OPINION OF ADVOCATE GENERAL TESAURO

delivered on 16 September 1997 *

1. The implementation of the single market, that area without internal borders within which the free movement of goods, persons, services and capital is ensured, ought by now to have been completed and to constitute one of the cornerstones and hallmarks of the Community. However, the questions referred to the Court by two Luxembourg judicial bodies, the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Council) (Case C-120/95) and the Cour de Cassation (Court of Cassation) (Case C-158/96), cast some doubt on whether this is so, by highlighting the fact that to this day citizens of the Community, unless they forgo reimbursement of the costs incurred, are obliged, as a rule, to obtain medical services in the State in which they are insured.

Reimbursement of medical expenses incurred in another Member State — whether to purchase medicinal products or to obtain medical treatment — is conditional on prior authorisation, the granting of which by the competent social security institution is moreover subject to particularly restrictive conditions. This state of affairs cannot but discourage the *free movement of patients*, or of the less affluent among them at least, which of itself is a disadvantage for the patients concerned of course. It is this very state of affairs which lies at the root of the disputes pending before the Conseil Arbitral des Assurances Sociales and the Cour de Cassation. The issue to be decided by the former is whether the sickness fund acted lawfully in refusing to reimburse the cost of a pair of spectacles purchased in another Member State by an insured person who had not applied for and obtained the prescribed authorisation in advance. The case before the latter, meanwhile, involves the refusal of a request for authorisation sought by an insured person on behalf of his daughter, who is a minor, for the purpose of claiming the cost of orthodontic treatment to be carried out in another Member State.

2. The questions referred by the two bodies require the Court to rule essentially on the compatibility with Community law of national rules, of Luxembourg in this case, which make the reimbursement of medical expenses incurred outside the national territory subject to the condition that the medical treatment or the purchase of the medical products and/or accessories in question were duly authorised by the competent social security institution. Those rules are attacked on two different grounds: that they limit the free movement of medical products and accessories, namely a pair of spectacles, and thus contravene Articles 30 and 36 of the Treaty (Case C-120/95); and that they may fetter the freedom to provide medical services, namely orthodontic treatment, by

* Original language: Italian.

reason of the restrictions they impose on the recipients of such services, and are thus contrary to Articles 59 and 60 of the Treaty (Case C-158/96).

The issue, therefore, is whether the requirement of prior authorisation, as a condition for reimbursement, is such as to constitute a barrier to the free movement of goods (Case C-120/95) or the freedom to provide services (Case C-158/96) and, if so, whether it may none the less be regarded as a barrier which is justified in view of the special requirements inherent in a national health service.

3. Although these two cases have been referred by two different bodies and, at least at first sight, turn on the interpretation of different provisions, I none the less consider it appropriate to deal with them together, since the contested national measure is the same in both instances and the arguments adduced by the parties and by the governments which have submitted observations are essentially the same. My decision is also influenced by the fact that the Community rules in the field of social security may have a significant bearing on the assessment of the restrictive effects on trade, whether in goods or in services, complained of by the plaintiffs in the main proceedings, and this impact would not in principle be any different according to whether it is Article 30 or Articles 59 and 60 which come into play.

Relevant legislation

4. Article 20(1) of the Luxembourg Social Insurance Code ('the Code'), which was enacted on 27 July 1992 and entered into force on 1 January 1994, provides that, with the exception of emergency care received in the event of accident or illness abroad, insured persons may receive medical treatment abroad or have recourse to a treatment centre or a centre providing ancillary facilities abroad only after obtaining the prior authorisation of the competent social security institution. The terms and conditions for granting authorisation are laid down by Articles 25 to 27 of the statutes of the Union des Caisses de Maladie ('the UCM statutes'), in the version which entered into force on 1 January 1995. In particular, the statutes provide that authorisation may not be given for services which are not eligible for reimbursement under the national rules (Article 25), that the cost of duly authorised treatment is to be reimbursed in accordance with the tariffs applicable to persons insured in the State in which the treatment takes place (Article 26), and that authorisation will be granted only after a medical assessment and on production of a written request from a doctor established in Luxembourg indicating the doctor or hospital centre recommended to the insured person and the criteria and facts which make it impossible for the treatment in question to be carried out in Luxembourg (Article 27).

It should also be noted, since those national rules were not yet in force at the time mate-

rial to Case C-120/95, that the relevant provisions of the former code were — so far as is relevant here — essentially identical. In particular, the question of treatment abroad and prior authorisation thereof was governed by Article 60(3), which is essentially the same as Article 20(1) of the Code currently in force. Furthermore, the rules governing reimbursement of the cost of spectacles were at the material time contained in Article 78 of the UCM statutes, which referred to the relevant collective agreement. For present purposes it is sufficient to note that then, as now, reimbursement was on a flat-rate basis with a ceiling of LFR 1 600 for frames. [1]

5. As regards the relevant Community legislation, apart from the provisions on the movement of goods and provision of services, Article 22 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] (hereinafter 'the Regulation') is of particular significance, as we shall see below.

The relevant parts of that article provide:

'1. 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) ...

(b) ...

(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 or resi-

1 — See Article 119 of the current UCM statutes.

2 — See the version consolidated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

dence 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;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

2. ...

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.

3. The provisions of paragraphs 1 and 2 shall apply by analogy to members of the family of an employed or self-employed person.

...' [3]

This article therefore, like the Luxembourg legislation challenged in this case, makes reimbursement of medical expenses incurred in another Member State subject to the condition that the insured person (who received the benefits in question) obtained prior authorisation from the competent social security institution. Only if that is the case will the competent institution bear the costs incurred. [4]

Facts and questions submitted for a preliminary ruling

— *Case C-120/95*

6. The dispute in Case C-120/95 is between Mr Decker, a Luxembourg national, and the

3 — Article 22a, inserted by Regulation (EC) No 3095/95 (OJ 1995 L 335, p. 1), provides as follows: 'Notwithstanding Article 2 of the Regulation, Article 22(1)(a) and (c) shall also apply to persons who are nationals of a Member State and are insured under the legislation of a Member State and to the members of their families residing with them.' Following that amendment, therefore, it is no longer necessary to be a worker or a member of a worker's family in order to rely on Article 22; it is enough to be insured, irrespective of the basis on which one is insured.

4 — Article 36(1) of the Regulation provides that 'benefits in kind provided in accordance with the provisions of this chapter by the institution of one Member State on behalf of the institution of another Member State shall be fully refunded'.

Caisse de Maladie des Employés Privés (hereinafter 'the Fund') and arises from the latter's refusal to reimburse the cost of a pair of spectacles purchased from an optician in Arlon (Belgium) on production of a prescription from an ophthalmologist in Luxembourg. Arguing that this refusal, based on the ground that he had failed to seek prior authorisation as required under the relevant legislation, was contrary to the Community rules on the free movement of goods, Mr Decker complained to the Fund and subsequently appealed to the Conseil Arbitral des Assurances Sociales. [5]

7. For the purpose of resolving the dispute before it, the latter body decided to refer the following question to the Court for a preliminary ruling:

'Is Article 60 of the Luxembourg Code des Assurances Sociales, under which a social security institution of Member State A refuses to reimburse to an insured person, who is a national of Member State A, the cost of spectacles with corrective lenses, prescribed by a doctor established in Member State A but purchased from an optician established in Member State B, on the ground that all medical treatment abroad must be authorised in advance by the above social security institution, compatible with Articles 30 and 36 of the EEC Treaty, in so far as it penalises in general the importation by private individuals of medicinal products or, as in this case, spectacles from other Member States?'

— *Case C-158/96*

8. The plaintiff in Case C-158/96 is another Luxembourg national, a Mr Kohll, who, unlike Mr Decker, did request prior authorisation from the Union des Caisses de Maladie (hereinafter 'the UCM'), with which he is insured, to enable his daughter Aline, who is a minor, to receive orthodontic treatment in Trier (Germany). His request was rejected, however, by decision of 7 February 1994, on the grounds, first, that the treatment sought was not urgent and, secondly, that suitable treatment of that kind could be obtained in Luxembourg.

The Conseil Arbitral des Assurances Sociales, before which Mr Kohll challenged the refusal, since confirmed by the UCM Management Board, dismissed his appeal by decision of 6 October 1994. Mr Kohll appealed against that decision to the Conseil Supérieur des Assurances Sociales which, by decision of 17 July 1995, upheld the contested decision on the ground that Article 20 of the Code and Articles 25 and 27 of the UCM statutes, on which the refusal was

5 — The Conseil Arbitral des Assurances Sociales dismissed the appeal by order of 24 August 1993. It likewise dismissed Mr Decker's appeal against that order by decision of 20 October 1993. It was after the setting aside of that decision by the Cour de Cassation that the case was remitted to the Conseil Arbitral des Assurances Sociales.

based, were fully in accordance with Article 22 of the Regulation.

9. Finding that the appellate body had considered only whether the Luxembourg rules were consistent with the Regulation, and had not taken any account of the provisions on freedom to provide services, the Cour de Cassation, before which Mr Kohll challenged the decision of the appellate body, decided that it was necessary to refer the following questions to this Court for a preliminary ruling:

'(1) Are Articles 59 and 60 of the Treaty establishing the EEC to be interpreted as precluding rules under which reimbursement of the cost of benefits is subject to authorisation by the insured person's social security institution if the benefits are provided in a Member State other than the State in which that person resides?

(2) Is the answer to Question 1 any different if the aim of the rules is to maintain a balanced medical and hospital service accessible to everyone in a given region?'

The issues raised and outline of this Opinion

10. As they are worded, the questions referred by the Conseil Arbitral des Assurances Sociales and the Cour de Cassation turn solely on the interpretation of the Treaty provisions relating to the free movement of goods and services: the Court has been asked to determine whether the requirement of prior authorisation for reimbursement of medical expenses incurred in a Member State other than the State of residence is contrary to Articles 30 and 59 of the Treaty.

In the course of the procedure, however, there was some discussion, in depth, of the applicability to the case of the Community rules on social security, and specifically Article 22(1)(c)(i) of the Regulation. In particular, it was argued that it is this provision which regulates the issue of prior authorisation and reimbursement and that, since the disputed rules are fully in accordance with it, the possibility of conflict with Articles 30 and 59 does not arise. This is closely linked to another argument put forward during the course of the procedure, according to which the fact that the disputed measure falls within the sphere of social security means that, even if the Regulation were inapplicable to the case at hand, the measure still could not be examined from the point of view of the Community rules providing for the free

movement of goods and services. This, the argument basically runs, is because the social security sector is even today, at least where it is not governed by *specific* Community rules, a matter within the purview of the Member States.

