REGIONAL SOCIAL POWERS AND FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN UNION

BY **HERWIG VERSCHUEREN***
Professor of International and European Social Law at the University of Antwerp and Visiting Professor at the University of Brussels (VUB)

1. INTRODUCTION

This article examines the impact of European Union (EU) law on the free movement of persons on the social powers of regions in the EU Member States and more specifically on the relationships between the sub-national entities of a Member State with devolved competences in the field of social protection. Several Member States with a regionalised structure have introduced a residence-based distribution of competence between sub-national entities in this field. In Member States like Belgium, Germany, Spain, Austria and the United Kingdom, regions have gained 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 regionalised and non-regionalised Member States, local authorities have also introduced some social benefits, albeit 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. Yet, 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, we enter the realm of EU law as soon as we consider cross-border situations involving two or more Member States. The European legislative framework provides a number of solutions for such situations. If an individual has ties with more than one Member State, confusion may arise regarding the question of which Member State's social protection schemes

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apply to that individual. Such cross-border situations may present themselves not only in nationally organised systems of social protection, but also in social protection schemes organised by sub-national entities of a Member State.

In Section 2 we shall consider the solutions that the European legal framework provides for situations that are cross-border between Member States. These solutions are expressly laid down in secondary EU law. They are based on the principles of the free movement of persons under the European Treaties and have been the subject of extensive case law of the Court of Justice of the European Union (CJEU). European Union law has thus delineated 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 other words, the territorial and personal boundaries of the circles of solidarity of the Member States are, in principle, drawn by EU law, which aims to guarantee the free movement of persons between the Member States.

In Section 3 we shall examine how these European rules affect systems of social devolution developed (or under development) 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.

In other words: what are the contours of social devolution in the Member States under EU law? And to what extent are these contours a constraint on the ability of regionalised Member States autonomously to distribute internal powers in the field of social protection between different levels of government?

2. THE EUROPEAN STRAND OF SOCIAL FEDERALISM

2.1. NO SEPARATE EUROPEAN SOCIAL PROTECTION

The starting point of EU law and policy is that the Member States are entirely free to organise their internal social protection systems as they see fit. In so far as social protection is concerned, the European Treaties assign hardly any harmonising powers to the European institutions. Article 153(1)(c) of the TFEU (ex Article 137 of the TEC) does entitle the Union to support and complement the activities of the Member States in the field of 'social security and social protection of workers', including by means of directives laying down minimum requirements. However, the Union has never used

this competence, nor is it likely to do so in the short to medium term. The only harmonising initiatives that have been taken are a number of directives concerning the equal treatment of men and women in matters of social security.[1]

2.2. THE IMPACT OF THE EUROPEAN PRINCIPLE OF FREE MOVEMENT OF PERSONS ON SOCIAL PROTECTION SCHEMES IN THE MEMBER STATES

2.2.1. European Social Security Co-ordination

These starting points do not prevent EU law from indirectly affecting national legislation in the field of social protection. This impact is due primarily to the principle of the free movement of persons. Additionally, the social policies of the Member States are affected indirectly by European rules relating to the free movement of goods and services, as well as by competition rules, including the prohibition of State aid. However, in the present contribution we shall leave aside the impact of these latter aspects of EU law, as the focus of our study is on questions relating to the personal and territorial boundaries of solidarity schemes in Member States and their sub-national entities.[2]

Most tangible of all in this respect is European social security co-ordination. Such co-ordination 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.[3] The purpose is to co-ordinate 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 co-ordination system. Until 1 May 2010, the applicable regulations were Regulation (EEC) 1408/714 and Regulation (EEC) 574/72.[5] These Regulations were replaced on

(1) See, e.g. Council Directive (EEC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24. Additionally, we refer to the abundant case law of the CJEU prohibiting discrimination on the basis of gender in relation to rights stemming from occupational social security systems, such as supplementary pensions rights. See, e.g. C. Barnard, *EC Employment Law* (Oxford, Oxford University Press, 2012) 454 - 498.

(2) On the impact of European internal market and competition law, see among others: M. Krajewski, U. Neergaard and J. van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe* (The Hague, Asser Press, 2009); E. Mossialos, G. Permanand, R. Baeten and T. Hervey (eds), *Health Systems Governance in Europe. The Role of EU Law and Policy* (Cambridge, Cambridge University Press, 2010).

