1. German child-care benefit is payable to non-residents only if they are employed for at least 15 hours a week in Germany. These cases, which come by way of a reference for a preliminary ruling from the Nordrhein-Westfalen Landessozialgericht (Regional Social Court, North Rhine-Westphalia), raise the question whether the wife of a worker employed in Germany has a right to the benefit by virtue of Council Regulation (EEC) No 1408/71 or Council Regulation (EEC) No 1612/68 where both spouses are German nationals resident in the Netherlands and the wife does not satisfy the employment criterion. In one of the cases the national court asks in addition whether the German child-care benefit legislation discriminates on grounds of sex contrary to Community law by reason of its differential treatment of full-time and part-time workers.

3. Article 2(1) provides:

"This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors."


2. Article 1(u)(i) of Regulation No 1408/71 in the version in force at the relevant time defines 'family benefits' as:

'All benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II'.

The relevant Community legislation

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* Original language: English.
4. Article 3(1) provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

5. Article 4(1) provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(h) family benefits.'

6. Article 5 provides:

'The Member States shall specify the legislation and schemes referred to in Article 4(1) ... in declarations to be notified [to the Council].'
9. Article 7 of Regulation No 1612/68 provides:

'(1) A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

(2) He shall enjoy the same social and tax advantages as national workers.

...'

The facts and questions

10. Entitlement to German child-care benefit (Erziehungsgeld) is governed by Paragraph 1 of the Law on the grant of child-care benefit and child-care leave (Bundesgesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub; 'BGEE'). Paragraph 1(1) provides that a person who (1) is resident or habitually resident in the territory to which the law applies (i.e. in the Federal Republic of Germany); (2) has a dependent child in his household; (3) himself looks after and brings up that child and (4) has no, or no full-time, gainful employment, is entitled to child-care benefit.

11. However, non-residents may also be entitled to the benefit: Paragraph 1(4) provides that a national of a Member State who has employment in the territory to which the law applies the weekly duration of which is at least 15 hours and who fulfils conditions 2 to 4 of Paragraph 1(1) is entitled to child-care benefit.

12. The German Government explains in its observations that the exception to the residence requirement introduced by Paragraph 1(4) was designed to cater for the situation of frontier workers employed in Germany who have a particularly close link with the State of employment. Those persons are accorded the right to child-care leave of up to three years, during which period their contract of employment remains extant. Because of the close connection between child-care benefit and child-care leave they are also entitled to child-care benefit.

7 — Incorporating by reference Article 8 of Title IV of the Sozialgesetzbuch (Code of Social Law). That reference was added in an amendment made in 1990; the previous version, relevant only to Case C-312/94, merely required that there be employment in the territory to which the law applies, without further definition.
According to the Government, there is a sufficiently close link with the German employment market to justify such an exception to the principle of territoriality only where the employment is on a significant scale.

13. Neither the order for reference nor the German Government's observations in these cases contain much detail of the benefit. However, considerably more information has been provided by the Bundessozialgericht (Federal Social Court) in its order for reference in the similar case of Mille-Wilsmann v Land Nordrhein-Westfalen; most of the following information is taken from that source.

14. When they were first introduced with effect from 1 January 1986, both child-care leave and child-care benefit were originally available until the child concerned was 10 months old. The period of entitlement was subsequently extended in several stages and is currently 24 months for child-care benefit.

15. The benefit is paid at a flat rate of DM 600 per month subject to certain income thresholds. In the first six months of the child's life, the rate has since 1 January 1994 been reduced if the parents' income exceeds DM 100,000 if the parents are married and DM 75,000 in other cases, plus DM 4,200 for each additional child. After the child has reached six months, whether the benefit is paid at all and, if so, in what amount depends on whether the parents' income exceeds certain limits which are graduated according to the number of members of the family (DM 29,400 for married persons, otherwise DM 23,700, plus DM 4,200 for each additional child).

16. Maternity benefit payable for the period after the birth is set off against child-care benefit. Child-care benefit is however paid in addition to child allowance. It is not taken into account when calculating income-related social security benefits and it does not in principle affect maintenance obligations. It is not subject to income tax.

17. Mr and Mrs Hoever and Mr and Mrs Zachow are German nationals who have been resident in the Netherlands since the mid-1980s. Mr Hoever and Mr Zachow are employed full-time in Germany; Mrs Hoever is employed for 10 hours per week in Germany, from which employment she took 18 months' child-care leave when her son was born; Mrs Zachow was at all material times not in employment. Mrs Hoever and Mrs Zachow applied for German child-care

8 — Case C-16/96, pending.
benefit in respect of their sons born in 1991 and 1987 respectively. In each case, the application was refused in the first instance. In Mrs Hoever's case, the ground was that in the case of a national of a Member State resident in a Member State other than Germany the benefit was payable only to employed persons and not to members of their family; in view of the insignificant number of her working hours, Mrs Hoever was not an employed person. In Mrs Zachow's case, the ground was that she was resident and habitually resident in the Netherlands. Appeals in both cases to the Sozialgericht (Social Court), Münster, were dismissed on the ground inter alia that the applicants did not fall within Article 73 of Regulation No 1408/71 since they were not 'employed'.

Both applicants appealed to the Landessozialgericht, Nordrhein-Westfalen, which referred the following questions to this Court:

2. If so:

(a) May the spouse of a person employed in the Federal Republic of Germany, whose family lives in another Member State, claim payment of child-care benefit on the basis of Article 73 of Regulation No 1408/71?

