JUDGMENT OF THE COURT (third chamber)

27 October 2011 *

In Case C-255/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 July 2009,

European Commission, represented by E. Traversa and M. França, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, M.L. Duarte, A. Veiga Correia and by P. Oliveira, acting as Agents,

defendant,

supported by

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

* Language of the case: Portuguese.

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, E. Juhász, Judges, and D. Šváby, (Rapporteur),

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 February 2011,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC in so far as it makes no provision – in Decree Law No 177/92 of 13 August 1992 laying down the conditions for reimbursement of medical expenses incurred

abroad (*Diário da República* I, Series-A, No 186, p. 3926), or in any other measure of national law – for the reimbursement of non-hospital medical expenses incurred in another Member State, other than in the circumstances specified in Regulation (EEC) No 1408/71 of the Council 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), or, to the extent that Decree-Law No 177/92 allows the reimbursement of non-hospital medical expenses incurred in another Member State, it makes such reimbursement subject to prior authorisation.

Legal context

European Union ('EU') law

2 Under Article 22(1) of Regulation No 1408/71:

'An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay;

…

or

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay … in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

…'

National law

3 Decree-Law No 177/92 governs medical care abroad for persons insured under Portugal's national health system (Serviço Nacional de Saúde; 'the SNS').

4 Article 1 of Decree-Law No 177/92 provides:

'1. This decree-law shall govern highly specialised medical care abroad which cannot be provided in Portugal on account of a lack of technical resources or personnel.

2. Persons insured under the national health system shall be beneficiaries of this care.

3. Requests for referrals abroad made by private establishments shall not fall within the scope of this decree-law.'

5 Article 2 of Decree-Law No 177/92, which lays down the conditions for full reimbursement of costs as provided for under Article 6 thereof, states:

'The following conditions must be satisfied before the benefits provided for in Article 6 can be granted:

(a) a detailed hospital medical report favourable [to the recommendation], drawn up by the doctor treating the person concerned and approved by the competent service manager, must be submitted;

(b) that report must be approved by the medical director of the hospital in which the patient was treated;

(c) the Director General for Hospitals must grant consent on the basis of an opinion of the technical service.'

6 With regard to the power to take decisions and the mode of action, Article 4(1) of Decree-Law No 177/92 provides:

'It shall be for the Director General for Hospitals to rule on the request for medical care abroad made by the party concerned, in accordance with the conditions laid down in Article 2.'

The pre-litigation procedure

7 Following a request for information on the compatibility of national legislation and practice with the Court's case-law on the application of the rules of the internal market in healthcare services, sent to all the Member States by the Commission on 12 July 2002, the Portuguese Republic sent information, by letter of 17 January 2003, on the subject of the applicable Portuguese legislation.

8 On 28 July 2003, the Commission published a summary report entitled 'Report on the application of internal market rules to health services. Implementation by the Member States of the Court's jurisprudence' (SEC (2003) 900).

9 On the basis of the information available to it, the Commission sent a letter of formal notice to the Portuguese Republic on 18 October 2006 in which it alleged that, by providing in Decree-Law No 177/92 that the reimbursement of expenses for non-hospital services, incurred in another Member State, is to be subject to prior authorisation, which is granted only on very restrictive conditions, the Portuguese Republic had failed to fulfil its obligations under Article 49 EC.

10 By letter of 12 January 2007, the Portuguese Republic replied that it was 'difficult to imagine that healthcare services could be subject to the rules of the internal market', and that '…the position taken by the Portuguese State on the basis of the settled interpretation of the Court of Justice of the European Communities could be interpreted in the broadest sense, leading to the conclusion that the legislation of a Member State makes the assumption of health care costs subject to prior authorisation'.

11 In the light of that reply, the Commission sent the Portuguese Republic a reasoned opinion on 29 June 2007 in which it stated that the reply of the Portuguese Republic contained no new elements capable of calling into question the fundamental principles and the settled case-law of the Court, and requested the Portuguese Republic to take the necessary measures to comply with the opinion within two months.