(3) Articles 21, 45, 49, 56 of the TFEU (ex Articles 18, 39, 43 and 49 of the TEC).

(4) Council Regulation (EEC) 1408/71 concerning the application of the social security schemes to employees and self-employed persons, as well as to their family members travelling within the Community ('Regulation 1408/71').

(5) Council Regulation (EEC) 574/72 laying down the procedure for implementing Regulation 1408/71. This Regulation was also amended on several occasions.

1 May 2010 by Regulation 883/2004[6] and Regulation 987/2009.[7] It is not the intention of this co-ordination system to in any way harmonise or approximate the systems of the Member States. It does not touch upon the material and formal differences between the social security regimes of the various Member States and hence it does not affect the divergent rights of the individuals working or residing in those States.[8] 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.[9]

2.2.2. Determination of the Legislation Applicable in Cross-border Situations: State of Employment and State of Residence

One of the most important tasks of the co-ordination system is to determine the legislation applicable in cross-border situations. The relevant rules are contained in Title II of Regulation 1408/71 and 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, 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 or her.[10] The person in question shall be subject to the legislation of a single Member State only, and that legislation is to be determined in accordance with the provisions of the 2004 Regulation.[11]

In so 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

(6) European Parliament and Council Regulation (EC) 883/2004 on the co-ordination of the social security systems [2004] OJ L200/1 ('Regulation 883/2004'), as amended by European Parliament and Council Regulation (EC) 988/2009 [2009] OJ L284/43. For an introduction to this new Regulation, see the contributions in (2009) 1–2 *European Journal of Social Security. Special Issue on 50 Years of European Social Security Coordination* 1–241. See also F Pennings, European Social Security Law (Antwerp, Intersentia, 2010).

(7) European Parliament and Council Regulation (EC) 987/2009 laying down the procedure for implementing Regulation (EC) 883/2004 on the co-ordination of social security systems [2009] OJ L284/1.

(8) See, e.g., Case 41/84 *Pietro Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1, paragraph 20; Case C-340/94 *de Jaeck v Staatssecretaris van Financiën* [1997] ECR I-461, paragraph 18; Case C-493/04 *Piatkowski v Inspecteur van de Belastingdienst grote ondernemingen Eindhoven* [2006] ECR I-2369, paragraphs 19–20; Case C-208/07 v*on Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse* [2009] ECR I-6095, paragraph 84.

(9) See, e.g., Cases C-393/99 and C-394/99, *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v Claude Hervein and Hervillier SA and Guy Lorthiois and Comtexbel SA* [2002] ECR I-2829, paragraphs 50–51; *Piatkowski, above n 8, paragraph 34; von Chamier-Glisczinski*, above n 8, paragraph 85.

(10) See, e.g. Case C-196/90 *Fonds voor Arbeidsongevallen v De Paep* [1991] ECR I-4815, paragraph 18; Case C-275/96 *Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-3419, paragraph 28; Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883, paragraph 20; Case C-347/98 *Commission v Belgium* [2002] ECR I-3327, paragraph 27.

(11) Regulation 883/2004, Article 11(1).

person employed in the territory of one Member State shall be subject to the social security legislation of that State, even if he or she resides in the territory of another Member State or if his or 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 European social security co-ordination 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) of the TFEU). This prohibition holds not only for all conditions of employment and remuneration that apply in the State of employment, but also for social security provisions.[13] 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.[14] In the Flemish care insurance judgment, the CJEU appears to confirm that the lex loci laboris principle, which constitutes the basis for European social security co-ordination, is already contained in the Treaty provisions relating to the freedom of movement of employed and self-employed persons.[15]

Nonetheless, the application of the State-of-employment principle does not imply that a migrant worker is invariably entitled to social security benefits provided in the State of employment. If such a person resides in another Member State (eg, frontier workers) then, for certain benefits (eg, coverage of medical costs), he or she shall be entitled first and foremost in accordance with the legislation of the State of residence (albeit at the expense of the State of employment).[16] Moreover, the CJEU has confirmed that the application of the State-of-employment principle does not preclude a migrant worker from entitlements pursuant to the national legislation of the State of residence. The State of residence is not required to grant such social security rights, but EU law does not exclude it.[17]