(b) (in Case C-245/94 only) Does Paragraph 1(4) of the Law on child-care benefit constitute discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7 in so far as it accords nationals of a Member State who are engaged in employment in the Federal Republic of Germany the right to claim child-care benefit thereunder only if their employment entails a significant number of working hours?

3. If not:

(a) Is child-care benefit a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?

1. Is child-care benefit within the meaning of Paragraph 1 et seq. of the Law on the grant of child-care benefit and child-care leave, in the version contained in the public notification of 25 July 1989 (Bundesgesetzblatt I, p. 1550) and of the Law of 17 December 1990 (Bundesgesetzblatt I, p. 2823) a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71? 9

9 — The version of the law mentioned in the question referred in Case C-312/94 differs from that referred in Case C-245/94. The difference is not material in the present case.
(b) If so, is Article 7(2) of Regulation No 1612/68 applicable if the worker residing in another Member State is a national of the State where he is employed?

(c) If so, does Article 7(2) of Regulation No 1612/68 confer upon the worker’s spouse entitlement to payment of child-care benefit if the family resides in a Member State other than the State of employment?’

18. It should be noted that the possibility that Mrs Hoever and Mrs Zachow are ‘habitually resident’ in Germany for the purpose of Paragraph 1(1) of the BGEE is considered and dismissed by the national court. It takes the view that, although it is conceivable that a family living abroad close to the border in the catchment area of a German town may have its habitual place of abode in Germany, the applicants in these cases do not have sufficient social connections with Germany to be so regarded.

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20. In its first question, the national court asks whether the child-care benefit is a ‘family benefit’ within the meaning of Article 4(1)(h) of the regulation.

Questions 1 and 2(a)

19. The first two questions are essentially aimed at ascertaining whether the applicants are entitled to the benefit by virtue of Regulation No 1408/71 notwithstanding the fact that they do not satisfy the employment criterion set out in Paragraph 1(4) of the BGEE. Article 73 of the regulation provides that an employed or self-employed person subject to the social security legislation of one Member State is entitled, in respect of members of his family resident in another Member State, to the family benefits provided for by that legislation. Whether Article 73 applies in these cases depends on two issues: does the child-care benefit fall within the concept of ‘family benefits’ (Question 1) and can the applicants, as spouses of employed persons, themselves invoke the article (Question 2(a))?

21. Before turning to this question, I should point out that the Court has no jurisdiction in proceedings under Article 177 of the Treaty to apply the rules of Community law to a specific case or to judge a provision of
national law by reference to those rules. 10 The Court cannot therefore rule on the question whether the child-care benefit is a family benefit within the meaning of Regulation No 1408/71. However, the Court may provide the national court with an interpretation of the relevant Community law which will enable it to decide that question itself.

22. It is clear from previous decisions of the Court 11 that, as a general principle, the distinction between benefits excluded from Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant, and not on whether the national legislation — and by extension the national government — describes the benefit as a social security benefit or not. (Notification under Article 5 of Regulation No 1408/71 is similarly not decisive, although it should be noted that according to the Commission Germany has made no notification of the relevant legislation.) More specifically, to come within the scope of the regulation the benefit must be ‘granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position ... provided that it concerns one of the risks expressly listed in Article 4(1)’. 12

24. The German Government denies that the child-care benefit satisfies the ‘purpose’ test, arguing that it is not a ‘family benefit’ within the meaning of Article 1(u)(i) of the regulation. It denies that the benefit is intended to ‘meet family expenses’ as required by that definition: in contrast to child allowance (Kindergeld), it is paid to enable one of the parents to devote himself to looking after a child in the first phase of life, and is thus intended to remunerate (honorieren) that parent. Whether that parent is an employee is, according to the German Government, of no consequence, the implication being that the benefit is not intended to compensate for lost earnings during a break in employment.

23. There are thus two separate issues relevant to the question whether a benefit

25. That analysis is, however, difficult to reconcile with the findings of the national court and indeed with certain subsequent statements in the German Government’s observations.

10 — See for example Case C-356/89 Newton [1991] ECR 1-3017, paragraph 10 of the judgment.
26. The national court notes that the benefit was introduced:

"to assist the so-called "three-phase system" for reconciling the rearing of children with continued employment, in particular for women. It is based on the idea in family policy that, after an initial phase of employment, in a second phase one of the parents becomes temporarily entirely devoted to rearing children and then, in the third phase, returns to gainful employment. This is why, simultaneously with the introduction of the child-care benefit, a right to child-care leave was introduced in employment law. Against this background, entitlement to child-care benefit depends on whether the claimant gives up her employment entirely, or for the most part, in order to devote herself to rearing a child. Precisely for this reason, however, the child-care benefit has the function of relieving the financial burdens consequent upon the loss of earned income in what is normally still a young family. Therefore it serves to secure the maintenance of the family at the stage of rearing a child."  

27. In support of its analysis, the national court cites Federal Government figures showing that 96% of those entitled to child-care benefit also take child-care leave from employment. The national court makes similar points later in the order for reference, in connection with the second question referred, stating:

"In practice, child-care benefit is paid as a family benefit ... In the context of this actual legal situation, the child-care benefit functions in the final analysis as a contribution towards family maintenance during the phase of a child's early upbringing."  

28. Although the Bundessozialgericht denies that child-care benefit is a family benefit within the meaning of Regulation No 1408/71, the information it provides in its order for reference in Mille-Wilsmann 15 tends to support the view of the Landessozialgericht. It states for example that the benefit 'serves as recompense for the service of bringing up a child, to relieve the financial burdens consequent upon giving up income from a full-time occupation and to meet the miscellaneous expenses of caring for and bringing up the child', and that 'it serves to mitigate any adverse financial effects for families and therefore — indirectly — to cover family expenses'.