11. In those circumstances, I believe the first task is to ascertain whether the national rules in question fall within the scope of Articles 30 and 59. To do so, it will be necessary to determine, in the light *inter alia* of the Court's case-law in this area, to what extent and subject to what limits the fact that the measure in question is in the field of social security precludes any inquiry as to its compatibility with the fundamental freedoms guaranteed by the Treaty.

It will likewise be necessary to determine whether Article 22 of the Regulation applies to the case and, if so, whether this fact of itself takes the matter outside the scope of Articles 30 and 59. On this point, I cannot refrain from observing right away that a provision of secondary legislation, which is what Article 22 of the Regulation is, cannot in any event be regarded as capable of excluding an examination into whether or not Treaty provisions, such as Articles 30 and 59, have been infringed. I therefore take the view that even if, after examination, the Luxembourg rules are found to come within the scope of the Regulation and to be consistent with it, it does not follow that Articles 30 and 59 are inapplicable to this case.

12. Secondly, once it has been established that neither the social security nature of the national measure nor the existence of a Community provision having essentially the same content has the effect of precluding the application of Articles 30 and 59, it will then be necessary to determine whether the measure is compatible with the Community provisions in question. In other words, it will be necessary to ascertain whether the requirement of prior authorisation for reimbursement of medical expenses incurred in a Member State other than the State of residence amounts, at least in principle, to a barrier to trade in goods and/or services.

Needless to say, the conclusion arrived at will apply equally to Article 22 of the Regulation, assuming of course that the disputed national rules are consistent with it. In other words, if the barrier to the movement of goods and the provision of services is the requirement to seek prior authorisation — in the absence of which the competent institution will refuse to reimburse expenses incurred by an insured person in another Member State — it is quite clear that the barrier is created in like manner by both the national rules and the Regulation.

13. Lastly, we shall have to consider whether any restrictive effects caused by the national measure, and, by the same token, by Article 22 of the Regulation, may nevertheless be justified. To that end, it will first be neces-

sary to establish whether the disputed rule is discriminatory or indistinctly applicable, since the justifications which come into play in the two cases are different: express derogations (under Articles 36 and 56) in the former, and overriding requirements or, if one prefers, reasons relating to the general interest, in the latter. It is only in the latter case that account may be taken of special requirements, including economic requirements where appropriate, inherent in the existence, operation and maintenance of a national health service which is accessible to everyone.

Let me add that the analysis of the justifications relied upon and its outcome will inevitably imply a view on the validity or otherwise of Article 22 of the Regulation. If the disputed rules are found to be incompatible with Articles 30 and 59, this may result *ipso facto* in the relevant Community provision being declared invalid — to the extent that both measures (national and Community) lay down the same rules, follow the same logic and pursue the same aim.

14. Finally, let me point out that this reasoning process could undoubtedly proceed more rapidly and less laboriously if some of the steps mentioned above were omitted. I feel, however, that, at least in an Opinion, it is not permissible to dispense with the analytical rigour which a case of this importance demands.

I — The applicability of Articles 30 and 59

15. Although the points in dispute in the two cases are many, perhaps too many, there is fortunately no dispute about some fundamental matters which are essential to a correct definition of the issues involved. It is common ground that medical products constitute goods within the meaning of Article 30 of the Treaty, from which it follows that any unjustified limitation on the importation of this category of products, including importation by an individual for personal use, is contrary to that article. [6] Likewise, it is not disputed that medical activities constitute services, as is expressly provided for by Article 60, [7] nor, as was made clear by the Court, that 'the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there ... and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services'. [8]

That being the case, it is equally indisputable, in my view, that rules which make reimbursement of medical expenses conditional on the medical products and/or

6 — See Case 215/87 *Schumacher* [1989] ECR 617 and Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575.

7 — See also Case C-159/90 *Grogan* [1991] ECR I-4685, in which it was held that 'medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty' (paragraph 21).

8 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

services upon which they were incurred having been 'purchased' within the national territory are quite capable, at least in theory, of having an adverse effect on trade in goods and services. Suffice it for now to point out that such rules — for the very reason that they deny insured persons reimbursement of medical expenses incurred abroad, unless prior authorisation has been obtained — may discourage those concerned from purchasing such products or from seeking treatment in a Member State other than the one in which they reside, which may, in certain cases, act as a restriction on imports of the relevant products or on the freedom to provide the services in question.

16. The applicability of the Treaty rules on the free movement of goods and freedom to provide services has, however, been called into question, as indicated above, on the grounds that the national measure in question concerns social security and is alleged to be in accordance with a precise and specific provision of the Regulation. It has been argued that those two considerations, which, as we shall see, are interrelated, have the effect of taking the contested measure outside the scope of Articles 30 and 59. The following arguments seek to refute that contention, which was supported by the majority of the Member States which submitted observations in the two cases.

— The fact that the contested measure concerns social security

17. Let me begin by remarking that the fact that the national rules in question concern social security by no means has the effect of removing them, at least not automatically, from the scope of the Community rules on the movement of goods and provision of services. And I would add straight away that the Court's consistent view that 'Community law does not detract from the powers of the Member States to organise their social security systems' [9] by no means implies that the social security sector constitutes an island beyond the reach of Community law and that, as a consequence, all national rules relating to social security fall outside its scope. [10]

18. It is of course true that as Community law stands at present 'it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security

9 — Case 238/82 *Duphar* [1984] ECR 523, paragraph 16. See also, more recently, Case C-70/95 *Sodemare* [1997] ECR I-3395, paragraph 27.

10 — For a comprehensive review of the case-law in this area, and its implications, see the Opinion of Advocate General Fennelly, delivered on 6 February 1997 in Case C-70/95 *Sodemare* [1997] ECR I-3398, paragraphs 23 to 30.

scheme', [11] with the result that those subject to such legislation, if it makes affiliation compulsory, have no choice as to which scheme to join. It is also true, as the Court held in *Poucet and Pistre*, that the activity of sickness funds, and of the organisations involved in the management of the State social security system, 'is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 85 and 86 of the Treaty'. [12]

However, the scope of that case-law is much narrower and more confined than is claimed by the Member States in arguing that Community law does not apply to social security. It is therefore necessary to place those decisions in their proper context and to assess their implications correctly.

19. First of all, it is quite clear that, in the absence of harmonisation at Community level, it is for the Member States to lay down the conditions governing affiliation to the social security system and, at least in principle, 'the conditions governing entitlement to social security benefits'. [13] However, the Court has also made clear that the freedom thus left to the Member States must not give rise to 'discrimination between nationals of the host state and nationals of the other Member States'. [14]

In other words, while it is true that the organisation of the social security system remains a matter for the Member States and that the relationship between the social security institutions and their members is governed by national law, this does not mean that Member States may contravene with impunity a fundamental principle established by the Treaty to secure the free movement of persons, namely the prohibition of discrimination on grounds of nationality. [15]

20. Secondly, the point must be made that while the Court did indeed conclude that social security institutions are not subject to the rules on competition, this applies only in so far as the activity of those institutions is based 'on the principle of ... solidarity', in the sense that the benefits provided are 'statutory benefits bearing no relation to the

11 — It is not by chance that this statement is a constant feature of the case-law on the interpretation of Regulation No 1408/71. See, *inter alia*, Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12, and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

12 — Joined Cases C-159/91 and C-160/91 [1993] ECR I-637, paragraph 19.

13 — Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36.

14 — See *Coonan* and *Paraschi* (cited in footnote 11), paragraphs 12 and 15 respectively.

15 — Suffice it to recall that one of the cardinal principles of Regulation No 1408/71, although its purpose is limited merely to coordinating national legislation in this area, is in fact equality of treatment, laid down in Article 3(1), between a Member State's own nationals and those of other Member States resident in the State.

amount of the contributions'. [16] In other words, it is clear that the determining factor in the outcome — although the Court also referred, in the same judgment, to the exclusively social function performed by those institutions, whose activity is entirely non-profit-making — was precisely the fact that the system in question was based on the principle of solidarity. [17] This was confirmed in a later judgment in which the Court held that where those (or similar) institutions operate instead a supplementary insurance scheme, based on the funding principle and with the level of benefits directly linked to the level of contributions (the solidarity principle thus not applying), they are to be regarded as undertakings within the meaning of the Treaty rules on competition. [18]

In essence, therefore, compulsory affiliation to a particular scheme, although it has the effect of eliminating all potential competition by other entities or at any rate reducing their activity to a purely residual sector, is a necessary condition for the operation of a social security scheme based on the solidarity principle, which depends on everybody's contribution in order that each may benefit. It is therefore only such institutions as operate social security schemes of this nature that are exempted from the application of the Community rules on competition.

21. It is true also that in its judgment in *García*, the Court stated that Articles 57(2) and 66 of the Treaty, which were the legal basis for the adoption of the coordinating directives intended to facilitate the taking-up and pursuit of self-employed activities, could not 'regulate the field of social security, which is covered by different provisions of Community law'. [19] But this statement, I believe, cannot be interpreted as meaning that the Treaty rules on the right of establishment and provision of services are inapplicable, by definition, to national rules on social security, [20] and it should be read in the light of the particular features of that case.

16 — *Poucet and Pistre* (cited in footnote 12), paragraph 18.

17 — A point confirmed, albeit *a contrario*, in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, where the Court stated that, in the context of competition law, the concept of an undertaking 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed' (paragraph 21).

18 — Case C-244/94 *FFSA* [1995] ECR I-4013, paragraphs 17 to 22.

19 — Case C-238/94 [1996] ECR I-1673, paragraph 13.

20 — Since the statement was taken, albeit couched in more absolute terms, from my Opinion in that case (delivered on 29 February 1996, [1996] ECR I-1675, point 9), I must point out that it was certainly not my intention to arrive at such an result. Rather, as may be seen from the Opinion, I was seeking to make the point that in the present state of Community law, none of the provisions of the Treaty, including those directly concerning the social security sector or social affairs in general, can serve as a basis for 'the adoption of measures aimed at dismantling the national social security systems' (see footnote 6), where the term 'dismantling' means precisely the destruction of the different systems which exist at present in the Member States. There is no doubt, on the other hand, that if those systems were one day to be harmonised, the proper legal basis for undertaking the liberalisation (*inter alia*) of the activity of the institutions which administer them would indeed be Articles 57(2) and 66 of the Treaty.

