Belgium

The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination

Constitutional Court, Judgment 11/2009 of 21 January 2009

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Introduction

On 21 January 2009 the Belgian Constitutional Court terminated a long-lasting dispute over the conditions for affiliation to the care insurance scheme established by the Flemish Community. What started out as a classical conflict over the division of competences in Belgium resulted in a discussion about the impact of European Community (EC) law on the constitutional autonomy of the member states. Despite the entanglement between Belgian constitutional law and EC law,[1] the Flemish care insurance case reveals the different perspectives of both legal orders. In this case, the dialogue between the Belgian Constitutional Court and the European Court of Justice (ECJ) through the preliminary ruling procedure could not prevent reverse discrimination.

The Belgian federal structure is built upon autonomous entities that enjoy mutually exclusive competences for certain matters. Hence, in principle, under Belgian constitutional law the Flemish Community is not competent to extend its legislation on care insurance to persons living in another part of the country.[2] However, in a preliminary ruling of 1 April 2008, the ECJ confirmed that EC law requires an exception to this rule insofar as it concerns nationals of other member states or Belgians who previously made use of their right to freedom of move-

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[1] *See*, e.g., T.A.J.A. Vandamme, 'Prochain Arrêt: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court', 4 *EuConst* (2008) p. 127-148.

[2] Cour const., 11/2009, 21 Jan. 2009, para. B.12.3.

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ment within the EC.[3] Thus, the combination of the application of Belgian constitutional law and the application of EC law produces a situation of reverse discrimination, i.e., the less favourable treatment of some of a member state's own nationals in comparison to nationals of other member states.[4]

Reverse discrimination is generally regarded as a 'by-product' or a 'necessary evil' in a system of multilevel constitutionalism based upon a division of competences between national law and EC law.[5] On several occasions it has been argued that this conceptual framework, which is based upon a neat separation of the two legal orders, is difficult to reconcile with the logic of the internal market and the concept of European citizenship.[6] The issues at stake in the Flemish care insurance case add a new dimension to this discussion, namely the constitutional autonomy of some regional entities in the European Union.

After a short overview of the factual and legal background of the case, attention will be devoted to the controversial definition of 'purely internal situations' falling outside the scope of EC law. The interaction between the Belgian Constitutional Court and the ECJ will then be analysed in the light of the doctrine on reverse discrimination. Finally, a better recognition of regional entities will be suggested as part of an alternative model for defining the ambit of Community law.

The factual and legal background

Belgium is essentially organised into one Federal entity, three Communities (the Flemish Community, the French Community and the German-speaking Community) and three Regions (the Walloon Region, the Flemish Region and the Brussels Region). The Communities and the Regions have been granted mutually exclusive

[3] ECJ 1 April 2008, Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government*, n.y.r. For comments, *see*, e.g., P. Van Elsuwege and S. Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'assurance soins flamande', 5-6 *CDE* (2008), p. 655-711; T. Vandamme, case note in 1 *CMLRev.* (2009) p. 287-300.

[4] *See also* E. Cannizzaro, 'Producing "Reverse Discrimination" Through the Exercise of EC Competences', *Yearbook of European Law* (1997) p. 29.

[5] C. Ritter, 'Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234', 31 *ELRev.* (2006) p. 691; A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', 35 *LIEI* (2008) p. 44.

[6] *See*, e.g., Cannizzaro, *supra* n. 4; Tryfonidou, *supra* n. 5; E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects', 45 *CMLRev.* (2008) p. 13-45; A. Iliopoulou, *Libre circulation et non-discrimination, éléments du statut de citoyen de l'Union européenne* (Brussels, Bruylant 2008) p. 267-317; R. White, 'Free Movement, Equal Treatment and Citizenship of the Union', 4 *ICLQ* (2005) p. 885-905; N. Shuibhne, 'Free Movement of Persons and Wholly Internal Rule: Time to Move On?', 39 *CMLRev.* (2002) p. 731-771; S. O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship* (The Hague, Kluwer Law International 1996) p. 273-278.

competences and operate as autonomous legislators. The Communities are competent for socio-cultural matters such as social assistance, culture, education, sport and tourism whereas the Regions deal with economic matters such as transport, energy, agriculture, fisheries and environment. The federal competences, *inter alia*, include defence, immigration, justice and social security.[7] In addition, there are four geographical areas ('linguistic regions') in Belgium: the Dutch-speaking region; the French-speaking region; the bilingual region of Brussels-Capital, and; the German-speaking region.