29. The German Government refers to the close link between child-care benefit and child-care leave by reference to which it explains the entitlement of non-resident

13 — Emphasis added.
14 — Emphasis added.
15 — Cited in note 8.
employees to child-care benefit. The German Government's description of the aim of the benefit, namely to enable one of the parents to devote himself to bringing up a young child, itself suggests that the benefit is indirectly seeking to redress the effect of a temporary interruption in pay or, as the French Government notes, that it is intended to render unnecessary third-party child-care, e.g. crèche or child-minder, and thus avoid the costs which such arrangements would inevitably impose.

'first, ... it encourages workers who are poorly paid to continue working; and secondly, it is intended to meet family expenses, as is clear in particular from the fact that it is paid only where the claimant's family includes one or more children and from the fact that the amount of the benefit varies according to the age of the children. It is by virtue of that second function that a benefit such as family credit falls within the category of family benefits ... .' 17

30. In any event, a benefit may be intended to meet family expenses — and may certainly have that effect — even if there is no requirement of any salary foregone before the benefit is paid. Common sense suggests that a payment to an unsalaried parent devoting himself to the care of a child will in practice tend to contribute to family expenses.

31. Furthermore, even if it were the case that one of the aims of the child-care benefit at issue were other than meeting family expenses that would not in itself preclude the application of Regulation No 1408/71. Family benefits within the meaning of Article 1(u)(i) may have two purposes. Thus in Hughes 16 the Court found that family credit in Northern Ireland performed a dual function:

32. Advocate General Van Gerven had expressed a similar view, stating: 'Although I am willing to accept that Family Credit is intended to keep low-paid workers in employment, it cannot in my view be denied that Family Credit is a benefit intended to help meet the needs of the family.' 18

33. Finally, the German Government states in support of its argument that child-care benefit is not intended to meet family expenses that the benefit is a right specific to the parent who is looking after the child. I do not consider that this is relevant to the issue of its classification as a 'family benefit' for the purposes of Regulation No 1408/71. If anything, the fact that entitlement to the benefit lies only with the parent who is looking after the child suggests that the benefit is intended to meet family expenses.

16 — Cited in note 12.

17 — Paragraphs 19 and 20 of the judgment.
18 — At paragraph 6 of his Opinion.
34. The second criterion for a benefit to fall with the scope of Regulation No 1408/71 is that it be granted without discretion on the basis of a legally defined position. It is clear that the child-care benefit satisfies that requirement. The German Government itself appears to rely on that fact in connection with the separate issue of whether the benefit may properly be said to benefit the family rather than the individual claimant, stating that entitlement to the benefit depends on whether the claimant personally fulfils the conditions of entitlement (so that the benefit is not automatically available to either parent but only to the one who satisfies the conditions including the requirement not to work or not to work full-time).

35. In Hughes the Court ruled that 'a benefit which is granted automatically to families meeting certain objective criteria, relating in particular to their size, income and capital resources, must be considered a family benefit'. The national court in the present cases expresses doubts as to whether the criteria to be satisfied in the case of the child-care benefit in issue, albeit unquestionably objective, comply with the principle laid down in Hughes in that they concern neither the size nor the financial situation of the family. The Luxembourg Government appears to share these doubts, stating that the child-care benefit is a flat-rate payment, not varying with the number or age of the children.

36. It appears from the order for reference in Mille-Wilsmann that the amount of the benefit does in fact vary according to the financial situation of the family and, indirectly at least, with the number of children: see paragraph above.

37. Even on the basis of the somewhat more sketchy information provided by the national court and the German Government in these cases, however, the benefit appears to me in any event to satisfy the fundamental test laid down in Hughes, namely the objectiveness of the criteria: it is 'granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position'. As the Spanish Government correctly points out, the specific criteria mentioned by the Court in Hughes were given as examples relevant to the case before it; they are not, either severally or jointly, necessary for the classification of a benefit entitlement to which depends on other objective and legally defined criteria. In support of this it may be noted that Advocate General Van Gerven assumed in Hughes that it was the objective nature, rather than the subject-matter, of the criteria.

19 — Paragraph 22 of the judgment.
20 — Cited in note 8.
21 — Hughes, paragraph 15 of the judgment.
22 — Paragraph 5 of his Opinion.
of capital, income, and age and number of children that was decisive.

38. Finally, it is noteworthy that the immediately following definition of ‘family allowances’ in Article 1(u)(ii) of Regulation No 1408/71 expressly requires that the benefits covered be granted by reference to the number and, where appropriate, the age of members of the family. It is arguable that, had the definition of ‘family benefits’ in the regulation been intended to encompass such criteria, they would equally have been expressly included in the definition.

39. The national court’s second question concerns the interpretation of Article 73 of Regulation No 1408/71. More specifically, may the spouse of a person employed in Germany where all the members of the family live in another Member State claim the payment of child-care benefit thereunder?

40. In the circumstances of these cases, this question raises the preliminary issue whether Article 73 may be invoked where the worker concerned has not exercised the right to freedom of movement within the Community. As will be seen in relation to the national court’s questions concerning Article 7(2) of Regulation No 1612/68, the latter provision cannot be invoked by such a worker.

41. In the case of Article 73, however, the Court has not required that the worker concerned has exercised that right, although some intra-Community element is of course necessary. The Court has ruled in a case concerning a German national employed in Germany and resident with his family in Denmark that, in order for Article 73(1) to apply:

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…it is sufficient for the worker to be employed on the territory of a Member State whilst the members of the worker’s family reside on the territory of another Member State. That provision goes together with the rule laid down in Article 13(2)(a) of the same regulation which states that a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State. That arrangement stems from the objective of Regulation No 1408/71, which is to guarantee all workers who are nationals of the Member States and who move within the Community

equality of treatment in regard to the different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence, and it must be interpreted uniformly in all Member States regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits.  

