Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 22 April 2021 [1]

Case C-636/19

Y

v

CAK

(Request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands))

(Reference for a preliminary ruling – Cross-border healthcare – Directive 2011/24/EU – Article 3(b)(i) – Definition of 'insured person' – Article 7 – Reimbursement of costs of cross-border care – Regulation (EC) No 883/2004 – Article 1(c) – Article 24 – Right to benefits in kind provided by the Member State of residence at the expense of the Member State responsible for the pension – Article 56 TFEU)

I. Introduction

1. Is a person in receipt of a pension under the legislation of a Member State ('the State responsible for the pension') and who is entitled, under Article 24 of Regulation (EC) No 883/2004, [2] to benefits in kind provided by the Member State where he or she resides ('the State of residence') at the expense of the State responsible for the pension, but who does not have compulsory sickness insurance in the State responsible for the pension, covered by the definition of 'insured person' within the meaning of Article 3(b)(i) of Directive 2011/24/EU, [3] so that he or she may rely on Article 7(1) of that directive in order to be reimbursed by the State responsible for the pension for the costs of cross-border healthcare received in a third Member State? If the answer is in the negative, can a refusal by the State responsible for the pension to reimburse the costs of that cross-border healthcare on account of the lack of prior authorisation constitute an unjustified obstacle to the freedom to provide services, contrary to Article 56 TFEU?

[1] Original language: French.

[2] Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43) ('Regulation No 883/2004').

[3] Directive of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ 2011 L 88, p. 45).

2. Those are the questions raised in the present case, which will require the Court, first, to clarify the relationship between the provisions of Regulation No 883/2004 and those of Directive 2011/24 enabling an insured person to receive cross-border healthcare [4] and, secondly, to apply its case-law on prior authorisation as an obstacle to the freedom to provide services within the meaning of Article 56 TFEU. [5]

II. Legal context

A. EU law

1. Regulation No 883/2004

3. Recitals 20 and 22 of Regulation No 883/2004 state:

'(20) In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.

…

(22) The specific position of pension claimants and pensioners and the members of their families makes it necessary to have provisions governing sickness insurance adapted to this situation.'

4. Under Article 1(c), (q), (s) and (va) of that regulation:

'For the purpose of this Regulation:

…

(c) "insured person", in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

…

(q) "competent institution" means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

[4] Both the relationship and differences between those two legislative acts have already been examined in detail, inter alia, in the Opinion of Advocate General Hogan in *Veselības ministrija* (C-243/19, EU:C:2020:325, points 48 to 68). See also, in that regard, Carrascosa Bermejo, M.-D., 'Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU and the Regulations on social security coordination', *ERA Forum*, vol. 15, 2014, pp. 359-380.

[5] That question has already been addressed by the Court, inter alia, in its judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581), and of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)* (C-777/18, EU:C:2020:745).

(ii) the institution from which the person concerned is or would be entitled to benefits if he/she or a member or members of his/her family resided in the Member State in which the institution is situated;

…

(s) "competent Member State" means the Member State in which the competent institution is situated;

…

(va) "Benefits in kind" means:

(i) for the purposes of Title III, Chapter 1 (sickness, maternity and equivalent paternity benefits), benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes long-term care benefits in kind;

…'

5. Article 2 of that regulation, headed 'Persons covered', provides, in paragraph 1:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

6. Title II of that regulation, headed 'Determination of the legislation applicable', contains Article 11, headed 'General rules', paragraph 3(e) of which is worded as follows:

'Subject to Articles 12 to 16:

…

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.'

7. Title III of Regulation No 883/2004, headed 'Special provisions concerning the various categories of benefits', includes Chapter 1, Section 1 of which is headed 'Insured persons and members of their families, except pensioners and members of their families'.

8. Article 18(1) provides as follows:

'1. Unless otherwise provided for by paragraph 2, the insured person and the members of his/her family referred to in Article 17 shall also be entitled to benefits in kind while staying in the competent Member State. The benefits in kind shall be provided by the competent institution and at its own expense, in accordance with the provisions of the legislation it applies, as though the persons concerned resided in that Member State.'

9. Within Section 1, Article 19(1) of that regulation, headed 'Stay outside the competent Member State', provides:

'1. Unless otherwise provided for by paragraph 2, an insured person and the members of his/her family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation.'

10. Article 20 of that regulation, which is also included in Section 1 and is headed 'Travel with the purpose of receiving benefits in kind – authorisation to receive appropriate treatment outside the Member State of residence', states, in paragraphs 1 and 2:

'1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his/her condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness.'

11. Article 24 of Regulation No 883/2004, headed 'No right to benefits in kind under the legislation of the Member State of residence', which is included in Section 2 of Title III, headed 'Pensioners and members of their families', is worded as follows:

'1. A person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself/herself and the members of his/her family, in so far as he/she would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his/her pensions, if he/she resided in that Member State. The benefits in kind shall be provided at the expense of the institution referred to in paragraph 2 by the institution of the place of residence, as though the person concerned were entitled to a pension and benefits in kind under the legislation of that Member State.

2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined in accordance with the following rules:

(a) where the pensioner is entitled to benefits in kind under the legislation of a single Member State, the cost shall be borne by the competent institution of that Member State;

…'

12. Article 27 of that regulation, headed 'Stay of the pensioner or the members of his/her family in a Member State other than the Member State in which they reside – stay in the competent Member State – authorisation for appropriate treatment outside the Member State of residence', provides:

'1. Article 19 shall apply *mutatis mutandis* to a person receiving a pension or pensions under the legislation of one or more Member States and entitled to benefits in kind under the legislation of one of the Member States which provide his/her pension(s) or to the members of his/her family who are staying in a Member State other than the one in which they reside.

2. Article 18(1) shall apply mutatis mutandis to the persons described in paragraph 1 when they stay in the Member State in which is situated the competent institution responsible for the cost of the benefits in kind provided to the pensioner in his/her Member State of residence and the said Member State has opted for this and is listed in Annex IV.

