OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 18 May 2000 [1]

Subject-matter of the reference

1. By this reference for a preliminary ruling, the Belgian court is asking this Court to establish the criteria for calculating the level of reimbursement of medical expenses incurred in a Member State other than that where a person is entitled to register with a national social security scheme. The issue at the basis of the reference, on which the 10 Member States participating in these proceedings have submitted observations, concerns recognition of the right to reimbursement for medical treatment received abroad. The crux of the request by the referring court is therefore the general question regarding the reconciliation, on the one hand, of the protection of the right to choose where to receive a particular treatment or medical consultation and to be able to provide medical services to foreigners on the same terms as those offered to nationals affiliated to the national scheme with, on the other hand, the need to safeguard national schemes by limiting the flow of patients in or out of the country, which might make it impossible or extremely difficult for Member States to plan and organise health schemes.

The Community and the national legislation

2. 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] contains specific provisions on the movement of EC workers, that is to say those persons registered with a social security institute in one Member State who receive medical treatment in another Member State. In particular, so far as concerns the present case, Article 22 of that regulation provides that States may make the right to receive medical treatment abroad or payments in cash linked to the progression of the illness subject to author-

1 — Original language: Italian.

2 — OJ, English Special Edition 1971 (II), p. 416; see in particular codified version resulting from Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1).

isation. It provides, in particular, as follows:

'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) whose condition necessitates immediate benefits during a stay in the territory of another Member State;

...

(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 residence 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'.

The second subparagraph of Article 22(2), as amended by Council Regulation (EEC) No 2793/81 of 17 September 1981 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community and Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71, [3] establishes the conditions under which the

3 — OJ 1981 L 275, p. 1.

national authorities are obliged to give authorisation for medical treatment abroad. It provides that '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 resides 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. As regards the national legislation on this subject, as is to be seen above from the documents before the Court, Article 221(1)(2) of the Royal Decree of 4 November 1963 implementing the Law of 9 August 1963 establishing the sickness and invalidity insurance scheme recognises the right to reimbursement for medical treatment received abroad where the restoration of the recipient's health 'requires hospital treatment which can be given under better medical conditions abroad provided that the medical expert has first determined such treatment to be essential'.

In its observations, the Belgian Government notes that since Regulation No 1408/71 entered into force, such authorisation is in fact granted on the basis of the Community provisions and not on the basis of the national provisions. For the purpose of reimbursement, application must be made for form E 112, provided for by Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71.[4] In accordance with Ministerial Circular O.A. No 81/215-80/51 of 18 June 1971, reimbursement may be made only if specific requirements are met. The circular is worded as follows:

'The application of Article 22 of Regulation No 1408/71 should be based on the following principles:

1. authorisation to receive treatment abroad shall not be given where the medical and technical facilities for providing such treatment are also available in Belgium;

2. where authorisation to receive treatment abroad is given in very exceptional cases, that is to say where the treatment cannot be given in Belgium, the medical expert must clearly specify the establishment which is to provide the treatment and/or the medical specialist and also the proposed period of treatment;

3. subject to paragraph 2, benefits not covered by Belgian insurance cannot be provided abroad, that is to say Form E 112 cannot be issued for benefits

4 — OJ, English Special Edition 1972 (II), p. 159.

which are not reimbursable in Belgium under the compulsory sickness-invalidity insurance scheme (absolute bar).

...

4. thermal treatment may not be authorised.'

The facts and the questions referred for a preliminary ruling

4. In February 1990 Mrs Descamps, residing in Belgium, applied to the Alliance Nationale des Mutualités Chrétiennes ('the ANMC'), the sickness insurance fund with which she was registered, for authorisation (for the purpose of being granted entitlement to reimbursement) to undergo orthopaedic surgery in France. The ANMC refused to grant her authorisation on the basis that Mrs Descamps's application was insufficiently supported, as there was no opinion of a doctor practising in a national university institution.