(12) Regulation 883/2004, Article 11.
(13) See, e.g. *Pinna*, above n 8.
(14) 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-68/99 *Commission v Germany* [2001] ECR I-1865, paragraphs 22 - 23; *Inasti*, above n 9, paragraph 31; *Piatkowski*, above n 8, paragraph 19; Case C-103/06 *Derouin v Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris – Région parisienne (Urssaf de Paris – Région parisienne)* [2008] ECR I-1853, paragraph 20. See also recital 17 of the preamble to Regulation 883/2004, stating that: 'With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person.'
(15) Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, paragraph 48.
(16) See Article 17 of Regulation 883/2004.
(17) Case C-352/06 *Bosmann v Bundesagentur für Arbeit – Familienkasse Aachen* [2008] ECR I-3827, paragraphs 27 -29 and 33; *von Chamier-Gliszczinski*, above n 8, paragraphs 55 - 56.

In addition, 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, more particularly if those persons are simultaneously active in more than one Member State. The provisions of Regulation 1408/71 and Regulation 883/2004 then 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.[18]

Moreover, as a rule, the State-of-residence principle applies to those who are not (or no longer) economically active.[19] The category of economically inactive persons is understood to include pensioners.[20] Unemployed frontier workers are likewise subject to the legislation of the State of residence.[21] That is not to say, though, that inactive persons are exclusively entitled to social security benefits under the legislation of their State of residence. Retired persons who do not receive their pension from their State of residence, for example, are also subject to the legislation of the State that does pay their pension in so far as sickness benefits in cash, such as long-term care benefits, are concerned. Consequently these Member States must export those benefits.[22]

Regulation 833/2004 also contains a number of rules relating to the payment of benefits to persons who do not reside in the territory of the Member State under whose legislation they are entitled to benefits (the so-called export of benefits).[23] This holds first and foremost for benefits like old-age pensions or invalidity and long-term care benefits. There are, however, a number of exceptions to the export principle. One such exception is the special co-ordination regime that applies for so-called special non-contributory benefits that are situated in between social security and social assistance. For these kinds of benefits, a State-of-residence-based co-ordination system is in place. Another exception is unemployment benefits, which only need to be exported for a maximum of three months if the benefit-entitled person moves to another Member State in order to seek employment.[24] In other words, there is in effect a residence requirement for unemployment benefit entitlement.

(18) Regulation 883/2004, Article 13.
(19) *Ibid* Article 11(3)(e).
(20) *Ibid* Article 11(2).
(21) *Ibid* Article 11(3)(c).
(22) *Ibid* Article 29.
(23) *Ibid* Article 7.
(24) *Ibid* Article 64.

Moreover, in situations that are beyond the scope of these specific European co-ordination 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).[25] In others, particularly those concerning economically inactive persons, it has granted rights in accordance with the legislation of the State of residence.[26] And in yet some other cases, the Luxembourg Court has recognised the right of the individuals concerned to export to a Member State other than the State of residence a social benefit that is not within the scope of the European co-ordination system.[27]

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 regulations and legislation, 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 principles. At present, it relies on a complex and intricate

(25) Case C-35/97 *Commission v France* [1998] ECR I-5325.
(26) Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573. However, in the case of benefits with characteristics of social assistance, the Court has, in a number of judgments, recognised 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 its employment market. See Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.
(27) Case C-499/06 *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-3993; Case C-221/07 *Zablocka-Weyhermüller v Land Baden-Württemberg* [2008] ECR I-9029.

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, that is not to say 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 what 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. What criteria should be applied in determining to which sub-national entity's circle of solidarity an individual belongs? We leave aside how the various regionalised Member States of the European Union have answered this question.[28] Instead, we focus in this chapter exclusively on whether EU law affects how Member States delimit their circles of solidarity internally. Are regionalised Member States left entirely free to lay down in internal legislation the personal and territorial scope of application of social protection schemes developed by that State's sub-national entities? Or is the European system of defining circles of solidarity a model that can or even must be adopted by regionalised Member States in the organisation of relationships between their sub-national entities?

3.1. CAN EU LAW INTERVENE IN A REGIONALISED MEMBER STATE'S INTERNAL DISTRIBUTION OF COMPETENCES IN THE FIELD OF SOCIAL PROTECTION?

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, since the CJEU's judgment in the Flemish care insurance case, this is no longer a foregone conclusion.[29] The Flemish care insurance scheme was intended to cover the cost of

(28) On the Belgian case, see B. Cantillon, P. Popelier and N. Mussche (eds), *Social Federalism: The Creation of a Layered Welfare State. The Belgian Case* (Antwerp, Intersentia, 2011).

