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Social devolution and the impact of European Union Law. A critical analysis

Abstract

This article examines to what extent EU law impacts on the relationship between the sub-national entities of a Member State if these sub-national entities have regulatory powers in the field of social protection. More specifically, it sets out to explore whether the criteria relied upon in EU law for determining the scope of the circles of solidarity in the relationship between the Member States should also be applied in the context of the relations between the sub-national entities of regionalized Member States. It appears that EU law on the free movement of persons influences these matters, more specifically the European social security coordination system that determines to which national circle of solidarity a person migrating between Member States belongs. Indeed, in its judgment in the Flemish care insurance case the Court of Justice of the European Union (CJEU) also applied these rules to some categories of persons in a cross-border situation between different regions of a single Member State. This article critically analyses this case law, more specifically in terms of respect for the regionalized identity of socially devolved Member States. It concludes that this kind of respect requires that in the context of the relations between sub-national entities of a regionalized Member State the domestic constitutional rules determining the boundaries of circles of solidarity between these entities, should in all circumstances have preference over the EU rules applicable between Member States.

Keywords

Social devolution, European Union law, free movement of persons, purely internal situation, national identity

Introduction

Several Member States with a regionalized structure have introduced a residence-based distribution of competences between sub-national entities in this field. In Member States like Belgium, Germany, Spain, Austria and the United Kingdom, regions have gained the power to introduce elements of social protection and have created social benefits, in most cases limited to persons living on the territory of the relevant region. Furthermore, in both regionalized and non-regionalized Member States, local authorities too have introduced some social benefits, usually limited to residents of their territory. Hence, internal rules for the distribution of powers commonly delimit regional and local circles of solidarity on the basis of a place-of-residence criterion. At first sight, EU law does not seem to impact on Member States' internal rules regarding the distribution of social powers between their regions and the definition of internal circles of solidarity. Still, in this article, we shall see that EU law on the free movement of persons may indeed influence these matters.

The starting point of the analysis is that the EU allows its Member States great freedom in developing their own social protection systems. This is, first and foremost, a competence of the Member States themselves. However, as soon as we consider cross-border situations involving two or several Member States we enter the realm of EU law. The European legislative framework provides a number of solutions for such situations. Such cross-border situations may

present themselves not only in nationally organized systems of social protection, but also in social protection schemes organized by sub-national entities of a Member State.

In part 1 we will briefly highlight the position of regional and local entities under EU law. It would appear that while EU law in the first place only recognizes Member States as a whole, it should also respect regional and local autonomy in the Member States as part of their national identity. In part 2 we shall consider the solutions that the European legal framework provides for cross-border situations between Member States. These solutions are laid down expressly in the well-known EU social security coordination. This part of EU law delineates the boundaries of circles of solidarity between the Member States in order to clarify, on behalf of EU citizens in cross-border situations, which Member State's social protection schemes apply.

In part 3 we will examine how these European rules affect systems of social devolution developed in Member States, particularly in relation to the execution of regional (and local) competences in the field of social protection. The key questions in this respect concern the extent to which Member States, in their internal legal distribution and execution of regional and local competences in social protection, must take account of the European rules, and the extent to which such internal arrangements may deviate from the legal provisions agreed upon at EU level. It will analyse the judgment of the CJEU in the famous Flemish care insurance case and critically assess its outcome, more specifically in terms of respect for the regionalized identity of socially devolved Member States. We will draw some conclusions in part 4.

1. The position of regional and local entities under EU law

The original EEC Treaty largely ignored the regional issue. There was a so-called 'regional blindness': only Member States had legal personality and anything below the Member States was simply a part of the State.¹ There was no reference in the founding Treaties to regions or local authorities. However, more recently there has been an increasing sensibility to the particular status of regions within the constitutional order of the Member States.

The most important step in the recognition of regions in the EU legal order was the 2007 Treaty of Lisbon. The new Article 4(2) TEU introduced a duty for the EU to respect national identities, including regional and local autonomy. This new provision clearly indicates that regional and local self-government is protected as part of a Member State's national identity. The principle of subsidiarity was newly formulated in Article 5 TEU which now says that the EU may only act insofar as the objectives of the proposed action '*cannot be sufficiently achieved by the Member State, either at central level or at regional and local level*'. Protocol 2 on subsidiarity requires the European Commission when proposing legislative action to take into account '*the regional and local dimension*' of the action envisaged, including any burden falling upon regional or local authorities. In addition, in numerous provisions of the TFEU references were made to the regional reality, such as in Article 13 (as regards the protection of animal rights); Articles 46 and 91 TFEU (as regards disparities in employment in the various regions); Article 167 TFEU (as regards cultural heritage); and Article 191 TFEU (as regards environmental protection).

It is clear that a new awareness of regional diversity is emerging. The EU, through its institutions, is expected and even obliged to take into account how a Member State organizes itself constitutionally. This follows from the obligation to respect the constitutional identity of the Member States. As a consequence, if the EU were to treat a complex, decentralized Member State as though it were a unitary State, it would be infringing the principle of institutional autonomy and respect for the national identity of the Member States as required by Article 4 TEU.² In the light of that Treaty provision the application of EU law may not deprive regional and local governments of their regulatory autonomy.