5. In spite of that refusal, in April 1990 Mrs Descamps decided in any case to undergo the surgery.

6. On her return to Belgium she brought an action before the Tribunal du Travail (Labour Court of First Instance), Tournai, applying for reimbursement by the ANMC of all the expenses incurred in France. The Belgian court dismissed the action, holding that the decision by the ANMC not to grant authorisation to Mrs Descamps was legitimate as the application for authorisation was not adequately supported. [5]

Mrs Descamps brought an appeal before the Cour du travail de Mons. That court designated a medical expert in order to establish whether in March 1990 it had been necessary to treat Mrs Descamps in a hospital abroad which could provide her with 'more favourable medical conditions' than those in national hospitals. In his report of 29 December 1994 the expert, Dr El Banna, concluded that the treatment and the operation that Mrs Descamps had received in the French hospital had been necessary for 'Mrs Descamps's recovery' within the meaning and for the purposes of Article 221(1) of the Royal Decree of 4 November 1963.

In the main proceedings, the ANMC pleaded in the alternative that the criteria used by the applicant to determine the amount of the reimbursement were unlawful. According to the ANMC, the reimbursable expenses amount to FRF 38 608.89,

5 — The Tribunal du Travail de Tournai stated that the applicant had not 'provided evidence, in the form at least of the opinion of a professor at a Belgian university that the operation performed in France was performed under better medical conditions that those in which it could have been provided in Belgium'.

equivalent to the sum that would be reimbursed by the French authorities for the treatment. However, Mrs Descamps maintains that the percentage of reimbursement is the level provided for by Belgian law which would entitle her to FRF 49 935.44.

7. Mrs Descamps died on 10 August 1996. Her heirs, namely, her husband — Mr Vanbraekel — and her six children, continued the case before the appellate court.

8. In its judgment of 9 October 1998 — in which the question now before the Court for a preliminary ruling was submitted — the Cour du travail states that, in designating the expert to establish whether the applicant's operation was necessary, it 'implicitly accepted' that the medical expenses incurred by Mrs Descamps should be paid for by the ANMC. On the matter of the determination of the amount to be reimbursed to Mrs Descamps, the Cour du travail puts the following question for preliminary ruling:

'Where, in the context of proceedings before it, a national court has acknowledged that hospital treatment in a Member State other than that of the competent institution was necessary, although the prior authorisation provided for in Article 22 of Regulation No 1408/71 was refused:

Must the costs of hospital treatment be reimbursed in accordance with the scheme of the State of the competent institution or in accordance with that organised by the State on whose territory the hospital treatment has taken place?

Is a limitation of the amount reimbursed under the legislation of the State of the competent institution permitted, having regard to Article 36 of Regulation No 1408/71 which refers to reimbursement in full?'

Admissibility

9. The Irish, Netherlands, Danish and United Kingdom Governments have all argued that the reference for a preliminary ruling is not admissible as, in their submission, the order for reference does not contain sufficient information on the facts and the law to allow participation by Member States in the proceedings for a preliminary ruling.

10. In my opinion the reference contains a clear, though succinct, outline of the facts in issue as well as an indication of the

national provisions applicable. The two questions referred for a preliminary ruling are equally clear in their content: they refer, essentially, to the criteria to be applied in calculating the amount of reimbursement for medical expenses incurred abroad. Some puzzlement might arise, on reading the order for reference, concerning the connection between an 'implicit statement' of unlawfulness regarding the refusal of authorisation by the Belgian administrative authority, on the one hand, and the interpretation of the provisions of Community law on the recognition of the right to reimbursement, on the other. I consider, however, that such puzzlement is of relative importance since, if the questions are dealing with the amount of reimbursement due to the claimant in the main proceedings — which is clear from their wording — it has to be assumed that the referring court has in fact, in this order for reference, acknowledged the applicant's right to reimbursement. In the light of that, I believe that the question referred for a preliminary ruling is undoubtedly admissible.

Substance

Authorisation procedure under Article 22 of Regulation No 1408/71

11. As I stated earlier, the two questions referred to the Court concern, essentially, the method of calculation and, therefore, the calculation of the reimbursement of the expenses for medical treatment received in a Member State other than the one where the person is registered. However, in the actual wording of the questions, the referring court appears implicitly to raise the issue of the significance to be attached, in the circumstances, to the fact that the claimant in the main proceedings underwent surgery in France without receiving prior authorisation from the Belgian authorities, that is to say, those of the State of registration. Furthermore, in the grounds of the order for reference the national court asks whether, in the light of *Decker* and *Kohll*, [6] the general provisions on freedom of movement impose particular constraints on the national authority in a case, such as that in point in the main proceedings, concerning hospital treatment.