By Decree of 30 March 1999 the Flemish Community established a system of 'care insurance' covering non-medical assistance and services for persons suffering from serious and prolonged disability.[8] Participation in the insurance scheme is mandatory for every person residing within the Dutch-speaking region and voluntary for persons residing in the bilingual region of Brussels-Capital.[9] The French-speaking and German-speaking Communities have no similar care insurance scheme. The Flemish Decree was challenged before the Belgian Court of Arbitration, which was renamed the 'Constitutional Court' in 2007.[10] The main point of contention concerned the question whether the insurance scheme had to be considered as 'aid to persons' for which the Communities are competent or, rather, as part of the social security competence of the Federal authority. The Court of Arbitration confirmed the competence of the Flemish Community to adopt the Decree.[11]

Afterwards, the European Commission informed the Belgian authorities that the residence requirement in the Flemish care insurance scheme was contrary to EC Regulation 1408/71 on the application of social security schemes to workers and members of their families as well as Articles 39 and 43 EC. In response to the Commission's remarks, the Flemish Community extended the insurance regime to EU nationals working in Flanders or Brussels but residing in another EU mem-

[7] On the Belgian constitutional system, *see* notably M. Uyttendaele, *Précis de droit constitutionnel belge: regard sur un système institutionnel paradoxal* (Brussels, Bruylant 2005); J. Vandelanotte, S. Bracke, G. Goedertier, *België voor beginners: wegwijs in het Belgisch labyrinth* (Brugge, Die Keure 2008).

[8] *Moniteur belge* of 28 May 1999, p. 19149.

[9] This is because the Flemish Community is only competent towards persons declaring themselves Dutch-speaking in the bilingual region of Brussels-Capital.

[10] The Court of Arbitration was established in 1983 to decide on questions regarding the division of legislative competences between the federated entities and the federal State. After a gradual extension of its competences, the Court of Arbitration developed into a full-fledged Constitutional Court, which is exclusively competent to test legislation on its compatibility with Belgian constitutional norms.

[11] Cour const., 33/2001, 13 March 2001, paras. B.3.3. to B.3.5. *See* on the importance of this Judgment for the construction of Belgian federalism, P. Martens, 'Le rôle de Cour d'arbitrage dans l'édification du fédéralisme en Belgique', 1 *Revue belge de droit constitutionnel* (2003) p. 3 at p. 9 and 10.

ber state.[12] As a result, the European Commission classified the infringement procedure on 4 April 2006. This, however, did not put an end to the controversy about the Flemish care insurance scheme. The amendments implied that persons working in Flanders or Brussels but residing in Wallonia remained excluded. In a new procedure before the Belgian Constitutional Court, the French Community and the Walloon Government claimed a violation of the principles of equality and non-discrimination (Articles 10 and 11 of the Belgian Constitution) as well as an impediment to freedom of movement for persons. Moreover, the Flemish Decree was challenged in the light of the federal competences on social security and regarding the economic and monetary unity of Belgium.

The judgments of the Constitutional Court and the ECJ

In its Judgment of 19 April 2006, the Belgian Constitutional Court dismissed the claims regarding the internal division of competences. Pursuant to Articles 128(2) and 130(2) of the Belgian Constitution and Article 5(1) of the Special Law on the Reform of the Institutions (1980), the Flemish Community is competent, with some exceptions, to legislate on 'aid to persons', including care insurance.[13] The Court further concluded that the Flemish legislation did not infringe the economic and monetary unity of Belgium due to the small amount of money involved and the limited impact of the criticised measures on the free movement of persons between the different parts of Belgium.[14]

The arguments related to the constitutional principles of equality and non-discrimination are closely connected with EC law.[15] Therefore, the Constitutional Court referred certain questions to the ECJ. First, it wanted to know whether the Flemish care insurance scheme fell within the scope of EC Regulation 1408/71. Secondly, it asked whether the Flemish Decree was in line with that Regulation as well as with the EC Treaty provisions on freedom of movement for persons (Articles 39 and 43 EC) and on citizenship of the Union (Article 18 EC).