But it also means that regions are bound by the Treaties and that EU law may impose obligations on regional authorities. Within their sphere of competence regions are required to respect and implement EU law. Each Member State is free to allocate powers internally and to implement directives by means of measures adopted at regional level, provided that this allocation of powers enables a correct application and implementation of EU law. It is indeed settled case law that the internal constitutional arrangements of a Member State do not provide valid grounds to justify a breach of EU law.³

2.The European strand of social federalism: social security coordination

The starting point of EU law and policy is that the Member States are entirely free to organize their internal social protection systems as they see fit. As far as social protection is concerned, the European Treaties assign hardly any harmonizing powers to the European institutions.

These starting points do not prevent EU law from indirectly affecting national legislation in the field of social protection. This impact is primarily due to the principle of the free movement of persons. Most tangible of all in this respect is the well-known European social security coordination. Such coordination is necessary with a view to ensuring the right to free movement of persons. The right of European citizens to move and reside freely within the territory of the Member States, to seek employment, to work, to pursue self-employed activities or to provide services in another Member State is guaranteed under the European Treaties themselves.⁴ The purpose is to coordinate the social security systems of the Member States in such a way as to eliminate any negative consequences for the migrating individual that may arise from differences between the various systems.

To this end, the European legislature has worked out an extensive coordination system, which is currently laid down in Regulation 883/2004⁵ and Regulation 987/2009.⁶ However, it is not the intention of this coordination system to harmonize or approximate in any way the systems of the Member States.⁷ This implies, among other things, that (labour) migration between the Member States may give rise to more extensive or less extensive social protection depending on the system that is in place in the Member State where the individual concerned is working or residing.⁸

One of the most important tasks of the coordination system is to determine the legislation applicable in cross-border situations. The relevant rules are included in Title II of Regulation 883/2004. These provisions are intended not only to prevent the simultaneous application of several national legislative systems and the complications that might ensue from this, but also to ensure that a person in a cross-border situation between Member States is not left without social security coverage because there is no legislation applicable to him/her.⁹ The person in question will be subject to the legislation of a single Member State only, and that legislation is to be determined in accordance with the provisions of Regulation 883/2004.¹⁰ The conflict rules laid down by Regulation 883/2004 are mandatory for the Member States and the latter do not have the option to determine to what extent their own legislation or that of another Member State is applicable.¹¹

As far as the determination of the applicable legislation is concerned, the governing principle is that of the State of employment (*lex loci laboris*). It means that a person employed in the territory of one Member State shall be subject to the social security legislation of that State, even if he/she resides in the territory of another Member State or if his/her employer is registered in another Member State.¹² The choice of this principle is inspired by, among other things, the legal context in which the European social security coordination is applied: the

principle's aim is to ensure the free movement of workers. Such freedom of movement entails a prohibition of discrimination based on nationality by the Member State where the migrating worker is employed (Article 45(2) TFEU). Hence, the State-of-employment principle is an expression of the premise that a migrating worker is entitled to the same rights in the State of employment as workers of that Member State.¹³ In the Flemish care insurance judgment (see further below), the CJEU appears to confirm that the *lex loci laboris* principle, which constitutes the basis for European social security coordination, is already part of the Treaty provisions relating to the freedom of movement of employed and self-employed persons.¹⁴

Nonetheless, the fact that the State-of-employment principle is the starting point for economically active persons does not prevent the application of the social security system of the State of residence in a number of situations, particularly if those persons are simultaneously active in more than one Member State. The provisions of Regulation 883/2004 in their turn refer to the State of residence, provided that occupational activities are pursued in that country. In a number of other cases, it is the registered office or the place of business of the employing undertaking that determines to which country's social security legislation the person in question is subject.¹⁵

Moreover, as a rule, the State-of-residence principle applies to those who are not (or no longer) economically active.¹⁶ The category of economically inactive persons is understood to include pensioners.¹⁷ Unemployed frontier workers are likewise subject to the legislation of the State of residence.¹⁸

Furthermore, in situations beyond the scope of these specific European coordination rules (or other rules of secondary EU law), the CJEU has always sought the most appropriate basis for delimiting the circles of solidarity of the Member States. In such instances, the Court commonly refers directly to the Treaty provisions on free movement of persons. In some cases, particularly those relating to economically active individuals, the CJEU has granted rights pursuant to the legislation of the State of employment (or former State of employment).¹⁹ In other cases, particularly those concerning economically inactive persons, it has granted rights in accordance with the legislation of the State of residence.²⁰

It appears from the above analysis that European legislation and case law have tried to resolve the matter of determining to which circle of solidarity a person migrating within the European Union belongs. The answer to this question depends on the circumstances. In the case of economically active persons, the starting point is the State-of-employment principle, whereas in the case of those who are not (or no longer) economically active, it is the State-of-residence principle. However, these starting points are qualified in both legislation and case law: in some situations involving economically active persons, the legislation of the State of residence is applicable, while in specific cases involving economically inactive persons, the legislation applicable is that of the former State of employment. Invariably, the European legislature and judges appear to have tried to establish with which Member State the person concerned is linked most closely from a socio-economic perspective.