12 In its answer to that reasoned opinion, dated 4 September 2007, the Portuguese Republic contended that 'Decree-Law No 177/92 did not preclude the application of Community legislation concerning Portuguese citizens' access to healthcare services within the European Union or even the fundamental freedoms of Union citizens, as enshrined in the Treaty establishing the European Union'.

13 On 12 February 2008, the Portuguese Republic informed the Commission of its intention to 'continue the internal reflection on the financial impact of the system', which would require an additional period of at least one month, given that there had been a recent change in the composition of the Government.

14 In response to a reminder sent to it by the Commission on 18 June 2008, the Portuguese Republic re-stated, by letter of 24 July 2008, the position taken in reply to the reasoned opinion.

15 On 15 April 2009, the Commission sent the Portuguese Republic an additional reasoned opinion in order to set out in greater detail the scope of the infringement of Community law alleged against it. The Commission considers that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC, as interpreted by the case-law of the Court, by not making provision, either in Decree-Law No 177/92 or in any other measure of national law, for the reimbursement of non-hospital medical expenses incurred in another Member State, other than in the circumstances specified in Regulation No 1408/71.

16 By letter of 15 May 2009, the Portuguese authorities replied to the additional reasoned opinion that 'there is provision in Decree-Law No 177/92 for the reimbursement of expenses incurred by SNS beneficiaries for treatment abroad' and that 'Portuguese legislation does not preclude reimbursement of medical expenses incurred abroad by an SNS beneficiary, even where they relate to specialist treatment, provided that the procedure for prior certification of the medical need is complied with'.

17 Being dissatisfied with those explanations, the Commission decided to bring the present action.

Procedure before the Court

18 By order of the President of the Court of Justice of 17 November 2009, the Kingdom of Spain and the Republic of Finland were granted leave to intervene in support of the forms of order sought by the Portuguese Republic. The Republic of Finland, however, did not submit any written observations; nor did it attend the hearing.

19 At the hearing, the Commission, on being asked by the Court to explain the inferences that it drew from Case C-512/08 *Commission* v *France* [2010] ECR I-8833 and the impact of that judgment in the circumstances of the present case, stated that it was withdrawing part of its action under Article 78 of the Rules of Procedure of the Court of Justice.

20 By document of 24 March 2011, the Commission confirmed that partial withdrawal and stated that its action is now concerned only with non-hospital medical expenses incurred in another Member State, with the exception of some medical services which, although provided in a consulting room, require the use of major and costly equipment exhaustively listed in the national legislation, such as a scintillation camera, with or without a positron emission coincidence detector; emission tomography; a positron camera; nuclear magnetic resonance imaging or spectrometry apparatus for clinical use; a medical scanner; a hyperbaric chamber or a cyclotron for medical use.

The action

Arguments of the parties

The Portuguese legislation

21 The Commission states that it has had difficulty understanding the position of the Portuguese Republic, because the information provided by it on the subject of the reimbursement of non-hospital medical expenses has been ambiguous or contradictory.

22 The Commission concluded from the Portuguese Republic's reply to the questionnaire from the Directorate-General for the Internal Market, regarding the compatibility of national rules with the case-law of the Court, that Decree-Law No 177/92 was a national legislative measure which set out the applicable provisions on the reimbursement of non-hospital medical expenses incurred in another Member State.

23 However, the Commission states that, in its reply to the reasoned opinion, that Member State asserted that in the Portuguese law concerning access to healthcare services there was no provision making the right to reimbursement of non-hospital medical expenses subject to prior authorisation in situations in which the SNS beneficiary makes use of a private provider in the national territory or in another Member State and that, in those situations, … the SNS does not reimburse non-hospital medical expenses. The Commission stated that it had concluded from this that Portuguese law did not make provision for the reimbursement of non-hospital medical expenses incurred in another Member State, other than in the circumstances specified in Regulation No 1408/71.