With regard to the first question, the ECJ clarified that the classification of a 'social security' matter does not depend on its definition under national law. The ECJ confirmed the settled case-law that schemes such as the Flemish care insur-

[12] *Moniteur belge* of 9 June 2004, p. 43593. The Decree was again amended in 2006 in order to avoid that persons residing outside the European Economic Area (EEA) could benefit from the Flemish care insurance and to take into account the periods of affiliation to a social insurance scheme in other Member States of the EEA. *See Moniteur belge* of 16 Jan. 2006, p. 2154.

[13] Cour const., 51/2006, 19 April 2006, paras. B.1. to B.3.10. This reasoning already appeared in Judgment 33/2001, *supra* n. 11, para. B.3.3.

[14] Ibid., para. B.10.3.

[15] On the role of Arts. 10 and 11 of the Belgian Constitution for the incorporation of EC law in the Belgian legal order, *see* Vandamme *supra* n. 1.

ance fall within the scope *ratione materiae* of EC Regulation 1408/71.[16] The answer to the second question turned out to be more complicated. In line with the written observations of the European Commission, both the Advocate-General and the ECJ distinguished between two categories of persons: citizens of other member states and Belgian citizens who have made use of their freedom of movement rights on the one hand, and, on the other hand, Belgian citizens who have never made use of those rights. The first category of persons clearly falls within the ambit of EC law, despite the argument of the Flemish Community that it has no competence regarding social assistance for persons residing outside the Dutch-speaking region or the bilingual Brussels-Capital region.[17] The ECJ has held on numerous occasions that a member state cannot justify the failure to observe its obligations under Community law by alleging that it runs counter to the principles of its national constitutional structure.[18]

The situation is different as far as the second category of persons is concerned. The EC rules on freedom of movement for persons do not apply to activities that are confined in all respects within a single member state.[19] As Advocate-General Sharpston observed, the case at stake presented 'a rather curious version of a purely internal situation'.[20] Since the Flemish Community operates as an autonomous legislator its position is largely comparable to that of a member state. Hence, the question arises whether the traditional doctrine on 'purely internal situations' also applies for member states with a federal structure. The Advocate-General referred to the case-law on internal tariff barriers[21] and suggested a broad interpretation of the Treaty provisions on European citizenship to extend the application of EC law to Belgian nationals who never exercised their Community rights to freedom of movement.[22]

[16] ECJ, Case C-212/06, *supra* n. 3, paras. 16 to 23.

[17] Ibid., para. 58.

[18] *See*, *inter alia*, ECJ 10 June 2004, Case C-87/02, *Commission* v. *Italy*, *ECR* I-5975, para. 38; ECJ 26 Oct. 2006, Case C-102/06, *Commission* v. *Austria*, *ECR* I-111, para. 9.

[19] *See*, *inter alia*, ECJ 27 Oct. 1982, Joined Cases 35/82 and 36/82, *Morson and Jhanjan*, *ECR* 3723, para. 16; ECJ 22 Sept. 1992, Case C-153/91, *Petit*, *ECR* I-4973, para. 8.

[20] Opinion of A.G. Sharpston in the Flemish care insurance case (C-212/06) delivered on 28 June 2007, para. 119.

[21] Of particular interest is the analogy with the case *Carbonati Apuani* where the Court pointed out that the internal market, as defined in Art. 14(2) EC, draws no distinction between inter-state frontiers and frontiers within a single State for the prohibition of customs duties and charges having equivalent effect. *See* ECJ 9 Sept. 2004, Case C-72/03, *Carbonati Apuani*, *ECR* I-8027, para. 22.