Even though social protection is an almost exclusive competence of the Member States, one discerns a form of European 'social federalism' in this body of EU law, in the sense that it is for the European lawmaker to determine to which circle of solidarity persons migrating within the EU belong. In setting the boundaries of these circles, however, Europe struggles with the question of which criteria to apply, and particularly with the choice between the State-of-employment and the State-of-residence principle. At present, it relies on a complex and intricate combination of these two principles, each of which is, moreover, applied in a qualified way and with room for exceptions.

3.The impact of European ‘social federalism’ on social devolution in the Member States

In the Member States, rights and obligations in respect of social protection are usually laid down at the federal level. Still, this does not mean that sub-national entities (even at the local level) cannot have powers in the field of social policy. In the domestic context, social devolution concerns, first, the question of what policy-making levels are empowered to take certain initiatives in the field of social protection. Once the federal, regional and local powers in a Member State have been fixed, the question arises as to how to define the boundaries of the circles of solidarity of the comprising entities. Which criteria should be applied in determining to which sub-national entity’s circle of solidarity an individual belongs? We leave aside how the various regionalized Member States of the European Union have answered this question. This is discussed in the other contributions of this special issue. Instead, in this article we focus exclusively on whether EU law affects how Member States delimit their circles of solidarity internally. Are regionalized Member States left entirely free to lay down in internal legislation the personal and territorial scope of application of social protection schemes developed by these States’ sub-national entities? Or is the European system of defining circles of solidarity a model that can or even must be adopted by regionalized Member States in the organization of relations between their sub-national entities?

3.1.Can EU law intervene in a regionalized Member State’s internal distribution of competences in the field of social protection? The Flemish care insurance case

The delineation of the circles of solidarity of the various sub-national entities comprising a Member State would initially appear to be a matter which is purely internal to the Member State in question and to its constitutional order. However, ever since the CJEU’s judgment in the Flemish care insurance case, this is no longer a foregone conclusion.²¹ The Flemish care insurance scheme was intended to cover the costs of non-medical assistance and services for persons who were unable to perform daily tasks necessary for their basic needs or other related activities.²² Only persons residing in the territory of Flanders were (compulsorily) affiliated to this scheme. They were obliged to pay an annual contribution and were entitled to a monthly benefit, provided they fulfilled the conditions of being in need of assistance. Affiliation to the Flemish care insurance scheme was optional for persons residing in Brussels. It was a typical example of a residence-based regional social security benefit, limited to persons residing on the territory of a specific region within a regionalized Member State.

However, this residence condition was in conflict with the abovementioned requirements of the EU social security coordination, more in particular with the State-of-employment principle. At the request of the European Commission, the Flemish legislature amended the decree in order to bring it in line with this EU principle.²³ The applicability of the State-of-employment principle to economically active persons entailed that, in a European cross-border context, the Flemish care insurance scheme must also comply with the principle. More specifically, employees or self-employed persons who lived in Flanders but worked in another Member State could not be compelled to join the Flemish care insurance scheme. Moreover, employees and self-employed persons who lived in a Member State other than Belgium but worked in Flanders (or Brussels) could not be excluded from the Flemish care insurance scheme on the basis of the fact that they did not reside in Flanders. In addition, the principle of the export of benefits implied that persons working in Flanders but residing in another Member State were entitled to

this benefit, so that the residence requirement laid down in the Flemish legislation was discarded.

As a result, persons working in Flanders but residing in another Member State fell within the ambit of the Flemish care insurance scheme. However, persons working in Flanders but living in another region of Belgium, in particular Wallonia, remained excluded. The Flemish legislature assumed the latter situation to be a purely internal one, to which EU law did not apply. For that reason, the amendments to the Care Insurance Decree did not address cross-border situations between Flanders/Brussels and another Community in Belgium (i.e., in practice, Wallonia). Yet the amendments were challenged before the Belgian Constitutional Court as being discriminatory against persons residing in Wallonia.

In these proceedings, the Belgian Constitutional Court referred a number of questions to the CJEU for a preliminary ruling. The Constitutional Court wished to learn, in particular, whether the exclusion from the Flemish care insurance scheme of persons working in Flanders or Brussels but living in Wallonia was contrary to the provisions of Regulation 1408/71²⁴ and to the Treaty provisions regarding the free movement of persons.²⁵ The case was essentially about the impact of EU law on the delimitation of circles of solidarity in the context of the relationship between sub-national entities within a given Member State.