In view of the fact that that case concerned a challenge to the requirement of compulsory affiliation to a statutory social security scheme in reliance on the liberalisation introduced by a directive coordinating national rules on direct insurance other than life assurance, it need only be pointed out that the exclusion from liberalisation of the activities of bodies operating statutory social security schemes, which is, moreover, an express provision of that directive, was a necessary corollary to the exemption, already established, of such activities from the competition rules. Otherwise the obligation to join such schemes would inevitably have been removed, whereas the Court emphasised that the obligation was necessary 'in order to ensure that the principle of solidarity is applied and that their financial equilibrium is maintained', pointing out that, if the obligation was removed, 'the schemes in question would thus be unable to survive'. [21]

however, Member States are bound to comply with Community law even when exercising the powers reserved to them in the field of social security.

There is no basis for any other conclusion. The fact remains, therefore, that no discrimination based on nationality is permitted on the territory of a Member State, [22] and that, with the exception of the case where national rules are closely bound up with the operation and survival of the relevant social security scheme, social security is not exempt from the application of Community law. In particular, for the purposes of the present case, we may note that unjustified restrictions on the free movement of persons (establishment and services) and of goods are not permitted merely because the benefit conferred on individuals by the relevant Community rules conflicts with a national measure which in some way relates to social security.

22. In the light of the foregoing, it is abundantly clear that the statement that Community law does not detract from the powers of Member States to organise their social security systems means, quite simply, that Community law does not regulate this area directly, nor does it impinge on it, if its application would have the effect of jeopardising the survival of social security schemes of the kind described above. Otherwise,

23. The Court's case-law on the matter confirms this. For example, the Court has acknowledged that, as Community law stands at present, a Member State may consider that the social welfare system it has put in place, 'whose implementation is in principle entrusted to the public authorities, [and which] is based on the principle of solidarity', [23] necessarily requires, in order to achieve its objectives, that the admission of

21 — *García* (cited in footnote 19), paragraph 14.

22 — See point 19 and footnote 14, above.

23 — *Sodemare* (cited in footnote 9), paragraph 29.

private operators to the system be subject to the condition that they are non-profit-making; the Court accordingly came to the conclusion that national rules laying down such a requirement are not contrary to Article 52 of the Treaty. [24] Clearly, the outcome was determined by the importance attributed, rightly or wrongly, to the fact that the system in question was based on the principle of solidarity.

The Court has taken an entirely different approach, however, in cases where the national measures, albeit falling within the sphere of social security, were not of such a kind, on the face of it, as to be capable of having an adverse effect on the survival of social security schemes based on the principle of solidarity. For example, in upholding as compatible with Article 52 a Belgian measure which denied laboratories operated by legal persons, whose members were also legal persons, reimbursement of the cost of clinical biology services performed by them, the Court not only pointed out that the legislation in question applied without distinction to Belgian nationals and those of other Member States, but also stated that there was no evidence that it had been adopted for 'discriminatory purposes' or that it produced 'discriminatory effects'. [25] Still on the subject of Article 52, but on a more general note, the Court has stated that Member States are under an obligation to observe its provisions 'even though, in the absence of Community legislation on social security for self-employed persons, they retained legislative jurisdiction in this field'. [26]

24. The Court has also had occasion to state, in relation to the rules on the free movement of goods, that even measures adopted in the field of social security and which do not relate directly to importation, 'depending on the manner of their application and the use made of them, ... may affect the possibilities of marketing the preparations and, to that extent, ... may indirectly influence the possibilities of importation', [27] thus, potentially, falling foul of Article 30. This would be the case, for instance, of national rules which had the effect of making only domestic products eligible for reimbursement.

Lastly, in *Sodemare*, where a possible breach of the rules on the freedom to provide

24 — *Idem*, paragraphs 32 and 34. The Court none the less felt it necessary, in that judgment, to state that the system in question cannot however 'place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established' (paragraph 33).

25 — Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraph 11.

26 — Case 143/87 *Stanton* [1988] ECR 3877, paragraph 10. See also the judgments of the same date in Joined Cases 154/87 and 155/87 *Wolf* [1988] ECR 3897, paragraph 10.

27 — *Duphar* (cited in footnote 9), paragraph 18. See also Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraphs 38 and 42, where the Court held that national rules which gave preference, as regards eligibility for reimbursement, only to domestic pharmaceutical products, were contrary to Article 30.

services was also in issue, the Court took pains to explain that in the case in question there was no provision of services within the meaning of the Treaty. It accordingly ruled that 'Article 59 of the Treaty does not cover the situation of a company which, having established itself in a Member State in order to run old people's homes there, provides services to residents who, for that purpose, reside in those homes permanently or for an indefinite period.' [28] That statement demonstrates, however, lest there be any remaining doubt, that social security does not *per se* fall outside the scope of the Community rules.

25. In short, the fact that, in the present state of Community law, Member States' powers in the field of social security, as in other areas, [29] remain intact, by no means leaves them free to enact in that field rules which are contrary to Community law. It follows that the social security nature of the disputed rules does not, of itself, by any means have the effect of precluding any review of their compatibility with Articles 30 and 59 of the Treaty.

28 — *Sodemare* (cited in footnote 9), paragraphs 36 to 40.

29 — A similar approach is to be seen, for example, in the area of direct taxation. The Court, in its case-law in that field, has consistently held that 'although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law' (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; see also, more recently, Case C-250/95 *Futura Participations* [1997] ECR I-2471, paragraph 19).

— *Article 22 of the Regulation*

26. It now falls to be considered whether the above conclusion may be called into question by reason of the existence of a provision of Community law, namely Article 22 of the Regulation, governing the very matter which concerns us. Let me say straight away that the answer to that question can only be in the negative, although the possibility of the said provision itself being invalid cannot be excluded.

But let us take things in order. We need first to ascertain whether the provision in question governs the matter in hand, then to verify whether the contested national measure is consistent with it and, finally, if that is indeed the case, to examine whether that fact alone may be regarded as precluding any further inquiry into the question whether the fundamental freedoms guaranteed to individuals by the Treaty, which undoubtedly include the free movement of goods and services, have been observed.

27. Let me begin by observing that Article 22(1)(c) of the Regulation, by making it

possible for individuals — albeit subject to authorisation by the competent institution — to receive the medical services they require in another Member State, 'constitutes one of the measures intended to permit a worker who is a national of one of the Member States of the Community, without regard to the national institution to which he is affiliated or the place of his residence, to receive benefits in kind provided in any other Member State', [30] and to do so, of course, without having to forgo reimbursement of the expenses incurred. Clearly, Mr Kohll and Mr Decker are seeking to be allowed to avail themselves of this possibility.

I need hardly add, in this regard, that these individuals, although they are Luxembourg nationals and have not exercised their right to freedom of movement, are persons to whom the Regulation applies. As we know, the Regulation applies not only to migrant workers and members of their families, but also to (sedentary) workers and to members of their families moving within the Community for reasons other than work. [31]

28. That being so, it would appear, at least on the face of it, that cases such as this do indeed come within the scope of Article 22 of the Regulation and are accordingly governed by it. That conclusion, which is not in dispute in respect of cases where the benefits sought by the insured person consist, for example, in specialist consultations or treatment (as in the Kohll case), is however disputed in respect of cases where the benefits sought consist instead of the purchase of medical products and accessories (as in the Decker case).

Specifically, the Commission argues that the term 'benefits' in Article 22 covers only medical services in the strict sense and does not extend to medical products and accessories, such as medicines and spectacles. By contrast, the Member States which have intervened (in the Decker case) maintain that the term covers all benefits necessary for the treatment of a particular ailment and hence all products necessary for that purpose as well. They further argue that the applicability of Article 22 to medical products and accessories is confirmed by Article 19 of Regulation (EEC) No 574/72, [32] which expressly provides that frontier workers — who are entitled to medical treatment in both their State of residence and their State of employment — may purchase such items as medicines and spectacles only in the

30 — Case 117/77 *Pierik I* [1978] ECR 825, paragraph 14.

31 — See Case 182/78 *Pierik II* [1979] ECR 1977, paragraph 4, and Case 75/63 *Hoekstra* [1964] ECR 177, in particular at p. 186. Moreover, by virtue of the insertion of Article 22a in the Regulation, it is no longer even necessary, for the purposes of the application of Article 22 at least, to be a worker or a member of a worker's family; it is now enough to be insured (see footnote 3, above).

32 — Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 (see the amended and updated version published in OJ 1997 L 28, p. 102).

Member State in which those 'products' were prescribed. [33]

29. There is no doubt that 'sickness and maternity' benefits, within the meaning of Chapter I in Title III of the Regulation, of which Article 22 forms part, include 'benefits under legislation concerning invalidity which are in the nature of medical or surgical benefits'. [34] Furthermore, I am not convinced by the Commission's argument that Article 19 of Regulation No 574/72 has no application to the present case. While it is true that the provision in question applies only to frontier workers, whom it requires to purchase medical products and accessories (and to have laboratory analyses carried out) in the Member State where the prescription was made, this is simply because those workers are the only ones to have access, without prior authorisation, to the 'benefits' in question in two different Member States. It would be illogical, however, to infer that what frontier workers are not allowed to do, to prevent them from purchasing the relevant products in whichever of the two Member States has more favourable reimbursement terms, other workers in any of the other 14 Member States are permitted to do.

That said, I readily concede that where the benefit sought consists, as it does in the Decker case, in the purchase of a pair of spectacles, or in the purchase of medical products in general, it can hardly be argued that the treatment in question could not be provided in sufficient time to prevent any deterioration in the insured person's state of health, in which case Article 22 provides that authorisation may not be refused. But this fact is not conclusive, as it means simply that authorisation will virtually never be granted for the purchase of medical products and accessories, [35] save in the case of products (for example, a particular kind of prosthesis or appliance) which cannot be found in the Member State in question.

30. In the final analysis, it is my view that Article 22 is intended to apply not only to medical services, in the narrow sense, as the Commission maintains, but to all benefits involved in a particular type of treatment or health-care, and thus also to medical products and, for our purposes, to the purchase of a pair of spectacles. I therefore conclude

33 — Article 19 of Regulation No 574/72 provides:
'In the case of frontier workers or members of their families, medicinal products, bandages, spectacles and small appliances may be issued, and laboratory analyses and tests carried out, only in the territory of the Member State in which they were prescribed, in accordance with the provisions of the legislation of that Member State, except where the legislation administered by the competent institution or an agreement concluded between the Member States concerned or the competent authorities of those Member States is more favourable.'