3. Article 20 shall apply *mutatis mutandis* to a pensioner and/or the members of his/her family who are staying in a Member State other than the one in which they reside with the purpose of receiving there the treatment appropriate to their condition.

4. Unless otherwise provided for by paragraph 5, the cost of the benefits in kind referred to in paragraphs 1 to 3 shall be borne by the competent institution responsible for the cost of benefits in kind provided to the pensioner in his/her Member State of residence.

5. The cost of the benefits in kind referred to in paragraph 3 shall be borne by the institution of the place of residence of the pensioner or of the members of his/her family, if these persons reside in a Member State which has opted for reimbursement on the basis of fixed amounts. In these cases, for the purposes of paragraph 3, the institution of the place of residence of the pensioner or of the members of his/her family shall be considered to be the competent institution.'

13. Article 31 of that regulation, headed 'General provision', which is included in Section 3 of Chapter 1, states:

'Articles 23 to 30 shall not apply to a pensioner … who [is] entitled to benefits under the legislation of a Member State on the basis of an activity as an employed or self-employed person. In such a case, the person concerned shall be subject, for the purposes of this Chapter, to Articles 17 to 21.'

2. Directive 2011/24

14. Article 3 of Directive 2011/24 is worded as follows:

'For the purposes of this Directive, the following definitions shall apply:

(a) "healthcare" means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices;

(b) "insured person" means:

(i) persons, including members of their families and their survivors, who are covered by Article 2 of Regulation [No 883/2004] and who are insured persons within the meaning of Article 1(c) of that Regulation; and

(ii) …'

15. Article 7 of that directive, headed 'General principles for reimbursement of costs', provides, in paragraphs 1 and 2:

'1. Without prejudice to Regulation [No 883/2004] and subject to the provisions of Articles 8 and 9, the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.

2. By way of derogation from paragraph 1:

(a) if a Member State is listed in Annex IV to Regulation [No 883/2004[6]] and in compliance with that Regulation has recognised the rights to sickness benefits for pensioners and the members of their families, being resident in a different Member State, it shall provide them healthcare under this Directive at its own expense when they stay on its territory, in accordance with its legislation, as though the persons concerned were residents in the Member State listed in that Annex;

…'

16. Article 8 of that directive, headed 'Healthcare that may be subject to prior authorisation' provides, in paragraphs 1 and 2:

'1. The Member State of affiliation may provide for a system of prior authorisation for reimbursement of costs of cross-border healthcare, in accordance with this Article and Article 9. The system of prior authorisation, including the criteria and the application of those criteria, and individual decisions of refusal to grant prior authorisation, shall be restricted to what is necessary and proportionate to the objective to be achieved, and may not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients.

2. Healthcare that may be subject to prior authorisation shall be limited to healthcare which:

(a) is made subject to planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources and:

(i) involves overnight hospital accommodation of the patient in question for at least one night; or

(ii) requires use of highly specialised and cost-intensive medical infrastructure or medical equipment;

[6] Following the adoption of Regulation No 988/2009, the Netherlands is listed in Annex IV to Regulation No 883/2004, which contains the list of Member States which have granted additional rights to pensioners returning to the competent Member State (Article 27(2) of Regulation No 883/2004).

…

Member States shall notify the categories of healthcare referred to in point (a) to the Commission.'

B. Netherlands law

17. Article 69 of the Zorgverzekeringswet (Law on healthcare insurance; 'the Zvw'), in the version applicable to the facts in the main proceedings,[7] provides:

'1. Persons living abroad who, by the application of a regulation of the Council of the European Communities or the application of such a regulation pursuant to the Agreement on the European Economic Area or to a treaty on social security, when they are in need of healthcare have a right to healthcare or to the reimbursement of the costs thereof, as provided in the legislation on healthcare insurance of their country of residence, must report to the [Centraal Administratie Kantoor (Central Administration Office, Netherlands; 'the CAK')] unless they are obliged to take out healthcare insurance under this law.

2. The persons referred to in paragraphs 1, 14 and 15 are obliged to pay a contribution to be determined by ministerial regulation, a portion of which, as determined by that regulation, is to be regarded as a healthcare insurance premium for purposes of the application of the Wet op de zorgtoeslag (Law on healthcare allowances).

…

4. The [CAK] shall be responsible for the implementation of the provisions of paragraphs 1, 14 and 15 and of the international rules mentioned therein and for the adoption of decisions on the levy and collection of the contributions referred to in paragraphs 2 and 3.

…'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

18. Y, the appellant in the main proceedings, is a Netherlands national who lives with her spouse in Belgium and receives an old-age pension under the Algemene Ouderdomswet (Netherlands General Law on old-age pensions) ('the AOW').[8] At the material time, Y – as the recipient of that pension – was entitled, under Article 24 of Regulation No 883/2004, to healthcare in her State of residence (Belgium) at the expense of the Member State responsible for the pension (the Netherlands). In order to qualify for that entitlement, she was required to pay a contribution under Article 69 of the Zvw, in conjunction with Article 30 of Regulation No 883/2004. As a pensioner with entitlement under EU law,[9] Y was not covered by the Netherlands compulsory healthcare insurance scheme and was exempt from the related contributions.

7 Stb. 2005, No 358, in the version in force between 1 April 2014 and 1 January 2017 (Stb. 2013, No 578).

8 Stb. 1956, No 281.

9 The Netherlands Government explained that those persons are referred to as 'verdragsgerechtigde gepensioneerden' (pensioners with entitlement under an agreement), since the term 'verdragsgerechtigd' covers, in essence, any person residing outside the Netherlands who is entitled to a statutory benefit payable by the Netherlands under EU law.