The two questions for a preliminary ruling are therefore coupled with two other points on which all the participants in these proceedings have dwelt at length: the first is whether in this case authorisation within the meaning and for the purposes of Article 22 of Regulation 1408/71 was properly guaranteed, the second, of a general nature, is whether at present, in the light of *Decker* and *Kohll*, Member States retain the option — under Article 22, cited above — to make the right to reimbursement of the cost of medical treatment provided in a Member State other than that where the worker is registered with a health insurance scheme subject to a particular authorisation procedure.

6 — Case C-120/95 *Decker* v *Caisse de maladie* [1998] ECR I-1831 and Case C-158/96 *Kohll* v *Union des caisses de maladie* [1998] ECR I-1931.

12. *(a)* In my opinion, the first point is of limited importance for the purpose of answering the questions put by the referring court. In its judgment of 9 October 1998, in other words in its actual reference to this Court, the Cour du travail recognises that Mrs Descamps was entitled to reimbursement of the expenses incurred for the operation in France, and therefore that the refusal by the Belgian authorities to grant authorisation was unlawful. If the national court annuls the decision refusing authorisation on the basis of its national law which, as we shall see, is based on the Community legislation on the subject, and recognises the claimant's right to reimbursement, this Court can only take formal note of that decision. Neither Article 22 of Regulation No 1408/71, nor any other provision of Community law, in providing for lapse of the right to reimbursement in the absence of prior authorisation, could have any impact on the effects implicit in the national judgment. It would be contradictory to consider that an individual who is entitled under the regulation to receive treatment abroad loses that right if the competent authority refuses his application for authorisation in breach of its obligations under the Community legislation. It follows that there is no real problem in this case relating to the exercise of the right to benefit from medical services provided abroad.

In any case, as the authorisation under Article 22 (even if issued *a posteriori*) is in any event based on the principle of freedom of movement, the conditions to be met for them to be incompatible with Regulation No 1408/71 do not exist. I would add that, in my opinion, even authorisation granted by the competent administrative authority after the medical treatment may produce the effect of prior authorisation, inasmuch as its content is in no way incompatible with the provisions of Article 22 of the regulation. That article lays down the 'minimum rules' to be observed by the States in order to allow freedom of movement of health services. Any further measure with a similar content, based on the same aims, cannot therefore be considered as being contrary to the regulation.

13. (b) As regards the more general point concerning the lawfulness of the national provisions which, for the purpose of reimbursement of medical expenses incurred abroad, require the person concerned to apply for and receive authorisation from the competent authorities of the State of registration, it clearly falls outside the subject-matter of the dispute in the main proceedings which gave rise to this reference for a preliminary ruling. As I have already had occasion to point out, that dispute does not, as it stands, concern the existence or otherwise of Mrs Descamps's right to reimbursement, but merely the determination of the amount to be reimbursed. [7]

7 — The question of how to interpret the rules on the freedom to provide services in relation to national legislation which, for the purposes of reimbursement, requires the person to apply for and receive authorisation is the specific subject of a question for a preliminary ruling in Case C-157/99 *Smits and Peerbooms* v *Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

In the order for reference the Belgian court acknowledges that the claimant — and now her heirs — are entitled to reimbursement of the medical expenses incurred in France for the surgical treatment she received there. To that end the national court bases itself on the national provisions which are in some way more favourable to the insured person than the Community provisions, in that, as it points out, they provide more scope for authorisation to be granted to persons who have received medical treatment abroad. While Article 22 of Regulation No 1408/71, as amended by the 1981 regulation, requires authorisation to be granted only for treatment which cannot physically be provided on national territory within a period such as not to interrupt the course of the disease, the national legislation requires such authorisation to be given in all cases where 'the restoration of the patient's health requires hospital treatment which can be given under *better* medical conditions abroad provided that the medical expert has first determined such treatment to be essential'. [8] It is clear that the regulation requires the States to grant authorisation only where it is materially and technically impossible to provide the same treatment on national territory. The Belgian legislation, instead, requires a comparison to be made of the treatment provided nationally and abroad and, where the latter is more effective, to grant the claimant the right to reimbursement. In the present case, therefore, the Belgian system provides for hypotheses of reimbursement which differ in nature and time from those in which the obligation under Article 22 of the regulation exists. It follows that there is no incompatibility between the Belgian law and the Community instrument of secondary legislation.