In its judgment, the CJEU first reiterated that EU law cannot be applied to purely internal situations.²⁶ At the same time, however, it defined the notion of a 'purely internal situation' strictly. Indeed, the CJEU did not rule out that certain EU citizens living in Wallonia but working in Flanders (or Brussels) nonetheless fell within the ambit of EU law.²⁷

It was in this context that the CJEU considered the residence requirement in the Care Insurance Decree. It held that the requirement presented a potential obstacle to the free movement between the Member States of employed and self-employed persons. In the Court's view, migrant workers pursuing (or contemplating the pursuit of) employment or self-employment in Flanders or Brussels might be dissuaded from making use of their freedom of movement. Moving from their Member State of origin to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed. In other words, the Court argued that the fact that workers find themselves in a situation in which they suffer either the loss of eligibility for care insurance or a limitation of the place to which they transfer their residence is, at the very least, capable of impeding the exercise of the right to free movement conferred by EU law.²⁸

Moreover, the Court found this impediment to be unjustified. It rejected the Flemish government's argument that the non-applicability of the Flemish care insurance scheme to residents of Wallonia was due to the requirements inherent in the distribution of powers within the Belgian federal structure and, particularly, to the fact that the Flemish Community had no power in relation to care insurance vis-à-vis persons residing in the territory of other linguistic communities of Belgium.²⁹ The position of the CJEU implies that Member States must ensure that their internal legal distribution of powers in relation to social security does not impede the exercise of the right to free movement between Member States. Thus, in the Court's opinion, the principle of the free movement of persons within the European internal market takes precedence over the internal constitutional organization of a Member State. The general nature of the Court's position entails that all regional and local authorities which are empowered to confer social benefits are precluded from imposing a requirement of residence in their region/municipality upon migrant EU workers or self-employed persons (and their families) who wish to work there, unless there is an adequate justification for that prerequisite.

The above also implies that, as far as the relationship between sub-national entities of a Member State is concerned, a distinction is to be made between two categories of European citizens: those with recourse to EU law on grounds of their having exercised their right to free movement as workers or self-employed persons, and those without recourse to EU law. This gives rise to

what we might refer to as ‘reverse discrimination’.³⁰ As a consequence, the majority of those living in Wallonia but working in Flanders (or Brussels) are unable to invoke EU law to claim eligibility for the Flemish care insurance. The Court expressly rejected the contention that these persons could resort to the principle of citizenship of the Union set out in Article 17 EC (now Article 20 TFEU), which includes, in particular, the right of every citizen of the Union to move and reside freely within the territory of the Member States (Article 18 EC, now Article 21 TFEU). More specifically, the Court held that Union citizenship is not intended to extend the material scope of the Treaty to internal situations that have no link with EU law.³¹

The CJEU nevertheless remarked that its interpretation of the provisions of EU law might be of use to the Belgian Constitutional Court, even as far as purely internal situations are concerned.³² The CJEU appeared to be implicitly referring to the general principle of non-discrimination laid down in Articles 10 and 11 of the Belgian Constitution. Yet the Belgian Constitutional Court did not accept this suggestion in its ensuing ruling of 21 January 2009.³³ The Constitutional Court did acknowledge that the ambit of the Flemish Care Insurance Decree should, pursuant to EU law, be extended to persons living in Wallonia but working in Flanders (or Brussels) and who were either nationals of another Member State or Belgian nationals who had exercised their right to move freely within the EU. In this context, the Constitutional Court also took explicit account of the fact that only a relatively small group of individuals would benefit from this extension.³⁴

However, as regards persons who were unable to invoke EU law, the Constitutional Court reaffirmed the exclusively territorial distribution of powers between Belgium’s various Communities. It concluded that the Flemish Care Insurance Decree was not applicable to Belgians living in Wallonia and working in Flanders (or Brussels) who had never exercised their right to free movement within the EU. According to the Constitutional Court, the fact that these residents were consequently not eligible for care insurance, even if they worked in Flanders (or Brussels), was entirely due to the fact that no such insurance was provided by the other Belgian Communities, nor by the Belgian Federal Government.³⁵

3.2. Critical Reflections

The CJEU’s assertion that EU law is, in principle, applicable to nationals of a Member State who work (or reside) in another Member State and to Member State nationals who have exercised their right to free movement is, in itself, not surprising. Such individuals must indeed have the possibility to invoke the prohibition of discrimination on grounds of nationality as laid down in various European legal instruments.³⁶ Moreover, unjustified restrictions on the free movement of employed, self-employed and economically inactive persons cannot be tolerated under the rules of EU law.³⁷ However, it is questionable whether the CJEU’s ruling is satisfactory when those principles are applied in the context of the relationship between sub-national entities of a single federal Member State. In what follows, we shall make some critical observations regarding the Court’s judgment.

3.2.1. Legal uncertainty over who precisely has recourse to EU Law

The application of the European place-of-employment principle to relations between sub-national entities of a Member State has created considerable legal uncertainty. To begin with, the CJEU failed to specify adequately which migrant employees and self-employed persons should be considered to be impeded in the exercise of their right to free movement by the Flemish care insurance scheme. Did the Court merely intend to refer to those persons who move from another Member State to Belgium, in order to live in Wallonia and work in Flanders (or

Brussels)? Indeed, the CJEU seemed to point to a disadvantage suffered ‘*as a consequence of*’ the exercise of the right of free movement between Member States. This would entail that persons who had previously moved from a Member State other than Belgium to Wallonia as employees or self-employed persons, and who only at a later stage took up work in Flanders (or Brussels) while living in Wallonia, would have no recourse to the Flemish care insurance judgment. After all, the latter category of persons’ non-eligibility for the Flemish care insurance scheme is attributable to their economic migration between two sub-national entities of a single Member State rather than to the exercise of their right to free movement from one Member State to another.

