JUDGMENT OF THE COURT (Fifth Chamber)
18 March 2004 *

In Case C-8/02,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Sigmaringen (Germany) for a preliminary ruling in the proceedings pending before that court between

Ludwig Leichtle

and

Bundesanstalt für Arbeit,

on the interpretation of Articles 49 EC and 50 EC,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, acting for the President of the Fifth Chamber, A. La Pergola (Rapporteur) and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Spanish Government, by L. Fraguas Gadea, acting as Agent,

— the United Kingdom Government, by P. Ormond, acting as Agent, and S. Moore, Barrister,

— the Commission of the European Communities, by H. Michard and C. Schmidt, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2003,

gives the following

Judgment

By order of 28 November 2001, received at the Court on 11 January 2002, the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen, Germany) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 49 EC and 50 EC.

Those questions were raised in proceedings between Mr Leichtle and the Bundesanstalt für Arbeit (Federal Labour Office, 'the Bundesanstalt') concerning the latter's refusal to reimburse expenditure to be incurred in connection with a health cure which Mr Leichtle proposed to take in Italy.

National legislation

The Allgemeine Verwaltungsvorschrift für Beihilfen in Krankheits-, Pflege-, Geburts- und Todesfällen (General Administrative Provisions on Assistance in the event of Sickness, Treatment, Birth and Death), known as 'the Beihilfevorschriften' (Assistance Provisions), in the version of 10 July 1995 (*Gemeinsames Ministerialblatt*, p. 470), as last amended on 20 February 2001 (*Gemeinsames Ministerialblatt*, p. 186, hereinafter 'the BhV'), govern the grant of assistance to civil servants and to federal judges and to retired Federal civil servants in the event of sickness, treatment, birth and death.

4 Under Article 1 of the BhV, that assistance is to 'supplement the private cover to be paid for out of current remuneration', as the persons covered are supposed to have taken out private sickness insurance.

5 Reimbursement under private sickness insurance or by way of the assistance provided for by the BhV takes the form of reimbursement to those concerned of the amounts incurred by them.

6 Article 8 of the BhV, entitled 'Expenditure incurred in connection with a health cure eligible for assistance', provides:

'...

(2) The following expenditure shall satisfy the conditions for the grant of assistance in respect of a health cure:

1. the expenditure provided for in Paragraph 6(1)(1) to (3),

2. expenditure incurred on board and lodging for a maximum of 23 calendar days, including days of travel, up to an amount of DEM 30 per day; ...

3. the expenditure provided for in Paragraph 6(1)(9),

4. expenditure incurred in respect of visitors' tax...,

5. expenditure incurred in connection with the final medical report.

(3) The expenditure referred to in Paragraph 8(2)(2) to (5) shall be eligible for assistance only if:

1. according to a report drawn up by a medical officer or a medical consultant, the health cure is necessary to restore or maintain fitness for work following serious illness or, in the case of considerable chronic pain, balneotherapy or climotherapy treatment is absolutely necessary and cannot be replaced by other forms of treatment offering the same prospects of success, in particular by treatment at the official's place of residence or posting within the meaning of the Bundesumzugskostengesetz (German Federal Law on Removal Costs);

2. the authority responsible for determining the amount of the assistance has first recognised such eligibility. That recognition shall be valid only where treatment is commenced within four months of notification of the decision;

...

(6) For the purposes of this provision, "health cure" shall mean a cure taken under medical supervision, according to a cure plan, and at a health spa listed in the Register of Health Spas; the accommodation must be at the health spa and tied to that location.'

7 Under Paragraph 13 of the BhV, entitled 'Expenditure incurred outside the Federal Republic of Germany which is eligible for assistance':

'(1) Expenditure incurred outside the Federal Republic of Germany shall be eligible for assistance only where it constitutes expenditure provided for in Article 6 and 9 to 12 and only in so far as it would have been incurred in the Federal Republic of Germany and eligible for assistance up to the permitted amount had the treatment been taken at the place of residence of the person concerned.

(2) ...