14. In the order for reference the national court also asks, however, what significance may be attached, for the purposes of this case, to the *Decker* and *Kohll* judgments of 1998 in which the Court declared as incompatible with the general provisions on freedom of movement national legislation, such as that of Luxembourg, on reimbursement of medical expenses incurred abroad which more or less reproduced the provisions of the regulation and, therefore, made reimbursement subject to authorisation by the national administrative authority. Such authorisation was to be issued only following a medical examination and on submission of a request by a doctor established in Luxembourg, listing the criteria and circumstances which made it impossible to carry out that particular treatment in Luxembourg. [9]

15. In both cases in the national proceedings the refusal to reimburse expenses incurred respectively in purchasing a pair of spectacles with corrective lenses in Belgium — *Decker* — and in receiving treatment provided by an orthodontist established in Germany — *Kohll* — was disputed; in both cases authorisation had not been given. In both references for a preliminary ruling the Luxembourg courts

8 — Emphasis added.

9 — For an outline of that national legislation, see the Opinion of Advocate General Tesauro delivered on 16 September 1997.

asked whether, on the basis respectively of Articles 30 and 59 of the Treaty (now Articles 28 EC and 49 EC) the procedure for authorisation under Luxembourg law constituted a restriction on the freedom to provide services or a measure having equivalent effect to a restriction on the importation of medicinal products. Clearly, therefore, the questions did not touch on the applicability in those cases of the provisions of Regulation No 1408/71. The Court, following the Opinion of the Advocate General, held that the provisions of primary law on freedom of movement, as fundamental principles of the Community legal order, also apply to the provision of health services and the marketing of medicinal products, although the latter are governed by provisions adopted by the Member States on the basis of national legislation on social security. On that basis, the Court concluded that the fact that the national legislation was in conformity with Community secondary legislation, Article 22 of Regulation No 1408/71 in those cases, did not have 'the effect of removing that measure from the scope of the provisions of the Treaty' and was therefore an unlawful restrictive measure.

16. However, the Court did not specify in those cases which are the services that come within the scope of the regulation and, as it were, escape from the application of Articles 30 and 59 of the Treaty. It is precisely with a view to obtaining such a definition that, in the present case, all the Member States participating in these proceedings have dwelt at length on the scope of Regulation No 1408/71. In my opinion, however, it is precisely on the basis of those judgments that it is possible to establish whether Regulation No 1408/71 is applicable in cases such as the one now before the Court.

17. Even though those judgments established the principle that provisions of national law on the provision of services, and on the import and export of products related to the medical sector, do *not as such* escape the general principle of freedom of movement, that interpretation was not extended to services and products which form an integral part of the national health scheme, services and products which in this case may be part of the organisation and functioning of hospital systems. I have reached this conclusion, first, on the basis of the introductory passage of the grounds of those judgments, which concerns the scope of Regulation No 1408/71, and second, on the basis of the interpretation, in the same passage, of Articles 56 and 66 to the effect that the requirements of maintaining a medical/hospital service may, however, justify a derogation by Member States from the general provisions.

18. On the first point, I should point out that in both judgments the Court takes as its starting point the principle, set out many times in earlier case-law, that Community law neither restricts Member States' competence with respect to organisation of their social security systems, and in particular to the establishment of the conditions governing the right or obligation to register with a social security scheme, nor their competence as regards determination of the

conditions governing entitlement to individual benefits.