24 The Commission notes that the Portuguese Republic declared, however, in reply to the additional reasoned opinion, that 'access to healthcare services in another Member State follows a procedure … in which clinical need must be certified', which seems to indicate that in Portugal there is a system of prior authorisation for the reimbursement of non-hospital medical expenses in relation to which the beneficiary has used a private provider in another Member State.

25 Lastly, it is claimed that the Portuguese Republic expressly acknowledged in its defence that there was no possibility of reimbursement of non-hospital medical costs other than in the circumstances specified in Regulation No 1408/71.

26 The Portuguese Republic disputes the alleged ambiguities and contradictions in the explanation of the rules in force in Portugal. It states, in that regard, that there are two possibilities under Portuguese law for accessing healthcare services abroad, which are laid down, respectively, in Regulation No 1408/71 – in particular, Article 22 thereof – and in Decree-Law No 177/92, which governs 'highly specialised medical care abroad which cannot be provided in Portugal'.

27 Decree-Law No 177/92 must be interpreted in accordance with the logic of the way in which the SNS operates and is intended to apply the framework law on health – that is, Law No 48/90 of 24 August 1990 – paragraph 2 of Heading XXXV of which provides that 'solely in exceptional cases where it is impossible to guarantee treatment in Portugal under the required conditions of safety and where it is possible to do this abroad, the national health service shall bear the cost of such treatment'.

28 The Portuguese Republic explains that Decree-Law No 177/92 was intended to be an instrument for hospital management. Under that law, medical treatment abroad is possible where, owing to the capacity of the hospital care network (public or private), the Portuguese health system cannot provide the treatment needed for the patient affiliated to that system. That treatment is intended to provide the patient with the care needed, with a guarantee of quality and medical effectiveness.

29 Treatment abroad is subject to certain conditions which are laid down in Decree-Law No 177/92. Under that law, requests for highly specialised medical care abroad must be submitted by hospitals belonging to the national health system and a detailed medical report, to be approved by the relevant service manager and medical director (Article 2(1) and (2)), must be attached to them. The final decision lies with the health director. The medical report must also provide a number of details about the patient's

state of health and the treatment, and the places abroad where the patient is to be operated on or treated. Where the statutory requirements are satisfied, the patient has a right to full reimbursement of the costs, including the outward travel and accommodation costs of the patient and a companion. Payment is made by the clinical unit which is responsible for the prior certification procedure (Article 6).

30 The Portuguese Republic emphasises that no distinction should be made between hospital care and non-hospital care. Referring to the criterion relating to the nature of the national health service establishment responsible for drawing up the medical certificate, this concerns hospital care, whereas, when referring to the criterion of the treatment required, this concerns 'highly specialised medical care' provided by the foreign hospital service or care unit, which could cover the typical services of a hospital unit (such as a surgical intervention) and any medical acts that do not fall within that strict concept of hospital care (specialist consultations).

31 The Portuguese Republic adds that the procedure for prior certification of the clinical need for treatment abroad is comparable to the procedure for referral to a specialist.

32 The rules governing medical care abroad, as set out in Decree-Law No 177/92, are consistent with the requirements or structural choices connected to the operation of the SNS, which was created to implement Article 64 of the Portuguese Constitution, paragraph 2 of which states that the right to health protection is to be given effect 'by means of a national health service that shall be universal and general and, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge'.

EU law

33 The Commission submits that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC, as interpreted by the case-law of the Court. The effect of that case-law is that Article 49 EC applies to the situation of a patient who receives, in a Member State other than his Member State of residence, medical services which are provided for consideration. Decree-Law No 177/92, however, which lays down the conditions for reimbursement of medical expenses incurred abroad, either (i) makes no specific provision for the reimbursement of non-hospital medical expenses incurred in another Member State, other than in the circumstances specified in Regulation No 1408/71, or (ii) makes the reimbursement of those non-hospital medical expenses subject to prior authorisation, on restrictive conditions.

