No 1408/71) for a former worker who receives pensions from both his former State of employment and his home State and acquired an entitlement to care allowance in his former State of employment because he is reliant on care to forfeit the entitlement to care allowance after returning to his home State?'

42. Written and oral observations were submitted by the parties to the main proceedings, but also by the Czech, German, Portuguese and United Kingdom Governments and the European Commission.

V – My analysis

43. The dispute in the main proceedings concerns the continuance of entitlement to a care allowance acquired by a former migrant worker insured under the German care insurance scheme on a compulsory basis.

44. In essence, the question is whether Articles 39 EC and 42 EC on freedom of movement for workers and Articles 27 and 28 of Regulation No 1408/71 must be interpreted as precluding the continuance of that entitlement in the context of optional continued insurance under the German care insurance scheme, since the person concerned, who has transferred his residence to Portugal and receives a retirement pension paid by that State, is now compulsorily insured under the Portuguese social security scheme.

45. The answer to that question depends, first, on whether the Portuguese social security scheme actually provides cover for situations of reliance on care such as that of Mr da Silva Martins.

46. It follows from some of the information provided to the Court that pensioners, invalids and survivors who are reliant on care may receive in Portugal a supplement to their pension, according to the degree of their reliance on care. My examination of the Portuguese legislation reveals, in fact, that Decree-Law No 265/99 (17) introduced, as from 1 August 1999, the supplement for reliance on care ('complemento por dependência'). In accordance with Articles 1(2) and 2 of Decree-Law No 265/99, that supplement is a cash benefit, which can be granted

1(2) and 2 of Decree-Law No [illegible], that supplement is a cash benefit, which can be granted to pensioners entitled to an old-age, invalidity or survivor's pension who are reliant on care.

47. Reliance on care is assessed by a medical board, which meets in the context of the social security system for assessing disability. Under Article 7(1)(a) of that decree-law, the amount of the supplement for reliance on care is determined according to one of the two degrees of reliance on care within which the persons concerned may fall and is a percentage of the amount of the social pension under the non-contributory scheme, which is set by statute. The first degree covers persons who cannot independently perform essential everyday actions. The amount of the supplement for reliance on care is set at 50% of the amount of the social pension. The second degree covers persons who, in addition to being reliant on care in the first degree, are bedridden or have severe dementia. The amount of the supplement for reliance on care is then set at 90% of the amount of the social pension. That supplement is paid monthly and, in accordance with Article 8 of that decree-law, the competent authorities provide an additional payment in July and December. In order to receive that supplement, it seems there is neither a qualifying period nor an age requirement. (18)

48. Nevertheless, in its order for reference, the national court states that Mr da Silva Martins does not receive any care allowance in Portugal. It points out that no provision is made for such a benefit in the social security system, since assistance for persons who are reliant on care is, at most, provided in the form of benefits in kind in the context of social measures or in the context of the sickness insurance scheme (in-patient accommodation). In its written observations, the Portuguese Government did not refer to those rules. It states that there are no specific benefits, either in cash or in kind, covering the risk of reliance on care in Portugal, which it confirmed in response to a question addressed to it by the Court at the hearing.

49. Accordingly, I do not know the nature and scope of cover against the risk of reliance on care in Portugal. Moreover, I do not know whether Mr da Silva Martins is, for the purposes of the Portuguese legislation, eligible for the grant of such benefits. Finally, nothing in the case-file indicates whether the Mr da Silva Martins has applied to the Portuguese social security scheme for the supplement for reliance on care or receives benefits in kind such as those briefly described by the referring court.

50. In those circumstances and in so far as the national court alone has jurisdiction to assess the facts in the case before it, (19) I shall analyse the question referred working on the assumption relied on by the Bundessozialgericht and the Portuguese Government that Mr da Silva Martins is not, at present, covered against the risk of reliance on care under the Portuguese social security scheme.

51. That assumption allows me, first of all, to determine which of the two Member States, the Federal Republic of Germany or the Portuguese Republic, is, in principle, responsible for covering Mr da Silva Martins' risk of reliance on care.