[22] The A.G. stipulated that Art. 18 EC not only includes a right to move but also a right to reside anywhere within the territory of the Union. She expressly invited the Court to clarify whether the application of Art. 18 EC implies that the freedom to reside derives from prior exercise of the freedom to move or whether it is possible to exercise the freedom to reside without first exercising the freedom to move between Member States. *See* Opinion A.G. Sharpston, *supra* n. 20, paras. 143-144.

The ECJ did not follow this revolutionary approach. Based upon its previous case-law, the Court briefly observed that 'citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law'.[23] Such purely internal situations must be dealt with within the framework of the national legal system. Significantly, the Court nevertheless remarked that the interpretation of EC law could be useful to the national court 'in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court.'[24]

Rather than focusing on the issue of reverse discrimination, the Belgian Constitutional Court, after the ECJ's preliminary ruling, simply observed that the Flemish Community has no competence with respect to persons residing in other regions of the country. The only exception to this fundamental rule of Belgian constitutional law stems from EC law and concerns non-Belgian EU nationals and Belgians who already used their Community right to free movement. The difference of treatment resulting from the extension of the care insurance legislation to the latter group of persons, excluding 'static' Belgians, does not amount to discrimination. It is rather the result of the exercise of autonomous competences by various legislators within the Belgian federal state structure. This difference of treatment can only be resolved if the other Belgian Communities adopt similar legislation.[25]

Comments

Reverse discrimination and the definition of 'purely internal situations'

The Flemish care insurance case clearly illustrates the dilemmas and complexities surrounding the definition of 'purely internal situations' falling outside the scope of EC law. Following the ECJ's traditional approach, the EC Treaty provisions on free movement of persons and European citizenship only apply in an inter-state context. A direct result is the emergence of reverse discrimination: persons who remain confined within their member state of origin cannot benefit from the more generous rights accorded to their 'migrant' compatriots and to nationals from other member states. Situations of reverse discrimination are not prohibited under EC law and are to be dealt with at the national level.[26] This 'division of labour'

[23] ECJ, Case C-212/06, *supra* n. 3, para. 39.

[24] Ibid., para. 40.

[25] Cour const., 11/2009, *supra* n. 2, paras. B.13.2 to B.16.

[26] ECJ 16 June 1994, Case C-132/93, *Steen* v. *Deutsche Bundespost*, *ECR* I-2715, paras. 10-11; ECJ 5 June 1997, Case C-64/96, *Uecker and Jacquet*, *ECR* I-3171, para. 23.

between the ECJ and the national courts reflects the principles of conferred powers and subsidiarity (Article 5 EC). On the other hand, it seems somewhat paradoxical that member states remain entitled to discriminate against their own nationals in a Community that is based on the rule of law and the principle of equal treatment, particularly in the light of the provisions on European citizenship.[27] Moreover, it may appear self-contradictory to strive at an Internal Market characterised by the abolition of barriers to freedom of movement *between* member states whereas such barriers may be reintroduced 'through the backdoor' *within* member states.[28] This is particularly problematic in member states with a federal constitutional structure such as Belgium.

Aware of the sometimes undesirable consequences of reverse discrimination, the ECJ has gradually extended the scope of application of EC law without calling into question the principle of the inapplicability of Community law to purely internal situations. In a number of customs duties cases, the Court observed that charges levied at a regional or even a municipal border also constitute an obstacle to the free movement of goods.[29] This partial opening to internal situations has not been extended to other provisions on free movement, leading to a seemingly unjustifiable contradiction between the case-law on customs duties or charges having equivalent effect and the line taken by the Court in other areas.[30] However, also with regard to free movement of persons, the ECJ has adopted a very flexible approach to the need for a cross-border element.[31] Arguably, this tendency to bring apparently internal situations inside the scope of EC law is inspired by a desire to avoid reverse discrimination as much as possible. The downside of this approach is a lack of legal certainty. The boundaries between the scope of application of EC law and national law become increasingly blurred, thereby creating an arbitrary distinction between persons who can or cannot find a genuine or even an artificial link with EC law.[32]

[27] *See* the legal doctrine mentioned under footnote 6.