In addition, there is a lack of clarity regarding the categories of individuals who have exercised their right to free movement, not as employed or self-employed workers but as persons, for example as students. Does it suffice for this kind of EU citizen to have resided in another Member State in the past in order to be able to rely on the CJEU’s judgment on the Flemish care insurance scheme?³⁸

3.2.2 Failure to see the internal distribution of powers in the field of social protection as an aspect of domestic social security legislation

By applying the State-of-employment principle to persons who have exercised their right to free movement within the EU but find themselves in a cross-border situation between sub-national entities of a single Member State, EU law interferes with the internal organization of social devolution within that Member State. A residence-based distribution of competence between sub-national entities exists in several regionalized Member States. Likewise, the jurisdiction of local authorities is usually limited to residents of their territory. Hence, internal rules concerning the distribution of powers commonly delimit regional and local circles of solidarity on the basis of a residence criterion. In consequence of the CJEU’s case law, this internal, residence-based delimitation system must be repealed in relation to a limited category of persons. As far as those persons are concerned, the system is substituted by the framework designed for the delineation of circles of solidarity between different EU Member States, which is predominantly workplace-centred.

Although the Court – understandably – wanted to ensure the application of the principles of the free movement of persons as laid down by EU law, it did not need to go that far. As explained above, Regulation 883/2004 contains rules determining which Member State’s social security legislation applies in cross-border situations. The legislation which is applicable according to that regulation encompasses all provisions of the Member States’ internal law in the field of social security. In previous judgments, the CJEU repeatedly held that all national laws directly connected with and sufficiently relevant to the legislation on the branches of social security to which that regulation applies, were envisioned.³⁹

In our view, the constitutional distribution of powers in the field of social security and social protection between the sub-national entities of a regionalized Member State is also sufficiently and directly linked with the social security legislation of that State. The applicability of the federal and regional social security schemes is – to a considerable degree – dependent on whether these schemes were established in accordance with the internal constitutional system of power division. If the European coordination rules determine that a given Member State’s legislation applies, then that Member State’s constitutional rules regarding the internal distribution of powers in the field of social security and social protection should apply as well. As a result, a migrant worker who is employed in a regionalized Member State should be subject to that Member State’s constitutional provisions regarding the distribution of powers in respect of social security and social protection schemes.

Entirely in line with the rationale behind the European system of social security coordination, the CJEU could have held that the State of employment’s internal distribution of powers

regarding social security legislation is applicable to all migrant employees and self-employed persons who live and work in the State concerned. Any ensuing disadvantages⁴⁰ could then have been interpreted as a consequence of the characteristics inherent in the social security system of the Member State in question, more specifically of its regionalized structure. In this regard, the Court could have relied on its earlier case law, according to which migration between Member States may result in better or in worse social protection, depending on the system prevailing in the Member State where the individual is employed.⁴¹

3.2.3. The (non-)applicability of the place-of-employment principle to purely internal situations and the issue of reverse discrimination

The application of the EU rules concerning the demarcation of circles of solidarity to relations between a Member State's sub-national entities gives rise to 'reverse discrimination'. Pursuant to the Flemish care insurance scheme judgment, the European State-of-employment principle is held to apply to a certain group of persons who find themselves in a cross-border situation between sub-national entities of a single Member State. Yet, persons who find themselves in a very similar situation but have no recourse to EU law are governed by national criteria, which may be different (e.g., the place-of-residence principle). This state of affairs may create instances of so-called 'reverse discrimination', whereby EU law grants more rights to persons who can rely on EU law than the rights enjoyed by persons who find themselves in a purely internal situation and are, therefore, merely subject to the relevant domestic legislation.

In the Flemish care insurance case, the government of the French Community and the Advocate General suggested that reverse discrimination is irreconcilable with Union citizenship, a status enjoyed by all Member States' nationals. They regarded this form of 'discrimination' as a consequence of the very operation of EU law itself and, hence, as the responsibility of that legal order.⁴² However, the CJEU pointed out that it is settled case law that the Treaty rules governing freedom of movement for persons – and the measures adopted to implement them – cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State.⁴³ Hence, a difference in treatment is maintained between those who are able to invoke EU law in situations concerning the relationship between sub-national entities of a given regionalized Member State, and those who are not.