19. On 6 March 2015, following a consultation with a general practitioner in Belgium, Y underwent a radiological examination at the Academisch Ziekenhuis Maastricht (Maastricht University Hospital, Netherlands; 'the AZM') and subsequently, on 8 March 2015, a magnetic resonance imaging (MRI) scan. On 9 and 11 March 2015, Y's spouse telephoned the respondent in the main proceedings, the CAK – the competent body responsible for implementing Regulation No 883/2004[10] – concerning planned medical treatment in Germany. The CAK brought the authorisation procedure to the attention of Y's spouse.

20. On 12 March 2015, the AZM diagnosed Y with stage 2 breast cancer and proposed a course of treatment.

21. On 13 March 2015, Y requested a second medical opinion from the Franziskus Hospital Harderberg in Osnabrück (Germany), for which she applied for prior authorisation from the CAK. At that consultation, she was diagnosed with stage 3 cancer.

22. On 20 March 2015, Y underwent breast surgery in that German hospital and, on 25 March 2015, her lymph nodes were removed. Those operations required Y to remain in hospital for the period from 19 to 30 March 2015. Subsequently, between 14 April 2015 and 24 June 2015, Y received post-operative treatments in that hospital, including radiotherapy. No request for prior authorisation was submitted to the CAK in respect of those operations and treatments.

23. On 19 March 2015, the Belgian sickness insurance fund[11] to which Y belonged applied to the CAK for (a posteriori) authorisation in respect of the medical treatment scheduled following the consultation of 13 March 2015 at the Franziskus Hospital Harderberg.

24. On 1 May 2015, the CAK refused that application for authorisation, taking the view that it could be granted only if Y had requested authorisation for the treatments in question, which she had not done.

25. On 1 July 2015, Y applied to the CAK for reimbursement of the costs relating to her medical treatments in Germany, totalling EUR 16 853.13, and to that end submitted the invoices in respect of those treatments.

26. By decision of 20 July 2015, the CAK refused that application on the ground that Y had travelled to Germany in order to receive medical treatments classified by it as 'scheduled treatment' of the kind referred to in Article 20 of Regulation No 883/2004, treatments which were not administered in Belgium (the State of residence) or the Netherlands (the State responsible for the pension) and for which Y had not requested prior authorisation. In the absence of such a request for authorisation, the CAK took the view that it did not have the power to reimburse the medical costs at issue.

27. By decision of 4 January 2016, Y's objection to the decision of 20 July 2015 was rejected as unfounded.

[10] The referring court states that, since 1 January 2017, the CAK has exercised the powers previously exercised by the Zorginstituut Nederland (Netherlands) in cases such as that in the main proceedings.

[11] The Christelijke Mutualiteit Limburg (Limburg Christian Sickness Insurance Fund), which was the 'institution of the place of residence' referred to in Article 1(r) of Regulation No 883/2004.

28. By judgment of 24 November 2016, the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) dismissed the action against the decision of 4 January 2016 as unfounded. That court held, in essence, that the hospital stay, preliminary interview and treatment scheduled in Germany within the space of one week did not demonstrate the existence of extreme urgency as regards Y's state of health during her stay in that State. According to that court, the CAK was entitled to classify the medical treatment provided to Y in Germany as 'scheduled treatment', for which no authorisation had been granted, and, consequently, to refuse reimbursement of the related medical costs.

29. Y lodged an appeal against that judgment before the referring court, the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands), essentially claiming that (i) the surgeries performed on 20 and 25 March 2015 had to be regarded, owing to their urgent and unexpected nature from a medical perspective, as 'non-scheduled' treatment for the purposes of Article 19 of Regulation No 883/2004, reimbursement of which was not subject to prior authorisation, and (ii) the costs of the post-operative treatments, including radiotherapy, which were also performed in Germany between 14 April and 24 June 2015, were not subject to prior authorisation under Article 8 of Directive 2011/24 either.

30. In that regard, the referring court states that, in its view, the CAK was not required to reimburse the costs incurred by Y in Germany on the basis of Article 20(1) of Regulation No 883/2004, which applied, *mutatis mutandis*, to pensioners like Y in accordance with Article 27(3) of that regulation. While acknowledging that it was not necessary to determine whether the absence of a request for prior authorisation by Y was sufficient in itself to entitle the CAK to refuse reimbursement of those costs, the referring court states that, in the proceedings before it, it was established that even if such authorisation had been requested in good time, it could have been refused by the CAK on the ground that, based on a statement by the Belgian sickness insurance fund, the same treatment would have been possible within the same time frame in Belgium. Therefore, according to the referring court, the requirements laid down in the last sentence of Article 20(2) of Regulation No 883/2004 for obtaining benefits in kind in the case of scheduled treatment in a Member State other than the State of residence or the State responsible for the pension on behalf of the latter State have not been satisfied.

31. However, the referring court enquires whether, as Y claims, a pensioner is nevertheless entitled to rely on Directive 2011/24 in order to secure reimbursement of all or some of the costs of post-operative care received in Germany, in so far as that directive does not require authorisation for cross-border outpatient healthcare. In that regard, the referring court wishes to know whether Y, a pensioner who is not insured under a compulsory national sickness insurance scheme, falls within the scope *ratione personae* of that directive as an 'insured person' within the meaning of Article 3(b)(i) thereof. If the answer is yes, that court shares Y's view that, under Article 8(2)(a)(ii) of Directive 2011/24, post-operative care (including radiotherapy) is not care which may be subject to authorisation. [12]

32. Lastly, if the Court were to find that Y does not fall within the scope *ratione personae* of Directive 2011/24, the referring court asks whether Article 56 TFEU precludes the State responsible for Y's pension from refusing to reimburse her, without her having obtained prior authorisation, the costs of out-patient healthcare received outside the State of residence and the State responsible for the pension, as an unjustified obstacle to the freedom to provide services guaranteed by that provision.

[12] The referring court states that the care which motivated Y's hospital stay in Germany from 19 to 30 March 2015 (that is to say, the care related to both surgeries) is care caught by Article 8(2)(a)(i) of Directive 2011/24 and is therefore subject to prior authorisation.