(29) *Government of the French Community and Walloon Government*, above n 15. For a detailed discussion of this judgment, see C. Dautricourt and S. Thomas, 'Reverse Discrimination and Free Movement of Persons under EU law: All for Ulysses, Nothing for Penelope?' (2009) 34 *EL Rev* 433; P. Van Elsuwege and S. Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'a*ssurance soins flamande' (2008) Cahiers de droit européen* 655; H. 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) 2 *Revue belge de sécurité sociale*, 173 / H. Verschueren, 'De regionalisering van de sociale zekerheid in België in het licht van het arrest van het Europese Hof voor Justitie inzake de Vlaamse zorgverzekering' (2008) 2 *Belgisch Tijdschrift voor Sociale Zekerheid* 177.

non-medical assistance and services for persons who were unable to perform daily tasks necessary for their basic needs or other related activities.[30] Only persons residing in the territory of Flanders were (compulsory) 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 regionalised Member State.

However, this residence condition was in conflict with the abovementioned requirements of the EU social security co-ordination, more particularly 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.[31] 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 (or Brussels) 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 (or Brussels). In addition, the principle of the export of benefits implied that persons working in Flanders (or Brussels) 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 (or Brussels) but residing in *another Member State* fell within the ambit of the Flemish care insurance scheme by vitue of EU law and its State-of-employmnet principle. However, persons working in Flanders (or Brussels) but living in *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

(30) Decree of the Flemish Community of 30 March 1999 concerning the organisation of the care insurance scheme.
(31) This amendment was made by the Decree of 30 April 2004.

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 1408/71 and to the Treaty provisions regarding the free movement of persons. The Court made reference to the free movement of workers (Article 39 of the EC; now Article 45 of the TFEU), self-employed persons (Article 43 of the EC; now Article 49 of the TFEU), and EU citizens in general, irrespective of whether they are pursuing an economic activity (Article 18 of the EC, now Article 21 of the TFEU).[32] 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 answer, the CJEU first reiterated that EU law cannot be applied to purely internal situations.[33] At the same time, however, it defined the notion of a 'purely internal situation' strictly. According to the Court, this category consisted of 'Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the German- or French-speaking region and have never exercised their freedom to move within the European Community'.[34] Hence, 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. The Court referred, first and foremost, to nationals of Member States *other* than Belgium working in the Dutch-speaking region or in the bilingual region of Brussels-Capital but living in another part of the national territory, but also to *Belgian* nationals in the same situation who had made use of their right to free movement.[35]

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 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.[36]

(32) Belgian Constitutional Court, No 51/2006, 19 April 2006.
(33) *Government of the French Community and Walloon Government*, above n 15, paragraph 38.
(34) *Ibid* paragraphs 37–38.
(35) *Ibid* paragraph 41.
(36) *Ibid* paragraph 48.

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.[37] 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 organisation 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.[38]

The above also implies that, in so 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'.[39] 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 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 of the EC (now Article 20 of the 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 of the EC, now Article 21 of the TFEU). More particularly, 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.[40]

(37) *Ibid* paragraphs 57–58.

(38) An example of such a justification is found in the judgment of the EFTA Court of 3 May 2006 in Case E-3/05, *EFTA v Norway* (see www.eftacourt.int). This case concerned the application of a residence requirement for eligibility for a regional supplement to Norwegian family allowance in the northern regions of Norway (Finnmark and part of Troms). The purpose of the supplement is to reverse the depopulation trend in these areas and to provide additional support to residents with children, among other things to compensate for the harsh living conditions. Eligibility is conditional upon the family actually living in the region. People working in the region but living elsewhere with their family are not entitled to the supplement. The EFTA Court ruled that the regional residence condition for this social security benefit is legitimate given the overall aim, and that it is proportional to this aim and therefore not in breach of Regulation 1408/71.

(39) On the issue of reverse discrimination, see further below.

(40) *Government of the French Community and Walloon Government*, above n 15, paragraph 39.