In *Decker*, with respect to the application of Article 30 of the Treaty to a measure relating to reimbursement of the sum paid for the purchase of a pair of spectacles with corrective lenses, the Court refers to the *Duphar* judgment of 1984,[10] in which, ruling on the Netherlands legislation on reduction of the amount to be reimbursed in respect of pharmaceutical products, it upheld the principle that 'Community law does not detract from the powers of Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the consumption of pharmaceutical preparations in order to promote the financial stability of their health-care insurance schemes'.[11] In *Duphar* the Court also held that, although the national legislation led to a reduction in imports, this could not '*in itself* be regarded as constituting a restriction on the freedom to import guaranteed by Article 30 of the Treaty',[12] but would amount to a restriction prohibited by the Treaty only if there were arbitrary discrimination against foreign products, that is to say where foreign products which were cheaper than internal products were excluded from the lists of reimbursable products. In *Duphar* the Court therefore affirmed, also in respect of intra-Community trade in pharmaceutical products, that a State is entitled to adopt measures relating to the organisation and functioning of its own social security system, even if such measures produce restrictive effects on the trade in pharmaceutical products, provided only that such measures should not constitute unjustified protection of internal products.

In *Kohll*, which concerns reimbursement of expenses for orthodontic treatment, the Court refers, again regarding the application of the provisions of the Treaty on freedom of movement (Article 59 in this case), to the *Webb* judgment[13] of 1981. In that case the Court was asked to rule on the Netherlands legislation concerning a system of authorisation for the provision of labour which, according to national law, could be prohibited if it was 'in the interests of good relations on the labour market or of the labour force affected'. The French Government, participating in those proceedings, had maintained that that legislation, whilst restricting the ability of undertakings in the sector to provide services, should be regarded as a social- policy measure and as therefore not being subject to the principles set out in Articles 48 to 51 of the Treaty. The Court held that argument to be unfounded, stating that, even if the activities of employees from placement undertakings fell within the scope of the provisions of primary and secondary law on freedom of movement of employees, the undertakings engaging in such operations continue to be persons covered by the rules

10 — Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523.

11 — See, in particular, paragraph 16.

12 — See in particular paragraph 20.

13 — Case 279/80 *Webb* [1981] ECR 3305.

on the provision of services. The Court stressed that the special nature of certain services does not remove them from the ambit of 'the rules on the freedom to supply services'. [14]

It is clear from the passages from the *Decker* and *Kohll* judgments cited above, as well as from the grounds of the judgments to which they refer that the Court has never held that the application of the general rules of primary law on freedom of movement to the national health-care sector is to be considered as unlimited and absolute, but, on the contrary, as restrained by the need to ensure that the Member States' powers in the field of social security are respected.

19. The second point for analysis, with reference to the grounds of the judgments in *Decker* and *Kohll*, concerns the application of the general rules to hospital infrastructures. In that regard, I would recall that, in *Kohll*, in answer to the second question referred for a preliminary ruling, as to whether any incompatibility inherent in national legislation on the authorisation procedure included national systems intended 'to maintain a balanced medical and hospital service accessible to everyone in a given region', the Court held that, although reasons of a purely economic nature concerning the need to safeguard the functioning of the system cannot justify restricting the freedom to provide services, 'a risk of seriously undermining the financial balance of the social security system' may, however, enable a State to escape the general prohibition on hindering the freedom to provide services. [15] Moreover, again in *Kohll*, the Luxembourg Government pleaded, in defence of its own system, the need to safeguard public health on its own territory. In that connection, it stated, on the one hand, that the national legislation was needed to guarantee a check on the quality of the medical service that the patient intends to receive abroad and, on the other hand, that its own system was intended to guarantee 'a balanced medical and hospital service available to all its insured'. The Court held the first argument to be unfounded, stating that Articles 56 and 66 of the Treaty, which do contain safeguard clauses intended to protect public health, do not remove the entire national sector of health-care services from the application of the fundamental principle of freedom of movement, inasmuch as these services, too, constitute an important 'sector of economic activity' from the point of view of freedom to provide services. The Court, however, accepted the argument on maintaining 'a balanced medical and hospital service

14 — In particular paragraph 10.