52. To that end and as the referring court points out, it is necessary to refer to the rules of coordination set out in Articles 27 and 28 of Regulation No 1408/71. Those provisions specifically cover the situation of individuals who receive retirement pensions payable under the legislation of several States. They make it possible to determine which of those two Member States is responsible for paying sickness benefits.

53. In this case, I think that that examination should be carried out in the light of the rules set out in Article 28(1)(b) of Regulation No 1408/71, contrary to the submissions made by BBKK and the Czech and German Governments.

54. In the light of the information at my disposal, I am of the view that Article 27 of Regulation No 1408/71 is not applicable to this case. That provision expressly refers to the situation in which a pensioner who is drawing pensions under the legislation of two Member States, of which one is that of the Member State in whose territory he resides, is entitled to sickness benefits under the legislation of the latter Member State. However, although Mr da Silva Martins is actually 'entitled to sickness benefits' in Portugal, in that he is covered against the traditional

is actually entitled to sickness benefits in Portugal, in that he is covered against the traditional risks of the sickness insurance branch, the fact remains that, according to the information at my disposal, he is not covered against the specific risk of reliance on care, since that scheme seems not to provide for such cover. Accordingly, it seems to me difficult to conclude he has, for the purposes of Article 27 of Regulation No 1408/71, a right to the benefit in question in the Member State of residence.

55. In contrast, Article 28(1)(b) of that regulation covers the situation in which there is no entitlement to benefits in the State of residence. Under that provision, where a pensioner who is entitled to draw pensions under the legislation of two or more Member States resides in a Member State in which he is not entitled to benefits, he none the less receives cash benefits provided by one of the Member States responsible for the payment of his pension, in so far as he would be entitled to them under the legislation of one of those States. In this case, it is common ground that Mr da Silva Martins meets the conditions required by the German legislation for receipt of the care allowance, since BBKK has been paying him that benefit since December 2001. To that extent and in accordance with the coordination rules laid down in Article 28(1)(b) of that regulation, I believe that Mr da Silva Martins is therefore, in principle, entitled to receive that allowance in Portugal, since he does not receive such benefits in that State.

56. The principle having been established, it is now appropriate to consider whether, as the national court argues, the rules on conflicts of laws laid down in Article 15(2) of Regulation No 1408/71 nonetheless preclude Mr da Silva Martins from maintaining his German care insurance on an optional continued basis, since he is compulsorily insured under the Portuguese social security scheme. (20)

57. I think not, given the principles set out in Articles 9(1) and 15(1) of that regulation.

58. It is true that that regulation, according to the eighth recital in its preamble, seeks to ensure that the persons concerned are, in principle, subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and, in particular, the complications which could result therefrom. That principle is expressed in Article 13(1) of Regulation No 1408/71 which provides that a person to whom that legislation applies is to be subject to the legislation of a single Member State only. (21)

59. Nevertheless, Articles 9(1) and 15(1) of that regulation provide for an exception as regards admission to voluntary or optional continued insurance.

60. Article 9 of Regulation No 1408/71 forms part of Title I, entitled ‘General provisions’. It is itself entitled ‘Admission to voluntary or optional continued insurance’. That article applies to the present dispute in so far as it covers every type of insurance incorporating a voluntary element, (22) such as the optional continued insurance provided for in Paragraph 26(2) of the SGB XI.

61. Article 9(1) of Regulation No 1408/71 provides that the provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State are not to apply to persons resident in the territory of another Member State who, at some time in their working life, were subject to the legislation of the first State as employed or as self-employed persons. I understand, from reading that provision, that a worker such as Mr da Silva Martins, who has been subject in the course of his employment to the legislation of a Member State may therefore apply to be insured on an optional continued basis in that State, although he is now subject to the legislation of another Member State.

62. That principle is, in my opinion, confirmed by the provisions of Article 15(1) of Regulation No 1408/71. That provision is contained in Title II, entitled ‘Determination of the legislation applicable’. It is entitled ‘Rules concerning voluntary insurance or optional continued insurance’.