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.[41] 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.[42] The Constitutional Court did acknowledge that the ambit of the Flemish Care Insurance Decree should, pursuant to EU law,[43] 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.[44] 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.[45]

However, as regards persons who were unable to invoke EU law, the Constitutional Court reaffirmed the exclusively territorial distribution of powers between Belgium's different 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.[46]

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.[47] Moreover, unjustified restrictions on the free movement of employed,

(41) *Ibid* para 40.
(42) Belgian Constitutional Court, No 11/2009, 21 January 2009. For an analysis of this ruling, see T. Vandamme, annotation of *Government of the French Community and Walloon Government v Flemish Government* (2009) 46 *CML Rev* 287; P. Van Elsuwege and S. Adam, 'Belgium. The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court, Judgment 11/2009 of 21 January 2009' (2009) 5 *European Constitutional Law Review* 327; J. Velaers, 'Social Federalism and the Distribution of Competences in Belgium' in Cantillon, Popelier and Mussche (eds), above n 28, 152–57.
(43) Belgian Constitutional Court, No 11/2009, 21 January 2009, paragraph B.10.2.
(44) *Ibid* paragraph B.10.1.
(45) *Ibid* paragraph B.10.2.
(46) *Ibid* paragraph B.16.
(47) See, among others, Articles 18 and 45 of the TFEU.

self-employed and economically inactive persons cannot be tolerated under the rules of EU law.[48] However, it is questionable whether the CJEU's ruling is satisfactory as far as those principles are applied in the context of the relationships 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. 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 organisation of social devolution within that Member State. A residence-based distribution of competence between sub-national entities exists in several regionalised Member States. Likewise, the jurisdiction of *local* authorities is usually limited to residents of their territory, in regionalised as well as non-regionalised Member States. 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 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. This means that these rules determine which State's legislation is to be applied, leaving open the question which regional or local legislation should be applied. Indeed, the State-of-employment principle in Regulation 883/2004 only refers to States and not to sub-national entities of States. 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

(48) On non-discriminatory obstacles to the freedom of movement of workers, see, e.g., Case C-415/93 *Union royale belge des sociétés de football association ASBL v Bosman, Royal club liégeois SA v Bosman and others and Union des associations européennes de football (UEFA) v Bosman* [1995] ECR I-4921; Case C-109/04 *Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-2421; Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181.

legislation on the branches of social security to which Regulation 1408/71 applies, were envisioned.[49]

In our view, the constitutional distribution of powers in the fields of social security and social protection between the sub-national entities of a regionalised 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 co-ordination rules determine that a given Member State's legislation applies, then that Member State's constitutional rules regarding the 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 regionalised 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 co-ordination, 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 work in the State concerned. Any ensuing disadvantages[50] could then have been interpreted as a consequence of the characteristics inherent in the social security system of the Member State in question, more particularly of its regionalised 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.[51]

3.2.2. Legal Uncertainty Over Who Precisely Has Recourse to EU Law

The application of the European place-of-employment principle to relationships between sub-national entities of a Member State has created considerable legal uncertainty. In so far as concerned the legal position of migrant EU employees and self-employed persons working in Flanders (or Brussels) and living in Wallonia, the judgment of the CJEU did not rely on the provisions of Regulation 1408/71 (now

(49) Case C-327/92 *Rheinhold & Mahla NV v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1995] I-1223, paragraph 15; Case C-34/98 *Commission v France* [2000] ECR I-995, paragraph 35; Case C-169/98 *Commission v France* [2000] ECR I-1049, paragraph 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.

(50) In the Flemish care insurance case, non-entitlement to the Flemish scheme due to residence in one of Belgium's other Communities.

(51) See, e.g. *Inasti*, above n 9, paragraphs 50–51; Piatkowski, above n 8, paragraph 34; von Chamier-Gliszczinski, above n 8, paragraph 85.

Regulation 883/2004), but merely on Articles 39 and 43 of the EC (now Articles 45 and 49 of the TFEU). This is understandable to a certain extent, as the Regulation is not intended to co-ordinate different social security systems that may co-exist within a single Member State. There is nothing in the Regulation to suggest otherwise, as it merely refers to the Member States as such. However, the non-applicability of the detailed co-ordination rules of Regulations 1408/71 and 883/2004 does give rise to certain specific difficulties, which the more general Articles 45 and 49 TFEU cannot resolve.