34 — Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 9. The particular case involved the refusal by the competent social security institution, that of the Netherlands, to reimburse to a Belgian national expenses which she had incurred in Belgium on pharmaceutical products and medicines.

35 — Of course, prior authorisation granted for medical treatment in another Member State cannot but also cover expenses incurred in that State on the purchase of medical products and accessories; this fact is, I believe, indisputable and, indeed, has not been disputed.

that the cases under consideration do indeed fall within the scope of Article 22(1)(c) of the Regulation.

31. I now turn to the question whether the contested measure is in conformity with Article 22 of the Regulation. It is not in dispute that both measures (Community and national) make the reimbursement of medical expenses incurred in another Member State subject to prior authorisation. Both measures also require, in order for such authorisation to be granted, that the benefits sought by the insured person are among those eligible for reimbursement under the legislation of the Member State in question. I would also recall that Member States are bound to grant authorisation, under Article 22(2), only where the treatment sought cannot be provided within such time as to ensure its effectiveness, thereby leaving all other eventualities to the Member States' discretion. For their part, the national rules in force in Luxembourg, specifically Article 25 of the UCM Statute, provide that authorisation is to be granted only if the treatment sought is not available in Luxembourg or if the standard of the health-care provided is inadequate for the particular ailment from which the insured person is suffering.

Accordingly, there can be no doubt that the contested rules are consistent with Article 22 of the Regulation. It is quite clear that those rules, at least in terms of their wording, do not go beyond the limits laid down by the latter provision. [36]

32. That finding, however, as already indicated, does not mean, contrary to the contention of a number of governments during the proceedings, that there is no possibility of the contested rules conflicting with Articles 30 and 59 and that, consequently, there is no need to examine whether the former are compatible with the latter. Furthermore, the arguments put forward in support of this view are, even on the face of it, devoid of substance.

In particular, we need not be detained by the argument that if the contested rules were found to be incompatible with Articles 30

36 — It would be otherwise only if the interpretation given by the Court to the phrase 'treatment appropriate to his condition', in Article 22(1)(c), were still valid today. The Court had held that the phrase in question meant that 'benefits in kind for which the worker is authorised to go to another Member State *cover all treatment calculated to be effective* for the sickness or disease from which the person concerned suffers' (*Pierik I*, cited in footnote 30, paragraph 15, and *Pierik II*, cited in footnote 31, paragraph 10; emphasis added). Unfortunately, that interpretation must now be regarded as having been superseded, because Article 22(2) was amended, in fact as a consequence of the *Pierik* judgments, and made more restrictive so that, in particular, it now sets out expressly and without ambiguity the one case in which authorisation may not be refused.

and 59 of the Treaty, the fact that this would mean that Article 22 of the Regulation was unlawful (as well) would have the effect of giving those Treaty provisions precedence over Article 51, the legal basis of the Regulation, thereby setting up a hierarchy of norms for which there is no basis in the Treaty itself. Suffice it to say that the fact that a particular national rule is compatible with an article of the Treaty can under no circumstances constitute sufficient reason for the rule in question to be immune from the application of other (relevant) Treaty provisions. [37] Similarly, it is difficult even to conceive that a regulation might violate Treaty provisions with impunity merely because (and as long as) it complied with the Treaty provision which constitutes its legal basis, in this case Article 51. [38]

33. Furthermore, the Regulation 'does not set up a common scheme of social security but allows different national schemes to exist and its sole objective is to coordinate those national schemes', [39] whence it follows that the 'substantive and procedural differences between the ... systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 of the Treaty'. [40] It would therefore be perverse, in the absence of common rules on the matter, to hold that a national measure is exempt from any review of its compatibility with the Treaty provisions merely because it is one of those covered by the Community's coordinating legislation adopted on the basis of Article 51.

This appears also to be the view taken by the Court in its decisions in point. I refer, in particular, to a judgment in which the Court interpreted the provisions of the Regulation relied upon in the case in question as meaning that entitlement to family benefits provided in respect of children resident in another Member State may not also be conferred on self-employed persons affiliated to a voluntary social insurance scheme where, as in that case, the competent national institution for the payment of such benefits is German. [41] That conclusion, however, did not prevent the Court from inquiring into whether the national rules under which the self-employed are eligible for the allowances in question only if they are affiliated to a statutory social security scheme were com-

37 — On this point see, for example, Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, paragraphs 20 and 21, in which the Court ruled that the possible classification of a national measure as aid within the meaning of Article 92 did not exempt it from the prohibition in Article 30.

38 — I would also recall that the Court has made it clear that the discretionary power vested in the Community legislature by Article 51 must be exercised by means which are objectively justified (Case 19/76 *Triches* [1976] ECR 1243, paragraph 18). This statement can only be interpreted as meaning that measures adopted pursuant to Article 51 may not unjustifiably restrict the scope of the rights conferred by the Treaty on the citizens of the Community.

39 — Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7; Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23; and Case C-227/89 *Rönfeldt* [1991] ECR I-323, paragraph 12.

40 — Case 41/84 *Pinna* [1986] ECR 1, paragraph 20.

41 — *Stöber and Piosa Pereira* (cited in footnote 13), paragraphs 32 to 34.

patible with Article 52. [42] Thus, having pointed out that the rules in question treat 'nationals who have not exercised their right to free movement and migrant workers differently, to the detriment of the latter, since it is primarily the latter's children who do not reside in the territory of the Member State granting the benefits in question', the Court found that such treatment was not objectively justified and held that the rules in question 'must be regarded as discriminatory and hence as incompatible with Article 52 of the Treaty'. [43]

34. In short, the Court held in that case, on the one hand, that the relevant provisions of the Regulation did not entitle the plaintiffs to the benefits sought and upheld the lawfulness of such exclusion [44] and, on the other, that the plaintiffs were entitled to those benefits by virtue of Article 52 of the Treaty, with which the relevant national rules were therefore in conflict. [45] Clearly, this is an outcome which confirms, at the risk of stating the obvious, that there is no basis for the argument that the Court is precluded from inquiring into whether national rules are compatible with Treaty provisions having direct effect, solely because such rules are in conformity with the relevant regulation or, at least, are not outlawed by it.

II — The restrictive effects of the contested measure

35. Having established the relevance to the case of the fundamental freedoms enshrined in the Treaty, I now propose to examine whether the contested national rules may act as a barrier to the movement of goods and the provision of services. I need hardly add that the outcome of this examination will be equally valid in relation to Article 22 of the Regulation, now that we have shown that the

42 — This approach confirms, moreover, that the Court's statement quoted above to the effect that observance of a directly effective provision, such as Article 52 of the Treaty, is binding on Member States 'even though, in the absence of Community legislation on social security for self-employed persons, they retained legislative jurisdiction in this field' (*Stanton* and *Wolf*, cited in footnote 26, paragraph 10 in each case), has not lost any of its significance merely because of the fact that the Regulation has since been extended to cover self-employed workers.

43 — *Stöber and Piosa Pereira* (cited in footnote 13), paragraphs 38 and 39.

44 — In this connection, the Court noted in that judgment that 'there is nothing to prevent Member States from restricting entitlement to family benefits to persons belonging to a solidarity system constituted by an old-age insurance scheme. The Member States are at liberty to determine the conditions for entitlement to social security benefits, since Regulation No 1408/71 merely plays a coordinating role' (paragraph 36).

45 — In that respect, it is puzzling that the Court did not find it necessary to question the validity of the provision of the Regulation which permitted workers not affiliated to the statutory social security scheme to be excluded from eligibility for family allowances — particularly if it is borne in mind that, in support of its conclusion that the national rules were incompatible with Article 52, the Court pointed out that such exclusion had the effect of placing at a disadvantage nationals who had exercised their right to free movement. But if that is the case, it must follow that the provision of the Regulation which permits such exclusion is invalid. I need hardly recall that the Court has consistently held that 'the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the advantages in the field of social security guaranteed to them by the law of a single Member State' (see, *inter alia*, Case 284/84 *Spruyt* [1986] ECR 685, paragraph 19, and Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 21). Clearly, the same must apply to self-employed persons who exercise their right to freedom of movement, since the Regulation is now also applicable to them.

national rules in question are in conformity with it. In other words, any restrictive effects on the movement of goods and/or the provision of services will be capable of being traced back to both the national rules and the Community Regulation.

— *The movement of goods*

36. The disputed rules, it will be recalled, makes the reimbursement of medical expenses incurred by an insured person in a Member State other than his or her State of residence — whether on the purchase of medical products and accessories or on medical and hospital services — subject to the condition that the insured person in question has obtained prior authorisation from the competent social security institution. It therefore needs to be determined whether, as claimed by the plaintiffs in both the main proceedings, the requirement of prior authorisation is in conflict, at least in principle, with Article 30 and/or Article 59 of the Treaty.

37. I have already recalled that, according to the Court's case-law in this area, any rules which unjustifiably restrict an individual's ability to import medicinal products for personal use is contrary to Article 30. [46] I need hardly add that this must also apply to a pair of spectacles and, in general, to all medical or surgical accessories.

On that point, all the Member States which submitted observations in the two cases were at one in dismissing the possibility of any barrier to intra-Community trade. In their view, the rules in question have neither the object nor the effect of restricting trade flows but in fact do no more than set out the terms and conditions for reimbursement of medical expenses. The rules are therefore concerned only with the relationship between the insured person and the social security institution to which he is affiliated, the Member States maintain. That line of reasoning, which is, to say the least, based on a simplistic view of the issue, must be rejected as regards both the movement of goods and the provision of services.

That said, it is true that the rules under discussion by no means amount to a ban on importing the products in question, nor do they even directly affect the possibility of purchasing them outside the national territory. Insured persons remain free to purchase such products wherever they please, including in a Member State other than their

46 — See paragraph 15, above, in particular footnote 6.

State of residence. [47] But from that it does not follow, at least not of itself, that the rules in question do not create any barrier to the importation of such products.