42. The answer to the question whether and to what extent the members of the family of a worker may claim rights under the regulation has since Kermaschek v Bundesanstalt für Arbeit 25 depended on whether the rights claimed were 'derived rights', that is to say, rights acquired through the claimant's status as a member of a worker's family. In Kermaschek the Court was asked whether the spouse (who was not a national of a Member State) of a national of a Member State could claim rights under Article 69 of the regulation, under which unemployed workers entitled to unemployment benefit in one Member State who go to another Member State in order to seek employment retain their entitlement to unemployment benefit from the first State. The Court considered the wording of Article 2(1) of the regulation, which in the version in force at the material time provided that the regulation:

43. The Court regarded it as clear from that wording that the provision referred to two distinct categories: workers on the one hand and the members of their family and their survivors on the other. Only the nationals of a Member State, stateless persons and refugees who are or have been subject to the legislation of one or more Member States are covered in their capacity as workers. The Court then ruled:

'Whereas the persons belonging to the first category can claim the rights to benefits covered by the regulation as rights of their own, the persons belonging to the second category can only claim derived rights, acquired through their status as a member of the family or a survivor of a worker, that is to say of a person belonging to the first category.' 26

44. That principle was subsequently reaffirmed in a number of cases relating to unemployment benefit 27 and various other

26 — Ibid.
benefits and allowances covered by the regulation (old-age allowance, supplementary invalidity benefit allowance, and disability allowance).

45. It is clear in the present cases from the national legislation under which child-care benefit is payable, supplemented by the information provided by the national court and the German Government, that the applicants' entitlement to the benefit under German law does not depend on their status as members of a worker's family: whether they are entitled depends on whether they personally fulfil the conditions set out in Paragraph 1(4) of the Law. Thus on the basis of Kermaschek they would not be entitled to payment of child-care benefit by virtue of Article 73 of Regulation No 1408/71.

46. In Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte, the Court recently had occasion to reconsider the decision in Kermaschek, in particular the relevance of the requirement that the members of a worker's family can claim only derived rights under the regulation in a situation where the family member concerned is himself a national of an EC Member State (Kermaschek concerned a national of the former Yugoslavia; of the subsequent cases directly applying the above-stated principle, Deak concerned a Hungarian national, Zaoui an Algerian national and Taghavi an Iranian national, while Frascogna concerned an Italian national and Schmid a German national).

47. Cabanis-Issarte concerned the entitlement to a Netherlands pension of a French national, the widow of a French national who had worked in the Netherlands. In its judgment of 30 April 1996, the Court voiced its concern that the rule established in Kermaschek may in certain cases conflict with the principle of non-discrimination enshrined in Article 3(1) of Regulation No 1408/71, adversely affect freedom of movement for workers and undermine the fundamental Community law requirement that its rules should be applied uniformly. The effect of the distinction between 'own rights' and 'derived rights' is to deny the surviving spouse of a migrant worker the benefit of the fundamental rule of equal treatment. The Court accordingly limited the scope of the Kermaschek line of cases to unemployment benefit, entitlement to which may therefore

31 — Case C-308/93, ECR I-2097.
still be restricted to workers who are nationals of a Member State and denied to members of their family. 32 and in my view it would be artificial to apply that distinction to such benefits.

48. There are essential strands of the Court's reasoning which are not applicable to the present cases: in particular, the principle of equal treatment enshrined in Article 3(1), the linchpin of the judgment, is not relevant to these cases since they do not concern differential treatment by the State of residence of non-national residents, the situation addressed by Article 3(1).

51. The purpose of Article 73 is to prevent a Member State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in a Member State other than that providing the benefits. 35 Once it is accepted that the German child-care benefit is essentially a family benefit, it undermines the intention behind Article 73 to deny it to the applicants in these cases.

49. However, in circumstances such as the present cases I am not convinced that it would in any event have been appropriate to apply the distinction established by Kermaschek.

50. Family benefits by their nature cannot be regarded as payable to an individual in isolation from his family circumstances. To argue, in the context of a family structure to which Article 73 applies, that the applicant's right to a family benefit is not to be regarded as acquired through his or her status as a member of the family seems perverse. None of the cases decided on the basis of the distinction drawn in Kermaschek has concerned a right to family benefits under Article 73.

52. It should be noted that interpreting Article 73 so as to confer entitlement to German child-care benefit on the spouse of a frontier worker employed in Germany and resident in another Member State should not result in unjustified duplication of benefits contrary to the scheme and objectives of Regulation No 1408/71, since Article 10 of Council Regulation (EEC) No 574/72 34 lays down rules applicable in the case of overlapping of rights to family benefits. In particular, in cases such as these where the applicants are not employed in the State of residence, Article 10(1)(a) of that regulation provides that family benefits payable by the

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32 — See paragraphs 26 to 34 of the judgment.


State of employment in application of, inter alia, Article 73 take priority over benefits payable by the State of residence, which are consequently suspended.

53. The contrary view might on the other hand lead to a gap in social protection for the families of frontier workers contrary to the aims of the regulation. That would be the case if under the rules of the State of residence family benefits of the kind in question were linked to employment rather than residence.