To begin with, the CJEU failed adequately to specify 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)? In its judgment, the CJEU appeared to regard the residence condition as a potential *obstacle* to the free movement of persons, rather than, as the Advocate General had suggested,[52] as an instance of discrimination against migrant EU citizens on grounds of their nationality. This may imply that the Court was primarily concerned with those rules that cause 'workers to lose, *as a consequence of the exercise of their right to freedom of movement*, social security advantages guaranteed them by the legislation of a Member State'.[53] 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 subsequently 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?[54]

(52) *Government of the French Community and Walloon Government*, above n 15, Opinion of AG Sharpston, paragraphs 71–83.
(53) *Government of the French Community and Walloon Government*, above n 15, paragraph 46 (emphasis added).
(54) For other examples of legal uncertainties created by the CJEU's judgment, see Verschueren, above n 29, 213–15; Dautricourt and Thomas, above n 29, 445–46; Van Elsuwege and Adam, above n 29, 667.

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 relationships between a Member State's sub-national entities (at least in so far as 'EU migrants' are concerned) 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 State 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.[55] 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.[56] The Court reiterated that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with EU law.[57] 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 regionalised Member State, and those who are not.

The issue of reverse discrimination has given rise to considerable legal debate in recent years.[58] Amongst other things, it has been pointed out that the requirement of

(55) *Government of the French Community and Walloon Government*, above n 15, Opinion of AG Sharpston, paragraph 154.
(56) *Government of the French Community and Walloon Government*, above n 15, paragraph 33.
(57) *Ibid* paragraph 39.
(58) See, e.g., Dautricourt and Thomas, above n 29; E 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; C Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 *EL Rev* 690; E Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *CML Rev* 13; A Trifonidou, 'Reverse Discrimination in Purely Internal Situations. An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43; Van Elsuwege and Adam, above n 29.

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. It suffices, for example, for a national of a Member State to have been born in another Member State, or for the individual concerned occasionally to travel to other Member States for business purposes.[59] 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.[60] However, the CJEU has more recently confirmed its traditional position on this issue.[61]

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

Some authors 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 relationships between the Member States and relationships between sub-national entities of a regionalised 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.[62] The authors in question refer to, amongst other things, the case law of the CJEU in relation to the free movement of goods, where it is held that any restriction on the free movement of goods between sub-national entities or regions of a single Member State may be seen as an unjustified restriction on the free movement of goods among the Member States.[63] Hence, it is argued, the EU rules

(59) See, e.g. Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279; Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2002] ECR I-9925.

(60) See among others Spaventa, above n 58, 36–39 and 44. See also the pleas to resolve this reverse discrimination in the literature referred to in n 43.

(61) Case C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, paragraphs 76–77; Case C-245/09 *Omalet v Rijksdienst voor Sociale Zekerheid* (CJEU, 22 December 2010), paragraph 12; Case C-434/09 *McCarthy v Secretary of State for the Home Department* (CJEU, 5 May 2011), paragraph 45.

(62) See, eg Dautricourt and Thomas, above n 29, 453–54; Van Elsuwege and Adam, above n 19, 705–08. See also *Government of the French Community and Walloon Government*, Opinion of AG Sharpston, above n 15, paragraphs 122–32.

(63) See especially Case C-163/90 *Administration des Douanes et Droits Indirects v Léopold Legros and Others* [1992] ECR I-4625; Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry SA v Direction Générale des Douanes and Société Dindar Confort, Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Société Dindar Autos v Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunions* [1994] ECR I-3957; Joined Cases C-485/93 and C-486/93 Simitzi v Kos [1995] ECR I-2655.

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

The fact that a Member State's sub-national entities may be relevant to the application of EU law is, in itself, not surprising. The CJEU has, for example, also recognised these entities' relevance to the application of EU law on State aid. If a sub-national entity of a Member State reserves the benefit of a measure for undertakings established in that sub-national entity, that measure may be selective and in contravention of EU law. However, in situations where a Member State's sub-national entities possess either symmetric autonomous powers or sufficient institutional, procedural and economic/financial autonomy in a particular matter, the CJEU regards the sub-national entity, not the territory of the entire Member State to which the sub-national entity belongs, as the relevant context wherein the selectivity of the measure should be assessed.[64] The fact that undertakings established in another sub-national entity of the Member State cannot benefit from the measure does not make that measure territorially selective and potentially in breach of EU law on State aid, since the measure was taken by a sub-national entity possessing autonomous powers.[65]

Some authors have referred to this case law in support of their assertion that a Member State's sub-national entities possessing sufficient autonomy to regulate in a particular area must be treated as Member States in the context of the application of this regulation. This would also imply that relations between the various sub-national entities of the Member State in question are governed by the same rules applicable among Member States.[66] We think, however, that the aforementioned case law of the CJEU recognises, first and foremost, the internal constitutional rules of Member States with regard to the autonomy of their sub-national entities. In the context of the application of EU law, such a sub-national entity may thus take mea-

(64) Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraphs 52–68; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* [2008] ECR I-6747, paragraphs 53–60. See more recently also Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I-10821, paragraph 60.