33. It is in those circumstances that the Centrale Raad van Beroep (Higher Social Security and Civil Service Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Directive [2011/24] be interpreted as meaning that persons referred to in Article 24 of Regulation No 883/2004, who receive benefits in their country of residence at the expense of the Netherlands but who are not insured in the Netherlands under the statutory health insurance scheme can rely directly on that directive for the reimbursement of costs of care provided?

If not,

(2) Does it follow from Article 56 TFEU that, in a case such as the present one, not granting reimbursement for care provided in a Member State other than the country of residence or the country providing the pension is an unjustified obstacle to the free movement of services?'

34. The Netherlands Government and the European Commission lodged written observations and also answered the written questions put by the Court.

IV. Analysis

A. Preliminary remarks

35. The questions referred for a preliminary ruling in the present case are raised in the specific context of the rules applicable in the Netherlands, which provide that persons in receipt of a pension under Netherlands legislation who do not reside in the Netherlands are entitled, pursuant to Article 24 of Regulation No 883/2004, to healthcare in their State of residence. In order to qualify for that entitlement, that class of persons is obliged to pay a contribution to the CAK. In accordance with that scheme, if medical costs are incurred outside the Netherlands, the CAK is to make arrangements for payment with the State in which those costs were incurred.

36. In the present case, Y holds a pension under the legislation of the Netherlands and, as she resides in Belgium, does not have Netherlands compulsory sickness insurance. However, she is entitled, in accordance with Article 24 of Regulation No 883/2004, to benefits in kind under the legislation of her State of residence, Belgium, provided at the expense of the State responsible for her pension, the Netherlands.

37. In the main proceedings, Y seeks reimbursement from the CAK of the costs of the medical services she received in Germany in connection with treatment for breast cancer. Those requests for reimbursement concern two types of costs: (i) the costs of surgeries, including the related costs of hospital accommodation, in respect of which Y seeks reimbursement, inter alia, under Article 19 of Regulation No 883/2004, taking the view that that treatment cannot be classified as 'scheduled treatment' and, therefore, did not require prior authorisation, as claimed by the CAK; and (ii) the costs of post-operative treatments, including radiotherapy, in respect of which Y seeks reimbursement under Article 7 of Directive 2011/24, since, according to Y, that directive does not make reimbursement subject to prior authorisation. Consequently, Y contends that she is able to rely on the provisions of both Regulation No 883/2004 and Directive 2011/24.

38. The referring court rules out the application of Regulation No 883/2004 to the facts in the main proceedings (see point 30 of this Opinion) and seeks the Court's guidance only on the application of Directive 2011/24 and Article 56 TFEU. The Court is therefore not required to consider whether the referring court was right to classify the two surgeries in Germany as 'scheduled treatment' caught by Article 20 of Regulation No 883/2004 and whether the absence of a request for prior authorisation is sufficient in itself to refuse reimbursement of the costs. However, I think it is worth pointing out that, after this request for a preliminary ruling was made, the Court delivered two judgments which related both to 'scheduled treatment' within the meaning of Article 20 of that regulation [13] and to the right to reimbursement of the costs of treatment under that article in the event of refusal or of absence of prior authorisation. [14]

B. First question referred for a preliminary ruling

39. By its first question, the referring court asks, in essence, whether persons in receipt of a pension under the legislation of a Member State and who are entitled, under Article 24 of Regulation No 883/2004, to benefits in kind provided by their State of residence at the expense of the State responsible for the pension, but who do not have compulsory sickness insurance in the State responsible for the pension, may rely on Directive 2011/24 in order to obtain reimbursement of the costs of cross-border healthcare provided to them in a third Member State.

40. It should be noted at the outset that Article 7(1) of Directive 2011/24 provides that, 'without prejudice to Regulation [No 883/2004] and subject to the provisions of Articles 8 and 9 [of that directive], the Member State of affiliation shall ensure the costs incurred by *an insured person* who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation'. [15] It follows from the wording of that provision that the right to reimbursement is a right only 'insured persons' enjoy.

41. In order to answer the first question, it is therefore necessary to determine whether a person in Y's situation, who receives a pension in a first Member State and who is entitled, under Article 24 of Regulation No 883/2004, to benefits in kind provided by the Member State of residence at the expense of the first Member State, but who does not have compulsory sickness insurance in that first Member State, may be classified as an 'insured person' within the meaning of Article 7(1) of Directive 2011/24, with the result that he or she may invoke the right to reimbursement of the costs of cross-border care.

[13] See, in that regard, judgment of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)* (C-777/18, EU:C:2020:745, paragraphs 38 to 44).

[14] See judgments of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)* (C-777/18, EU:C:2020:745, paragraphs 45 to 55), and of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872, paragraphs 28 to 33), and Opinion of Advocate General Hogan in *Veselības ministrija* (C-243/19, EU:C:2020:325, points 48 to 68). In that regard, I note that the Court has already identified two situations in which an insured person, even without a properly issued authorisation before the provision of scheduled treatment begins in the Member State of stay, is entitled to be reimbursed directly by the competent institution in an amount equivalent to that which would ordinarily have been reimbursed by that institution if the insured person had been granted such authorisation. Such a situation may arise when, in particular, for reasons relating to his or her state of health or to the need to receive urgent treatment in a hospital, the insured person was prevented from applying for such authorisation or was not able to wait for the decision of the competent institution on the application for authorisation submitted. Therefore, a rule which excludes, in all cases, reimbursement in respect of hospital treatment given in another Member State without authorisation, deprives the insured person of reimbursement in respect of such treatment, even though all other conditions for reimbursement are met. Such a rule, which cannot be justified by requirements of public interest and, in any event, does not satisfy the requirement of proportionality, therefore constitutes an unjustified restriction of the freedom to provide services (see judgment of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)*, C-777/18, EU:C:2020:745, paragraphs 46 to 48 and the case-law cited).

[15] Emphasis added.