38. In the first place, it is quite clear that the rules in question, by requiring prior authorisation only for purchases made outside the national territory, involve unequal treatment based on the place of purchase of the products concerned. [48] Even assuming, for the sake of argument, that such differentiated treatment is in itself of no relevance for the purposes of the application of the Community rules on goods, it is nevertheless the case that the rules in question, by denying insured persons not having obtained prior authorisation reimbursement of medical expenses incurred outside the national territory, have the effect of deterring those concerned from buying medicinal products, or even a pair of spectacles, in another Member State. In other words, such rules constitute a clear disincentive to purchase the products concerned in a Member State other than the State of residence: and this results, or at any rate may result, in a limitation on imports of such products.

Moreover, the authorisation in question, in view of the particularly restrictive conditions to which its grant is subject, is very unlikely to be accorded in a case where the benefit sought by the insured person is simply the purchase of a pair of spectacles and/or, in general, any products prescribed in the Member State in which he or she is resident. [49] In those circumstances, clearly, the rules in question regulate the reimbursement process in such a way that only products purchased in the national territory are eligible. [50] In view of the point made above regarding the deterrent effect of reimbursement not being available, it is therefore indisputable that such rules inhibit, albeit indi-

47 — Suffice it to note that Mr Decker had no difficulty whatsoever in purchasing the pair of spectacles giving rise to the dispute in a Member State other than his State of residence. The problems began, however, when he applied to the competent social security institution for reimbursement of the cost, which was duly refused.

48 — In this regard, it should however be emphasised that the authorisation in question, although it is required only for the purchase of products 'abroad', cannot be equated with other prior authorisations 'struck down' by the Court (see, for example, Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 18). This is essentially because in the case which concerns us importation as such is not subject to authorisation.

49 — In circumstances such as these, it is obvious that the competent social security institution will refuse to grant prior authorisation, since it must be assumed, first, that a pair of spectacles (even of a particular kind), or a medicinal product, prescribed respectively by an ophthalmologist and a doctor established in a given Member State, are available in the territory of that State and, secondly, that the state of health of the insured person is not going to deteriorate if he does not purchase those products outside the national territory (on this point, see also paragraph 29, above). If anything, the insured person's state of health could deteriorate if he decided, instead of buying the products he needs as soon as possible, to seek prior authorisation and to await the result (virtually certain to be negative) of a series of medical and administrative formalities.

50 — A very clear corollary of the decision in *Duphar*, interpreted *a contrario*, is that if national rules were to regulate the reimbursement process in such a way that only domestic products were eligible, they would be contrary to Article 30 (judgment cited in footnote 9, paragraphs 18 to 22). The fact that in the case which concerns us it is only products purchased in the national territory which are eligible for reimbursement should not, to my mind, produce a different outcome.

rectly, imports of medical products and accessories by private individuals for their personal use.

39. To my mind, this is sufficient to warrant the conclusion that the national rules in question meet the criteria for a measure having equivalent effect to a quantitative restriction inasmuch as they are capable, in accordance with the well-known *Dassonville* formula, 'of directly or indirectly, actually or potentially, hindering intra-Community trade'. [51] It follows that, without prejudice to any possible justification which may be available, they must be regarded as contrary to Article 30 of the Treaty. This conclusion also holds, it goes without saying, in relation to Article 22 of the Regulation.

— *The provision of services*

40. The same rules are in dispute and the barrier is of the same type. However, the relevant provisions of Community law, Articles 59 and 60 of the Treaty in this case, are different, as is the position of the central figure, who, as always in such cases, is still the patient. In this case, the patient derives standing in Community law not indirectly, via the products he imports, but rather as a recipient of services, [52] which is a factor of some importance. Given then that the patient is covered by the provisions on freedom to provide services when travelling to another State in order to avail himself or herself of medical treatment appropriate to his or her state of health, what are we to make of the rules in question?

Let me say straight away that those rules must also be regarded as being in conflict with Articles 59 and 60, for reasons broadly similar to those adduced in considering their compatibility with Article 30. Before examining more closely the restrictions they place on freedom to provide services, however, I believe it worthwhile to clear up some of the misunderstandings which have emerged during the course of the proceedings.

51 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

52 — See *Luisi and Carbone* (cited in footnote 8), paragraph 16. In that connection, moreover, I cannot overcome the suspicion that the rules on the provision of services may also be of relevance to cases involving the purchase of products (as in the Decker case). In view of the special nature of the products in question and also the fact that the Court has acknowledged that the presence of qualified personnel is required both for the sale of spectacles and contact lenses and for that of medicinal products (see Case C-369/88 *Delattre* [1991] ECR I-1487 and Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547, both concerning pharmacists, and Case C-271/92 *LPO* [1993] ECR I-2899, which concerned opticians), it could very well be argued that the rules applicable in such cases also come within the scope of Articles 59 and 60 of the Treaty. In short, I do not believe the possibility can be ruled out, at least not categorically, that the rules on the provision of services may apply to the circumstances of Mr Decker travelling to another Member State to purchase a pair of spectacles: by virtue of the fact that the journey is undertaken not for the purpose of simply purchasing a product but to take advantage of the professional skills of an optician established in another Member State. That said, the points made in the text in relation to the Kohll case would clearly also be valid in relation to the Decker case if it were found that the rules on the provision of services were applicable to that case as well.

41. It has been argued that the rules in question merely lay down the terms and conditions for reimbursement of medical expenses and that, accordingly, they are concerned only with the relationship between the insured person and the social security institution to which he or she is affiliated, with the result that a dispute over reimbursement of the expenses in question is purely an internal matter. The relevant service in such circumstances, according to this argument, is the benefit provided by the social security institution to the insured person, and not a provision of services within the meaning of Articles 59 and 60 of the Treaty. In any event, it should be acknowledged that an activity financed by the State using public funds does not involve any provision of services within the meaning of those articles.

That argument, in my opinion, betrays some confusion about the nature of the issue under consideration. What needs to be determined is whether national rules which make reimbursement of medical expenses incurred in a Member State other than the State of residence conditional upon prior authorisation have the effect of discouraging and hence restricting the freedom to provide services in the sector in question. The fact that the rules in question are in the field of social security and are expressly concerned with the terms and conditions of reimbursement of medical expenses is, in this regard, wholly irrelevant. [53] Nor does the mere fact that the State is involved in financing the benefit in question mean that there is no provision of services: the fact remains that the medical treatment is supplied for consideration [54] and that the insured person bears a significant portion of the cost through his health insurance contributions. [55]

42. That said, it is clear that the rules in question do not prohibit insured persons (who are recipients of services in this case) from using a provider of services established in another Member State and, in general, do not, at least not directly, make their access to medical care in other Member States subject to conditions. Moreover, since the requirement of prior authorisation applies to all

53 — The case-law on services provides many examples of national measures which, although they were not concerned with the provision of a service themselves, were found to be contrary to Article 59 as they were liable to have an adverse effect on the provision of the service in question. For instance, the Court has held that national rules which made the grant of a housing benefit subject to the requirement that the relevant loan was obtained from a credit institution established in the Member State in question were incompatible with Article 59, for the very reason that such a requirement was liable to dissuade borrowers from approaching banks established in other Member States in order to obtain loans intended to finance the construction, acquisition or improvement of housing (Case C-484/93 *Svensson* [1995] ECR I-3955). Needless to say, in that case just as in the present case, the rules under scrutiny did not directly concern the provision of the services in question.

54 — The Court has in fact made clear that it is not necessary that the service should be paid for directly by those receiving it (see Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 16), hence the nature of the issue does not change even if the competent social security institution pays for the service directly.

55 — Medical practice is thus not comparable to public instruction in this respect (see Case C-263/86 *Humbel* [1988] ECR 5365, paragraphs 4 to 6, and Case C-109/92 *Wirth* [1993] ECR I-6447).

persons resident in the Member State in question wishing to travel to another Member State in order to obtain the health-care they require, it is equally clear that those rules do not discriminate on grounds of nationality among the recipients of the services in question.

None the less, the fact of the matter is that the authorisation referred to is required only where it is sought to use a provider of services established in another Member State, and this constitutes, albeit indirectly, a difference in the treatment of insured persons based on the country of origin of the service. Furthermore, reimbursement is denied only to insured persons who obtain a medical service in another Member State but without having secured the requisite authorisation; this constitutes a difference in the treatment of insured persons according to whether they choose to avail themselves of services supplied by providers established in the national territory or in another Member State.

43. In short, it is abundantly clear that the rules in question, because they make reimbursement of medical expenses incurred in another Member State subject to prior authorisation and because they deny reimbursement of such expenses to insured persons who have not obtained such authorisation, are a highly deterrent factor and thus entail a restriction on the freedom to provide services. Furthermore, it cannot be denied that a situation of that kind is bound inevitably to have an adverse effect on providers of the service in question who are not established in the State concerned. [56] Save for the limited number of instances in which authorisation is granted, they can supply only benefits which are not eligible for reimbursement.

In the final analysis, the disputed national measure and, by the same token, Article 22 of the Regulation, entail restrictions based, albeit indirectly, on where the provider of services is established. [57] Both provisions reduce very substantially the freedom of health-care consumers (recipients of services) to use (also) providers of services established in other Member States and thereby hinder the latter's cross-border trade. Clearly, such restrictions are manifestly contrary, at least in principle, to Article 59 of the Treaty. [58]

56 — It may be recalled that Article 59 requires 'the abolition of any restriction (...), when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services' (Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12). I need hardly add that the nature of the issue does not change even if the rules in question do not apply to all providers of services established in the territory but only to those approved for social security reimbursement purposes. It is settled case-law that the fact that national rules do not give preference to all domestic providers of a service is immaterial for the purposes of the application of Article 59 (see, for example, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25).

57 — In that regard, the General Programme for the abolition of restrictions on freedom to provide services (OJ 1974 Special Edition, Second Series, IX, p. 3) included among the restrictions to be abolished those which impinge indirectly on providers of services, for example via their effect on the recipient of the service.

58 — This conclusion, that Article 22 of the Regulation is *also*, on the face of it, contrary to the Treaty rules on services, is one which commands widespread support among academic writers. See, *inter alia*, Bosscher, *La seguridad social de los trabajadores migrantes en la perspectiva del establecimiento del mercado interior*, in *Los sistemas de seguridad social y el mercado único europeo*, Madrid, 1993, p. 23 et seq., in particular p. 31 et seq.; and Cornelissen, *The Principle of Territoriality and the Community Regulations on Social Security*, in *Common Market Law Review*, 1996, p. 439 et seq., in particular pp. 463 to 466.