[28] Opinion of A.G. Sharpston, *supra* n. 20, paras. 116-118.

[29] This line of case-law is based upon practical and conceptual considerations. On the practical side, the Court pointed at the difficulties in distinguishing between products from domestic origin and those from other member states. From a more conceptual point of view, the application of EC law to internal border tariffs stems from the very principle of a customs union. *See* ECJ 16 July 1992, Case C-163/90, *Legros e.a.*, *ECR* I-4625, paras. 16-17; ECJ 9 Aug. 1994, Joined Cases C-363 and 407 to 411/93, *Lancry e.a.*, *ECR* I-3957, paras. 27-29; ECJ 14 Sept. 1995, Joined Cases C-485 et 486/93, *Simitzi*, *ECR* I-2655, para. 17; ECJ, Case C-72/03, *supra* n. 21, para. 22.

[30] *See* the Opinion of A.G. Poiares Maduro in the case *Carbonati Apuani* (C-72/03) delivered on 6 June 2004, para. 48.

[31] *See* for classical examples of this approach: ECJ 6 June 2000, Case C-281/98, *Angonese*, *ECR* I-4139; ECJ 11 July 2002, Case C-60/00, *Carpenter*, *ECR* I-6279; ECJ 2 Oct. 2003, Case C-148/02, *Garcia Avello*, *ECR* I-11613; ECJ 9 Jan. 2007, Case C-1/05, *Jia*, *ECR* I-1.

[32] Tryfonidou, *supra* n. 5, p. 52-53.

The problematic distinction between cross-border and purely internal situations is highly relevant for the outcome of the Flemish care insurance case. Whether a Belgian national working in Flanders or Brussels but residing in another part of the country can benefit from the Flemish care insurance scheme depends upon the exercise of his or her Community rights to free movement. This criterion raises practical and legal problems. It is, for instance, not entirely clear *what kind* of movement should be exercised, *when* that exercise should have happened and for *how long* a cross-border element should exist.[33]

Despite the invitation of Advocate-General Sharpston to reconsider the settled case-law on purely internal situations, the ECJ decided to adopt a cautious approach by referring the issue back to the Belgian Constitutional Court.[34] The connected statement that 'interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal' can be regarded as a hint to encourage the avoidance of reverse discrimination at the national level.[35] This turned out to be redundant in the context of the Flemish care insurance scheme because the ECJ had to express itself on the situation of non-Belgian EU nationals anyway. Moreover, it appeared to be ineffective because the Belgian Constitutional Court ultimately excluded an extension of the Flemish care insurance to 'static' Belgians. In this case, a situation of reverse discrimination resulting from the application of EC law could not be prevented on the basis of an EU-friendly interpretation of the national constitution. This might be surprising for an outsider – particularly in the light of the wording of Articles 10 and 11 of the Belgian Constitution – but it is logical in the light of the fundamental importance attributed to the division of powers between the autonomous entities in the Belgian federal structure.

The different perceptions of the ECJ and the Belgian Constitutional Court

It has been argued that the best solution to the problem of reverse discrimination is to improve the co-operation between the ECJ and the national courts.[36] The

[33] D. Martin, 'Comments on *Gouvernement de la Communauté française and Gouvernement wallon* (Case C-212/06 of 1 April 2008) and *Eind* (Case C-291/05 of 11 December 2007)', 10 *EJML* (2008) p. 372.

[34] It is noteworthy that the A.G. did not expect a reversal of the Court's case-law since only one member state (the Netherlands) intervened in the Flemish care insurance case. *See* Opinion A.G. Sharpston, *supra* n. 20, paras. 156-157.

[35] This solution reflects the ECJ's answers to preliminary questions referred to in contexts of at first glance purely internal situations. *See* for example ECJ 5 Dec. 2000, Case C-448/98, *Guimont*, *ECR* I-10663, paras. 20-23.