42. For the reasons set out below, I consider that that question should be answered in the affirmative.

1. The concept of 'insured person' within the meaning of Directive 2011/24

43. The concept of 'insured person' is defined in Article 3(b) of Directive 2011/24 and denotes, in particular, under point (i), 'persons … who are covered by Article 2 of Regulation [No 883/2004] and who are insured persons within the meaning of Article 1(c) of that Regulation'. That definition therefore refers to the general provisions on 'definitions' and 'persons covered' in Regulation No 883/2004. In so far as that definition refers to the provisions of that regulation cumulatively, if a person is to be classified as an 'insured person' within the meaning of that directive, those two requirements laid down by that regulation must be satisfied.

44. In that regard, it should be noted, first, that Article 2(1) of Regulation No 883/2004 provides that that regulation is to apply, inter alia, to 'nationals of a Member State … who are or have been subject to the legislation of one or more Member States' and, secondly, that Article 1(c) of that regulation provides that '"insured person", in relation to the social security branches covered by Title III, [16] Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of th[at] Regulation'.

45. As regards the first requirement laid down in Article 2(1) of Regulation No 883/2004, which concerns the 'persons covered' by that regulation, there is no question, in my view, that a person, like Y, who is a national of a Member State and who receives a pension from that Member State entitling him or her to benefits in kind provided by his or her State of residence at the expense of the State responsible for the pension, must be regarded as being 'subject to the legislation of a Member State', even though that person does not have compulsory sickness insurance in the State responsible for the pension. Y, as a Netherlands national, should be regarded as being 'subject to the legislation' of the Netherlands because she receives an old-age pension under the AOW and is liable to pay a contribution to the CAK under the Zvw (see point 18 of this Opinion).

46. As regards the second requirement referred to in Article 1(c) of Regulation No 883/2004, it should be noted that the term 'insured person' was introduced by that regulation [17] primarily for the purposes of Chapter 1 of Title III thereof, headed 'Sickness, maternity and equivalent paternity benefits', [18] given that the provisions coordinating sickness require that the person be 'insured' in a Member State. Y receives an old-age pension under the AOW and, on that basis, is entitled to the healthcare provided for, inter alia, in Article 24 of that regulation, which, although it does not expressly refer to 'insured persons', forms part of Chapter 1 and therefore concerns one of the 'branches of social security covered by Title III', in accordance with the first sentence of Article 1(c) of that regulation.

[16] Namely, the following branches: (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; and (j) family benefits.

[17] Regulation No 883/2004 modernised and simplified the rules contained in 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1). The term 'insured person' was not, however, defined in Regulation No 1408/71.

[18] Chapter 3 of Title III of Regulation No 883/2004, headed 'Death grants', where the term 'insured person' is used, contains only two provisions, namely Articles 42 and 43, while Chapter 1 contains 3 sections and 18 articles.

47. Furthermore, in order for Y, as a 'pensioner' within the meaning of Article 24 of Regulation No 883/2004, to be regarded as an 'insured person' within the meaning of Article 1(c) of that regulation, she must – in accordance with the last sentence of that provision –'[satisfy] the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of th[at] Regulation'.

48. In that regard, it should be noted that pensioners within the meaning of Article 24 of Regulation No 883/2004 may, in accordance with Article 16(2) of that regulation, be exempted, at their request, from the application of the legislation of the Member State of residence which, under Article 11(3)(e) thereof, would ordinarily apply. [19] In the present case, it is common ground that Y is subject to the legislation of the Netherlands as the Member State competent under Title II of that regulation.

49. Although it is not for the Court to verify, by interpreting national law, whether Y fulfils the 'conditions required' under Netherlands legislation to have the right to the benefits provided for in Article 24 of Regulation No 883/2004, it should be noted that the term 'legislation' within the meaning of that regulation must be interpreted broadly [20] and that national legislation must be applied, in accordance with Article 1(c) of that regulation, 'taking into account the provisions of th[at] Regulation'.

50. Thus, it is clear that the conditions required under Netherlands legislation to have the right to those benefits in kind in the territory of the Netherlands are, in fact, the same as the conditions laid down in Article 24 of Regulation No 883/2004, which makes entitlement to the benefits in kind provided for in that article subject to three conditions. First, the person concerned must receive a pension or pensions under the legislation of one or more Member States. Secondly, he or she must not be entitled to benefits in kind under the legislation of the State of residence. Thirdly, he or she should be entitled to those benefits under the legislation of the State responsible for the pension if he or she resided there. Besides those three conditions, as the Netherlands Government confirmed, no other condition is required under Netherlands legislation in order to qualify for benefits in kind under Article 24 of that regulation. [21]

51. Therefore, in the absence of other conditions at national level, a 'pensioner' within the meaning of Article 24 of Regulation No 883/2004 may be classified as an 'insured person' within the meaning of Article 1(c) thereof as long as he or she satisfies the three conditions laid down in Article 24 of that regulation.

52. In addition, it should be pointed out that the Kingdom of the Netherlands opted to be included in the list of Member States set out in Annex IV to Regulation No 883/2004, which means that a person who is a pensioner and who, like Y, resides in another Member State is entitled, under Article 18(1) of that regulation, read in conjunction with Article 27(2) thereof, to benefits in kind while staying in the Netherlands (the competent Member State), at the expense of the competent institution and in accordance with the provisions of the applicable national legislation, as though he or she resided there. It was presumably pursuant to that provision that Y

[19] Article 16(2) of Regulation No 883/2004 states that that possibility is available, at the request of the person concerned, provided that he or she is not subject to the legislation of the State of residence on account of pursuing an activity as an employed or self-employed person.

[20] In accordance with the first paragraph of Article (1)(l) of Regulation No 883/2004, the term 'legislation' means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1) of that regulation.

[21] See, in that regard, Article 69(1) of the Zvw, cited in point 17 of this Opinion.

arranged to have a radiological examination carried out at the AZM, in the Netherlands, following an initial consultation with a general practitioner in Belgium. Consequently, on any view, it seems to me to be difficult to argue that Y is not an 'insured person' under Netherlands legislation.