(3) Expenditure referred to in Paragraph 8(2)(2) to (5) which is incurred in respect of a health cure outside the Federal Republic of Germany shall be eligible for assistance, by way of exception, only where:

1. it is established in a report drawn up by a medical officer or medical consultant that the health cure is absolutely necessary outside the Federal Republic of Germany on account of the greatly increased prospects of success, and

2. the health spa is listed in the Register of Health Spas, and

3. the other requirements laid down in Article 8 are met.

Expenditure under Article 8(2)(1) and 8(2)(3) to (5) shall be eligible for assistance without being restricted to the costs incurred in the Federal Republic of Germany.

(4) ...'

Main proceedings and questions referred to the Court

8 Mr Leichtle is an official of the Bundesanstalt für Arbeit (Federal Labour Office; 'the Bundesanstalt'). On 22 February 2000, he requested the Bundesanstalt to confirm that the expenditure associated with a health cure which he proposed to take at Ischia (Italy) was eligible for assistance under the BhV.

9 That request was rejected by the Bundesanstalt on 29 February 2000, on the ground that the condition laid down in Article 13(3)(1) of the BhV had not been met. According to the opinion of the Bundesanstalt's medical officer, the medical information available did not permit the conclusion that the cure provided at Ischia offered much greater prospects of success than the health cures available in Germany.

10 Mr Leichtle's objection against that decision was rejected by the Bundesanstalt by decision of 22 March 2000.

11 Mr Leichtle then brought an action before the Verwaltungsgericht Sigmaringen for annulment of those decisions. He then went to Ischia, where he took a health cure between 29 April and 13 May 2000.

12 In support of his action, Mr Leichtle maintains that Article 13(3) of the BhV infringes Articles 49 EC and 50 EC, as it has the effect that access to cures provided in other Member States is rendered practically impossible for those concerned; and the barrier to the freedom to provide services thus created cannot be justified by the need to maintain treatment capacity or essential medical capacity on national territory.

13 The Bundesanstalt counters that a complete opening-up of access to European cure establishments would endanger the financial equilibrium, the medical and hospital competence and the medical standards of the system of German cure establishments.

14 The Bundesanstalt further contends that Mr Leichtle has no legal interest in bringing proceedings. It states that the expenditure relating to strictly medical treatment received by Mr Leichtle at Ischia, amounting to EUR 239.10, was recognised as eligible for assistance up to an amount of EUR 154.41, so that the only question remaining in dispute is the eligibility of the related costs of EUR 326.72 and EUR 1 124.84 in respect of travel and accommodation. Mr Leichtle cannot in any event claim reimbursement of those costs, since he took the cure without the mandatory condition of prior recognition of eligibility for assistance having been satisfied.

15 The Verwaltungsgericht Sigmaringen states that it is not disputed between the parties that the medical conditions laid down in Article 8(3)(1) of the BhV are met, namely that the cure taken by Mr Leichtle was necessary and could not be replaced by other forms of treatment at his place of residence which offered the same prospects of success.

16 According to the Verwaltungsgericht Sigmaringen, it is likewise established that application of the criterion laid down in Article 13(3)(1) of the BhV must, in this case, lead to a refusal of recognition of eligibility for assistance, since Germany has spas, particularly at Bad Steben or Bad Münster am Stein, capable of providing alternative cures equivalent to that taken by Mr Leichtle in Italy.

17 It follows that the outcome of the main action depends principally on whether that provision is correct to subject the grant of assistance towards certain expenditure relating to health cures taken in other Member States to restrictive conditions distinct from those which apply where the cure takes place on national territory, or whether Articles 49 EC and 50 EC preclude its doing so.

18 The Verwaltungsgericht Sigmaringen considers, first of all, that it may be inferred from the Court's case-law, and in particular from Case C-158/96 *Kohll* [1998] ECR I-1931 and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, that Article 13(3)(1) of the BhV constitutes, both for the official concerned and for service providers established in other Member States, a barrier to the freedom to provide medical services.