34 The Commission argues that the Portuguese rules governing non-hospital care expenses incurred in another Member State cannot be justified either on grounds relating to public health or on the basis of a supposed risk that the financial balance of the social security system would be seriously undermined.

35 The Portuguese Republic contends that there is no provision in the Treaty which confers on citizens of the European Union the right to claim reimbursement of medical expenses relating to treatment administered abroad or permits them to exercise such a right unreservedly, without it being governed by a mechanism of prior authorisation.

36 According to the Portuguese Republic, the Court's case-law on the applicability of Article 49 EC to cross-border healthcare services is characterised by its lack of legal certainty. Furthermore, it has evolved in the context of proceedings for a preliminary ruling, pursuant to Article 234 EC, which means that those approaches cannot be applied in the present case.

37 Article 22 of Regulation No 1408/71 also makes the provision of cross-border healthcare services subject to prior authorisation; and, even if prior authorisation could constitute a restriction of the freedom to provide services, Article 49 EC does not preclude it, provided that it is subject to objective criteria which must also be satisfied for the reimbursement of medical expenses relating to treatment carried out in the national territory.

38 Moreover, the Portuguese Republic emphasises the need to connect and reconcile Article 49 EC with the other provisions of the Treaty and contends that Article 152(5) EC defines an area of competence which is reserved to the Member States, the effect of which is to preclude any application of other provisions of the Treaty which would undermine the powers of the national decision-making authority in relation to the organisation, funding or design of the chosen model for the national health system.

39 The Portuguese Republic argues that prior authorisation is justified by the need to maintain the financial balance of the social security system.

40 The Kingdom of Spain argues that Article 49 EC does not impose any obligation on the Member States to adopt positive implementation measures, particularly since the European directive is the legal instrument expressly provided for in EU law for imposing such positive implementation measures within the national legal systems. According to the Kingdom of Spain, Article 52 EC expressly provides that the European directive is to be the means of liberalising the internal market for services.

41 Furthermore, the Commission has failed to prove that the Portuguese Republic applies its rules in breach of its obligations under Article 49 EC – for instance, by systematically refusing the authorisation for treatment abroad, as provided for under the system.

42 As regards the compatibility of the Portuguese rules with Article 49 EC, the Kingdom of Spain states that a system which provides for prior authorisation does not necessarily place an unjustified restriction on the freedom to provide services. There are overriding grounds in the general interest which justify such a system, in particular in connection with hospital health services.

43 As for the proportionality of the rules at issue, the Kingdom of Spain states that it is necessary to consider whether the administrative authorisation procedure introduced by the Portuguese rules is based on objective and non-discriminatory criteria which are known in advance to the persons concerned, enabling them to determine the limits attaching to the national authorities' discretion.

Findings of the Court

44 After making the withdrawal referred to in paragraph 20 above, the Commission claims that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC by making no provision – in Decree-Law No 177/92 or in any other provision of national law – for the reimbursement of non-hospital medical expenses incurred in another Member State, other than in the circumstances specified in Regulation (EEC) No 1408/71, or, to the extent that Decree-Law No 177/92 allows the reimbursement of non-hospital medical expenses incurred in another Member State, by making such reimbursement subject to prior authorisation.

45 Referring in particular to Article 152(5) EC, the Portuguese Republic challenges the applicability of Article 49 EC to cross-border healthcare.

46 It should be noted in this connection that, according to settled case-law, medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services (see, inter alia, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 29, and Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 36), there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment (Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 41; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 38; Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 86; and *Commission* v *France*, paragraph 30).

47 Whilst it is established that EU 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 EU level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits (see Case C-490/09 *Commission* v *Luxembourg* [2011] ECR I-247, paragraph 32 and the case-law cited). It should also be noted that, under Article 152(5) EC, action by the European Union in the field of public health must fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care (see *Watts*, paragraph 146).