54. Finally, it is worth mentioning a possible argument that Mrs Hoever, who at the material time was herself employed part-time in Germany, is entitled to invoke Article 73 in her own right. Although the national court did not raise the point in the questions referred, it appears from the order for reference that the Sozialgericht Münster considered the argument and ruled that Mrs Hoever was not an 'employed person' for the purposes of the regulation. Article 1(a) of and Annex I. I to the regulation set out a number of alternative definitions of 'employed person', all of which depend on compulsory or voluntary insurance for various social security contingencies. It is implied in the order for reference that Mrs Hoever's employment is not subject to social insurance. If that is the case, then unless Mrs Hoever had taken out appropriate optional insurance cover — which is nowhere suggested — the argument that she may invoke Article 73 in her own right cannot succeed.

55. The national court's third question, referred in Case C-245/94 only, asks whether Paragraph 1(4) of the BGEE constitutes discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7 in so far as it provides that nationals of a Member State who are employed in Germany can claim child-care benefit only if their employment entails a significant (mehr als geringfügige) number of working hours.

56. Article 3(1) of Directive 79/7 provides that the directive is to apply to statutory schemes which provide protection against sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and to social assistance in so far as it is intended to supplement or replace such schemes. Article 3(2) states explicitly that the directive is not to apply to provisions concerning family benefits except in the case of family benefits granted by way of increases of benefits due in respect of the abovementioned risks.

57. Since the scheme at issue in Case C-245/94 concerns none of the abovementioned risks, Directive 79/7 is not applicable.

58. The Commission, however, argues that the scheme falls within the scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Article 5(1) of that directive provides: 'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

59. Although the national court's question makes no reference to Directive 76/207, the Court may in order to provide a satisfactory answer to a national court which has referred a question to it consider provisions of Community law to which the national court has not referred in the text of its question. Since the Commission has argued that Directive 76/207 applies to the scheme at issue in Case C-245/94, I will consider the scope of that directive.

60. Article 1 of the directive provides:

'(1) The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. ...'

(2) With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

61. That it was, as suggested by that article, intended to exclude social security from the scope of the directive is confirmed by the fourth recital in the preamble, which states:

'Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments ... '
62. The 'subsequent instruments' to which implementation of the principle in social security matters was reserved found realization as early as 1979, in Directive 79/7 cited in the national court's question. Although that directive is expressed not to apply to family benefits and is hence irrelevant to this case, it is none the less unquestionably intended \(^ {38} \) to implement the principle of equal treatment in social security matters and hence in my view confirms that \textit{prima facie} there is no scope for Directive 76/207 to apply to such matters.

63. Finally, the substantive provisions of Directive 76/207, which mainly concern access to jobs, promotion and vocational training, support the view that it does not cover social security, and Article 5(1) must be read accordingly.

64. Since the Commission bases its argument that Directive 76/207 applies to the national legislation in issue in this case on a statement originally made by the Court in three cases decided in 1986, \(^ {39} \) in which it stated that, in view of the fundamental importance of the principle of equality of treatment, the exclusion of social security matters from the scope of Directive 76/207 must be interpreted strictly, I will examine the source and scope of that statement and consider whether it supports the Commission's argument.

65. The statement was made in the context of a trio of cases, \textit{Roberts v Tate & Lyle}, \textit{Marshall v Southampton and South-West Hampshire Area Health Authority} and \textit{Beets- Proper v Van Lanschot Bankiers}, \(^ {40} \) concerning the compatibility with Directive 76/207 of various national provisions linked to different retirement ages for men and women. Miss Roberts alleged that it was discriminatory for men and women over 55 years old to be granted an immediate pension as part of the arrangements on a mass redundancy since, given the existence of different normal retirement ages, male employees made redundant were entitled to their pension ten years before their normal retirement age whereas women were not so entitled until five years before their normal retirement age. Miss Marshall and Mrs Beets-Proper in contrast alleged in essence that it was discriminatory to require women to retire from employment, albeit with a pension, at an earlier age than men.

66. The applicant in the first case and the respondents in the second and third cases

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\(^ {38} \) See the first and second recitals in the preamble.

\(^ {39} \) Case 151/84 \textit{Roberts v Tate & Lyle} [1986] ECR 703, paragraph 35 of the judgment; Case 152/84 \textit{Marshall v Southampton and South-West Hampshire Area Health Authority} [1986] ECR 723, paragraph 36 and Case 262/84 \textit{Beets-Proper v Van Lanschot Bankiers} [1986] ECR 773, paragraph 38.

\(^ {40} \) Cited in note 39.
invoked the judgment of the Court in Burton v British Railways Board. In that case, Mr Burton had alleged that the fact that access to a voluntary redundancy scheme was tied to the minimum national pensionable age which differed as between men and women discriminated against him on grounds of sex inasmuch as a woman of his age (58) would have been entitled to redundancy whereas he was not. The Court ruled that that fact could not in itself be regarded as discrimination contrary to Article 5 of Directive 76/207. The Court reached that conclusion on the basis that, although Directive 76/207 was applicable because the terms of a voluntary redundancy scheme were ‘conditions governing dismissal’, the different age conditions could not be regarded as discriminatory because they stemmed from the fact that the national minimum pensionable age was different for men and women. The Court referred to Article 7 of Directive 79/7, which permits Member States to exclude from the scope of that directive ‘the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits’. It followed from that permitted exclusion that the determination of different minimum pensionable ages, and hence the conferring of benefits differing for men and women only by virtue of that difference, did not amount to discrimination prohibited by Community law.

By virtue of Article 5, the principle of equal treatment therefore applied. In view of the fundamental importance of that principle, the Court felt it necessary to make it clear that the exception under Article 7 of Directive 79/7, which was the basis for the Court’s ruling in Burton, should not be broadly construed, with the result that it did not apply to any of the cases before it. The Court was accordingly able to distinguish Burton and, in each case on the basis of Article 5(1) of Directive 76/207, ruled in Marshall and Beets-Proper that there was discrimination and in Roberts that there was not.