[36] M.P. Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination', in C. Kilpatrick, T. Novitz, P. Skidmore (eds.), *The Future of Remedies in Europe* (Oxford, Hart 2000), p. 138.

expectation is then that a general right of equality under national constitutional law could almost automatically lead to a treatment of purely internal situations comparable to that of situations falling within the scope of EC law.[37] Such a solution appeared to work for example in Italy[38] but faced its limits in the case of Belgium. Even though Articles 10 and 11 of the Belgian Constitution provide that 'all Belgians are equal before the law' and that 'enjoyment of the rights and freedoms recognised for Belgians should be ensured without discrimination', the different perceptions of the ECJ and the Belgian Constitutional Court on at least three fundamental issues (social security, free movement of persons and the constitutional autonomy of regional entities) explain the final result of reverse discrimination.

The concept of social security

It is first important to note the discongruence between EC law and Belgian constitutional law on the concept of 'social security'. Whereas the ECJ concluded that the Flemish care insurance scheme qualifies as a social security benefit under EC Regulation 1408/71, it is not considered to be a social security matter under Belgian law. This is a very significant issue because, as was mentioned earlier, social security is regulated at the federal level whereas the Communities are competent for 'aid to persons'. The conclusion of the Belgian Constitutional Court that, in the light of the internal division of competences, the Flemish legislation on care insurance cannot be regarded as social security, created the context for reverse discrimination. In the hypothesis that the measure at stake concerned a federal competence, the question whether Belgian nationals had exercised their Community rights to free movement or not would have been irrelevant. The conclusion that the matter in question falls within the competences attributed to the Communities implies that a distinction between Belgians arises depending on their place of residence. Belgians who are working but not living in Flanders or Brussels cannot benefit from the Flemish care insurance unless they fall under the EC law provisions on the free movement of persons.

The free movement of persons

The distinction between 'static' and 'migrant' Belgians followed by the ECJ and the Belgian Constitutional Court in the Flemish care insurance case is somewhat misleading. In fact, 'static' Belgians are also moving inside the country when they work in Flanders or in Brussels but reside in Wallonia. However, their 'migration' is confined to the Belgian territory whereas only 'inter-state' movement is covered

[37] E. Spaventa, *Free Movement of Persons in the European Union. Barriers to Movement in their Constitutional Context* (Alphen aan den Rijn, Kluwer Law International 2007) p. 128.

[38] *See* Corte costituzionale, sentenza 16-30 dicembre 1997, n. 443.

by EC law. The reverse discrimination of 'static Belgians' is a direct result of a different perception on the free movement of persons as part of the Belgian constitutional order, on the one hand, and as a principle of the EC Internal Market rules, on the other hand. Whereas the EC Treaty provisions on free movement of persons prohibit any restriction, even minor, to that freedom,[39] the Belgian Constitutional Court accepts that in view of the limited amount of money involved and the marginal effect on freedom of movement the Flemish legislation did not endanger the economic and monetary unity of Belgium.[40] In other words, the different perception on the application of the *de minimis* rule further explains the emergence of reverse discrimination. Again, this outcome might be surprising given the close connection between the concept of the Belgian economic union and the EU Internal Market.[41] Yet, the notion of free movement serves a different purpose under Belgian constitutional law in comparison to EC law.[42] It guarantees a certain protection of the federal authority against the federated entities in the Belgian legal order whereas it operates as a key objective of the European integration process. Hence, the idea that the free movement of persons between the different parts of the Belgian State mirrors the freedom of movement under EC law is fundamentally flawed.

The constitutional autonomy of regional entities

A final and fundamental difference in the approaches of the Belgian Constitutional Court and the ECJ concerns the recognition of the constitutional autonomy of regional entities in a federal state. From the perspective of EC law, the constitutional organisation of a member state cannot justify an infringement of the treaty provisions on free movement.[43] Hence, the Flemish argument that requirements inherent in the division of powers within the Belgian federal state precluded an extension of its legislation to 'migrant' Belgians and other EU nationals, was not even seriously considered by the ECJ and Advocate-General Sharpston.[44] It is noteworthy that exactly the same argument constitutes the cornerstone for the final conclusion of the Belgian Constitutional Court that the Flemish legislation on care insurance cannot be extended to 'static' Belgians living outside Flanders or Brussels. Even if one can feel uneasy with such a result,[45] the difference of

[39] ECJ, Case C-212/06, *supra* n. 3, para. 52.