48 The fact nevertheless remains that, when exercising that power, Member States must comply with EU law and, in particular, with the provisions on the freedom to provide services (see, inter alia, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; *Müller-Fauré and van Riet*, paragraph 100; *Watts*, paragraph 92; *Elchinov*, paragraph 40; Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 53; and *Commission* v *Luxembourg*, paragraph 32).

49 Accordingly, the Court has held that Article 152(5) EC does not exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC, to make adjustments to their national systems of social security, but that it does not follow that this undermines their sovereign powers in the field (see *Watts*, paragraph 147, and *Commission* v *Luxembourg*, paragraph 45).

50 Likewise, with regard to the argument based on the nature of the Portuguese national health system, it should be noted that the fact that the applicable national rules are social security rules and, more specifically, provide, as regards health insurance, for benefits in kind rather than reimbursement does not mean that medical treatment falls outside the scope of that basic freedom (see, to that effect, *Müller-Fauré and van Riet*, paragraph 103; *Watts*, paragraph 89; *Commission* v *Spain*, paragraph 47; and *Commission* v *Luxembourg*, paragraph 36).

51 Furthermore, the provision of medical services does not cease to be a provision of services for the purposes of Article 49 EC simply because, after paying the foreign provider for the care received, the insured person subsequently seeks reimbursement of the related costs through a social security system (*Commission* v *Spain*, paragraph 47).

52 It follows that Article 49 EC applies to cross-border healthcare.

53 It is appropriate, therefore, to consider whether the Portuguese legislation at issue constitutes a failure to comply with Article 49 EC.

54 It is settled law that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services entirely within a single Member State (see, inter alia, Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 25 and the case-law cited).

55 In order to examine this, it is first necessary to clarify the system provided under the Portuguese legislation for the reimbursement of non-hospital medical expenses incurred in another Member State.

56 It is established that, other than in the circumstances specified in Regulation No 1408/71, which are not the subject of the present action, Decree-Law No 177/92 is the only Portuguese legislation applicable in relation to reimbursement of medical care costs incurred abroad.

57 In that regard, it should be noted first that, in accordance with Article 1 of Decree-Law No 177/92, that measure applies to 'highly specialised medical care abroad which cannot be provided in Portugal on account of a lack of technical resources or personnel'.

58 Second, Article 2 of Decree-Law No 177/92 provides for the reimbursement, in accordance with the conditions which it lays down, of non-hospital medical expenses linked to 'highly specialised' medical treatments abroad which cannot be provided in Portugal. However, other than in the circumstances specified in Regulation No 1408/71, there is no possibility of reimbursement of medical expenses for non-hospital medical care abroad that is not covered by Decree-Law No 177/92, as the Portuguese Government finally admitted at the hearing.

59 In such circumstances, given the partial withdrawal of the Commission, it is appropriate to examine in turn the situation of 'highly specialised' medical care which does not involve the use of major and costly equipment exhaustively listed in the national legislation, in respect of which Decree-Law No 177/92 makes reimbursement subject to prior authorisation (non-hospital care other than 'major' covered by Decree-Law No 177/92), and that of non-hospital care, not covered by Decree-Law No 177/92, in respect of which there is no provision for reimbursement under Portuguese law (non-hospital care other than 'major' not covered by Decree-Law No 177/92), these two situations corresponding to two alternative complaints formulated by the Commission.

Non-hospital care other than 'major' covered by Decree-Law No 177/92

60 It should be recalled, in this respect, that the Court has held that the mere requirement, for treatment planned in another Member State, of prior authorisation to which responsibility for payment by the competent institution is made subject, in accordance with the rules governing cover in force in the Member State to which that institution belongs, constitutes, both for patients and service providers, an obstacle to the freedom to provide services, since such a system deters, or even prevents, those patients from approaching providers of medical services established in a Member State to obtain the treatment in question (see, to that effect, *Kohll*, paragraph 35; *Smits and Peerbooms*, paragraph 69; *Müller-Fauré and van Riet*, paragraphs 41, 44 and 103; *Watts*, paragraph 98; and *Commission* v *France*, paragraph 32).