63. Under that provision, ‘[Article] 13 [which lays down the principle that a worker is to be

63. Under that provision, '[Article] 13 [which lays down the principle that a worker is to be subject to the legislation of a single Member State only] shall not apply to voluntary insurance or to optional continued insurance', subject to an exception which is, in my view, not relevant to the dispute in the main proceedings. From a reading of Article 15(1) of Regulation No 1408/71, I understand that a worker, while being compulsorily subject to the social security legislation of his State of employment or residence, may be subject to the legislation of another Member State with respect to his voluntary or optional continued insurance.

64. It is true that the national court refers, in its order for reference, to Article 15(2) of that regulation. I would point out that that provision provides that, where application of the legislations of two Member States entails overlapping of insurance under a compulsory insurance scheme and a voluntary or optional continued insurance scheme, the person concerned must be subject exclusively to the compulsory insurance scheme. According to the referring court, that provision might therefore prevent the person concerned from continuing his optional insurance under the German care insurance scheme.

65. I do not share that fear, since I am of the opinion that Article 15(2) of Regulation No 1408/71 does not apply in this case. I think that that provision, read in the light of the eighth recital in the preamble to and Article 12 of that regulation, seeks to ensure that an individual is not, in respect of one and the same risk, required to contribute twice, to two separate social security schemes, to one on a compulsory basis and to the other on a voluntary basis, and cannot, by that means, receive overlapping benefits of the same nature. However, in this case, should it be found that Mr da Silva Martins is actually not insured against the risk of reliance on care in the context of his insurance under the Portuguese compulsory insurance scheme, there is no likelihood of encountering such difficulties. His optional insurance under the German care insurance scheme merely provides him with additional benefits against a risk which, over the same period, is not covered in Portugal.

66. Accordingly, I consider that, in accordance with the principles laid down in Articles 9(1) and 15(1) of Regulation No 1408/71, Mr da Silva Martins may, in circumstances such as those of the main proceedings, maintain his optional insurance under the German care insurance scheme while he is also insured on a compulsory basis under the Portuguese social security scheme during the same period.

67. As a result of that insurance, in respect of which the minimum contribution was EUR 16.61 in 2010, (23) the care allowance should accordingly be paid to the person concerned. Nevertheless, the referring court asks whether it is possible to export such an allowance to Portugal, in so far as Paragraph 34(1)(1) of the SGB XI suspends payment of that allowance so long as the recipient remains permanently abroad.

68. The German Government submits that, even if he meets the formal requirements to be insured on an optional basis under Paragraph 26(2) of the SGB XI, Mr da Silva Martins cannot obtain that allowance in Portugal. That provision allows only the continuance of insurance under the social security scheme, thereby enabling persons who are temporarily resident abroad to fulfil the condition relating to the period of insurance imposed by Paragraph 33(2) of the SGB XI. Also, in answer to a question addressed to it by the Court at the hearing, the German Government stated that the applicability of Paragraph 26(2) of the SGB XI is limited by the principle of territoriality, since the Federal Republic of Germany is the only State where such benefits could be acquired. The German Government then referred to Paragraph 34(1)(1) of the SGB XI, which expressly provides that entitlement to benefits is suspended for as long as the insured person resides abroad.

69. However, that provision must be read in light of *Molenaar* and the interpretation which the Court then adopted of Article 28(1)(b) of Regulation No 1408/71. (24)

70. That case concerned the situation of Mr and Mrs Molenaar, who were employed in Germany but resident in France. Both were voluntarily insured against sickness in Germany and were, like Mr da Silva Martins, required to take out German care insurance from 1 January 1995.

However, the competent social security fund had informed them that they were not entitled to care insurance benefits while they resided in France, in accordance with Paragraph 34(1)(1) of the SGB XI.