III — The reasons advanced to justify the contested measure

44. Given that it is the same measure which creates barriers of the same kind to both the free movement of goods and the freedom to provide services, it is hardly surprising that the reasons advanced to justify it are essentially the same in the case of both freedoms. To be precise, the Luxembourg Government and most of the governments which have submitted observations in the two cases contend that the restrictions entailed by the contested rules are necessary on public health grounds and, in particular, to ensure the maintenance of a balanced medical and hospital service accessible to everyone.

As already indicated, appraisal of those justifications necessarily entails taking a view on the validity of Article 22 of the Regulation. Once we have established that this provision, by imposing the requirement of prior authorisation, produces the same restrictive effects as the national measure in issue, we must perforce ascertain whether or not, like the national measure, it is compatible with Articles 30 and 59 of the Treaty. [59] The outcome would be different only if the two measures (national and Community), while laying down essentially the same rules, had different aims and/or followed different schemes.

45. That said, in order to determine what type of justification is permissible it first needs to be decided whether the contested measure is to be categorised as formally discriminatory or as indistinctly applicable. In the former case it can be justified, and hence upheld as compatible with Community law, only if it comes within the scope of Article 36 (goods) and Article 56, referred to by Article 66 (services), in other words, if it comes within one of the derogations

59 — For the sake of completeness, I would point out that the European Commission on Human Rights has given an opinion on the relevant Luxembourg rules and on Article 22 of the Regulation, in a case in which the plaintiff — a Luxembourg national who had been refused by the health insurance fund reimbursement of medical expenses incurred in another Member State (Belgium) and for which she had not obtained prior authorisation — alleged a violation of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms on account of the excessive length of the procedure and the fact that the dismissal of her appeal on the ground of inadmissibility by the Cour de Cassation, a court bound by the obligation to make a reference for a preliminary ruling under Article 177 of the Treaty, had deprived her of the possibility of a ruling by the Court of Justice on the interpretation of Article 59 of the Treaty, with which, she contended, the national rules were manifestly in conflict. The Commission on Human Rights — having noted that the health insurance fund and the Luxembourg courts had dismissed her action on the ground that the plaintiff could not reasonably claim, under Article 60(3) of the Code des Assurances Sociales, Article 51 of the Treaty and Article 22 of the Regulation, reimbursement of medical expenses incurred in another Member State without having sought and obtained the prescribed authorisation in advance — stated that the legislation applicable to the case did not confer on the plaintiff an entitlement to be reimbursed for health-care received in Belgium. Essentially, the Commission on Human Rights, having interpreted Article 22 of the Regulation as not conferring entitlement to reimbursement, drew the conclusion that the plaintiff did not hold a right under Article 6(1) of the Convention and accordingly held the action to be inadmissible (Decision of 16 April 1996, *Marie-Anne München* v *Luxembourg*, No. 28895/95).

expressly provided for by the Treaty, [60] with the further consequence that no consideration may be given to economic aims pursued by means of the restrictive measure [61] but only, in the present instance, to the protection of public health.

In the latter case, on the other hand, there is a broader range of requirements pertaining to the general interest capable of justifying the measure. The Court has held that in order to be compatible with Community law 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'. [62] This means, first, that even measures applicable without distinction may be incompatible with Community law if they are restrictive and not justified by overriding requirements or reasons relating to the general interest; [63] and, secondly, as we shall see below, that in this latter case consideration may *also* be given to economic aims pursued by means of the restrictive measure, such as the safeguarding of the financial stability of the health-care system.

46. However, the parties and the governments which submitted observations have, in justifying the contested measure, referred without distinction both to the protection of public health, and thus to one of the derogations provided by Articles 36 and 56, and to the safeguarding of the financial stability of the health-care system, which is a reason relating to the general interest. The Commission, for its part, submits that the measure is discriminatory as regards goods, since prior authorisation is not required to purchase the relevant products in the national territory, but indistinctly applicable as regards services, since the authorisation requirement,

60 — In relation to goods, see Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraphs 8 and 11, and, more recently, Joined Cases C-321/94 and C-324/94 *Pistre* [1997] ECR I-2343, paragraph 52. In relation to services, it was only in its judgment in *Bond van Adverteerders* (cited in footnote 54) that the Court for the first time clearly stated that 'national rules which are (...) discriminatory are compatible with Community law only if they can be brought within the scope of an express derogation' (paragraph 32); on the same point, see also the more recent case of *Svensson* (cited in footnote 53), paragraph 15.

61 — As regards goods, see *Duphar* (cited in footnote 9), paragraph 23, and Case 7/61 *Commission* v *Italy* [1961] ECR 317, at p. 329. As to services, see, *inter alia*, *Bond van Adverteerders* (cited in footnote 54), paragraph 34, and, more recently, Case C-17/92 *Fedicine* [1993] ECR I-2239, paragraphs 16 and 21.

62 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, in which, significantly, the Court referred without distinction to all the fundamental freedoms enshrined in the Treaty, thus highlighting the unitary nature, for the purposes which concern us here, of the relevant rules.

63 — This approach, which when first adopted, in the *Cassis de Dijon* judgment, was confined to the free movement of goods, was subsequently extended to the other fundamental freedoms enshrined in the Treaty. As far as services are concerned, that approach was expressly adopted, in particular, in Case C-288/89 *Gouda* [1991] ECR I-4007, paragraphs 11 to 15, *Commission* v *Netherlands* (cited in footnote 56), paragraphs 15 to 19, and *Säger* (cited in footnote 56), paragraph 15. Given, however, that since its very first decisions on the subject the Court has upheld as justified in the general interest measures restricting freedom to provide services (see, for example, Case 33/74 *Van Binsbergen* [1974] ECR 1299), it is clear that the *Gouda*, *Commission* v *Netherlands* and *Säger* judgments, far from constituting a new departure, merely clarified the existing approach and provided it with a fuller theoretical analysis.

although it applies only where medical services are sought abroad, applies in the same manner to nationals and non-nationals alike. It would seem, therefore, that under the rules laid down for goods even measures which, while not prescribing any particular formalities for the purposes of importation as such, are likely to discourage imports, are discriminatory, whereas under the rules governing services only measures which involve different treatment based on nationality are discriminatory. [64]

I cannot subscribe to this analysis. The measure in question does not directly hinder trade either in goods or in services. It may, however, have the effect of limiting such trade by reason of the obvious disadvantage (no reimbursement) in purchasing products or medical services abroad, without authorisation. What needs to be determined, therefore, is whether restrictions on the free movement of goods and on the freedom to provide services based, albeit indirectly, on where the seller of the goods or provider of the service is established, fall to be classified as discriminatory or as indistinctly applicable.

47. So far as concerns the rules on goods, let me begin by pointing out that this is the first time that the Court has been called upon to determine whether a measure which imposes an additional burden (prior authorisation) only on those intending to purchase the products in question outside the national territory is discriminatory for the purposes and within the meaning of Article 30 of the Treaty. Given that authorisation is required solely for the purpose of conferring a benefit (total or partial reimbursement of the cost of a particular product) and not for the purpose of importation, [65] it must be recognised, however, that the measure in question does not lay down different rules for imported products, but rather entails a difference in the treatment of persons (the insured), all resident in the same Member State, according to whether they have chosen to purchase a particular product in their State of residence or in some other Member State. Let me add that the fact that the difference in the treatment of insured persons depends, albeit indirectly, on the place where the optician or pharmacist who supplies the products is established, is of no significance for the purposes of the rules on goods, even if it may be considered to constitute formal discrimination based on the place of establishment. [66]

Any restriction on imports stems from the deterrent effect, on insured persons' decisions, of the fact that the cost of products

64 — This view has in fact been superseded by developments in the case-law. The Court also regards as discriminatory, and hence as justifiable only in accordance with one of the derogations set out in Article 56, national rules which treat services differently according to their origin (see, *inter alia*, *Bond van Adverteerders*, cited in footnote 54, paragraphs 26 and 29, Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraphs 9 to 11, and *Fedicine*, cited in footnote 61, paragraph 14).

65 — There still is complete freedom as regards actual importation. See paragraph 37, above, and, in particular, footnote 48.

66 — This would be a relevant factor, however, if it were decided that the rules on the provision of services were also applicable to the Decker case. See footnote 52, above.

purchased in another Member State is not reimbursed. It is my view, therefore, that the measure in question, even though it favours the purchase of products sold in the national territory, is not formally discriminatory. Leaving aside all other considerations, it requires no specific formality to be complied with at the time of and for the purpose of importation, nor does it favour domestic products over imported products.

48. Turning to the scope of the contested national measure in relation to the provisions on services, I would first recall that the Court has consistently held that measures are formally discriminatory only where they prescribe different rules for non-nationals [67] and/or for the provision of services 'originating' in other Member States. [68] It regards as indistinctly applicable, on the other hand, measures capable of applying to all those who carry on a particular activity in the territory of a particular Member State, even if such measures expressly impose a requirement of residence [69] or establishment [70] which effectively makes it impossible for service providers established in another Member State to carry on the activity in question. [71]

The measure under consideration, it is worth noting, does not entail any discrimination based on nationality nor does it prescribe, at least not directly, separate rules for service providers established in another Member State. The difference in treatment concerns, at least formally, all those insured under the social security scheme in question. Bearing in mind, however, that different treatment depends on the choice of doctor or of hospital, it is quite clear that the difference in the way insured persons are treated depends on the place where the provider of the service is established. Is this sufficient to warrant a finding that the measure in question, in so far as it *results* in different rules applying in respect of the provision of services originating in another Member State, is in any event to be categorised as discriminatory?

49. A negative answer to this question could be deduced from the fact, referred to above, that, under the Court's case-law on services, rules requiring a person to be established in the Member State in question in order to carry on a given activity are justifiable on

67 — See Case C-20/92 *Hubbard* [1993] ECR I-3777, paragraphs 14 and 15, and Case C-45/93 *Commission* v *Spain* [1994] ECR I-911, paragraphs 9 and 10.

68 — See footnote 64, above.

69 — See, for example, *Van Binsbergen* (cited in footnote 63), paragraph 14, and Case 39/75 *Coenen* [1975] ECR 1547, paragraphs 7/8 and 9/10.

70 — See, in particular, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraphs 52 to 57, and Case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, paragraph 31.