53. In the light of the foregoing, I consider that, in the present case, the requirements laid down in Article 1(c) and Article 2 of Regulation No 883/2004 are satisfied. It should therefore be concluded that Y, as a 'pensioner' within the meaning of Article 24 of that regulation, must also be regarded as an 'insured person' within the meaning of Article 3(b)(i) of Directive 2011/24 and, as such, must be able to benefit from the general principles applicable to the reimbursement of costs provided for in Article 7(1) of that directive.

2. The distinction between 'insured person' and 'pensioner' within the scheme of Regulation No 883/2004

54. That conclusion cannot, in my view, be invalidated by the argument put forward by the Netherlands Government that 'pensioners' within the meaning of Regulation No 883/2004 cannot also be 'insured persons' within the meaning of that regulation. According to that government, that regulation draws a clear distinction between the provisions applying to 'insured persons' and those applying to 'pensioners', with the result that those two categories are mutually exclusive. In support of that argument, it states that, in Chapter 1 of Title III of that regulation, Section 1 is given over to 'insured persons and members of their families, *except pensioners and members of their families*' and that Section 2 is devoted exclusively to '*pensioners* and members of their families'.[22] Similarly, in Chapter 3 of Title III of Regulation No 883/2004, Article 42 governs the death of an 'insured person' or a member of his or her family, while Article 43 of that regulation governs the death of a 'pensioner' or a member of his or her family. By that logic, Article 24 of that regulation, which appears in Section 2 of Chapter 1, should therefore apply exclusively to 'pensioners' and not to 'insured persons', so that a pensioner, like Y, cannot rely on the provisions of Article 7(1) of Directive 2011/24.

55. Based on an analysis of Regulation No 883/2004, I consider that, although the terms 'insured person' and 'pensioner' are admittedly not used interchangeably, since they have an autonomous and separate meaning, for the following reasons it must be possible for the concept of 'insured person' to encompass the concept of 'pensioner' as a specific category of 'insured persons' who warrant provisions adapted to their circumstances.

56. It should be noted at the outset that the scope *ratione personae* of Regulation No 883/2004 is the result of a gradual broadening – by the case-law of the Court and subsequent legislative amendments – of the initial scope of Regulation No 3/1958.[23] In a root-and-branch simplification of the very complex provisions on the scope *ratione personae* of former Regulation No 1408/71, Article 2 of Regulation No 883/2004 refers generally and exhaustively to all 'nationals of a Member State … who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors'.[24] It follows that the concept of 'insured person' covers persons who, irrespective of their status (for example, employed person, pensioner, etc.), satisfy the conditions required under the legislation of the competent Member State to have the right to benefits. This means that Regulation No 883/2004

22 Emphasis added.

23 Regulation of the Council on social security for migrant workers (*Journal officiel* 1958, P 30, p. 561).

24 See, in that regard, recitals 3 and 7 of Regulation No 883/2004.

applies in full, irrespective of whether the person concerned was insured as an employed person, a non-working person or by reason of other circumstances such as, inter alia, residence or nationality.

57. It is in the light of those developments that the distinction made by the EU legislature between 'insured persons' and 'pensioners' must be examined. Historically, that distinction derives from Regulation No 1408/71, particularly Articles 27 to 34 thereof, which correspond, in essence, to Articles 23 to 30 of Regulation No 883/2004.

58. In that regard, it should be pointed out, in the first place, that according to recitals 20 and 22 of Regulation No 883/2004, 'in the field of sickness, maternity and equivalent paternity benefits, *insured persons* … living or staying in a Member State other than the competent Member State, should be afforded protection', and '*the specific position* of pension claimants and *pensioners* … makes it necessary to have provisions governing sickness insurance adapted to this situation'.[25] Therefore, 'pensioners' appear, in the mind of the EU legislature, as a sub-category of 'insured persons' who, because of their 'specific position', require rules adapted to their situation.

59. That is the logic according to which, by drawing a distinction, for the purposes of Chapters 1 and 3 of Title III of Regulation No 883/2004, between the provisions applying to 'insured persons' and those applying to 'pensioners', the EU legislature sought to lay down specific provisions better adapted to that category of insured persons.

60. Specifically, given their individual situation – that is to say, persons in receipt of a pension under the legislation of at least two Member States or resident in a Member State whose legislation does not grant them any benefits (see Articles 23 and 24 of Regulation No 883/2004) – the purpose of those provisions is to determine the Member State responsible for granting sickness benefits (see Title III, Chapter 1, Section 2 of that regulation) to such pensioners or the provision of benefits in the event of their death (see Title III, Chapter 3, Article 43 of that regulation). Those provisions may therefore be regarded as conflict-of-law rules adapted to the needs of pensioners and their family members.

61. Concerning, in particular, the distinction made in Chapter 1 of Title III of Regulation No 883/2004, it should be noted that Section 2 of that chapter, headed 'Sickness, maternity and equivalent paternity benefits', lays down special coordinating rules for pensioners in the event of sickness and maternity, including as regards members of their families (see Articles 23 to 30). Those rules therefore constitute a *lex specialis* in relation to the rules in Section 1 (Articles 17 to 22), which constitute the *lex generalis*. Put another way, Section 2 applies only to pensioners (insured persons), while Section 1 applies to all insured persons, including pensioners, where Section 2 so provides. That structure is confirmed by Article 31 of that regulation, which also indicates that Articles 23 to 30 are complementary, since those articles 'shall not apply to a pensioner … who [is] entitled to benefits under the legislation of a Member State on the basis of an activity as an employed or self-employed person'.