(65) See, on this discussion in the context of regional tax measures, K. Lenaerts and N. Cambien, 'Regions and the European Courts: Giving Shape to the Regional Dimension of Member States' (2010) 35 *EL Rev* 609, 629–33; B. Peeters, 'European Legal Limitations to the Repartition of Fiscal Competences in a Federal State Structure' in Cantillon, Popelier and Mussche (eds), above n 28, 227–53 and S. Kingston, 'The European Court of Justice and the Devolution of Taxation Powers' in Cloots, De Baere and Sottiaux (eds.), *Federalism in the European Union* (Oxford and Portland, Hart, 2012), 249-264.

(66) Dautricourt and Thomas, above n 29, 453; Van Elsuwege and Adam, above n 29, 707–08.

sures the scope of which is limited to its own territory. These measures may therefore differ from measures taken by other sub-national entities of the same Member State, without these measures having to be regarded as regionally selective and therefore unlawful under EU law on State aid.[67]

In our opinion, this case law does not warrant the conclusion that a sub-national entity, in its relations with other sub-national entities of the same Member State, must always apply EU internal market law. In its judgment of 17 November 2009, for example, the CJEU ruled that a regional Sardinian tax on stopovers made by aircraft or boats operated by persons having their tax domicile outside the territory of the region constituted an obstacle to the freedom of movement of services. The Court held, more precisely, that persons 'having their tax domicile outside the territory of the region *and established in other Member States*' suffered an additional cost.[68] Thus, in order for EU internal market law to apply, the CJEU continues to require a cross-border element involving another Member State. A cross-border situation only involving another sub-national entity of the same Member State clearly does not satisfy this requirement. This conclusion also holds in relation to EU law on the free movement of persons.

Moreover, if a Member State's sub-national entity were also subject to EU free movement law in *internal* cross-border situations, the rules governing these internal situations could not be different from the EU rules governing the relations between the Member States. This implies, for instance, that the notion of 'economic and monetary union' could not be interpreted differently in the domestic and EU legal orders. Thus, it has been argued that the notion of 'economic and monetary union' laid down in Belgian constitutional law[69] should be interpreted in the same way as its counterpart in EU internal market law, particularly in so far as the applicability of the place-of-employment criterion for access to social protection is concerned.[70]

Yet it appears that 'economic and monetary union' does not necessarily have the same meaning in Belgian constitutional law as the corresponding notion in EU

(67) Vandamme, above n 42, 298–99. See also J.A. Winter, annotation of *Portugal v Commission* (2008) 45 *CML Rev* 183, 195. The CJEU applied the same reasoning to divergences between measures adopted by the different sub-national entities of a Member State in order to comply with a regulation in an area in which these entities have autonomous competences. Such divergences do not constitute discrimination in breach of EU law. See Case C-428/07 *Horvath v Secretary of State for Environment, Food and Rural Affairs* [2009] ECR I-6355.
(68) *Presidente del Consiglio dei Ministri v Regione Sardegna*, above n 64, paragraph 32 (emphasis added).
(69) See Article 6(1) VI(3) of the Belgian Special Law on Institutional Reform. Pursuant to this provision, the regions must, when exercising their economic powers, take due account of the freedom of movement of persons, goods, services and capital, of the freedom of commerce and industry, and of the economic and monetary union.
(70) H. Storme, 'Vlaamse zorgverzekering. Een lange weg naar een geschikte aanknopingsfactor' (2008) *Nieuw Juridisch Weekblad* 614, 622–23.

law.[71] In its judgment of 21 January 2009, the Constitutional Court confirmed this viewpoint.[72] Indeed, to 'purely internal' Belgian situations, involving a person living in Wallonia and working in Flanders (or Brussels), the Constitutional Court did not apply the EU place-of-employment principle but the internal Belgian constitutional rule regarding the delimitation of the personal and territorial scope of a social protection scheme introduced by the Flemish Community, that is, the place-of-residence principle. It appears that the Belgian Constitutional Court gave precedence to the territorial distribution of powers laid down in the Belgian Constitution over the principles of EU internal market law. Applying the EU place-of-employment principle to a purely internal cross-border situation would have been incompatible with the Belgian constitutional territorial distribution of powers, which is based on residence.