15 — As regards the sacrosanct nature of the State's competence with respect to the organisation of social security systems, I would point out that the exclusive nature of that competence is based on the need not to compromise the financial equilibrium of those systems (see, *inter alia*, *Duphar*, cited above, in particular paragraph 16, and Case C-238/94 *García and Others* v *Mutuelle de prévoyance sociale* [1996] ECR I-1673, in particular paragraph 14). Financial equilibrium, however, does not in itself justify derogation from the general rules on freedom of movement as it is typically an economic criterion and therefore as such not sufficient to be regarded as a safeguard clause for the purposes of Articles 56 and 66 of the Treaty. It operates, instead, as a safeguard clause when considered in conjunction with the need to protect internal social security systems from the economic point of view. Consequently, if considered on the basis of the national interests guaranteed by the national social security schemes, it may operate on a general criterion for justifying a derogation in favour of the national legislation.

available to all', holding that Article 56 of the Treaty allows Member States to restrict the freedom to provide services if the provisions designed to maintain the system are essential for the protection of public health or even the survival of the population.

20. I consider, therefore, in the light of those passages from the grounds of the judgments in *Decker* and *Kohll*, that the Court did not wish in any way to undermine or compromise the competence of the Member States with respect to the organisation of their own national systems of public health-care. However, apart from the exclusion of measures on the organisation of the medical/hospital service which the Court expressly removed from the ambit of the general rules, it remains, nevertheless, necessary to define the criteria to be used to trace the dividing line between services falling under national health-care schemes and those to be considered as excluded and, therefore, as subject to the rules on freedom of movement. In my opinion, the criteria in question cannot be identified on the basis of abstract principles, given the diversity of the individual social security systems and the evolution which they constantly undergo.

21. An indication of a general nature can be found in the *Humbel* judgment of 1988 [16] on the subject of public education. In that case, the Belgian court asked this Court to establish whether courses provided in a technical institute forming part of the national system of secondary education came within the scope of Article 59. The Court replied to the question on the basis of the concept of 'services' within the meaning of Article 60 of the Treaty, according to which services under Community law are to be understood as 'services normally provided for remuneration', including 'activities of an industrial or commercial character and the activities of craftsmen and the professions'. Furthermore, the Court stated, for the purposes of defining the scope of those provisions, that 'the essential characteristic' is that there should be remuneration, understood as 'consideration for the service in question,... normally agreed upon between the provider and the recipient of the service'. As regards the instruction provided under national public systems, payment of a school fee was not considered to be 'remuneration' within the meaning of Article 60 of the Treaty, for two reasons: the first is that the State establishing the system 'is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields', the second is that the education system 'is, as a general rule, funded from the public purse and not by pupils or their parents'.

If those two conditions are transposed to a national system of health-care, it follows that services which, on the one hand, are an integral part of the public health-care

16 — Case 263/86 *Humbel* v *Belgium* [1988] ECR 5365, in particular paragraphs 14 to 20.

system, in the sense that they are established and organised by the State, and, on the other hand, are financed by public funds, must be excluded from the provisions on freedom of movement.

22. Those health-care services, which are removed from the restrictions and prohibitions imposed by general rules on freedom of movement fall, instead, within the scope of Regulation No 1408/71 which has as its legal basis Article 51 of the Treaty. That article provides for the Council to adopt measures for the purpose, not of harmonising national systems, but of coordinating them with regard only to benefits provided for migrant workers within the Community. This is precisely the object and the purpose of the relevant provisions of secondary legislation in the present case. [17] In confirmation of that interpretation, I would point out that in its judgment in *Jordens-Vosters* of 1980 [18] the Court interpreted Regulation No 1408/71 as being a measure which, adopted under Article 51 of the Treaty, has as its essential object 'to ensure that social security schemes governing workers in each Member State moving within the Community are applied in accordance with uniform Community criteria' (paragraph 11). [19]

23. On the basis of the considerations set out above, I am of the opinion that reimbursement of medical expenses incurred, as in the present case, in a Member State other than the State of registration for treatment and an operation within the framework of a hospital infrastructure, is governed by Regulation No 1408/71 or by the national legislation, whichever is the more favourable, with the result that, in a case such as this, the authorities of the State of registration may make entitlement to reimbursement subject to an appropriate authorisation procedure.

The amount of the reimbursement

24. As I have already pointed out, the two questions referred for a preliminary ruling concern the criteria which should be used to determine the amount to be reimbursed

17 — See, to this effect, the fourth and fifth recitals of amending Regulation No 118/97.