Still, the issue of reverse discrimination has given rise to considerable legal debate.⁴⁴ Amongst other things, it has been pointed out that the requirement of a cross-border element to trigger the applicability of EU law is somewhat artificial. It is apparent from the case law of the CJEU in relation to freedom of movement of persons that such a cross-border element is quite easily found. Some authors have suggested that EU citizenship and the rights associated with it belong to all nationals of the Member States, including those who have not migrated within the EU. Hence, sedentary EU citizens should be able to invoke the prohibition of discrimination on grounds of nationality as laid down in Article 18 TFEU in order to claim, from the Member State of which they are nationals and where they reside, the same rights as those granted to EU migrants on the basis of EU law.⁴⁵ They believe that a solution to the problem of reverse discrimination lies in the application of the same rules, in particular the rules on freedom of movement of persons, to relations between the Member States and relations between sub-national entities of regionalized Member States. According to this view, the rules governing free movement of persons should apply not only to movements between Member States, but also to movements between the sub-national entities of those Member States.⁴⁶ Hence, it is argued, the EU rules on freedom of movement of persons should equally apply between sub-national entities of a Member State, particularly in matters where those sub-national entities possess regulatory powers. Therefore, those sub-national entities should, in their mutual relations in matters which are governed by EU internal market law, effectively be treated as EU

Member States. Consequently, they should be bound by the specific EU laws applicable to cross-border situations between such Member States.

3.2.4. Treating sub-national entities as Member States in the application of the freedom of movement for persons disregards the Member States' singular nature

We submit that this position disregards the singular nature of devolved Member States. Extending the rights stemming from EU free movement law to intra-state situations would extend the scope of EU law beyond the powers conferred to the EU and therefore be against the principle of conferral of competence (Article 5 TEU). Indeed, the so-called reverse discrimination is not a matter of EU law but of national law. It would be up to the national level, policy makers and the judiciary, to formulate answers to this issue, taking into account the national political and legal context. They may lift the reverse discrimination by guaranteeing persons in an intra-State cross-border situation the same rights as persons in an inter-State cross-border situation, but in our view this is a choice to be made at national level and not an obligation following from EU law.

The mandatory application of EU internal market law to relations between a Member State's sub-national entities would render the federal structure of that Member State meaningless. By denying that national and European criteria may diverge, one threatens to make any regionalization superfluous and insubstantial. The treatment of these sub-national entities as if they were Member States would preclude any internal legal delimitation of the personal and territorial scope of application of social protection schemes established by sub-national entities that differs from the EU rules governing the relationship between Member States.

Lastly, the assumption that sub-national entities of a single Member State should, in their mutual relations, be regarded as fully-fledged Member States appears to be contrary to the EU Treaty. The new Article 4(2) TEU proclaims that the '*Union shall respect the equality of Member States before the Treaty as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*'.⁴⁷ Hence, the respect for national constitutional identity, including its regional and local governments, should guide policy makers as well as judges, including the Court of Justice. So, the devolved structure of a Member State should be taken account of by the Court of Justice when interpreting the concepts of 'restrictions to the free movement of persons' and of 'purely internal situations'. It would mean that a situation where a migrant person finds him/herself in a cross-border situation only between two sub-entities of the same Member State, should be considered as being a purely internal situation to which EU law on the free movement of person does not apply.⁴⁸

4. Conclusion

This article started with the following question: To what extent does EU law impact on the relationship between the sub-national entities of a Member State if these sub-national entities have regulatory powers in the field of social protection? More specifically, we set out to explore whether the criteria relied upon in EU law for determining the scope of the circles of solidarity in the relations between the Member States should also be applied in the context of relations between the sub-national entities of regionalized Member States.

The judgment of the CJEU in the Flemish care insurance case answers this question in the affirmative, but only for the limited group of people who, in view of their migratory history, are able to invoke EU law. For the large majority of persons who find themselves in a cross-border situation between a Member State's sub-national entities, by contrast, only internal

legislation applies. However, this does mean that any territorial and personal delimitation of the circles of solidarity by a sub-national entity of a Member State is in part governed by rules of EU law and is, therefore, no longer a matter to be determined by domestic constitutional law alone.

This case law has created considerable legal uncertainty, and the ensuing reverse discrimination has been met with incomprehension. It remains an open question whether the European rules for delimiting circles of solidarity between Member States in situations involving migrant EU citizens, and which constitute a form of European social federalism, should be applied in their entirety to relationships between the sub-national entities of a single Member State. Although this would resolve both the legal uncertainty and the reverse discrimination problem, we remain unconvinced.

It would be legally more consistent to resolve this unsatisfactory situation by applying, in the context of relations between sub-national entities of a regionalized Member State, the domestic constitutional rules governing the distribution of powers to all categories of persons, including EU migrants.

The alternative proposal that the European rules for determining circles of solidarity should equally apply to persons who find themselves in a cross-border situation between a regionalized Member State's sub-national entities on the other hand threatens to prejudice the often delicate and precarious political agreements underlying the structure of such States. According to the latter 'solution', the sub-national entities of a regionalized Member State should be treated as if they themselves were Member States, which ultimately compromises the federal nature of the State to which those sub-national entities belong.