62. In the second place, I consider that that interpretation cannot be invalidated by the fact that some provisions of Section 2 of Chapter 1 of Title III of Regulation No 883/2004, which refer to pensioners, make a number of provisions of Section 1 of that chapter, in particular Article 18(1) and Articles 19, 20 and 21, applicable '*mutatis mutandis*' to pensioners. On the contrary, the way in which Chapter 1 is organised confirms, in my view, that 'pensioners' are to be treated in all

[25] Emphasis added.

respects as 'insured persons' and also confirms the application of the *lex generalis*, where justified. Section 1 of that chapter is headed 'Insured persons and members of their families, *except pensioners and members of their families*', which implies that pensioners are subsumed under the category of 'insured persons'.[26] It is therefore normal, in the interests of clarity and consistency, that where rules of the *lex generalis* apply to 'pensioners' who are subject to a *lex specialis*, express reference is made to that fact in the rules of the *lex specialis*, namely Section 2 of Chapter 1. That said, it is true that the use of the words '*mutatis mutandis*' is misleading, since all the rules concern 'insured persons' and there is thus no need to refer to an application by analogy.

63. It follows that, contrary to the Netherlands Government's assertion, the terms 'insured person' and 'pensioner' used in Regulation No 883/2004 are not mutually exclusive.

3. The concept of 'insured person' within the scheme of Directive 2011/24

64. As has been established in points 43 and 44 of this Opinion, Directive 2011/24 refers to the definition of 'insured person' set out in Regulation No 883/2004. A broad interpretation of the concept of 'insured person' within the meaning of that regulation also appears to be supported by the use of that term in Directive 2011/24.

65. As the referring court points out, that interpretation is consistent with the concept of 'Member State of affiliation', which, for the persons mentioned in Article 3(b)(i) of Directive 2011/24, is defined, in Article 3(c)(i) of that directive, as 'the Member State that is competent to grant to the insured person a prior authorisation to receive appropriate treatment outside the Member State of residence according to Regulations [Nos 883/2004 and 987/2009[27]]'. Accordingly, the EU legislature did not intend to make the right to reimbursement conditional on the person concerned being 'affiliated' to the compulsory statutory sickness insurance scheme of a Member State.[28]

66. Furthermore, it should be noted that it is by way of derogation from paragraph 1 of Article 7 of Directive 2011/24 – which governs the right to reimbursement of the costs of cross-border healthcare incurred by 'insured persons' – that paragraph 2(a) of that article extends that right, inter alia, to 'pensioners … resident in a different Member State', in order to cover healthcare costs incurred in the territory of the State responsible for the pension, where that State is listed in Annex IV to Regulation No 883/2004. Accordingly, it must be inferred that the EU legislature considered, in the context of the adoption of Directive 2011/24, that 'pensioners' are indeed covered by the concept of 'insured person' within the meaning of Article 1(c) of Regulation No 883/2004. Moreover, that is the only occasion on which the term 'pensioner' is used in that directive.

67. In the light of the foregoing, I propose that the following answer be given to the first question referred for a preliminary ruling: the combined provisions of Article 7(1) and Article 3(b)(i) of Directive 2011/24, read in conjunction with Article 1(c) and Article 2 of Regulation No 883/2004, must be interpreted as meaning that persons in receipt of a pension under the legislation of a Member State and who are entitled, under Article 24 of that regulation, to benefits in kind

[26] Emphasis added.

[27] Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing [Regulation No 883/2004] (OJ 2009 L 284, p. 1).

[28] See also recital 13 of Directive 2011/24, which states that 'the obligation to reimburse costs of cross-border healthcare should be limited to healthcare to which the insured person is entitled according to the legislation of the Member State of affiliation'.

provided by the State of residence at the expense of the first Member State, but who do not have compulsory sickness insurance in that first Member State, may rely, as 'insured persons' within the meaning of those provisions, on that directive in order to obtain reimbursement of the costs of cross-border healthcare provided to them in a third Member State.

C. The second question referred

68. By its second question, the referring court asks, in essence, whether a person in receipt of a pension under the legislation of a Member State and who is entitled, under Article 24 of Regulation No 883/2004, to benefits in kind provided by the State of residence at the expense of the first Member State may rely on Article 56 TFEU in order to obtain reimbursement of the costs of healthcare which he or she received in a Member State other than the Member State in which he or she resides or the Member State responsible for the pension.

69. I note at the outset that, if the Court were to reply as proposed in point 67 of this Opinion, there would be no need to answer the second question. In that situation, Y would fall within the scope *ratione personae* of Directive 2011/24, so that the referring court would have to examine, in the light of the provisions of that directive, whether the person concerned is entitled to reimbursement of the costs of cross-border healthcare she received in Germany, in particular the costs of medical treatments in respect of which she did not request prior authorisation. The following examination is therefore based on the premiss that the Court does not concur with that analysis and considers that the first question should be answered in the negative.

70. In that regard, it must be borne in mind first of all that the application of Article 20 of Regulation No 883/2004 to a specific situation does not mean that that situation may not also come within the scope of Article 56 TFEU and that the person concerned may simultaneously have the right, under that article, to have access to healthcare in another Member State under rules on the assumption of costs and reimbursement which are different from those laid down by Article 20 of that regulation.[29] That case-law could also apply in the context of Directive 2011/24, notwithstanding the fact that, as is apparent from recital 8 thereof, the directive has codified the Court's case-law relating to the freedom to provide services guaranteed by Article 56 TFEU in the field of healthcare, while intending to achieve a more general, and also effective, application of principles developed on a case-by-case basis in that case-law.

71. Indeed, I recall that it is settled case-law that medical services provided for consideration fall within the scope of Article 56 TFEU on the freedom to provide services, including situations where care is provided in a hospital environment.[30] The freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to travel to another Member State in order to receive those services there.[31]

[29] Judgment of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)* (C-777/18, EU:C:2020:745, paragraph 33 and the case-law cited).

[30] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 36 and the case-law cited).

[31] Judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 37 and the case-law cited), and of 21 June 2012, *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraphs 26 to 28).