Besides, the mandatory application of EU internal market law to relationships between a Member State's sub-national entities would render meaningless the federal structure of that Member State. In a regionalised Member State, the demarcation of the material, personal and territorial scope of application of the legislation of that State's sub-national entities proceeds on the basis of national political agreements and constitutionally-established criteria.[73] These criteria may vary from those incorporated in EU law to govern the relationships between the Member States. By denying that national and European criteria may diverge, one threatens to make any regionalisation superfluous and insubstantial. The treatment of these sub-national entities as if they were Member States would, for example, preclude any internal legal delimitation of the personal and territorial scope of application of social protection schemes established by sub-national entities. A simple reference, *mutatis mutandis*, to EU rules governing the relationships between Member States would then suffice. Furthermore, the treatment of such sub-national entities as if they were Member States might also threaten the federal cohesion within regionalised Member States. Indeed, it would then be only a small step towards such sub-national entities acquiring the status of fully-fledged autonomous Member States.

Lastly, the assumption that sub-national entities of a single Member State should, in their mutual relationships, be regarded as fully-fledged Member States appears to

(71) E. Van Brutsem, 'L'affaire de la "zorgverzekering": comment concilier la libre circulation des travailleurs et l'organisation fédérale des états?' (2009) *Chroniques de droit social* 193, 198–99; Vandamme, above n 42, 294–95; Van Elsuwege and Adam, above n 42, 336; J. Velaers and J. Vanpraet, 'De materiële en territoriale bevoegdheidsverdeling inzake sociale zekerheid and sociale bijstand (II)' (2009) 64 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 195, 210–11 and S. Feyen, 'Economic and Monetary Union: Caught between Brussels and Luxembourg? The influence of EU law on Belgian Federalism Case Law', in Cloots, De Baere and Sottiaux (eds.), *Federalism in the European Union* (Oxford and Portland, Hart, 2012), 392-404.
(72) Belgian Constitutional Court, No 11/2009, 21 January 2009, paragraph B.16.
(73) In the same vein: E. Cloots, 'The European Court of Justice and Member tate Federalism: Balancing or Categorisation?', in Cloots, De Baere and Sottiaux (eds.), *Federalism in the European Union* (Oxford and Portland, Hart, 2012), at 351.

be contrary to the EU Treaty. The new Article 4(2) of the 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.[74]

4. CONCLUSION

This chapter 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 relationships among the *Member States* should also be applied in the context of relationships between the *sub-national entities* of regionalised 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. This does mean, however, 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 evolution has given rise to so-called 'reverse discrimination' between persons who, in a cross-border situation between sub-national entities, are able to invoke EU law and those who are not. The CJEU has held that this issue is beyond the ambit of EU law. The Belgian Constitutional Court, for its part, has confirmed the applicability of the Belgian rules governing internal distribution of powers to the group of sedentary persons, as otherwise the domestic, exclusively territorial, system of power division would be threatened.

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

(74) See also Vandamme, above n 42, 298. For a recent reference to this provision and the relevance of the national identity of Member States for the implementation of EU law, see Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* (CJEU, 22 December 2010), paragraph 92. The CJEU referred to the status of the Austrian State as a Republic.

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 regionalised Member State, the domestic constitutional rules governing the distribution of powers to *all* categories of persons, including EU migrants.[75] We feel this solution follows from the rationale behind the EU Regulations concerning the co-ordination of social security within the Union. Economically active EU migrants ought to be subject to the legislation of the country where they are employed, including to any constitutional rules regarding the delimitation of circles of solidarity within that Member State. *Migrant* EU citizens who find themselves in a cross-border situation between two sub-national entities must, in other words, be treated in the same way as the group of *non-migrants* who find themselves in the same interregional situation.

The alternative proposal that the European rules for determining circles of solidarity should equally apply to sedentary persons who find themselves in a cross-border situation between a regionalised Member State's sub-national entities, by contrast, 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 regionalised 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 impose the solutions that have been worked out at the EU level to these internal issues. What is more, such an imposition may be regarded as an improper interference with the constitutional relationships established within regionalised Member States.

(75) See also A.P. van der Mei, 'Editorial. Combating Reverse Discrimination: Who Should Do the Job?' (2009) 16 *Maastricht Journal of European and Comparative Law* 379, 381–82.

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