71. In its judgment, the Court held that such a provision, which prohibits cash payment of care insurance benefits in the Member State in which the migrant worker resides, infringes, in the case of pensioners covered by the legislation of a Member State other than that in which they reside, Article 28(1)(b) of Regulation No 1408/71.

72. As I have pointed out, that provision provides that a person who receives retirement pensions payable under the legislation of two or more Member States and who meets the conditions imposed by the legislation of one of those States for entitlement to cash benefits must be paid those benefits in the Member State in which he resides, even if the legislation of the latter State does not provide for benefits of that type. In that case, the cash benefits are provided by the institution of the competent State under the conditions provided for by the legislation of the latter State. Those benefits may also be paid by the institution of the place of residence, on behalf of and in accordance with the legislation of the competent State.

73. As follows from *Molenaar*, payment of the German care allowance therefore cannot be made subject to the condition that the insured person resides in the territory of the Member State where he is insured. That allowance must be exportable to the recipient's Member State of residence. In so far as Mr da Silva Martins has been receiving the care allowance provided for in Paragraph 37 of the SGB XI since 1 January 2002, there is therefore nothing to preclude his continuing to receive such an allowance after his definitive return to Portugal. In that regard, such exportability does not seem to raise any particular practical difficulties, since the German authorities allowed the payment of such an allowance during his temporary stay in Portugal from 1 January 2002 to 31 December 2002.

74. In the light of all those considerations, I consider that Mr da Silva Martins may therefore maintain his voluntary insurance under the German care insurance scheme pursuant to Articles 9(1) and 15(1) of Regulation No 1408/71 and receive the care allowance paid by that insurance scheme in accordance with Article 28(1)(b) of that regulation.

75. That conclusion is necessary, in my view, having regard to the objectives that the European Union legislature seeks to pursue in that matter.

76. I would point out that the provisions of Regulation No 1408/71 must be interpreted in the light of the objectives pursued by Articles 39 EC and 42 EC. It is settled case-law that the exercise by migrant workers of their right to freedom of movement requires that they should not be placed at a disadvantage as compared with those who pursue all their activities in one Member State. (25) Regulation No 1408/71 thus aims not to penalise those migrant workers who extend their activities beyond the territory of a single Member State and seeks to ensure the maintenance of rights and benefits acquired or being acquired. According to the Court, that means that the exercise of the right to freedom of movement must not simply result in the payment of social security contributions on which there is no return. (26) That entails that migrant workers must not have the amount of social security benefits guaranteed them by the legislation of a Member State reduced or be deprived of those benefits, especially where those advantages represent the counterpart of contributions which they have paid. (27)

77. With regard to elderly persons reliant on care, I think that the pursuit of those objectives is of very particular importance. Indeed, as now enshrined in Article 25 of the Charter of Fundamental Rights of the European Union, the elderly have the right to lead a life of dignity and independence. I am of the view that, for those elderly persons who lose their autonomy, respect for that independence should take the form of as wide a choice of lifestyles and care provision as possible. (28) If many elderly persons decide to return to their State of origin in order to be near to and benefit from the support of their family, those persons must not, quite apart from their disability and sometimes their precarious situation, be hindered in their movement by the loss of the rights which they were legitimately able to acquire during their professional activity.

loss of the rights which they were legitimately able to acquire during their professional activity.

78. In the light of those objectives, I therefore cannot accept the argument that Mr da Silva Martins can neither maintain his insurance under the German care insurance scheme nor obtain the care allowance in Portugal.

79. First, it would mean that the person concerned had paid social security contributions on which there is no return. Mr da Silva Martins contributed to the German care insurance scheme from 1 January 1995 before he was able to receive, from August 2001, initial cover for reliance on care (in the form of a benefit in kind), since entitlement to the benefits was originally subject to the completion of a minimum period of insurance of five years.