61 In the present case, Decree-Law No 177/92 makes reimbursement of medical expenses incurred abroad subject to a threefold prior authorisation. Under Article 2 of that Decree-Law, reimbursement requires: (i) a detailed, medical report in favour of the treatment abroad, drawn up by the doctor treating the person concerned; (ii) the

approval of that report by the medical director of the hospital service; and (iii) the consent of the Director General for Hospitals.

62 Although the rules at issue do not directly prevent the patients concerned from approaching providers of medical services established in another Member State, the prospect of financial loss in the event of refusal by the national health system to meet the medical costs as a result of an unfavourable administrative decision is per se clearly liable to deter them (see, to that effect, *Kohll*, paragraph 35; *Smits and Peerbooms*, paragraph 69; and *Müller-Fauré and van Riet*, paragraph 44). The complexity of the authorisation procedure, which is manifested in particular in its three-stage arrangement, constitutes an additional deterrent factor as regards turning to cross-border healthcare services.

63 Furthermore, Decree-Law No 177/92 makes provision for meeting the costs of medical care abroad solely in exceptional cases where the treatment needed for patients affiliated to the Portuguese health system is not available under that system. By its very nature, that condition will severely limit the circumstances in which such authorisation can be obtained (see, to that effect, *Smits and Peerbooms*, paragraph 64, and *Müller-Fauré and van Riet*, paragraph 42).

64 The argument of the Portuguese Government that the procedure laid down in Decree-Law No 177/92 for 'prior certification of the clinical need' ('referenciação prévia da necessidade clínica') for treatment abroad is comparable with a referral to a specialist in Portugal, cannot succeed.

65 First, according to the information provided by the Portuguese Government in its pleadings before the Court, access to specialised care in Portugal, guaranteed by the SNS, simply requires a certificate of clinical need, issued by the doctor providing treatment for the person concerned, and not a threefold prior authorisation equivalent to that required under Decree-Law No 177/92 for reimbursement of medical expenses incurred in another Member State.

66 Second, the very restrictive condition mentioned in paragraph 63 above does not, by definition, apply in respect of care provided in Portugal.

67 Similarly, the restrictive nature of the authorisation procedure laid down in Decree-Law No 177/92 is not affected by the assertion that beneficiaries of the national health service who receive healthcare services outside the SNS framework from providers situated in Portugal pay the entire cost of that care.

68 In applying the case-law set out in paragraph 54 above, the conditions for the SNS's assuming the cost of hospital treatment to be obtained in another Member State should not be compared with the position under national law in relation to hospital treatment received in private local hospitals. On the contrary, the comparison should be made with the conditions in which the SNS provides such services in its own hospitals (*Watts*, paragraph 100).

69 Furthermore, the Portuguese Republic is incorrect in maintaining that Article 22 of Regulation No 1408/71 lays down the principle that prior authorisation is required for any treatment in another Member State.

70 As the Court has held, the fact that a national measure may be consistent with a provision of secondary legislation – in the present case, Article 22 of Regulation No 1408/71 – does not have the effect of removing that measure from the scope of the provisions of the Treaty. Moreover, Article 22(1) of Regulation No 1408/71 is intended to enable an insured person, authorised by the competent institution, to go to another Member State to receive treatment there which is appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure. On the other hand, Article 22 of Regulation No 1408/71, interpreted in the light of its purpose, is not intended to regulate and accordingly does not in any way prevent reimbursement by the Member State of affiliation, at the tariffs in force in the competent State, of costs incurred in connection with treatment provided in another Member State, even without prior authorisation (*Kohll*, paragraphs 25 to 27).

71 In such circumstances, the prior authorisation at issue must be regarded as a restriction on the freedom under Article 49 EC to provide services.