18 — Case 69/79 *Jordens-Vosters* v *Bedrijfsvereniging* [1980] ECR 75. See, to the same effect, Case 41/84 *Pinna* v *Caisse d'allocations* [1986] ECR 1, in particular paragraph 21, and Case 313/86 *Lenoir* v *Caisse d'allocations* [1988] ECR 5391. In *Lenoir* the Court states that 'Article 51 of the Treaty provides for the coordination, not the harmonisation, of the legislation of the Member States. As a result, Article 51 leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of the Member States, and hence in the rights of the persons working in the Member States, are unaffected by Article 51 of the Treaty' (paragraph 13).

19 — See also Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149 in which the Court ruled that Article 46(3) of Council Regulation No 1408/71 was invalid as it was incompatible with Article 51, because it restricts the possibility of aggregating insurance periods expressly provided for by primary legislation. In determining the scope of Article 51, the Court affirmed that this legislation 'requires the Council to adopt in the field of social security such measures as are "necessary" to provide freedom of movement for workers'.

of the cost of the medical treatment received 'in kind', within the meaning of Article 22(1)(c)(i) of Regulation No 1408/71, in another Member State.

25. The regulation does not contain any provision on the law applicable for the purpose of the calculation of the amount of the reimbursement. However, it follows from the principles on which Article 51 of the Treaty is based that coordination of systems of social security must be such as to prevent any discrimination founded on the place of residence of the worker. Under point (b) of Article 51, such coordination must be intended to secure for migrant workers 'payment of benefits to persons resident in the territories of Member States'. Furthermore, Regulation No 1408/71 establishes, in Article 3, relating specifically to 'Equality of treatment', that, '[S]ubject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State'. It therefore expressly prohibits any discrimination based on nationality. Finally, in the light of the principles set out in *Decker* and *Kohll*, it may also be said that a national measure providing for different social security treatment according to the place in which the health-care service is provided constitutes unjustified discrimination for the purposes of those provisions of primary and secondary law. In other words, once the right to reimbursement is recognised, reimbursement must be provided 'without that person incurring additional expenditure' merely because he received the medical treatment abroad. [20]

It follows, on the one hand, that a person registered with the social security body of a Member State is entitled to full reimbursement of all the expenses incurred abroad [21] and, on the other, that the reimbursement must be equivalent to that to which the person would be entitled in the case of an identical service provided on national territory. [22] If the basis for calculating the reimbursement is the total sum of the expenses incurred abroad — and all the Member States participating in the proceedings are agreed on this interpretation —, the percentage of the reimbursement will be that prescribed in the law of the State of registration. That means that, if no right to reimbursement is recognised in the State of registration for the medical services provided there, such a right cannot be recognised in respect of the services provided abroad. In the light of that reasoning, the law of the State of registration must be used as the basis for establishing whether or not there exists a right to reimbursement. Thus, aside from any definition of medical

20 — Paragraph 28 of *Decker* and paragraph 26 of *Kohll*.

21 — In that regard, I would point out, for the purposes of Article 34(1) of Regulation No 574/72 (in the codified version under Regulation No 118/97 cited above), relating to reimbursement of expenses incurred during a stay in another Member State if it is not possible to complete the authorisation formalities during an employed or self-employed person's stay, 'his expenses shall, upon his application, be refunded by the competent institution in accordance with the refund rates administered by the institution of the place of stay'.

22 — In the national systems where there is no reimbursement but where the person is exempt from payment at the outset, or must pay only a very small part of the fee for the services, it is this percentage of the fee which should be taken into account in calculating the amount of reimbursement.

treatment as the provision of a service for the purposes of the application of the general rules on freedom of movement and, hence, for the purposes of assessing the requirement to submit a formal request for authorisation, equal treatment must in all cases be guaranteed for those receiving medical services within their own country and those receiving them abroad. [23]

In support of that interpretation, I would point out that Article 13 of Regulation No 1408/71 states that 'a person employed in the territory of one Member State shall be subject to the legislation of that State', that is to say, the legislation of the State of registration for the purposes of calculating the reimbursement; with the result that it is that legislation which decides which individuals are entitled to social security benefits, [24] and it is that legislation which defines the scope of such benefits. [25] Furthermore, Article 22, cited above, provides that authorisation to receive health-care services abroad can only be given where these are provided for by the legislation of the State of registration, that is to say where they are reimbursable if provided within the national territory. [26]