[40] Cour const., 51/2006, *supra* n. 13, para. B.10.3.

[41] In the *Flemish Ecotax* case, for instance, the Belgian Constitutional Court explicitly referred to the case-law of the ECJ for the definition of charges having equivalent effect under Belgian constitutional law. *See* Cour const., 55/96, 15 Oct. 1996, paras. B.4.2.5. to B.4.2.7.

[42] Vandamme, *supra* n. 3, p. 295.

[43] *See*, e.g., ECJ 14 July 1988, Case 38/87, *Commission* v. *Hellenic Republic*, *ECR* 4415, para. 16.

[44] ECJ, Case C-212/06, *supra* n. 3, paras. 57 and 58. *See also* Opinion A.G. Sharpston, *supra* n. 20, paras. 99-103.

[45] *See* Vandamme, *supra* n. 3, p. 296-297 and Van Elsuwege and Adam, *supra* n. 3, p. 711.

treatment on matters where the federated entities have been attributed exclusive territorial competences is not considered to be a form of discrimination under Articles 10 and 11 of the Constitution but rather a logical consequence of regional autonomy.[46] Any alternative interpretation would have been difficult to reconcile with the fundamental importance attributed to the internal distribution of competences under Belgian constitutional law.[47]

Towards a better recognition of regional entities for the definition of cross-border situations?

The different visions of the Belgian Constitutional Court and the ECJ on at first sight comparable or complementary concepts lead to a complex situation of reverse discrimination that sits uncomfortably under both EC law and national constitutional law. It is rather paradoxical that this result is in line with the settled case-law of both Courts. However, more satisfactory solutions seem possible in the future. A first option could be to accept that the federal organisation of a member state can be used as a potential justification for infringing free movement rights under EC law.[48] In other words, reverse discrimination would disappear due to an exception to EC Internal Market rules for persons working in Flanders or Brussels but living in another part of Belgium, irrespective of their nationality or former exercise of free movement rights. Such a solution, justified by the exclusive distribution of territorial competences in Belgium, would reflect the spirit of Article 4(2) TEU after the entry into force of the Lisbon Treaty.[49] On the other hand, it would not solve the problem that barriers to freedom of movement could be (re-)introduced as a result of internal constitutional developments in certain member states.

A more integrationist approach can also be suggested.[50] The point of departure for this alternative vision is the trend for regional entities increasingly to oper-

[46] Cour const., 11/2009, *supra* n. 2, para. B.16.

[47] On the relationship between non-discrimination and regional autonomy, *see also* Judgments 25/91 of 10 Oct. 1991, para. B.4; 37/92, 7 May 1992, para. B.3; 55/92, 9 July 1992, para. 5.B.14; 44/93, 10 June 1993, para. B.3; 35/95, 25 April 1995, B.12.2; 120/98, 3 Dec. 1998, para. B.4 ; 119/2004, 30 June 2004, para. B.4.2 ; 190/2005, 14 Dec. 2005, para. B.4.7. In a case concerning a prohibition set up by the Walloon Region on the detention of protected birds even when born and raised in captivity, the Constitutional Court concluded that the difference of treatment between Belgian citizens resulting from the limited territorial scope of application of this prohibition did not amount to discrimination. The Court considered such a difference a possible result of the exercise of autonomous competences by various legislators within a federal structure (Cour const., 139/2003, 29 Oct. 2003, para. B.14.2).

[48] Vandamme, *supra* n. 3, p. 298.