It does not therefore follow from those cases that social security matters may be regarded as falling within the scope of Directive 76/207: all that was said was that Article 7 of Directive 79/7, being a derogation from a fundamental principle of Community law enshrined in, inter alia, the first-mentioned directive, calls for a strict construction. Thus in the later case of Neestead v Department of Transport the Court regarded it as still unquestionably the case that ‘Directive 76/207 is not intended to apply in social security matters. That is clear from Article 1(2) ...’

67. In Roberts, Marshall and Beets-Proper the Court similarly ruled that Directive 76/207 was applicable since the provisions at

68. It does not therefore follow from those cases that social security matters may be regarded as falling within the scope of Directive 76/207: all that was said was that Article 7 of Directive 79/7, being a derogation from a fundamental principle of Community law enshrined in, inter alia, the first-mentioned directive, calls for a strict construction. Thus in the later case of Neestead v Department of Transport the Court regarded it as still unquestionably the case that ‘Directive 76/207 is not intended to apply in social security matters. That is clear from Article 1(2) ...’

41 — Case 19/81 [1982] ECR 555.
42 — Paragraphs 13 to 18 of the judgment.
43 — See Roberts, paragraph 37 of the judgment; Marshall, paragraph 38; and Beets Proper, paragraph 40.
45 — Paragraph 24 of the judgment.
69. Admittedly the Court in *Jackson and Cresswell v Chief Adjudication Officer* 46 considered that it followed from the above-cited statement in *Roberts, Marshall and Beets-Proper* that a scheme of benefits could not be excluded from the scope of Directive 76/207 solely because, formally, it was part of a national social security system. The Court went on, however, to rule that such a scheme will fall within the scope of the directive only if its subject-matter is access to employment, including vocational training and promotion, or working conditions, and that the mere fact that the conditions of entitlement for receipt of a particular benefit may be such as to affect the claimant’s ability to take up access to vocational training or part-time employment does not bring it within the scope of the directive. 47

70. It was on the basis that the subject-matter of the scheme at issue was access to employment and working conditions that the Court ruled in *Meyers v Adjudication Officer* 48 that a benefit with the characteristics and purpose of United Kingdom family credit fell within the scope of Directive 76/207. One of the conditions of entitlement to family credit is that the claimant or his married or unmarried partner be engaged in remunerative work; moreover, it had previously been held by the Court in *Hughes* 49 that one of the functions of family credit was to keep poorly paid workers in employment. While I accept that it is arguable that such a benefit is in a broad sense concerned with employment, I do not see how it follows from that general proposition that the benefit’s ‘subject-matter’ is access to employment or working conditions as found by the Court in *Meyers*.

71. In any event, it does not follow from the Court’s ruling in *Meyers*, that a benefit such as the family credit at issue in that case falls within the scope of Directive 76/207, that any other benefit which is a ‘family benefit’ for the purposes of Regulation No 1408/71 will similarly do so. The crucial feature in *Meyers* was that the credit was ‘paid to a family member because that person works and in order that he should continue to work’. 50 The link with working conditions was therefore perhaps closer and more apparent than is the case with child-care benefit.

72. Moreover the judgment in *Meyers* seems to imply (at paragraphs 12 and 13) that there is substantial authority for finding that social security schemes come within the scope of Directive 76/207. In fact, however, there was no such finding in any of the earlier cases, since *Roberts, Marshall and Beets-Proper* all concerned termination of employment on retirement age or redundancy and in *Jackson and Cresswell* the Court ruled that the

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47 — Paragraphs 27 to 30 of the judgment.
49 — Cited in note 12; see also paragraphs 31 to 32 above.
50 — See the Opinion of Advocate General Lenz, at paragraph 59.
subject-matter of the scheme at issue was not access to employment or working conditions.

73. Accordingly I find the Court’s conclusion that such a benefit falls within the scope of Directive 76/207 difficult to reconcile with the express terms of the directive and the Court’s earlier case-law (all the earlier cases on the point being decisions of the full Court).

74. In the light of the above, I am of the view that Directive 76/207 does not apply to the German child-care benefit at issue. I will none the less consider the implications it would have were it applicable in case the Court finds it to be so in line with the Commission’s view.

75. The national court notes that in the Federal Republic the overwhelming majority of part-time jobs are performed by women, in particular jobs entailing insignificant working hours (75%).

76. In a line of cases the Court has developed the principle that, where a measure treats part-time workers less favourably than full-time workers and it is established that that measure affects a much greater number of women than men, it is contrary to the principle of equal treatment unless it can be explained by objectively justified factors unrelated to any discrimination on grounds of sex. Although all the cases to date in which the Court has ruled that differential treatment of part-time workers constituted *prima facie* discrimination have concerned either Article 119 of the Treaty relating to equal pay or Directive 79/7 relating to social security benefits, there is no reason why the principles established by those cases should not be extended to cover access to employment and working conditions where the principle of equal treatment has been introduced by Directive 76/207; moreover in *Kirsammer-Flack* the Court appeared to assume that that was so, although it found no *prima facie* discrimination in that case.

77. The principle that differential treatment of part-timers constitutes *prima facie* indirect discrimination reflects the fact that as a general rule many more part-time workers are

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51 — Defined as less than 15 working hours per week. See Paragraph 8 of Title IV of the *Sozialgesetzbuch*.