71 — See, most recently, Case C-222/95 *Parodi* [1997] ECR I-3899, in which the Court again emphasised that the requirement of establishment 'has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided'. The Court added, however, that 'if such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued' (paragraph 31).

grounds relating to the general interest, by reason of the fact, however unsatisfactory this result may seem, that the requirement is imposed on all those who carry on a particular activity in the territory of a particular Member State and is thus, *formally* at least, not in any way discriminatory. From the same perspective, a measure which does not prescribe, at least not formally and directly, different rules for providers of services established in another Member State, should likewise be regarded as non-discriminatory.

On this very point, however, the case-law on measures of the kind at issue in this case, in other words measures by which the conferring of a benefit is made conditional upon a provider of services established in the national territory being used, is not free from uncertainties and contradictions. For example, in *Bachmann* the Court held that the contested measure, which made the deductibility of certain contributions subject to the condition that they were paid in the Member State itself, was justifiable in the interests of the cohesion of the national tax system, thereby classifying the measure as indistinctly applicable. [72] In the later case of *Svensson*, on the other hand, the Court ruled that a measure which specified as a condition for the grant of a housing benefit that the loan should be obtained from a lending institution established in the national territory was discriminatory on the ground of the place of establishment, and thus justifiable only on the basis of the derogations expressly provided for in the Treaty. [73] Nor did it help to clarify matters that the Court then considered it necessary, in the same judgment, to rebut the proposition that the measure in question was necessary in order to preserve the cohesion of the tax system: [74] in so doing, the Court was also verifying whether that measure could be justified on the basis of requirements likely to be taken into account only in the case of measures applicable without distinction.

50. I do not believe that the compatibility of a national measure with Community law may be assessed without distinction and/or cumulatively with regard to derogations expressly provided for in the Treaty and to grounds relating to the general interest, [75] particularly as the justifications in question apply in different situations which are in part governed by different rules. While acknowl-

72 — Case C-204/90 *Bachmann* [1992] ECR I-249. To this end, it is worth pointing out, the Court confined itself to noting that 'the requirement of an establishment is compatible with Article 59 of the Treaty where it constitutes a condition which is indispensable to the achievement of the public-interest objective pursued' (paragraph 32). It would appear from that statement that since the general interest can justify even a prohibition, imposed by means of a requirement of establishment, on exercising particular activities in the territory of the State concerned, there is all the more reason to regard as justified rules which entail some disadvantages, or at any rate do not confer certain advantages, for those who choose to avail themselves of providers of services not established in the State in question.

73 — *Svensson* (cited in footnote 53), paragraph 15. More precisely, the Court stated that 'the rule in question entails discrimination based on the place of establishment' and that accordingly it 'can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, and which do not include economic aims'.

74 — *Idem*, paragraphs 16 to 18.

75 — On this point, it should be emphasised that *Svensson* is not the only case, nor the first, in which the Court took into consideration, for the purpose of determining whether a national measure restricting freedom to provide services was compatible with Article 59, both the requirements set out in Article 56 and those relating to the general interest (see, for example, *Commission* v *Italy*, cited in footnote 70, paragraphs 31 and 32).

edging that it may not be an easy matter to establish whether or not a particular measure is discriminatory — either because the discriminatory effect (in fact) is all too obvious, or because the particular features of a given sector induce a degree of caution — it is essential none the less to place the measure in the proper category.

In short, it is my view that, for the purposes of this case and in order to dispel the aforementioned ambiguities in the case-law, the Court should either follow *Svensson* and rule that discriminatory measures include those which *indirectly give rise to* unequal treatment as between providers of services established in a given Member State and those not so established or, alternatively, confirm the approach which appears to have been adopted in *Bachmann*, namely that measures which *do not formally lay down* different rules for providers of services not established in the Member State are still deemed to be indistinctly applicable. I would merely add that the latter approach would appear at present to be more in keeping with the case-law in this area considered as a whole. This does not of course alter the fact that a reappraisal would be timely.

51. Assuming that the national measure under consideration is to be regarded as *indistinctly applicable*, with respect to the Community rules on both goods and services, I now turn to the requirements relied upon to justify it, namely the protection of public health and the maintenance of a balanced medical and hospital system accessible to everyone in a given region. The latter requirement, it may be recalled, is expressly mentioned in the second question submitted by the national court in Case C-158/96 (Kohll), while the Member States which submitted observations have referred instead to preserving the system's financial stability. The two aims are in fact interrelated in that the latter, more immediate, objective constitutes, according to those Member States, the means by which the former is to be achieved.

One further aspect, I believe, needs to be made clear. The points raised and the result arrived at in examining whether the contested measure is justifiable on public health grounds would be equally valid, given that it is a requirement expressly provided for in Articles 36 and 56 of the Treaty, if the contested measure were assumed to be *discriminatory*. [76] But the same cannot be said for the requirement of maintaining a balanced medical and hospital system accessible to everyone in a given region. Even granting that this aim comes within the concept of public

76 — See, in particular, Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151, paragraph 13.

health, in the broad sense of the term, [77] the fact remains that it is based entirely on the financial stability of the system and thus on an economic aim, which, as such, can under no circumstances justify a discriminatory measure. [78]

52. That said, let me add straight away that the proposition, also put forward by the Luxembourg Government, that the contested rules are necessary to ensure the quality of medical products and services — which, where travel abroad is involved, can only be checked when authorisation is requested — is devoid of any foundation. The conditions for taking up (and pursuing) the activities with which we are concerned here, like the rules governing the release of medicinal products on to the market, have been the subject of Community coordinating and harmonising directives. [79] Indeed, the Court has already cited those directives in judgments where it stated that the prescription of a medicinal product by a doctor in another Member State and the purchase of such a product in that State provide guarantees equivalent to those afforded where prescription is by a doctor in the importing State or the product is sold through a pharmacy in the Member State into which it is imported by a private individual. [80] That case-law, which of necessity also applies to the purchase of all medical and surgical accessories, including a pair of spectacles, presupposes that guarantees equivalent to those provided by doctors, pharmacists and opticians established in the national territory must be assumed to be provided by doctors, pharmacists and opticians established in other Member States as well.

In those circumstances, I do not believe it is reasonable to argue that the health of insured persons is not adequately protected when they obtain health-care in another Member State. [81] It follows, of course, that the measure in question cannot be regarded as necessary for the protection of health.

77 — But the Court has so far given a narrow interpretation to the concept of 'public health' and has allowed it to be used to justify only measures aimed at preventing risks to the health of humans and animals.

78 — See the judgments cited in footnote 61. I would merely note that in *Duphar* the Court made clear that because Article 36 relates to measures of a non-economic nature, it cannot therefore justify a national measure intended 'to reduce the operating costs of a sickness insurance scheme' (judgment cited in footnote 9, paragraph 23).

79 — I refer, in particular, to Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1), and, among the specific directives, to Council Directives 78/686/EEC and 78/687/EEC of 25 July 1978 concerning the mutual recognition of diplomas and the coordination of national provisions on dentists (OJ 1978 L 233, p. 1 and p. 10). I would also refer to Council Directives 85/432/EEC and 85/433/EEC of 16 September 1985 on the coordination of national provisions and the mutual recognition of diplomas in relation to certain activities in the pharmaceutical sector (OJ 1985 L 253, p. 34 and p. 37). Finally, I would recall that the free movement of pharmaceutical products is ensured at Community level, with due account taken of the protection of public health, by Council Directive 65/65/EEC of 26 January 1965 (OJ, English Special Edition 1965-1966, p. 20).

80 — See *Schumacher* (cited in footnote 6), paragraph 20, and *Commission* v *Germany* (cited in footnote 6), paragraph 18.

81 — Since the Luxembourg Government itself stated that insured persons are free to obtain health-care in another Member State, the question has to be asked why the aforesaid public health concerns no longer arise when reimbursement is not sought.

53. So far as preserving the system's financial stability is concerned, let me begin by stating that this is, in my view, a requirement worthy of protection by Community law. While it is true that the Court has on occasion categorically dismissed economic aims put forward to justify indistinctly applicable measures (as well), [82] it is also apparent, on a closer reading of the relevant judgments, that economic aims are indeed justifiable, where far from being an end in themselves, they are crucial to the operation of the system in question [83] or affect interests of vital importance to the State. [84]

From that point of view, I believe it is beyond dispute that the preservation of the financial stability of the social security system, which is indeed the essential aim of the measure in question, is not an end in itself but a means which contributes (at least) to providing insured persons with services of a certain standard in terms of both quantity and quality. If the financial balance of the system were upset, the level of health protection could deteriorate with obvious and inevitable adverse repercussions, particularly for insured persons belonging to the weakest strata of society. Moreover, the Court has already recognised, for example in the matter of equal treatment of men and women in the social security sector, [85] and also in interpreting the relevant provisions of the Staff Regulations of Officials, [86] that the financial stability of social security systems constitutes a legitimate objective and, accordingly, one worthy of protection.

54. I now turn to consider whether the contested measure is necessary for and suited to preserving the financial stability, and thereby the continued operation, of a medical and hospital service accessible to everyone. All the governments which submitted observations have argued, on this issue, that prior authorisation is essential in order to avoid the social security institutions having to reimburse the cost of the benefits in question in accordance with the legislation of the Member State in which each individual insured person chooses to avail himself or herself of medical care and/or to purchase medical products. They add that the Member State chosen will normally be the one in

82 — See *Gouda* (cited in footnote 63), paragraph 11. See also, more recently, Case C-398/95, *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* [1997] ECR I-3091, paragraph 23, in which the Court stated that 'maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State, must be regarded as an economic aim which cannot constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty'.

83 — I recall, for example, that in Case C-275/92 *Schindler* [1994] ECR I-1039, the Court stated that a ground which is 'not without relevance, *although it cannot in itself be regarded as an objective justification*, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture' (paragraph 60, emphasis added). I would further refer to Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 106 and 107, in which the Court upheld as legitimate the aim of maintaining a financial and competitive balance between football clubs as its purpose was to preserve a degree of equality and uncertainty as to results.

84 — This is one possible interpretation of the Court's acceptance of the cohesion of the tax system, which is undoubtedly an economic aim, as a ground related to the general interest (*Bachmann*, cited in footnote 72, paragraphs 21 to 28).

85 — See Case C-137/94 *Richardson* [1995] ECR I-3407, paragraphs 18 to 29.

86 — See, most recently, Case T-41/90 *Barassi* v *Commission* [1992] ECR II-159, paragraphs 32 to 35.

which the benefit in question is considered most advanced and is, accordingly, the most expensive.