[49] Art. 4(2) TEU provides that '(t)he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

[50] For a more extensive description of this alternative, *see* Van Elsuwege and Adam, *supra* n. 3, p. 704-709.

ate as the ultimate regulatory authorities within a given territory in several member states. The ECJ's traditional definition of purely internal situations insufficiently takes this evolution into account and proceeds from a 'unitary' interpretation of the notion 'member state' to distinguish between cross-border and purely internal situations. If, however, decentralised authorities of member states have the relevant competences and are free to establish barriers to free movement of persons between themselves, the *effet utile* of the Community law principle of freedom of movement is at risk. This observation inspired Advocate-General Sharpston to suggest a more dynamic interpretation of the notion of a 'purely internal situation', which would no longer be based on the formal concept of 'member state' but rather on the entity having *the relevant regulatory authority* in a given area. This can correspond to a member state but also to a decentralised entity within a member state.[51]

Inspiration for the further development of this approach could be found in the ECJ's recent case-law on state aid. Confronted with the question of whether tax measures adopted by a regional or local authority infringed Article 87(1) EC, the ECJ concluded that:

> [T]he reference framework need not necessarily be defined within the limits of the Member State concerned. […] It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.[52]

In a Judgment of 11 September 2008 the ECJ clarified the conditions under which an infra-state body can be regarded as 'sufficiently autonomous' to be considered the relevant legal framework for the definition of the political and economic environment in which undertakings operate.[53] First, a decentralised authority must have, from a constitutional point of view, a political and administrative status separate from that of the central government (*institutional autonomy*). Second, this au-

[51] *See* Opinion A.G. Sharpston, *supra* n. 20, paras. 117-118.

[52] ECJ 6 Sept. 2006, Case C-88/03, *Portugal* v. *Commission*, *ECR* I-7115, paras. 57-58.

[53] ECJ 11 Sept. 2008, Joined Cases C-428/06 to 434/06, *Union General de Trabajos de la Rioja*, n.y.r., para. 51.

thority must have the competence to adopt decisions without the central government being able to intervene directly as regards their content (*procedural autonomy*).[54] Third, the consequences of those decisions may not be compensated by actions from other regional entities or the central government (*economic and financial autonomy*).

Arguably, comparable criteria could be applied for the definition of purely internal situations in the framework of the EC internal market rules. This would not only ensure a better recognition of the constitutional realities of the member states but also prevent reverse discrimination without undermining the principle of subsidiarity.

Concluding remarks

The issue of reverse discrimination is an old sore in the process of European integration. The gradual expansion of EC competences and the creation of European citizenship has only reinforced the feeling that situations of reverse discrimination are hardly acceptable under EC law. The ECJ responded to this challenge by a flexible application of the Treaty provisions on free movement and by giving guidance to national courts through the preliminary ruling procedure. The latter option implies a form of 'judicial subsidiarity' presupposing that national courts are to deal with potential problems of reverse discrimination by using national constitutional principles such as equality and non-discrimination.

The Flemish care insurance case illustrates the limits of this constitutional dialogue for the prevention of reverse discrimination in member states with a federal constitutional structure. The orthodox reasoning of the ECJ, which *a priori* sets aside any arguments based on the internal legal system of the member states, and the fundamental importance attached to the internal division of competences under Belgian constitutional law resulted in a complex situation of reverse discrimination. Considering that the difference of treatment between 'static' and 'migrant' Belgians or other EU nationals arises precisely because EC law intervenes in favour of the second category, the prevention of such situations in the future mainly depends on an evolution in the ECJ's case-law. A revision of the classical approach to 'purely internal situations' could find inspiration in the conditions used for the definition of the 'relevant legal framework' in state aid cases. Accordingly, a better balance between regional autonomy in some member states and the application of EC law could be achieved.

[54] Significantly, in a recent case on tax reform in Gibraltar, the United Kingdom's residual power to legislate was deemed irrelevant in practice to undermine the procedural autonomy of the Government of Gibraltar in tax matters. *See* CFI 18 Dec. 2008, Joined Cases T-211 to 215/04, *Gibraltar* v. *Commission*, n.y.r., paras. 89-100.