This is clearly not to say that the European model of social federalism, which has developed detailed and intricate criteria for determining circles of solidarity in cross-border situations, cannot serve as a source of inspiration for the delimitation of circles of solidarity in cross-border situations between sub-national entities of a single Member State. We do feel, however, that there is no legal reason to make the solutions that have been worked out at EU level compulsory for these internal issues. What is more, such an obligation could be regarded as improper interference with the constitutional relations established within regionalized Member States.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Endnotes

1. See for an overview of evolution of the role of regions in EU law: Joxerramon Bengoetxea, 'Autonomous Constitutional Regions in a Federal Europe' in Elke Cloots and others (eds), *Federalism in the European Union* (Hart Publishing 2012) 235-239.
2. J Bengoetxea, 'Autonomous Constitutional Regions in a Federal Europe' in Elke Cloots and others (eds), *Federalism in the European Union* (Hart Publishing 2012) 241-242.
3. Case C-212/06 [2008] *Government of the French Community and Walloon Government v Flemish Government* ECR I-1683, para. 58. For more details on the role of regions in the EU legal order see eg Joxerramon Bengoetxea, 'Autonomous Constitutional Regions in a Federal Europe' in Elke Cloots and others (eds), *Federalism in the European Union* (Hart Publishing 2012) and Koen Lenaerts and Nathan Cambien, 'Regions and the European Courts: Giving Shape to the Regional Dimensions of Member States' (2010) 35 *European Law Review* 609.
4. Articles 21, 45, 49, 56 TFEU.
5. Regulation (EC) No 883/2004 of the European Parliament and Council of 29 April 2004 on the coordination of the social security systems [2004] OJ L200/1 (hereinafter Regulation

883/2004). For a more detailed analysis of this European social security coordination see: Maximilian Fuchs and Rob Cornelissen (eds), *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009* (Hart Publishing 2015) and Frans Pennings, *Introduction to European Social Security Law* (Intersentia 2015).

6. Regulation (EC) No 987/2009 European Parliament and Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems [2009] OJ L284/1.

7. See eg Case C-340/94 *de Jaeck v Staatssecretaris van Financiën* [1997] ECR I-461, para 18; Case C-493/04 *Piatkowski v Inspecteur Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I-2369, paras 19-20; Case C-208/07 *von Chamier-Glisczinski v Deutsche Angestellten-Krnakenkasse* [2009] ECR I-6095, para 84.

8. See eg: Joined Cases C-393 and C-394/99 *Inasti v Hervein and Hervillier and v Lorthiois and Comptexbel SA* [2002] ECR I-2829, paras 50-51; Case C-493/04 *Piatkowski v Inspecteur Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I- 2369, para 34; Case C-208/07 *von Chamier-Glisczinski v Deutsche Angestellten-Krnakenkasse* [2009] ECR I-6095, para 85.

9. See eg Case C-275/96 *Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-3419, para 28; Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883, para 20; Case C-548/11 *Mulders v Rijksdienst voor Pensioenen* [2013] Digital Reports, para 39.

10. Regulation 883/2004, Art 11(1).

11. Case C 345/09 *van Delft and others v College voor Zorgverzekeringen* [2010] OJ C346/17, paras 51-52; Case C-89/16 *Szoja v Sociálna poisťovňa* [2017] OJ C293/6, para 42.

12. Regulation 883/2004, Art 11 (3)(a).

13. The relevance of the principle of equal treatment to the rules governing the determination of the applicable legislation was underlined by the CJEU in, among other judgments: Case C-493/04 *Piatkowski v Inspecteur Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I-2369, para. 19; Case C-103/06 *Derouin v Urssaf* [2008] OJ C128/4 , para. 19. This was very recently explicitly confirmed by the CJEU with regard to the *lex loci laboris* principle in Case C-527/16 *Alpenrind* [2018] OJ C399/4, para. 98.

14. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] OJ C128/4, para 48.

15. Regulation 883/2004, Art 13.

16. *Ibid* Art 11(3)(e).

17. *Ibid* Art 11(2).

18. *Ibid* Art 11(3)(c).

19. Case C-35/97 *Commission v France* [1998] ECR I-5325.

20. Case C-184/99 *Grzelczyk v CPAS d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-456/02 *Trojani v CPAS Bruxelles* [2004] ECR I-7573. However, in the case of benefits with characteristics of social assistance, the Court recognized, in a number of judgments, that the host country where the migrant citizen is residing may ascertain whether there is a real link between the claimant and this country or whether this person has the right to legally reside in the host Member State. See eg Case C-138/02 *Collins* [2004] ECR I-2703; Case C-333/13 *Dano* [2015] OJ C16/4; Case C-67/14 *Alimanovic* [2015] Digital Reports; Case C-308/14 *Commission v United Kingdom* [2016] OJ C305/4. For an analysis of this case law see: Herwig Verschueren 'The right to reside and to social benefits for economically inactive EU migrants: how to balance freedom of movement and solidarity?' in Heidi Mercenier and others (eds.), *La libre circulation sous pression. Régulation et dérégulation des mobilités dans l'Union européenne* (Bruylant 2018).

21. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] OJ C128/4. For a more detailed discussion of this judgment, see: Camille

Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under EU law: All for Ulysses, Nothing for Penelope?’ (2009) 34 *European Law Review* 433; Peter Van Elsuwege and Stanislas Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande’ (2008) 44 *Cahiers de droit européen* 655; Herwig Verschueren, ‘La régionalisation de la sécurité sociale en Belgique à la lumière de l’arrêt de la Cour de Justice européenne portant sur l’assurance soins flamande’ (2008) 50 *Revue belge de sécurité sociale* 173

22. Decree of the Flemish Community of 30 March 1999 concerning the organization of the care insurance scheme.

23. This amendment was made by the Decree of 30 April 2004.

24. Regulation 1408/71 is the predecessor of Regulation 883/2004.

25. Belgian Constitutional Court, No 51/2006, 19 April 2006.

26. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] OJ C128/4, para. 38.

27. *Ibid* paras 37–38.

28. *Ibid* para. 48.

29. *Ibid* paras 57–58.

30. On the issue of reverse discrimination, see further below.

31. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] OJ C128/4, para. 39.

32. *Ibid* para. 40.

33. Belgian Constitutional Court, No 11/2009, 21 January 2009. For an analysis of this ruling, see Thomas Vandamme, ‘Annotation of Government of the French Community and Walloon Government v Flemish Government’ (2009) 46 *Common Market Law Review* 287; Peter Van Elsuwege and Stanislas Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande’ (2008) 44 *Cahiers de droit européen* 655.

34. See in particular paras B.10.1 and B.102 of the judgment.

35. *Ibid* para. B.16.

36. See, among others, Arts 18 and 45 TFEU.

37. On non-discriminatory obstacles to the freedom of movement of workers, see, eg, Case C-415/93 *Bosman* [1995] ECR I-4921, Case C-109/04 *Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-2421.

38. For other examples of legal uncertainties created by the CJEU’s judgment, see Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under EU law: All for Ulysses, Nothing for Penelope?’ (2009) 34 *European Law Review* 433, 445-446; Peter Van Elsuwege and Stanislas Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande’ (2008) 44 *Cahiers de droit européen* 655, 667; Herwig Verschueren, ‘La régionalisation de la sécurité sociale en Belgique à la lumière de l’arrêt de la Cour de Justice européenne portant sur l’assurance soins flamande’ (2008) 50 *Revue belge de sécurité sociale* 173, 213-215.

39. Case C-327/92 *Rheinhold & Mahla v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1995] ECR I-1223, para. 15; Case C-34/98 *Commission v France* [2000] ECR I-995, para. 35; Case C-169/98 *Commission v France* [2000] ECR I-1049, para. 33. In the *Commission v France* cases, the Court applied the rules concerning the determination of the applicable legislation to legislation that was classified as tax legislation under internal law.

40. In the Flemish care insurance case, non-entitlement to the Flemish scheme due to residence in one of Belgium’s other Communities.

41. See eg Case C-493/04 *Piatkowski v Inspecteur Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I-2369, para 34; Case C-208/07 *von Chamier-Glisczinski v Deutsche Angestellten-Krnenkasse* [2009] ECR I-6095, para 85; Case C-388/09 *da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* [2011] ECR I-5737, para 72; Joined Cases C-611/10 and 612/10 *Hudzinski and Wawrzyniak v Agentur für Arbeit Wesel - Familienkasse* [2012] Digital Reports, para 43.
42. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, Opinion of AG Sharpston,, para. 154.
43. Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, para 33.
44. Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under EU law: All for Ulysses, Nothing for Penelope?’ (2009) 34 *European Law Review* 433; Emmanuela Papadopoulou, ‘Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?’ (2002) 38 *Cahiers de droit européen* 95; Cyril Ritter, ‘Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234’ (2006) 31 *European Law Review* 690; Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13; Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations. An Incongruity in a Citizens’ Europe’ (2008) 35 *Legal Issues of Economic Integration* 43; Peter Van Elsuwege and Stanislas Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande’ (2008) 44 *Cahiers de droit européen* 655.
45. See among others Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13, 36-49 and 44. See also the pleas to resolve this reverse discrimination in the literature referred to in the previous footnote.
46. See eg Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under EU law: All for Ulysses, Nothing for Penelope?’ (2009) 34 *European Law Review* 433, 453-54; Peter Van Elsuwege and Stanislas Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’assurance soins flamande’ (2008) 44 *Cahiers de droit européen* 655, 705-08. See also Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, Opinion of AG Sharpston, paras 122-132.
47. For a reference to this provision and the relevance of the national identity of Member States for the implementation of EU law, see eg Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693, para. 92. The CJEU referred to the status of the Austrian State as a Republic.
48. In the same vein: Elke Cloots, ‘The European Court of Justice and Member State Federalism: Balancing or Categorisation’ in Elke Cloots and others (eds), *Federalism in the European Union* (Hart Publishing 2012) 351; Danny Pieters, *De Europese Unie tegen een Vlaamse sociale zekerheid? Woonplaatsbeginsel versus werklandbeginsel in de sociale zekerheid: beslist de Europese Unie?* (ACCO 2010).72; Anne Pieter van der Mei, ‘Combating Reverse Discrimination: Who Should Do the Job?’ (2009) 16 *Maastricht Journal* 379, 381-82.

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