19 Admittedly, the BhV's provisions do not preclude the grant of assistance in respect of the strictly medical services provided in the course of a cure taken in another Member State, the amount of the assistance in such a situation being limited, as is

apparent from Article 13(1), 8(2)(1) and 8(3) of the BhV, to that which would have been paid if the treatment had been provided in Germany. However, the fact that assistance in respect of board, lodging, travel costs, visitors' tax and the final medical report associated with a cure taken outside Germany is granted only where the person concerned has obtained prior recognition of eligibility, which is given only on the very restrictive conditions laid down in Article 13(3)(1) of the BhV, has the practical effect of preventing the official from taking such a cure. In fact, those cost factors should not be considered in isolation from the strictly medical services to which they are inevitably incidental, since a health cure by its nature takes time and requires that the patient travel to and stay at the place in question, and is thus comparable to in-patient treatment in hospital.

20 The Verwaltungsgericht Sigmaringen therefore asks whether or not the regime provided for in Article 13(3)(1) of the BhV can be justified in the light of the rules of the Treaty.

21 It considers, in that regard, that the judgment in *Smits and Peerbooms*, cited above, does not in itself provide the solution to the questions raised in this case, since, unlike the national system at issue in that case, the BhV do not guarantee benefits in kind to officials, nor do they plan, by means for example of contractual arrangements, a system of social insurance cover which needs to be protected by the restrictions provided for in the BhV.

22 The Verwaltungsgericht Sigmaringen also questions the relevance of the Bundesanstalt's argument that the complete opening-up of access to European cure establishments would entail a real danger to the financial equilibrium and the medical and hospital competence of the system of German cure establishments. It points out, in particular, that in *Smits and Peerbooms*, cited above, the Court decided particularly that it could not be accepted that priority be given to national hospital establishments with which the insured's sickness insurance fund had not

concluded an agreement, to the detriment of hospital establishments in other Member States.

23 If the Court interprets Articles 49 EC and 50 EC as meaning that they preclude the special condition imposed by Article 13(3)(1) of the BhV, the Verwaltungsgericht Sigmaringen is of the view that where a cure which has been shown to be medically necessary is available and where the only issue is whether the national provisions which determine whether assistance will be granted comply with Community law, the person concerned cannot be required to obtain prior recognition of eligibility for assistance, including by bringing proceedings before the competent court, before taking the proposed health cure. According to the Verwaltungsgericht Sigmaringen, that would amount to depriving the person concerned of any real possibility of taking such a cure in another Member State and therefore of taking advantage of the Community rules on freedom to provide services. Since he would be unable for medical reasons to delay the cure pending the outcome of the administrative and judicial procedures, he would be obliged to take a cure in Germany.

24 According to the Verwaltungsgericht Sigmaringen, it follows that the Bundesanstalt's argument that Mr Leichtle's claim must be declared inadmissible, on the ground that he took the cure in question without having first obtained recognition that the associated expenditure was eligible for assistance, must be rejected.

25 Noting that even though the case-law of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) contains some indications which appear to support the interpretation thus advocated, there is no settled national case-law on the question, the Verwaltungsgericht Sigmaringen seeks to ascertain whether that interpretation may be imposed by Community law.

26 It was in those circumstances that that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are Articles 49 EC and 50 EC to be interpreted as precluding rules of national law (in this case Article 13(3) of the BhV) under which the costs of a health cure taken in another Member State are reimbursable only where it is absolutely essential that the cure be taken outside the Federal Republic of Germany because it thus offers greatly increased prospects of success, where that is established in a report drawn up by a medical officer or a medical consultant and where the spa concerned is listed in the Register of Spas?

2. Are Articles 49 EC and 50 EC to be interpreted as precluding rules of national law (in this case point 3 in the first sentence of Article 13(3) of the BhV, read in conjunction with Article 8(3)(2) thereof) under which advance recognition of a health cure is precluded where the person concerned does not await the conclusion of the application procedure or of any subsequent court proceedings before commencing the cure and where the only matter in dispute is whether those rules are correct not to recognise a health cure taken in another Member State of the European Union as eligible for assistance?'