80. Secondly, it would place Mr da Silva Martins at a disadvantage as compared with a worker who, while also reliant on care, has not exercised his freedom of movement. Indeed, it is clear from the order for reference that an individual who has worked for his entire working life in Germany and who receives only a single German retirement pension continues to be insured under the German care insurance scheme on a compulsory basis and receives the relevant care allowance even though he has left the territory. (29) The referring court states that he is treated as if he were still resident in the territory. Yet, since Mr da Silva Martins has exercised a professional activity, however minimal, in Portugal, he is entitled neither to that benefit nor to any another similar benefit in Portugal and thus finds himself deprived of essential care.

81. It is obvious that such consequences could induce if not compel him to remain in Germany, which would constitute an obstacle to his right to freedom of movement, thereby making him yet slightly more reliant on care.

82. In the light of all the foregoing considerations, I consider that Articles 39 EC and 42 EC and Articles 9(1) and 15(1) of Regulation No 1408/71 must be interpreted as meaning that a former migrant worker who is compulsorily insured under the social security scheme of his Member State of residence may, where that insurance does not cover the risk of reliance on care, maintain during the same period his optional continued insurance under the care insurance scheme organised by his former State of employment. In accordance with *Molenaar* and Article 28(1)(b) of that regulation, the care allowance paid on the basis of that optional continued insurance must be provided to the person concerned in his Member State of residence.

VI – Conclusion

83. In the light of the foregoing considerations, I propose that the Court give the following reply to the question referred for a preliminary ruling by the Bundessozialgericht:

1. Articles 39 EC and 42 EC and Articles 9(1) and 15(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, must be interpreted as meaning that a former migrant worker who is compulsorily insured under the social security scheme of his Member State of residence may, where that insurance does not cover the risk of reliance on care, maintain during the same period his optional continued insurance under the care insurance scheme organised by his former State of employment.

2. In accordance with the judgment in Case C-160/96 *Molenaar* and Article 28(1)(b) of Regulation No 1408/71, as amended by Regulation No 1386/2001, the care allowance paid on the basis of that optional continued insurance must be provided to the person concerned in his Member State of residence.

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1 – Original language: French.

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2 – OJ, English Special Edition 1971(II), p. 416, as amended by Regulation (EC) No 1386/2001 of the

2 – OJ, English Special Edition 1971(II), p. 416, as amended by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) (‘Regulation No 1408/71’).

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3 – C-160/96 [1998] ECR I-843.

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4 – See ‘Frontier Workers in the European Union’, May 1997, available at the following Internet address: http://www.europarl.europa.eu/workingpapers/soci/default_en.htm.

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5 – Communication available at the following Internet address: http://ec.europa.eu/employment_social/social_protection/docs/com102_en.pdf.

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6 – Point 2.5. In the absence of specific rules, certain Member States therefore attempted to remedy those shortcomings in the context of bilateral conventions laying down rules of priority in cases of overlapping entitlement to care benefits. See, in particular, the Convention on social security between the French Republic and the Grand Duchy of Luxembourg, which entered into force on 1 September 2008. Care insurance forms the subject-matter of two provisions, one concerning recognition of the condition of reliance on care, making arrangements for appropriate cooperation between authorities and institutions (Article 6), and the other concerning laying down rules of priority in cases of overlapping entitlement to care benefits (Article 7).

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7 – Case C-215/99 [2001] ECR I-1901.

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8 – See *Molenaar*, paragraphs 24 and 25, and *Jauch*, paragraph 28. That case-law was most recently confirmed in Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 40.

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9 – Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrected version in OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43).

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10 – Case C-194/96 *Kulzer* [1998] ECR I-895, paragraphs 24 and 26 and the case-law cited.

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11 – *Molenaar*, paragraph 36, subsequently confirmed in *Jauch* and *von Chamier-Glisczinski*.

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12 – There are other types of assistance, such as combined benefits (‘Kombinationsleistung’), governed by Paragraph 38 of the SGB XI, and full in-patient care in a care home (‘vollstationäre Pflege’), governed by Paragraph 43 of the SGB XI.

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13 – That contribution, at a rate of 1.95% as at 1 January 2010, is borne equally by the person insured and his employer.