72 The existence of a restriction on the freedom to provide services having been established, it needs to be determined whether the Portuguese rules at issue can be justified in the light of overriding reasons and, in such a case, in accordance with settled case-law, to make sure that they do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (see Case 205/84 *Commission* v *Germany* [1986] ECR I-3755, paragraphs 27 and 29; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; and Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 30 and 31).

– Maintaining the financial balance of the social security system

73 In that regard, the Court has acknowledged that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services (*Commission* v *Luxembourg*, paragraph 43 and the case-law cited).

74 Accordingly, the Court has accepted that a requirement of prior authorisation may, under certain conditions, be justified by such a consideration in the context of hospital care (see, inter alia, *Smits and Peerbooms*, paragraphs 76 to 81; *Müller-Fauré and van Riet*, paragraphs 76 to 81; and *Watts*, paragraphs 108 to 110) and in the context of medical care which, although it may be provided outside a hospital setting, requires the use of major and costly equipment exhaustively listed in the national legislation (see, to that effect, *Commission* v *France*, paragraphs 34 to 42).

75 However, as regards non-hospital care other than 'major' covered by Decree-Law No 177/92, it must be found that no specific evidence has been produced by the Portuguese Government to support the assertion that, were insured persons at liberty to go without prior authorisation to Member States other than those in which their sickness funds are established in order to obtain that care, that would be likely seriously to undermine the financial balance of the SNS.

76 The documents before the Court do not indicate that removal of the requirement for prior authorisation for that type of care would result in patients travelling to other countries in such large numbers – notwithstanding linguistic barriers, geographical distance and the cost of staying abroad – that the financial balance of the Portuguese social security system would be seriously upset and that, as a result, the overall level

of public health protection would be jeopardised, a situation which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services.

77 Furthermore, care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. If emergencies are disregarded, the most obvious cases of patients travelling abroad are in border areas or where specific conditions are to be treated (*Müller-Fauré and van Riet*, paragraph 96).

78 Those various factors seem likely to limit any financial impact on the SNS of removal of the prior authorisation requirement in respect of care provided in the surgeries of foreign practitioners.

79 In any event, it should be borne in mind that it is for the Member States alone to determine the extent of the health cover available to insured persons, so that, when insured persons go without prior authorisation to a Member State other than that in which their sickness fund is established to receive treatment there, they can claim reimbursement of the cost of the treatment given to them only within the limits of the cover provided by the health insurance scheme in the Member State of affiliation (*Müller-Fauré and van Riet*, paragraph 98).

— Controlling the quality of healthcare services provided abroad

80 With regard to the argument of the Portuguese Republic that prior authorisation is necessary to ensure the quality of the services provided, it should be noted that it is true that the Member States may limit the freedom to provide services on grounds of

public health. However, that does not permit them to exclude the public health sector, as a sector of economic activity and from the point of view of freedom to provide services, from the application of the fundamental principle of freedom of movement (*Kohll*, paragraphs 45 and 46).

81 The Court has held, in the case of non-hospital services, that the conditions for taking up and pursuing associated activities have been the subject of several coordinating or harmonising directives, so that the requirement of prior authorisation for reimbursement of medical expenses cannot be justified on grounds connected to the quality of services provided abroad (see *Kohll*, paragraph 49).

82 In any event, Decree-Law No 177/92 makes the prior authorisation subject, not to verification of the quality of the care provided in another Member State, but to the fact that such care is not available in Portugal.

83 Consequently, the requirement of prior authorisation for reimbursement of the medical expenses in question cannot be justified on public health grounds relating to the need to control the quality of healthcare services provided abroad.

— Essential features of the SNS

84 According to the Portuguese Republic, the prior authorisation procedure is justified by the specific nature of the organisation and operation of the SNS, and particularly by the absence of a mechanism for the reimbursement of medical expenses and by the fact that, in order to arrange a consultation with a specialist, it is compulsory to attend a general practitioner first.