The questions for the Court

First question

27 By its first question, the national court is asking, in essence, whether Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a

Member State, such as those at issue in the main proceedings, under which the reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is conditional, first, on the obtaining of prior recognition of eligibility, which is given only provided that it is established, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary because of the greatly increased prospects of success in that other Member State, and, secondly, on the spa concerned being listed in the Register of Health Spas.

28 In order to answer that question, it must be noted as a preliminary point that, according to settled case-law, medical activities fall within the scope of Article 50 EC, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment (see, among others, Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 41; *Smits and Peerbooms*, cited above, paragraph 53; and Case C-385/99 *Müller-Fauré and Van Riet* [2003] ECR I-4509, paragraph 38).

29 Moreover, although it is not disputed that Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted, it is nevertheless the case that, when exercising that power, the Member States must comply with Community law (see, among others, *Smits and Peerbooms*, paragraphs 44 to 46, and *Müller-Fauré and Van Riet*, cited above, paragraph 100, and the case-law cited there).

30 Accordingly, the Court has ruled in particular that Article 49 EC precludes the application of any national rule making reimbursement of medical costs incurred in another Member State subject to a system of prior authorisation where it is apparent that such a system deters, or prevents, insured persons from approaching

providers of medical services established in Member States other than the State of insurance, save where the barrier to the freedom to provide services to which it gives rise is justifiable under one of the derogations allowed by the EC Treaty (see, to that effect, *Kohll*, paragraphs 33 to 36; *Smits and Peerbooms*, paragraphs 62, 69 and 71; and *Müller-Fauré and Van Riet*, paragraphs 44 and 45).

31 As regards this case, the question referred to the Court admittedly does not concern the reimbursement of expenditure relating to the actual treatment provided in the course of a health cure taken in another Member State, since that expenditure has, in this instance, already been reimbursed in accordance with the provisions of the BhV.

32 It is nevertheless the case, however, that the fact that a Member State's rules subject the reimbursement of the other expenditure incurred in respect of such a cure to conditions different from those applicable to cures taken in that Member State is capable of deterring those covered by social insurance from approaching providers of medical services established in Member States other than that in which they are insured.

33 As the national court observes, expenditure in connection with board and lodging can be regarded as forming an integral part of the health cure itself. In that regard, it is clear from Article 8(6) of the BhV that assistance granted on the basis of that legislation cannot be used for cures other than those carried out under medical supervision and in accordance with a cure plan in a health spa, while the accommodation must be at the spa and tied to it. Just as hospital treatment may involve a stay in hospital, a health cure administered for therapeutic purposes may well, by its nature, include a stay at a spa.

34 The medical report drawn up at the end of the cure falls squarely within the scope of medical activity.

35 Although travel costs and any visitors' tax are not medical in character, and are not as a rule paid to health care providers, they none the less appear to be inextricably linked to the cure itself, since, as previously stated, the patient is required to travel to and stay at the spa.

36 It follows that any conditions governing reimbursement of those various items of expenditure by a scheme such as the BhV are indeed capable of having a direct influence on the choice of the place of the cure and, therefore, on the selection of a health cure centre capable of providing services of that type.

37 As regards, first, the actual principle of the requirement for prior recognition of eligibility for assistance of expenditure on board, lodging, travel, visitors' tax and the making of a final medical report, and leaving aside the conditions on which such recognition may be obtained, it is appropriate to note that it follows from Article 8(3) and 13(3) of the BhV that that principle applies in respect of the expenditure occasioned by a health cure taken either inside or outside Germany. It follows that that requirement does not, as such, have the effect of making the provision of services between Member States, in this case the services offered by cure centres in other Member States, more difficult than the provision of services purely within one Member State, namely those offered by cure centres in Germany (see, to that effect, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17; *Kohll*, paragraph 33; and *Smits and Peerbooms*, paragraph 61).

38 As regards, secondly, the conditions to which the BhV subject the recognition of eligibility for assistance of expenditure on board, lodging, travel, visitors' tax and the making of the final medical report, incurred in respect of a health cure undergone outside Germany, it follows from Article 8(3) in conjunction with Article 13(3) of the BhV that there are two such conditions.