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14 – Paragraph 1(34) of the Law of 26 May 1994 (BGBl. I, p. 1014) in the version in force from 1 October 2009.

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15 – The referring court refers to Paragraph 20(1)(11) of the SGB XI in conjunction with Paragraph 5(1)(11) of Book V of the Code of Social Security.

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16 – The referring court considers that termination of Mr da Silva Martins’ compulsory insurance under the German care insurance scheme is not subject to challenge in the light of the first sentence of Article 12(1) and Article 13(2)(f) of Regulation No 1408/71, since Mr da Silva Martins definitively transferred his residence to Portugal.

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17 – Decree-Law of 14 July 1999 (*Diário da República* I, Series A, No 162 of 14 July 1999, p. 4397), as amended by Decree-Law No 309-A/2000 of 30 November 2000 (*Diário da República* I, Series A, No

277 of 30 November 2000, p. 6906-2, 'Decree-Law No 265/99'). See, also, the Internet site of the Portuguese Social Security (Segurança Social) (http://www2.seg-social.pt/), in particular the section devoted to the supplement for reliance on care, and the Internet site of MISSOC (European Commission – Employment, Social Affairs and Equal Opportunities), which is the Mutual Information System on Social Protection established by the European Union and which has comprehensive and updated information on the national social protection systems.

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18 – By way of information, on 1 January 2010 the amount of the social pension under the non-contributory scheme was set at EUR 189.52. The amount of the supplement for reliance on care paid to a person qualifying under the first degree of reliance on care would therefore be, according to my calculations, EUR 94.77 and that granted to a person qualifying under the second degree of reliance on care, EUR 170.58. Under Articles 20 and 14 of Order No 1514/2002 of the Ministry of Social Security and Labour of 28 October 2002, the amount of the social pension under the non-contributory scheme was set at EUR 143.80 for 2003. See the internet site http://www.isp.pt/winlib/cgi/winlibimg.exe?key=&doc=12704&img=1246. Unless I have made an error, on 1 January 2003 the supplement for reliance on care thus amounted to EUR 71.90 and to EUR 129.42 for an individual qualifying under the first and second degree of reliance on care, respectively.

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19 – Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-0000, paragraph 18 and the case-law cited.

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20 – It is clear from the order for reference that Paragraph 26 of the SGB XI offers individuals who have ceased all occupational activity in Germany and who reside in another Member State the opportunity to remain insured on an optional continued basis for the branches for which they cease to be compulsorily insured.

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21 – See Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraph 16 and the case-law cited.

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22 – Case 368/87 *Hartmann Troiani* [1989] ECR 1333, paragraph 12 and the case-law cited.

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23 – Information provided by the German Government in paragraph 13 of its written observations.

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24 – Paragraphs 39 and 44.

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25 – Case C-3/08 *Leyman* [2009] ECR I-9085, paragraph 45 and the case-law cited.

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26 – See, in that regard, Case C-16/09 *Schwemmer* [2010] ECR I-0000, in which the Court expressly stated that the 'legislation of the Union on the co-ordination of national social security legislation, taking account in particular of the underlying objectives, cannot, save in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker … of the enjoyment of benefits granted simply by virtue of the legislation of a Member State' (paragraph 58 and the case-law cited). See also Case C-345/09 *van Delft and Others* [2010] ECR I-0000, paragraph 101 and the case-law cited.

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27 – See *Bosmann*, paragraph 29 and the case-law cited.

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28 – See, in that regard, Kessler, F., 'Les normes du Conseil de l'Europe et la législation française sur la dépendance', *Le vieillissement comme processus*, *Revue française des Affaires sociales*, special issue of October 1997, p. 215, 222.

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29 – That situation is quite comparable to that in the case giving rise to the judgment in *Jauch*. In that case, Mr Jauch, a German national who has always resided in Germany, had spent his entire working life in Austria. As a consequence, he received a retirement pension paid by the Austrian authorities and received no German pension. In that judgment, the Court held that Mr Jauch, who was reliant on care, should receive Austrian care allowance in Germany.