26. For its part, Article 36 of Regulation No 1408/71, the subject of the second question referred to the Court, according to which '[B]enefits in kind provided in accordance with the provisions of this chapter by the institution of one Member State... shall be fully refunded', is not relevant for the purpose of calculating the amount to be reimbursed. That article, as indicated in the title of the seventh section, under which it falls, concerns 'dealings between institutions', or between competent national authorities. It therefore provides only that the State of registration is required to refund in full the State where the service is provided the costs of the health-care treatment, [27] provided that the cost has not already been recovered by

23 — In my opinion, there is, furthermore, justification for also applying these conclusions to health services not within the scope of Regulation No 1408/71, that is to say to the services covered by Article 59 of the Treaty. This interpretation makes less irrational the system of reimbursement resulting from the Community law on the subject, a system providing for complete liberalisation of services provided by individual doctors or medical undertakings, whilst, for treatment or operations in hospitals, it requires the individual to apply for and to receive authorisation. Such a requirement involves intervention, in part discretionary and non-contestable, by the competent administrative and/or health authorities as well as a (frequently prolonged) waiting period for the worker applying for medical treatment. Whilst under various national systems, the first category of treatment does not qualify for reimbursement, even if the treatment is provided on national territory (which usually happens where the treatment is not provided by particular doctors or in specific institutions), the second category is normally the responsibility of the national health-care scheme and, therefore, entitlement to reimbursement must as a rule be recognised if the relevant criteria are fulfilled.

24 — See Case 117/77 *Pierik* [1978] ECR 825, in particular paragraph 19.

25 — See Case 35/73 *Kunz* v *Bundesversicherungsanstalt* [1973] ECR 1025.

26 — I am therefore not in agreement with the Belgian Government, which argues that the law applicable for the purpose of calculating the amount of reimbursement, where authorisation has been given in accordance with Article 22 of the regulation, must be that of the State where the service is provided, and, where that authorisation has not been given, that of the worker's State of origin. In my opinion, the proper observance of the procedure under Article 22, cited above, is of no relevance for the purpose of calculating the reimbursement, since it affects the actual entitlement to recover medical expenses incurred abroad, so that, in a case such as this, in the absence of any authorisation, the person concerned will not have the right to claim full or partial reimbursement of the price of the medical services received abroad unless the national legislation grants this right.

27 — On this point, see also Article 93 of Regulation No 574/72, under which reimbursement of the benefits provided in kind, *inter alia*, under Article 22 is to be made 'by the competent institution to the institution which provided the said benefits as shown in the accounts of that institution'.

means of the payment by the patient for the service; where there is no entitlement to reimbursement, those costs are to be charged to the person receiving the service. The provision does not concern entitlement to reimbursement but is intended to avoid a situation where the movement of persons seeking medical treatment in various Member States creates functional and financial imbalances for the health services of the Member States, other than the State of registration, which are providing the treatment, and results in financial advantages for the States of origin.

In my opinion, therefore, Article 36 of Regulation No 1408/71 does not concern the reimbursement of individuals but of the competent institutions which bear the health expenditure connected with the benefits in kind referred to in Article 22 of that Regulation.

Conclusion

27. In the light of the foregoing considerations, I propose that the Court declare the reference from the Cour du travail de Mons to be admissible and that it reply as follows to the questions submitted to it:

(1) Reimbursement of medical expenses incurred whilst receiving medical treatment abroad, as provided for in Article 22(1)(c)(i) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (in the version contained in Council Regulation (EC) No 118/97 of 2 December 1996), must be based on the tariffs actually applied in the Member State where the treatment was provided and must be calculated in accordance with the coefficients applied in the light of the social security-system of the State of registration;

(2) Article 36 of Regulation (EEC) No 1408/71 must be interpreted as meaning that it does not concern reimbursement of individuals who have received medical treatment abroad, but reimbursement of the competent institutions which bear the health-care expenditure connected with the benefits in kind referred to in Article 22 of that regulation.