39 The first condition requires either that a report drawn up by a medical officer or a medical consultant establishes that the cure is necessary in order to restore or maintain the official's fitness for work following serious illness or that, in the case of considerable chronic pain, balneotherapy or climotherapy treatment is absolutely necessary and cannot be replaced by other forms of treatment offering the same prospects of success, in particular by treatment at the official's place of residence or posting.

40 In that regard, it must be held that such requirements, which, as is clear from Article 8(3)(1) and 13(3)(3) of the BhV, apply without distinction to expenditure occasioned in respect of health cures undergone inside or outside Germany, do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see, to that effect, the case-law cited in paragraph 37 of this judgment).

41 The second condition, laid down in Article 13(3)(1) of the BhV, applies, by contrast, only to expenditure occasioned in respect of a health cure taken in a Member State other than Germany, since it specifically implies that, in order for that expenditure to be recognised as eligible for assistance, it must be established in a report drawn up by a medical officer or medical consultant that the health cure is absolutely necessary owing to the greatly increased prospects of success outside the Federal Republic of Germany.

42 As is clear from the case-law referred to in Article 30 of this judgment, such a condition, which, by its very nature, has the effect of deterring officials covered by the BhV from approaching health cure centres established in other Member States, cannot be accepted unless the barrier to freedom to provide services resulting therefrom is justifiable in the light of the Treaty.

43 It is settled case-law that it is necessary, in that regard, where justification is based on an exception laid down in the Treaty or indeed on an overriding general-interest reason, to ensure that the measures taken in that respect do not exceed what is objectively necessary for that purpose and that the same result could not be achieved by less restrictive rules (see *Müller-Fauré and Van Riet*, cited above, paragraph 68 and the case-law cited there).

44 As is clear from the order for reference, the Bundesanstalt maintains, with reference to a letter from the Federal Interior Ministry, that a complete opening-up of access to European cure establishments would involve a real danger to the financial equilibrium and the competence of the medical and hospital resources of the system of German cure establishments. The Spanish Government likewise submits, in its written observations, that the disputed condition is justified in the light of the need to maintain financial equilibrium in respect of health cures and to ensure the maintenance of treatment capacity and of medical competence in that sector in Germany.

45 However, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State.

46 In that regard, it must be held that neither the file transmitted to the Court by the referring court nor the observations submitted to the Court contain clear material

substantiating the argument that Article 13(3)(1) of the BhV is necessary in order to maintain treatment capacity or medical competence essential for the protection of public health (see, to similar effect, *Müller-Fauré and Van Riet*, paragraph 70).

47 As regards the justification based on the need to avoid a risk of serious harm to the financial equilibrium of the social security system, no clear argument has been put before the Court in support of the assertion that Article 13(3)(1) of the BhV is necessary for such purposes (see, to similar effect, *Müller-Fauré and Van Riet*, paragraph 93).

48 Moreover, it should be borne in mind that it is for the Member States alone to determine the extent of the sickness cover available to insured persons (*Müller-Fauré and Van Riet*, paragraph 98). It follows that nothing precludes the amount up to which expenditure on board, lodging, travel, visitors' tax and the making of a final medical report, incurred in respect of a health cure taken in another Member State being limited to the amounts up to which such expenditure would have been recognised as eligible for assistance if a cure which was available and afforded equivalent therapeutic effectiveness had been taken in Germany. Indeed, such a limitation, which, as the Commission submitted, can be justified by the consideration that the costs to be borne by the State must be limited to what is necessary for medical purposes, is based on an objective, non-discriminatory and transparent criterion (*Müller-Fauré and Van Riet*, paragraph 107).

49 As regards, thirdly, the condition in Article 13(3)(2) of the BhV that the health spa concerned must be listed in the Register of Health Spas, it must be observed that such a requirement which, as the Advocate General stated in point 34 of his

Opinion, is probably intended to ensure that the spas concerned are in a position to provide the treatment deemed necessary, is also laid down as regards reimbursement of expenditure incurred in respect of health cures taken in Germany, as is clear from Article 8(6) of the BhV. It follows that such a requirement does not appear, *a priori* and in principle, to be such as to have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see the case-law cited in paragraph 37 of this judgment).