85 In that respect it should be noted that, even when applying Regulation No 1408/71, those Member States which have established a system providing benefits in kind, or even a national health service, are in any event required to provide mechanisms for *ex post facto* reimbursement in respect of care provided in a Member State other than the competent State (*Müller-Fauré and van Riet*, paragraph 105).

86 Likewise, the conditions on which benefits are granted, in so far as they are neither discriminatory nor an obstacle to freedom of movement of persons, remain enforceable where treatment is provided in a Member State other than that of affiliation. That is particularly so in the case of the requirement that a general practitioner should be consulted prior to consulting a specialist (*Müller-Fauré and van Riet*, paragraph 106).

87 Lastly, the Court has pointed out that nothing precludes a competent Member State with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another Member State can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria (*Müller-Fauré and van Riet*, paragraph 107).

88 Consequently, the essential features of the SNS cannot justify the prior authorisation requirement laid down in Decree-Law No 177/92 for the purposes of obtaining reimbursement in respect of non-hospital health care provided in another Member State.

89 It follows from the foregoing that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC in so far as, in Decree-Law No 177/92, it makes reimbursement in respect of 'highly specialised' non-hospital care received in another

Member State, which does not involve the use of major and costly equipment exhaustively listed in the national legislation, subject to prior authorisation.

Non-hospital care other than 'major' not covered by Decree-Law No 177/92

90 Decree-Law No 177/92 only governs highly specialised medical care abroad. It follows that, other than in the circumstances specified in Regulation No 1408/71, there is no provision under Portuguese law for reimbursement in respect of non-hospital care not covered by Decree-Law No 177/92. The Portuguese Republic admitted at the hearing, moreover, that there is no provision for reimbursement of those non-hospital medical expenses incurred in another Member State in respect of a consultation with a general practitioner or dentist, for example.

91 The Portuguese Republic has not put forward any specific argument in support of the compatibility of that lack of reimbursement with Article 49 EC, as interpreted by the Court.

92 In any event, the grounds relating both to the restrictive nature of the prior authorisation requirement and the lack of legitimate justification for that requirement clearly apply *a fortiori* in the case of non-hospital medical care for which there is no possibility of reimbursement.

93 Consequently, it must be held that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC by making no provision, other than in the circumstances specified in Regulation No 1408/71, for reimbursement in respect of non-hospital medical care provided in another Member State which is not covered by Decree-Law No 177/92.

94 It follows from all the foregoing considerations that the action brought by the Commission is well founded.

95 Consequently, it must be held that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC by making no provision for reimbursement of non-hospital medical care provided in another Member State which does not involve the use of major and costly equipment exhaustively listed in the national legislation, other than in the circumstances specified in Regulation No 1408/71, or, to the extent that Decree-Law No 177/92 allows reimbursement in respect of such care, by making such reimbursement subject to prior authorisation.

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs, inter alia, where the circumstances are exceptional. In this case the Portuguese Republic has been unsuccessful but has incurred costs, throughout the proceedings, while seeking to refute complaints which the Commission withdrew after the hearing. In those circumstances, the Commission and the Portuguese Republic must bear their own costs.

97 Under the first subparagraph of Article 69(4) of those Rules, the Kingdom of Spain and the Republic of Finland must, as interveners, bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC by making no provision for reimbursement in respect of non-hospital medical care provided in another Member State which does not involve the use of major and costly equipment exhaustively listed in the national legislation, other than in the circumstances specified in Regulation (EEC) No 1408/71 of the Council 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, or, to the extent that Decree-Law No 177/92 of 13 August 1992 laying down the conditions for reimbursement of medical expenses incurred abroad allows the reimbursement of such expenses, by making reimbursement subject to prior authorisation;**

2. **Orders the Portuguese Republic and the European Commission to bear their own costs;**

3. **Orders the Kingdom of Spain and the Republic of Finland to bear their own costs.**

[Signatures]