Now it must of course be acknowledged that an obligation to reimburse, in accordance with the legislation of the different Member States, the cost of benefits which insured persons have chosen to avail themselves of outside the national territory, could indeed upset the financial stability and adversely affect the continued operation of a balanced medical and hospital system accessible to everyone. In that regard, suffice it to note that, at present, the costs of health-care and the rules governing the financing of health insurance systems differ appreciably from one Member State to another. [87] Unrestricted freedom of movement for patients could therefore lead to imbalances which would be highly detrimental to those Member States in which the cost of benefits is significantly lower than the cost which their social security institutions would have to reimburse to insured persons who chose to avail themselves of such benefits in other Member States.

55. In view of this, the contested measure must be regarded as necessary and proportionate to the attainment of the aim pursued. The requirement of prior authorisation is the only means which enables the social security institutions to assume the burden of expenses incurred by insured persons in another Member State, on the terms laid down in that Member State, only where it is adjudged necessary because of the state of health of the persons insured and thus to contain excessive expenditure which could upset the financial balance of the system.

The Commission, however, arguing that Article 22 of the Regulation imposes an obligation not to refuse authorisation in a particular case but is silent as to other situations which might arise, maintains that each case has to be looked at individually to determine whether the grant of authorisation for a particular benefit, and the attendant financial burden, would entail upsetting the financial balance. [88] As attractive as this approach may appear, it is lacking in rigour. It is clearly the case, and rightly so, that Member States could (and indeed can) be more generous than is required of them by Article 22 of the Regulation; I wonder, however, on the basis of what criteria national rules which authorise insured persons to travel to other Mem-

87 — For an overview of current differences, see Le Grand, 'La asistencia sanitaria y la construcción del mercado único: perspectiva y problemática', in *Los sistemas de seguridad social y el mercado único europeo*, op. cit., p. 321 et seq. See also, in relation to the more general issue of the funding of social protection, Euzeby, 'Le financement de la protection sociale dans les pays de la CEE: problèmes et perspectives', in *Quel avenir pour l'Europe sociale: 1992 et après?*, Brussels 1990, p. 133 et seq., and, by the same author, 'Financement de la protection sociale, efficacité économique et justice sociale', in *Revue du Marché commun et de l'Union européenne*, 1997, p. 253 et seq.

88 — This point, it should be noted, would apply only to services. Having maintained that the contested measure was discriminatory in relation to the rules on goods, the Commission was consistent and submitted that the measure in question was not justifiable on the ground of protection of public health set out in Article 36 of the Treaty.

ber States to avail themselves of medical care, at least in the cases in which Article 22 of the Regulation so requires, can be regarded as compatible with that provision, which the Commission itself deems valid, but contrary to the Treaty rules on services. [89]

56. Rather, it is quite true that Article 22 of the Regulation in no way requires, or implies, that in cases in which authorisation is not granted on the ground that the conditions it lays down are not satisfied, insured persons must bear the full cost of the benefits concerned or are not entitled to any form of reimbursement. The purpose of the provision in question is to ensure that the right of the insured to certain benefits may, by derogation from the principle that a person is subject to a single body of legislation, which is the basis for the coordination brought about by the Regulation, also be exercised in another Member State (at least) in cases where a transfer is necessary because of the state of health of the person concerned. In other words, the provision in question is intended to guarantee to insured persons the right to receive appropriate care in another Member State without suffering financially as a result and without endangering the stability of the systems in operation in the various Member States.

57. But if this is true it follows, first, that the restrictions imposed by the relevant provisions of Article 22, precisely because they are aimed at ensuring that insured persons may avail themselves of medical benefits in another Member State on the terms laid down by the legislation of that State, are objectively justified and hence compatible with Articles 30 and 59 of the Treaty and, secondly, that the preservation of financial stability, the aim pursued by the national measure, is relevant only if and to the extent that it is assumed that reimbursement by the competent social security institution of benefits which insured persons choose to obtain in another Member State must be based on the rules and criteria applied by the Member State in which the benefits are provided.

That being so, it must therefore be considered whether the risk of upsetting the financial balance, and hence the need for prior authorisation, still subsists if the competent social security institution is obliged to make full reimbursement in accordance not with the legislation of the Member State in which the insured person received the care in question, but with the legislation and the tariffs in force in the Member State in which the recipient of the medical care is insured. In other words, the question is whether reimbursing Mr Decker, as he claims, on the same

89 — While I do not share the author's view (see paragraph 31 and footnote 36, above), I find more convincing the view put forward by da Mavridis in 'Le citoyen européen peut-il se faire soigner dans l'État de son choix?' in *Droit social*, 1996, p. 1086 et seq., according to which it is Article 22 itself, as interpreted by the Court in *Pierik I* and *Pierik II* (cited in footnotes 30 and 31 respectively), which requires authorisation to be granted for all care liable to ensure effective treatment of the disease from which the person concerned is suffering.

terms as those to which he would have been entitled had he bought the spectacles from an optician established in Luxembourg, or reimbursing Mr Kohll on the basis of the Luxembourg tariff, would really have the effect of undermining the financial balance of the system.

58. Viewed in those terms, it is clear that differences in financing methods and in health-care costs between the various systems are immaterial for as long as the competent social security institution does not have to reimburse benefits received by insured persons in another Member State in accordance with the legislation applicable in that State. It is self-evident that reimbursement to Mr Decker of the sum of LFR 1 600, to which he would have been entitled had he purchased the spectacles from an optician established in Luxembourg, would have no effect on the financial balance of the system, any more than would be the case in the event of reimbursement of orthodontic treatment provided in Germany to a person insured by the Luxembourg health insurance fund in accordance with the 'Luxembourg' cost of such treatment. [90]

90 — The only effect I can conceive of is that one optician established in Luxembourg will have sold one less pair of spectacles and the only orthodontist established in the same State will have lost one patient. It is therefore the individual practitioners who are adversely affected and not the system itself.

Nor, in consequence, would the maintenance of a *medical service* accessible to everyone in a given region be placed in jeopardy. While it is true that those living in border regions may cross the border more frequently, *inter alia* for medical treatment, the fact remains that the traffic is not all one-way, at least in principle, and, especially, that the benefits we have been considering do not affect the financial balance to a greater extent than if they had been obtained in the Member State of residence of the persons concerned.

59. I believe, however, that the position in relation to *hospital infrastructure* is quite different and requires a different answer. Unlike the benefits provided by individual practitioners, the reality in the case of hospitals is, first, that their location and number is determined by forward-planning and, secondly, that the cost of one person's stay in a hospital cannot be separated from that of the hospital as a whole. Clearly, if a large number of insured persons chose to avail themselves of hospital facilities located in another Member State, their domestic hospitals would be

under-utilised but would have the same staff and equipment overheads as if they were being used to full capacity. [91]

In other words, reimbursement, by the competent social security institution, of medical benefits received by insured persons in hospitals of other Member States, even on the basis of a flat-rate equivalent to the 'Luxembourg' cost of the benefits in question, would none the less result in an additional financial burden for the system concerned. In the hospital sector, therefore, it remains essential, in order not to disrupt the financial balance of the system and to ensure the maintenance of a service which is accessible, both financially and logistically, to everyone, including therefore those who do not intend to travel but wish to receive the health-care they require in the place nearest to them, to seek and obtain prior authorisation. [92]

60. In short, it is my view that the contested measure is justified in relation to all benefits which must be provided to insured persons in hospitals and, in general, to all benefits which the insured person wishes to have paid or reimbursed in full by the competent social security institution. On the other hand, the measure is not justifiable in relation to the purchase of products or medical services provided by private practitioners, consisting of consultations and visits to specialists, in respect of which a flat-rate reimbursement is requested at the tariff in force in the Member State in which the person concerned is insured.

Action by the Community legislature aimed at harmonising the area in question so as to allow genuine and effective freedom of movement for patients, which would be a significant factor in the creation of a single integrated market, would be welcome. Conscious of the fact that this is an ambitious goal which is difficult to achieve at present, I believe that the Community legislature should at least act, and do so promptly, to broaden the range of circumstances in which authorisation may not be refused. There is no doubt that it would be advantageous in many respects for authorisation to be granted in all cases in which the insured person could receive more effective treatment in another Member State or where, as was explained in the course of the hearing in the Kohll case, there is just one specialist in the Member State of residence capable of providing the service required.

91 — Of course, this does not mean I wish to associate myself with the view advanced by some Member States that, if freedom to choose one's doctor and hospital were given, there would be an uncontrolled and uncontrollable flow of patients from one Member State to another. The fact remains that travelling to a State other than the State of residence entails significant inconvenience, often including language difficulties, and additional costs, if only for those persons accompanying the patient.

92 — On this point, however, the question arises whether, and to what extent, the situation is otherwise, in relation to the aim of maintaining a hospital system accessible to everyone, in those Member States where the competent social security institution provides reimbursement, albeit on a partial and flat-rate basis, of the cost of benefits which insured persons choose to obtain in private clinics.

Conclusion

61. In the light of the foregoing considerations, I suggest that the Court answer the questions referred to it by the Luxembourg Conseil Arbitral des Assurances Sociales and the Cour de Cassation respectively, as follows:

(a) in Case C-120/95

Articles 30 and 36 of the Treaty are to be interpreted as precluding national rules under which a social security institution refuses to reimburse to an insured person, on the ground that prior authorisation is required for any health-care abroad, the cost of a pair of spectacles, prescribed by a doctor established in the Member State in which the insured person resides but purchased from an optician established in another Member State, in accordance with the legislation applicable in the former State;

(b) in Case C-158/96

Articles 59 and 60 of the Treaty are to be interpreted as precluding national rules under which reimbursement of the cost of benefits is subject to authorisation by the insured person's social security institution if the benefits are provided in a Member State other than the State in which that person resides, on condition that and in so far as such benefits are provided outside the hospital infrastructure and the cost is reimbursed in accordance with the rules not of the State in which they are provided but of the State of insurance; on the other hand, Articles 59 and 60 of the Treaty are to be interpreted as not precluding such rules where their purpose is the preservation of the financial balance along with the maintenance of a hospital service accessible to everyone in a given region, where the benefits in question must be provided in hospitals and, in general, in respect of all benefits the cost of which is to be reimbursed in accordance with the rules of the Member State in which they are provided, rather than the Member State in which the insured person resides.