50 It is, however, for the national court to determine, particularly in the light of the conditions to which the registration of health spas in such a Register of Health Spas may be subject, whether that registration requirement is or is not such as to give rise to the effect described in paragraph 49 of this judgment and to satisfy itself that those conditions are objective.

51 In view of all the foregoing considerations, the answer to the first question must be that:

— Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a Member State, such as those at issue in the main proceedings, under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is conditional on obtaining prior recognition of eligibility, which is given only where it is established, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary owing to the greatly increased prospects of success in that other Member State.

— Articles 49 EC and 50 EC are to be interpreted as meaning that they do not in principle preclude rules of a Member State, such as those at issue in the main proceedings, under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure, whether taken in that Member State or in another Member State, is made only where the health spa concerned is listed in the Register of Health Spas. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

Second question

52 By its second question, the national court is asking whether Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude the application of national rules under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the procedure for obtaining prior recognition of eligibility for assistance provided for in those rules or of any subsequent court proceedings before commencing the cure in question.

53 It is appropriate to observe as a preliminary point that it is clear from the order for reference that when Mr Leichtle went to Ischia in order to take the cure the Bundesanstalt had already rejected his application for recognition of eligibility for assistance in respect of the cure and that Mr Leichtle had already commenced proceedings for annulment of that decision before the national court.

54 It is thus sufficient, for the purposes of giving the national court the guidance which the resolution of the main proceedings requires, to indicate whether Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude the application of national rules under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings brought against a decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

55 In that regard, it must be observed that, ruling on a somewhat similar problem, the Court has previously held, as regards the prior authorisation to receive health care provided in another Member State referred to in Article 22(1)(c) 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, in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), that both the practical effect and the spirit of that provision required that if the request of an insured person for authorisation on the basis of that provision has been refused by the competent institution and it is subsequently established by a court decision that that refusal was unfounded, that person is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which it would ordinarily have borne if authorisation had been properly granted in the first place (*Vanbraekel and Others*, cited above, paragraph 34).

56 As the Commission correctly submitted, a similar approach should be adopted in this case.

57 Indeed, as the national court, the Commission and the Advocate General in point 39 of his Opinion pointed out, in the absence of acceptance that the judicial finding of infringement of Articles 49 EC and 50 EC by the contested decision of the Bundesanstalt may retroactively justify the assumption of responsibility for the expenditure in question, the practical effect of those Community provisions would be jeopardised, since in most cases patients cannot await the result of court proceedings before receiving the treatment which their state of health requires and are therefore obliged to abandon the idea of going to another Member State in order to be treated there.

58 In the light, particularly, of the information in the order for reference and reproduced in paragraph 25 of this judgment, it must be pointed out, in addition, that, as follows from consistent case-law, in the face of directly applicable Treaty provisions, such as Article 49 EC, it is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of Community law and, where this is not possible, to disapply any incompatible domestic provisions (Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 29).

59 In view of the foregoing, the answer to the second question must be that Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude the application of national rules under which the reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings brought against the decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

Costs

60 The costs incurred by Spanish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Sigmaringen by order of 28 November 2001, hereby rules:

1. Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a Member State, such as those at issue in the main proceedings, under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is conditional on obtaining prior recognition of eligibility, which is given only provided it is established, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary owing to the greatly increased prospects of success in that other Member State.

2. Articles 49 EC and 50 EC are to be interpreted as meaning that they do not in principle preclude rules of a Member State, such as those at issue in the main proceedings, under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure, whether taken in that Member State or in another Member State, is made only where the health spa concerned is listed in the Register of Health Spas. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

3. Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude the application of national rules under which the reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings brought against the decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

Timmermans La Pergola von Bahr

Delivered in open court in Luxembourg on 18 March 2004.

R. Grass V. Skouris

Registrar President