72. Thus, in the first place, it is necessary to determine whether national legislation, such as that at issue in the main proceedings, which makes the reimbursement of healthcare costs, incurred in a Member State other than the State of residence by a person who receives a pension under that legislation, subject to prior authorisation, constitutes a restriction on the freedom to provide services enshrined in Article 56 TFEU.

73. I note in that regard that, according to settled case-law, the requirement of prior authorisation for treatment planned in another Member State, to which responsibility for payment by the competent institution is made subject, *in accordance with the rules governing cover in force in the Member State to which that institution belongs*, constitutes, for both patients and service providers, an obstacle to the freedom to provide services, since such a system deters, or even prevents, those patients from approaching providers of medical services established in a Member State to obtain the treatment in question.[32] In other words, Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.[33] Accordingly, such authorisation may indeed constitute a restriction on the freedom to provide services.

74. In the second place, it is necessary to determine whether such a restriction on the freedom to provide services can be justified. The Court has held that although prior authorisation constitutes, for both patients and service providers, an obstacle to the freedom to provide services, Article 56 TFEU does not in principle preclude the right of a patient to receive hospital treatment in another Member State at the expense of the system with which he or she is registered from being subject to prior authorisation.[34] The purposes of any such prior authorisation requirement may be said to be in order: (i) not to risk seriously undermining the financial balance of a social security system; (ii) to maintain a balanced medical and hospital service open to all; (iii) to maintain treatment capacity or medical competence on national territory; and (iv) to enable planning in order to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned.[35]

75. The Court has held that, in relation to hospital care or medical care requiring highly specialised and expensive medical equipment ('major non-hospital care'),[36] although EU law does not preclude, in principle, a system of prior authorisation, it is nevertheless necessary that the conditions attached to the grant of such authorisation must be justified in the light of the imperatives mentioned above, that they do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules. Such a system must, in addition, be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.[37]

76. In the present case, the Netherlands Government has not put forward any justification in respect of the applicable Netherlands legislation, which makes reimbursement of the costs of benefits in kind provided to a pensioner under Article 24 of Regulation No 883/2004 in a

[32] Judgment of 27 October 2011, *Commission* v *Portugal* (C-255/09, EU:C:2011:695, paragraph 60 and the case-law cited).

[33] Judgment of 16 May 2006, *Watts* (C-372/04, EU:C:2006:325, paragraph 94 and the case-law cited).

[34] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 41).

[35] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 42 and 43).

[36] Judgment of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)* (C-777/18, EU:C:2020:745, paragraph 60 and the case-law cited).

[37] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 44).

Member State other than the State of residence subject to prior authorisation. It is therefore for the referring court to verify whether such justifications exist and whether they satisfy the conditions laid down by the case-law cited above.

77. It should nevertheless be pointed out that, as is apparent from the case-law of the Court, a national rule excluding, *in all cases*, payment for hospital treatment given in another Member State without prior authorisation deprives the insured person who, for reasons relating to his or her state of health or to the need to receive urgent treatment in a hospital, was prevented from applying for such authorisation or was not able to wait for the answer of the competent institution, of reimbursement from that institution in respect of such treatment, even though all other conditions for such reimbursement to be made are met. [38] The Court has held that, in such circumstances, reimbursement in respect of such treatment is not likely to compromise the achievement of the objectives of hospital planning, or seriously to undermine the financial balance of the social security system, as such reimbursement does not affect the maintenance of a balanced hospital service accessible to all, or that of treatment capacity and medical competence on national territory. [39]

78. It follows that national legislation which excludes the reimbursement, by the competent institution, of the costs relating to hospital or major non-hospital care received in another Member State, without prior authorisation, including in specific circumstances where the insured person was prevented from applying for such authorisation or was not able to wait for the decision of the competent institution on the application for authorisation submitted, for reasons relating to his or her state of health or to the need to receive urgent treatment, even though all other conditions for such costs to be assumed are met, does not satisfy the requirement of proportionality. Therefore, that legislation contains a disproportionate restriction of the freedom to provide services enshrined in Article 56 TFEU and fails to have regard to Article 8(1) of Directive 2011/24.

79. In this case, the documents in the main proceedings show that the CAK stated that it did not have the power to deal with the matter solely because of the lack of prior authorisation, without, however, verifying at the administrative stage whether Y's situation was so urgent that authorisation would not have been necessary (see points 24 and 26 of this Opinion). A quasi-automatic rejection procedure cannot therefore satisfy the requirement of proportionality.

80. In view of the above, I propose that the following answer be given to the second question referred for a preliminary ruling: Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which automatically excludes the reimbursement, by the competent institution, of the costs relating to hospital or major non-hospital care received in another Member State, without prior authorisation, including in specific circumstances where the insured person was prevented from applying for such authorisation or was not able to wait for the decision of the competent institution on the application for authorisation submitted, for reasons relating to his or her state of health or to the need to receive urgent treatment, even though all other conditions for such costs to be assumed are met.

[38] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 45).

[39] Judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 46).

V. Conclusion

81. In the light of the foregoing, I propose that the Court give the following answers to the questions referred for a preliminary ruling by the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands):

(1) The combined provisions of Article 7(1) and Article 3(b)(i) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, read in conjunction with Article 1(c) and Article 2 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009, must be interpreted as meaning that persons in receipt of a pension under the legislation of a Member State and who are entitled, under Article 24 of that regulation, to benefits in kind provided by their State of residence at the expense of the first Member State, but who do not have compulsory sickness insurance in that first Member State, may rely, as 'insured persons' within the meaning of those provisions, on that directive in order to obtain reimbursement of the costs of cross-border healthcare provided to them in a third Member State.

(2) Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which automatically excludes the reimbursement, by the competent institution, of the costs relating to hospital or major non-hospital care received in another Member State, without prior authorisation, including in specific circumstances where the insured person was prevented from applying for such authorisation or was not able to wait for the decision of the competent institution on the application for authorisation submitted, for reasons relating to his or her state of health or to the need to receive urgent treatment, even though all other conditions for such costs to be assumed are met.