53 — Advocate General Darmon also makes this point in paragraph 5 of his Opinion in Case C-184/89 Nimz [1991] ECR I-297.

women than are men: thus a measure which disadvantages part-time workers compared with full-time workers frequently works in practice to the detriment of women. It is that underlying effect which renders such treatment *prima facie* unlawful.

78. The cases to date on this aspect of indirect discrimination have concerned measures which affect in different ways two identifiable groups: a group of part-time workers consisting predominantly of women and a group of full-time workers consisting predominantly of men. In most cases, the former have been denied — or granted on less favourable terms — advantages accorded to the latter. Thus it has been relatively simple for the Court to contrast the position of a predominantly female group and that of a predominantly male group and conclude that, in the absence of objective justification, the differential treatment constitutes indirect discrimination.

79. The present case is apparently analogous in that the legislation at issue is framed so as to confer a benefit on a group which is in fact predominantly male and deny it to a group which is predominantly female. There is however a fundamental difference between this case and the cases which inspired the development of the principle that differential treatment of part-time workers may constitute indirect discrimination: in this case the benefit which, according to the letter of the law, is available to a predominantly male group is in fact almost invariably\(^{55}\) claimed by the women in that group. The favourable treatment of men in the comparator group of full-time workers which hitherto has been a necessary element in drawing the conclusion that part-time workers have suffered discrimination is accordingly missing. For that reason I have conceptual difficulties in extrapolating the settled case-law on part-time workers and sex discrimination to the present case.

80. If however the Court were to regard the conditions set by the Court in its previous case-law for a finding of *prima facie* discrimination as satisfied by virtue of the terms in which the national legislation is framed and hence to answer the national court’s question in the affirmative, it is in my view arguable that the measure is based on objective factors unrelated to any discrimination on grounds of sex and hence not unlawful. I put it like that since it is for the national court to determine whether and to what extent the grounds put forward to explain differential treatment in a specific case may be regarded as objectively justified economic grounds,\(^{56}\) although this Court may provide

\(^{55}\) The national court cites a figure of 98.6\%, presumably for all claims, i.e. under both Paragraphs 1(1) and 1(4).

\(^{56}\) See for example *Rinne-Kühn*, cited in note 52, paragraph 15 of the judgment.
guidance, based on the file sent by the national court and the written and oral observations submitted to it, in order to enable the national court to give judgment. 57

81. As stated above, the German Government has indicated the reasons for the working hours threshold for entitlement to child-care benefit for non-residents: in brief, to ensure a sufficiently close link with the German employment market to justify the exception to the principle of territoriality. As the Court has recently stated, in the current state of Community law social policy is a matter for the Member States and in choosing the measures capable of achieving the aim of their social and employment policy the Member States have a broad margin of discretion. 58

82. It may be noted that the Court has recently ruled that national legislation such as the German legislation under which employment entailing an insignificant number of working hours is excluded from compulsory old-age, sickness and unemployment insurance contributions does not constitute indirect discrimination on grounds of sex even where the relevant provisions affect considerably more women than men. 59

83. The Court stated that the national legislature was reasonably entitled to consider the legislation necessary in order to achieve a social and employment policy aim concerned with the structural principle of the national social-security scheme and the social demand for minor employment giving rise to a need to foster the supply of minor employment.

84. Equally in my view the social and employment policy aim sought to be achieved by the German Government by the child-benefit legislation is objectively unrelated to any discrimination on grounds of sex. In exercising its discretion the national legislature was reasonably entitled to consider that the legislation in question was necessary and appropriate in order to achieve that aim. In such circumstances, the mere fact that the provision affects a much greater number of female workers than male workers cannot be regarded as constituting an infringement of the principle of equal treatment enshrined in Article 5(1) of Directive 76/207.

Question 3: The scope of Regulation No 1612/68

85. The national court's third question is expressed to be asked only in the event that the Court answers the first question, as to whether the child-care benefit is a family benefit within the meaning of Regulation

57 — See Case C-328/91 Thomas and Others [1993] ECR 1 1247, paragraph 13 of the judgment.
No 1408/71, in the negative. However, as the Commission points out it is clear from previous decisions of the Court that, since Regulation No 1612/68 is of general scope with regard to freedom of movement for workers, Article 7(2) thereof may apply to social advantages which fall simultaneously within the scope of Regulation No 1408/71.\(^6\) I will therefore, notwithstanding the fact that I propose that the Court give an affirmative answer to the national court’s first question, answer Question 3, which comprises three separate questions which — like the questions concerning the scope of Regulation No 1408/71 — involve both the scope *ratione materiae* and the scope *ratione personae* of the regulation.

86. Council Regulation No 1612/68 on freedom of movement for workers within the Community was adopted on the basis of Article 49 of the Treaty, which requires the Council to issue directives or make regulations setting out the measures to bring about freedom of movement for workers as defined in Article 48. Like that article, the regulation refers in its preamble to the need to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons.\(^6\) Part I deals with employment and workers’ families, of which Title I covers eligibility for employment, Title II employment and equality of treatment and Title III workers’ families.

The scope *ratione materiae* of Regulation No 1612/68

87. Question 3(a) asks whether the child-care benefit is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68. As explained in paragraph above, the Court has no jurisdiction on a reference under Article 177 of the Treaty to answer this question as framed but may none the less give guidance to the national court to enable it to do so.

88. The Court has defined the social and tax advantages referred to in Article 7(2) of Regulation No 1612/68 as:

\[\text{‘all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of} \]

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\(^6\) First recital.
other Member States therefore seems likely to facilitate the mobility of such workers within the Community'.

89. Thus the Court has found that Article 7(2) encompasses such diverse advantages as access to cheap rail travel, an interest-free loan granted on childbirth, and an educational scholarship for study in another Member State.

90. In the light of the case-law, a benefit such as child-care benefit is unquestionably a 'social advantage' within the meaning of Regulation No 1612/68.

The scope ratione personae of Regulation No 1612/68

91. In Question 3(b) the national court asks whether Article 7(2) applies if the worker residing in another Member State is a national of the State where he is employed.

92. The Commission answers this question by reference to recent case-law of the Court on Article 52 of the Treaty, in particular Werner v Finanzamt Aachen-Innenstadt. In that case, which also concerned differential treatment (the denial of certain tax reliefs) accorded by Germany to a German national self-employed in Germany but resident in the Netherlands, the Court's ruling that Article 52 did not preclude heavier taxation of non-residents was based on the lack of any intra-Community element: as Advocate General Darmon pointed out, since Mr Werner had not made use of the freedoms provided for in Articles 48, 52 and 59 of the Treaty he could not invoke in his country of origin where he was established rights recognized by Community law. Put another way, 'the freedom of movement granted to Community nationals is deemed to involve movement for the purposes of an economic activity'.

93. A closer analogy with the present cases is Morson and Jhanjan v Netherlands, which concerned the question whether a dependent relative, who was not a national of a Member State, of a Netherlands national employed in the Netherlands could rely as against the Netherlands on Article 10 of Regulation No 1612/68, which grants dependent relatives of 'a worker who is a national of one Member State and who is employed in the territory of another Member State' the

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62 — Hoeckx, cited at note 11, paragraph 20 of the judgment.
64 — Case 65/81 Rena v Landescreditbank Baden Württemberg [1982] ECR 33.
67 — Paragraph 44 of his Opinion.
68 — Paragraph 30 of the Opinion of Advocate General Darmon; emphasis in the original.
right to install themselves with the worker. The Court ruled:

'the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law. Such is undoubtedly the case with workers who have never exercised the right to freedom of movement within the Community'.

94. Admittedly Article 10 is confined by its terms to a worker who is a national of one Member State employed in another Member State, whereas Article 7 does not in terms make it clear whether it similarly was intended to apply only where a national of one Member State is employed in another Member State. However I consider that it should be so construed, and the Court has certainly proceeded on that basis in a number of cases.

95. Article 7(2) reads: 'He shall enjoy the same social and tax advantages as national workers.' The pronoun refers to the worker whose situation is described in Article 7(1), which reads:

'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.'

96. In each of the present cases the worker concerned, namely the applicant's husband, is a national of the Member State in whose territory the allegedly discriminatory treatment occurs. There is thus no scope for application of Article 7(2).

97. That interpretation moreover is consistent with both the preamble to the regulation and the scheme of Title II of the regulation. That title, which comprises Articles 8 and 9, is headed 'Employment and equality of treatment'. Articles 8 and 9, concerning respectively trade-union membership and access to housing rights and benefits, are both expressed to apply to a 'worker who is a national of a Member State and who is employed in the territory of another Member State'.

98. Since neither of the applicants nor either of their respective husbands has exercised their right to freedom of movement within
the Community it must be concluded that in the present state of Community law none of them can invoke Regulation No 1612/68.

99. It should perhaps be noted that both Advocate General Darmon in Werner 72 and Advocate General Léger in Asscher v Staatssecretaris van Financiën 73 consider that the Council directives relating to the right of residence adopted on 28 June 1990, 74 which recognize a general right of residence independent of any economic activity, will have the effect of broadening the notion of freedom of movement by freeing it from the requirement of economic purpose. The restrictive interpretation which certain cases have given to that concept may therefore no longer be correct.

100. Since however those directives were not required to be implemented until 30 June 1992, they do not affect the principle for the purposes of these cases, in which the relevant events occurred in 1987 and 1991, any more than they did for the purposes of Werner or Asscher. Moreover they cannot override the clear wording of Article 7 of Regulation No 1612/68.

101. Question 3(b) having been answered in the negative, there is no need to answer Question 3(c) which concerns the effect of Article 7(2) if applicable.

Conclusion

102. Accordingly, I am of the opinion that the questions referred to the Court in the present cases should be answered as follows:

In Case C-245/94 Hoever:

(1) A benefit having the characteristics of German child-care benefit is a family benefit within the meaning of Article 4(1)(h) of Council Regulation (EEC)

72 — Cited in note 66.
73 — Case C 107/94, pending; Opinion delivered 15 February 1996.
No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

(2) (a) The spouse of a person who is employed in the Federal Republic of Germany and whose family lives in another Member State may claim payment of child-care benefit on the basis of Article 73 of Regulation No 1408/71.

(b) A provision of national law which gives non-residents who are engaged in employment in the Federal Republic of Germany the right to claim child-care benefit thereunder only if their employment entails a significant number of working hours does not constitute discrimination on grounds of sex contrary to Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions or Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

(3) (a) A benefit having the characteristics of German child-care benefit is a social advantage within the meaning of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.
(b) Article 7(2) of Regulation No 1612/68 is not applicable if the worker residing in another Member State is a national of the State where he is employed.

In Case C-312/94 Zachow:

(1) A benefit having the characteristics of German child-care benefit is a family benefit within the meaning of Article 4(1)(h) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

(2) The spouse of a person who is employed in the Federal Republic of Germany and whose family lives in another Member State, may claim payment of child-care benefit on the basis of Article 73 of Regulation No 1408/71.

(3) (a) A benefit having the characteristics of German child-care benefit is a social advantage within the meaning of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.

(b) Article 7(2) of Regulation No 1612/68 is not applicable if the worker residing in another Member State is a national of the State where he is employed.